

**Liberty Surplus Ins. Corp. v Burlington Ins. Co.**

2015 NY Slip Op 30564(U)

April 14, 2015

Sup Ct, New York County

Docket Number: 155165/2012

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
LIBERTY SURPLUS INSURANCE  
CORPORATION,

Index Number: 155165/2012

Sequence Number: 002

Plaintiff,

Decision and Order

- against -

BURLINGTON INSURANCE COMPANY and  
QBE INSURANCE CORPORATION,

Defendants.  
-----X

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendant Burlington Insurance Company's motion for summary judgment and plaintiff Liberty Surplus Insurance Corporation's cross-motion for summary judgment:

Papers Numbered:

Defendant Burlington: Notice of Motion - Affirmation - Affidavit - Exhibits .....	1
Plaintiff Liberty: Notice of Cross-Motion - Affirmation - Affidavit - Exhibits .....	2
Defendant Burlington's Reply Affirmation and Affidavit in Further Support of Motion and In Opposition to Cross-Motion .....	3
Plaintiff Liberty's Reply Affirmation in Further Support of Cross-Motion .....	4

Upon the foregoing papers, Burlington's motion is granted and Liberty's cross-motion is denied.

Background

This is an insurance coverage dispute in which an excess insurer – plaintiff Liberty Surplus Insurance Corporation (“Liberty”) – seeks contribution from a primary insurer – defendant Burlington Insurance Company (“Burlington”) – for payments made by the excess insurer to settle an underlying Labor Law action entitled Erick Quintana v 1510 Second Avenue, LLC, Supreme Court, Kings County, Index No. 6505/2007 (“the Quintana Action”). Liberty sues for a judgment declaring that: (1) Liberty’s umbrella policy is excess to Burlington’s policy for 1510 Second LLC (“1510”), Liberty’s Additional Insured and Burlington’s Named Insured, in the Quintana Action; (2) Burlington is obligated to indemnify 1510 in the Quintana Action and to contribute its \$1,000,000 policy limit to the settlement of Quintana’s claims; and (3) Burlington is obligated to reimburse Liberty for 1510’s defense costs incurred in the Quintana Action. Burlington now moves for summary judgment dismissing the complaint as against it, and Liberty cross-moves for summary judgment declaring that Liberty’s Umbrella policy is excess to Burlington’s policy and that Burlington must contribute its \$1,000,000 policy limit to the underlying settlement.

The facts, simply stated, are as follows. Erick Quintana, an employee of MRC Contracting II (“MRC”), sustained serious bodily injuries on August 28, 2006 while performing work at the premises, owned by 1510, pursuant to a July 2005 contract between MRC and 1510. The contract required MRC to defend and indemnify 1510 for all “claims, losses, liabilities, suits, judgments, actions and expenses ... arising out of” MRC’s work, and to procure commercial general liability insurance with a \$10 million limit for bodily injury damages, naming 1510 as an Additional Insured on the insurance policy, “which shall be primary to all other insurance” for MRC and “all Additional Insureds.”

Liberty insured MRC, as Named Insured, and 1510, as Additional Insured, for the policy period covering Quintana’s August 2006 accident, under two separate policies, to wit: a primary commercial general liability policy (bearing policy number EGL-NY-079608-015) with a \$1,000,000 limit for bodily injury damages (“the primary policy”), and an umbrella policy (bearing policy number LQ1-B71-198-470-015) with a \$5,000,000 limit for bodily injury damages (“the umbrella policy”). Both of Liberty’s policies also provide coverage to MRC for sums it is “legally obligated to pay by reason of liability imposed by law or assumed by [it] under an ‘insured contract.’” Liberty uniformly defines an “insured contract” as one “pertaining to” MRC’s business under which MRC “assume[s] the tort liability of another party to pay for ‘bodily injury’ ... to a third person... .”

Burlington insured 1510, as Named Insured, for the relevant policy period pursuant to a commercial general liability policy (bearing policy number HGL0011607) with a \$1,000,000 limit for bodily injury damages. Burlington’s policy requires insureds to obtain Burlington’s consent before voluntarily making any payments or incurring any expenses.

The “Other Insurance” provision in Liberty’s primary policy makes coverage for 1510 thereunder primary, and on a non-contributory basis. The “Other Insurance” provision in Liberty’s umbrella policy makes coverage for 1510 thereunder excess to “other insurance” that applies to a loss covered by the policy. Burlington’s “Other Insurance” provision makes coverage for 1510 excess to “any other primary insurance available to [1510] covering liability for damage arising out of the premises ... for which you have been added as an additional insured ... .”

