

Aspen Specialty Ins. Co. v Ironshore Indem. Inc.
2015 NY Slip Op 32965(U)
December 9, 2015
Supreme Court, New York County
Docket Number: 160353/2013
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NYSCEF DOC NO. 60

RECEIVED NYSCEF: 12/11/2015

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ENGORON
Justice

PART 37

Index Number : 160353/2014
ASPEN SPECIALTY INSURANCE
vs.
IRONSHORE INDEMNITY
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 9/25/2015
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion ~~to~~ to hear and renew

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/9/15



_____, J.S.C.
HON. ARTHUR F. ENGORON

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----x
ASPEN SPECIALTY INSURANCE COMPANY,

Index Number: 160353/2013

Plaintiff,

Sequence Number: 002

- against -

Decision and Order

IRONSHORE INDEMNITY INCORPORATED
and TRANSEL ELEVATOR, INC.,

Defendants.

-----x
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiffs' motion, pursuant to CPLR 2221(d) and (e), to reargue and renew this Court's July 7, 2015 Decision and Order, which granted, in part, defendants' motion to dismiss the complaint and plaintiff's cross-motion for partial summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, plaintiff's motion to reargue is granted, and upon re-argument, the Court adheres to its prior determination dismissing the fourth cause of action, for breach of contract; and plaintiff's motion to renew is granted, and upon renewal, the Court modifies its prior Decision and Order to the extent set forth below.

Background

The relevant facts are set forth at length in the July 7, 2015 Decision and Order. Briefly, this is an insurance declaratory judgment action in which plaintiff Aspen Specialty Insurance Company ("Aspen") seeks a declaration that its insured, Alphonse Hotel Corp. ("Alphonse"), is an Additional Insured under the commercial general liability policy issued by defendant Ironshore Indemnity Incorporated ("Ironshore") to defendant Transel Elevator Inc. ("Transel"), and that Ironshore must defend and indemnify Alphonse in an underlying lawsuit brought by one of Transel's workers to recover for injuries allegedly sustained while working at Alphonse's hotel (the "Patalano Action"). By Decision and Order dated July 7, 2015, this Court granted Aspen's motion for summary judgment to the extent of declaring that Alphonse is an Additional Insured on Ironshore's policy and that Ironshore is obligated to defend Alphonse in the Patalano Action, and granted defendants' motion to dismiss the fourth cause of action for breach of contract.

The Court could not determine on the prior motion whether coverage for Alphonse under

Ironshore's policy is primary/non-contributory or co-primary with Aspen, because Aspen failed to submit a copy of its commercial general liability policy on the initial motion. See Sport Rock Intern., Inc. v American Cas. Co. of Reading, Pa., 65 AD3d 12, 18 (1st Dep't 2009) (priority or allocation of coverage between insurance policies determined by comparison of other insurance clauses).

Discussion

Aspen is entitled to re-argument, as it correctly points out that the Court misconstrued the fourth cause of action in the complaint as a claim against Transel for breach of contract for failure to procure insurance, and not a claim against Ironshore for breach of contract for failure to provide Alphonse with a defense in the Patalano Action. See CPLR 2221(d)(2) (motion to reargue "shall be based upon matters of fact ...overlooked or misapprehended by the court"). Notwithstanding this misapprehension, however, the Court adheres to its prior determination dismissing the fourth cause of action. In declaring that Ironshore must provide Additional Insured coverage for Aspen in the Patalano Action – a finding with which Aspen takes no issue – the fourth cause of action to recover past defense costs Aspen paid on behalf of Alphonse under a breach of contract theory of recovery is moot. As an Additional Insured, Alphonse is entitled to a defense and indemnity in the Patalano Action; in other words, Ironshore is liable to pay Alphonse's defense costs – past, present and future. Indeed, Aspen admits (Reply Affirmation, ¶ 3) that the Court's July 7, 2015 Decision and Order entitles it to be reimbursed for past defense costs Aspen paid on behalf of Alphonse. Aspen's arguments that: (1) it can assert a breach of contract claim against Ironshore because it is an "intended beneficiary" of the Alphonse-Transel contract; and (2) Ironshore must pay Alphonse's defense costs under the "insured contract" provision of its policy, are improperly raised for the first time in reply and therefore not considered. See Wal-Mart Stores, Inc. v U.S. Fid. & Guar. Co., 11 AD3d 300, 301 (1st Dep't 2004) (motion court "properly declined to reach" argument "on the ground that it was improperly raised for the first time in reply").

