

National Union Fire Co. of Pittsburgh, PA. v Merchants Mut. Ins. Co.
2015 NY Slip Op 31830(U)
September 30, 2015
Supreme Court, New York County
Docket Number: 652489/2014
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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NATIONAL UNION FIRE COMPANY OF
PITTSBURGH, PA.,

Index No. 652489/2014

Plaintiff,

- against-

DECISION AND ORDER

MERCHANTS MUTUAL INSURANCE CO.,

Defendant.

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ROBERT R. REED, J.S.C.:

In this insurance coverage declaratory judgment action, defendant Merchants Mutual Insurance Co. (Merchants) moved for a change of venue to Monroe County. That motion was denied on the record.

The court now considers the cross motion of plaintiff National Union Fire Company of Pittsburgh, PA. (National Union) for summary judgment on its complaint, seeking a declaration that Merchants is obligated to reimburse National Union \$750,000 that National Union paid in partial settlement of an action captioned, *Delpa v Lidestri Foods, Inc.* (the underlying action), which was filed in Supreme Court, Monroe County, bearing index no. 15810/2010.

The underlying action involved a claim for personal injuries sustained by the plaintiff, Donald Delpa, who, on December 22, 2009, while employed as a construction worker by DDS Utilities, Inc. (DDS), fell through a hole in the roof of premises owned by Lidestri Foods, Inc. (Lidestri), injuring his pelvis and ribs. Lidestri

entered a service agreement with Paetec Co., to perform telecommunications work at the property it owned. Paetec entered a "Master Facilities Agreement" (exhibit C to complaint) with Fiber Technologies Networks, LLC (Fibertech), which, in turn, entered a "Master Subcontract Agreement" (exhibit D to complaint) with DDS Utilities, Inc. (DDS), the employer of Donald Delpa.

Exhibit C to the DDS contract with Fibertech, captioned, "Insurance Requirements," requires DDS to obtain four categories of insurance coverage and to provide certificates of insurance to Fibertech evidencing such coverage. Subdivision (1) requires DDS to obtain workers compensation insurance. Subdivision (2) requires DDS to obtain commercial general liability insurance (CGL), with limits of \$1 million per occurrence. Subdivision (2) (b) requires the following:

"[i]n the "Special Items" section of the standard accord Certificate, the following statement must be included: "Project: [t]he Contractor, the Owner and other indemnitees (as specified by contract) shall be named as additional insured on a primary & non-contributory basis to the Commercial General Liability Policy"

(*id.*).

Subdivision (4) of the Insurance Requirements provides that DDS shall obtain "Umbrella [coverage] - Minimum Limit: \$3,000,000 occurrence / \$3,000,000 aggregate" (*id.*). There is no provision in the Insurance Requirements for any entity to be named as an additional insured in a certificate of insurance under the required

umbrella policy.

National Union issued CGL Policy number GL 457-28-75 (exhibit E to complaint) to Lidestri. Pursuant to endorsement, Section IV of the National Union policy, captioned "CGL Conditions," subdivision (4), captioned, "5. Other Insurance," provides:

"[w]ith respect to the additional insured shown below, the insurance provided by this policy is excess only over such coverage as is provided the Additional Insured by "underlying insurance" listed in the schedule of "underlying insurance" of this policy. No other insurance available to the Additional Insured shall be primary or contributory with this insurance. Rather, any such other insurance shall be considered excess of the insurance provided by this policy"

(complaint, exhibit E).

The entire endorsement quoted above has been left blank. Neither the space for the named insured nor the space that refers to the "Third Party to whom this endorsement applies" has been filled in (*id.*).

Non-party Cincinatti Insurance Company (Cincinatti) issued CGL policy number CPP1056880 to DDS.

Merchants issued commercial umbrella insurance policy no.

CUP9140753 to DDS, with policy limits of \$1 million per occurrence (exhibit D to McCarter aff).

Prior to settlement, National Union tendered the defense and indemnity of the underlying action to both Cincinnati and Merchants, on an additional insured basis. The former accepted tender and the latter refused.

National Union argues that Merchants is obligated to provide primary coverage to Lidestri as an additional insured under the Merchants policy, but Merchants disputes that Lidestri is an additional insured under its policy.

The Merchants policy provides, in Section II, captioned, "who is an insured," subdivision (3): "[a]ny additional insured under any policy of "underlying insurance" will automatically be an insured under this insurance" (exhibit H to McCarter aff). Subdivision (24) of Section V of the Merchants Policy, captioned "definitions," defines "underlying insurance," as "any policies of insurance listed in the declarations under the schedule of "Underlying insurance" (*id.*). According to the complaint, the Merchants Policy identifies the Cincinnati policy as the "underlying insurance" at indorsement MU 6106, on the "Occurrence Excess Policy Declarations Page" (complaint, ¶ 21).

The Merchants policy in the parties' submissions contains no such endorsement MU 6106 (see exhibit D to McCarter aff). Indeed, on its cover page, the policy lists the endorsements included. There

is no MU 6106 listed.

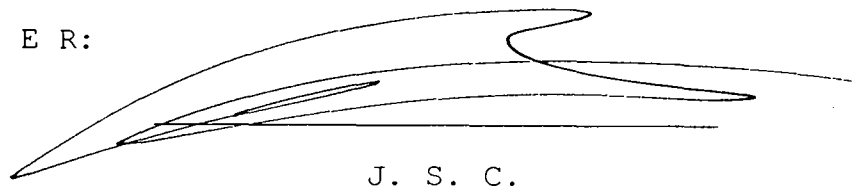
Therefore, National Union has failed to demonstrate its entitlement as a matter of law, to a judgment declaring that it is entitled to reimbursement from Merchants on an additional insured basis, either under the terms of the Fibertech subcontract or the Merchants policy.

Accordingly, it is

ORDERED that the cross motion of defendant National Union Fire Company of Pittsburgh, Pa. for summary judgment is denied.

Dated: 9/30/15

E N T E R:

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

J. S. C.