In February 2007, Quintana sued 1510, as owner, to recover for the injuries he sustained while working at the premises in August 2006. (Quintana also sued Marson Contracting Company, Inc., the general contractor on the project, but Justice Silber dismissed the complaint as against Marson. By Decision and Order dated July 18, 2014, this Court dismissed the instant complaint brought by Liberty against QBE Insurance Corporation, Marson’s commercial general liability insurer.) According to Quintana’s May 30, 2007 bill of particulars, Quintana sustained traumatic, severe and permanent brain injuries, and several other serious and permanent bodily injuries.

Burlington assumed the defense of 1510, its Named Insured, and commenced a third-party action against MRC for common-law and contractual indemnification, contribution and breach of contract for failure to procure insurance. By letter dated August 22, 2007, 1510’s attorney tendered 1510’s defense and indemnity to MRC and Liberty pursuant to MRC’s “contractual obligations and the insurance obligations” under the parties’ contract. By letter dated May 1,

2008, Liberty unconditionally and without reservation accepted 1510's tender and assumed its defense and indemnification in the Quintana Action pursuant to MRC's contractual obligations and as Liberty's Additional Insured. Pursuant to Liberty's specific request, and as part of its assumption of 1510's defense and indemnity, the attorneys that Burlington hired for 1510 transferred their file to the defense counsel that Liberty hired for MRC; signed a substitution of counsel form; and discontinued 1510's third-party action against MRC.

Burlington, "confident" that Liberty was protecting 1510's rights as an additional insured and based upon MRC's contractual obligations, closed its file and did not monitor or otherwise participate in the Quintana Action until January 2012, when Liberty requested that Burlington participate in a mediation of plaintiff Quintana's claims. In the nearly four years between May 2008 and January 2012, Burlington re-opened its file once in 2010 solely to determine if it owed 1510 a defense in a declaratory judgment action brought by MRC's workers' compensation insurer, Commerce. In June of 2010, Commerce sued for a judgment declaring it had no duty to defend or indemnify MRC in a third-party action brought by Marson for common-law and contractual indemnification and contribution. Commerce named 1510 as a defendant, but the complaint contains no allegations against 1510. Burlington, having determined that no coverage was available to 1510 for Commerce's declaratory judgment action, issued a denial letter to 1510 on July 23, 2010, and re-closed its file. By letter dated February 17, 2011, sent to 1510's former attorneys in the Quintana Action, Liberty advised that it had "reassessed" its coverage position and purported to reserve its rights to disclaim coverage for 1510 in the Quintana Action upon the ground that 1510 is not an insured or additional insured on the Liberty primary policy. Burlington apparently first received Liberty's February 2011 reservation of rights letter sometime after February 2012.

By separate letters each dated January 26, 2012, Liberty's coverage counsel and Liberty's trial counsel representing 1510 in the Quintana Action advised Burlington that the Quintana Action was scheduled for mediation on January 31, 2012, for trial on February 9, 2012, and that plaintiff Quintana's settlement demand was "in excess" of \$6,000,000. In coverage counsel's letter, Liberty "formally notified" Burlington, for the first time, of its position that the umbrella policy is excess to the coverage afforded by Burlington and requested that Burlington attend the mediation and participate in any settlement of the Quintana Action. Burlington agreed to retain counsel to appear at the mediation but advised that it was "extremely unlikely" that it would contribute to any settlement as it had no opportunity to analyze Quintana's claims and Liberty's newly asserted insurance coverage position.

The January 31, 2012 mediation did not result in a settlement. Burlington claims, and Liberty does not dispute, that Liberty failed to tender the \$1,000,000 limit of the primary policy during the mediation. At an April 10, 2012 pre-trial/settlement conference the Quintana Action settled for the total sum of \$2,500,000, of which Liberty paid \$2,150,000 and Commerce paid \$350,000. Liberty did not notify Burlington of the April 10, 2012 conference, and Burlington did not participate in the settlement of the Quintana Action. The Release signed by Quintana is in favor of 1510, Liberty, MRC and Commerce.

### Discussion

It is well settled that summary judgment should be granted where there is no triable issue of fact and a party is entitled to judgment as a matter of law. CPLR 212(b); See American Home Assur. Co. v Amerford Intl. Corp., 200 AD2d 472 (1<sup>st</sup> Dept' 1994).

At the outset, Liberty's third cause of action, for a declaration that Burlington must reimburse Liberty for 1510's defense costs in the Quintana Action, is subject to dismissal. Liberty admits that its primary policy provided 1510 with primary, non-contributory defense and indemnity and, therefore, Burlington has no obligation to reimburse Liberty for 1501's defense costs in the Quintana Action.