As to renewal, Aspen did not demonstrate a "reasonable justification" for its failure to submit on the initial motion a copy of its commercial general liability policy in support of its argument that Ironshore provides primary/non-contributory coverage to Alphonse in the Patalano Action: See CPLR 2221(e)(3) (motion to renew shall contain "reasonable justification for the failure to present [new] facts on the prior motion."). However, because the sole remaining issue in this action – i.e., whether Ironshore's coverage for Alphonse is primary/non-contributory – is simply and fully resolved by reviewing the Aspen policy, in the interest of judicial economy and substantial fairness, the Court exercises its discretion to relax this requirement, and grants Aspen's motion to renew. See generally Tishman Const. Corp. of New York v City of New York, 280 AD2d 374, 376 (1st Dep't 2001) (reasonable justification requirement of CPLR 2221(1)(3) "is a flexible one"; court, in its discretion, may grant renewal where requirements not met "so as not to 'defeat substantive fairness'").

Upon comparison of Aspen's policy with Ironshore's policy, it is clear that Ironshore insures Alphonse in the Patalano Action on a primary/non-contributory basis, and Aspen's coverage is excess. Pursuant to Aspen's Other Insurance clause, coverage for Alphonse thereunder is excess when there is "*any other primary insurance*" available to Alphonse covering liability for damages arising out of the premises or operations ...for which you have been added as an

additional insured.” Ironshore’s policy provides such “other primary insurance” to Alphonse as an Additional Insured for the reasons set forth in the Court’s July 7, 2015 Decision and Order, and because Transel agreed in writing to obtain insurance for Alphonse. See Pecker Iron Works of New York, Inc. v Traveler’s Ins. Co., 99 NY2d 391 (2003) (coverage for additional insureds primary “unless unambiguously stated otherwise.”).

In view of the foregoing, renewal is granted, and upon renewal this Court’s Decision and Order dated July 7, 2015 is modified solely to the extent of finding that Ironshore insures Alphonse in the Patalano Action on a primary/non-contributory basis, and that Aspen’s coverage is excess to that provided by Ironshore, and directing the Clerk to enter judgment accordingly.

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

Conclusion

Plaintiff’s motion to reargue is granted, and upon re-argument, the Court adheres to that part of its July 7, 2015 Decision and Order as dismissed the fourth cause of action, for breach of contract. Plaintiff’s motion to renew is granted, and upon renewal, the July 7, 2015 Decision and Order is modified solely to the extent of finding that Ironshore insures Alphonse in the Patalano Action on a primary/non-contributory basis and Aspen’s coverage is excess to that provided by Ironshore. The clerk is directed to enter judgment:

(1) declaring that Alphonse Hotel Corp. is an Additional Insured on Ironshore Indemnity Incorporated’s commercial general liability insurance policy (bearing policy number 000420803) for the personal injury action entitled Patalano v. Alphonse Hotel Corp., Supreme Court, New York County Index No. 154217/2013 (the “Patalano Action”), that the coverage provided by Ironshore Indemnity Incorporated to Alphonse Hotel Corp. is on a primary/non-contributory basis, and that Ironshore Indemnity Incorporated is obligated to defend Alphonse Hotel Corp. in the Patalano Action;

(2) declaring that Aspen Specialty Insurance Company insures Alphonse Hotel Corp. in the Patalano Action on an excess basis; and

(3) dismissing the fourth cause of action, for breach of contract.

Dated: December 9, 2015



Arthur F. Engoron, J.S.C.