The first and fifth causes of action, for a declaration that Liberty's umbrella policy is excess to, and attaches after payment of, Burlington's \$1,000,000 policy limit, and that Burlington must contribute its \$1,000,000 policy limit to the Quintana settlement, are also subject to dismissal. Burlington met its burden of establishing that there are no questions of fact and, as a matter of law, Liberty is not entitled to contribution from Burlington for the Quintana settlement because: (1) Burlington did not participate in or agree to the settlement reached at the April 10, 2012 pre-trial/settlement conference; (2) 1510, "whose liability was purely statutory, was entitled to contractual indemnification [from MRC] and a complete pass-through of liability" to MRC and its primary and excess insurer; and (3) Liberty accepted the tender of 1510's defense and indemnity pursuant to MRC's contractual indemnification obligations "unconditionally and without reservation." See Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co., *supra* 74 AD3d at 25 (1<sup>st</sup> Dep't 2010) (sub-contractor's excess insurer sued owner's primary insurer for contribution to settlement payments made by excess insurer in underlying Labor Law action; complaint dismissed, excess insurer not entitled to contribution from primary insurer because primary insurer "neither participated in the settlement negotiations nor agreed to the amount of the settlement"; owner entitled to contractual indemnification from sub-contractor and "complete pass-through of liability" to sub-contractor and its insurers, including excess insurer; and sub-contractor accepted owner's defense "unconditionally and without reservation"); AIU Ins. Co. v Valley Forge Ins. Co., 303 AD2d 325 (1<sup>st</sup> Dep't 2003) (excess insurer not entitled to contribution from primary insurer for settlement payments because primary insurer did not participate in or agree to settlement and insured entitled to full indemnification and a complete pass-through of liability).

Pursuant to the express terms of Burlington's policy, 1510, and Liberty on its behalf, did not have the authority to bind Burlington to the Quintana settlement because Burlington did not consent thereto – indeed, Burlington first learned of the settlement weeks later from Quintana's counsel. While Burlington's policy specifically states that it may be sued by an "organization" to recover on an "agreed settlement" – defined as a "settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative" – Quintana's release is signed by 1510 and Liberty, not Burlington. Burlington's participation in the January 31, 2012 mediation does not remove this case from the rule set forth in AIU Ins. Co. v. Valley Forge Ins. Co., *supra*, as contended by Liberty. Burlington's participation at the mediation was expressly limited and subject to Burlington's clear statement that it was "extremely unlikely" that it would contribute to any settlement, given the late notice of the mediation, Liberty's eleventh hour change in coverage position and the fact that 1510 was entitled to a complete pass-through of

liability to MRC and Liberty. Notably, the mediation was unsuccessful with no settlement reached due to Liberty's undisputed failure to tender its primary policy limit.

Liberty's attempt to distinguish Indemnity by arguing that Liberty's umbrella policy does not cover MRC's contractual indemnification obligation to 1510 because 1510 did not tender to Liberty's umbrella policy, is without merit. Liberty admits that notice provided to it as primary insurer constituted notice to it as excess insurer. See Marino v NY Tel. Co., 1992 U.S. Dist. LEXIS 12705 (SDNY 1992) (complaint provided to insurer that issued primary and excess policies constitutes notice under both policies, despite lack of reference to excess policy). Notwithstanding the absence of the Liberty umbrella policy number from 1510's August 22, 2007 tender letter, Liberty does not – and can not – deny that 1510 tendered its defense and indemnity in the Quintana Action pursuant to MRC's contractual indemnification obligations *and* that Liberty “unconditionally and without reservation” accepted 1510's tender and assumed 1510's defense and indemnification *pursuant to those precise contractual obligations*. Thus, Burlington correctly determined that it was entitled to contractual indemnification and a complete pass-through to MRC and its insurers. Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co., supra 74 AD3d at 24. Moreover, in view of Quintana's May 2007 bill of particulars alleging severe and permanent brain injuries, Liberty had notice as of May 2008 that its excess policy would be implicated in defending 1510 in the Quintana Action.


Contrary to Liberty's argument, Liberty's August 2009 letter disclaiming coverage to MRC for Marson's third-party complaint, Burlington's July 23, 2010 letter disclaiming coverage to 1510 for Commerce's declaratory judgment action, and Liberty's February 17, 2011 purported reservation of rights letter to 1510's former litigation attorneys, did not constitute notice to Burlington of “potential problems” with insurance coverage or of Liberty's coverage position that its umbrella policy was excess to Burlington's for the Quintana Action. Indeed, Liberty admits that it first provided Burlington with “formal” notice of Liberty's new coverage position on January 26, 2012, nearly four years after “unconditionally and without reservation” defending 1510 in the Quintana Action, a mere five days prior to the mediation and two weeks prior to the trial.

The Court has considered the parties' other arguments and finds them to be unavailing.

### Conclusion

The motion by Burlington Insurance Company is granted, and the motion by Liberty Surplus Insurance Corporation is denied. The clerk is directed to enter judgment dismissing the complaint as against Burlington Insurance Company and declaring that Burlington Insurance Company is not obligated to reimburse any defense costs, expenses or settlement payments made by Liberty Surplus Insurance Corporation in the underlying action, Trick Quintana v 1510 Second Avenue, LLC.

Dated: April 14, 2015

  
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Arthur F. Engoron, J.S.C.