SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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FRANK MERENDINO,

Plaintiff,

-against-

COSTCO WHOLESALE CORP., E.W. HOWELL CO., LLC, AND MERENDINO CORP.,

Defendants.

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E.W. HOWELL CO., LLC,

Third Party Plaintiff,

-against-

MERENDINO CORP.,

Third Party Defendant.

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COSTCO WHOLESALE CORPORATION

Fourth Party Plaintiff

-against-

E.W. HOWELL CO., LLC and MERENDINO CORP.,

Fourth Party Defendants.

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COSTCO WHOLESALE CORPORATION

Fifth Party Plaintiff,,

-against-

STARR INDEMNITY AND LIABILITY COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Fifth Party Defendants.

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Index No. 154010/12
Motion Seq. 02

DECISION/ORDER
ARLENE P. BLUTH, JSC

The motion by Starr Indemnity and Liability Company (Starr) to dismiss the fifth party complaint is granted. The cross-motion by Zurich American Insurance Company (Zurich) for summary judgment is granted in part and denied in part. The cross-motions by Costco Wholesale Corporation (Costco) and Merendino Corp. (Merendino) are denied as premature.

The instant action arises out of a personal injury suffered by plaintiff at a construction site on December 1, 2011 when he allegedly fell from a scaffold at Costco's Staten Island warehouse. The current motions arise out of disputes concerning insurance coverage and indemnity for the parties. Starr claims that the fifth party action against it must be dismissed because it has already agreed to assume Costco's defense without reservation. Zurich brings a cross-motion for summary judgment dismissing all claims against it, declaring that Zurich has no current or past obligation to defend or indemnify Costco with regard to the underlying action by plaintiff and declaring that Zurich's policy applies excess to the primary and excess policies provided by Starr.

Costco brings a cross-motion seeking summary judgment on claims against fourth party defendants E.W. Howell Co., LLC (Howell) and Merendino for contractual indemnification, including defense costs and attorneys' fees. Costco also seeks summary judgment on its declaratory judgment action in the fifth party complaint against Starr and Zurich for contractual indemnity including defense costs and attorneys' fees.

Merendino brings a cross-motion for summary judgment seeking dismissal of Costco's fourth party complaint and Howell's third party complaint.

Background

Costco was the owner of the premises and contracted with Howell to serve as the general contractor for the construction at Costco's warehouse. The contract required Howell to obtain general liability insurance for the protection of Costco. Howell subsequently obtained insurance coverage from Zurich. This policy (Zurich Policy) names Costco as an additional insured.

Howell executed a subcontract with Merendino to perform work at Costco's warehouse. Under this subcontract, Merendino was obligated to obtain commercial general liability insurance for the protection of Costco. Merendino obtained liability insurance from Starr that named Costco as an additional insured (Starr Primary Policy). Merendino also obtained excess liability insurance from Starr (Starr Excess Policy). Costco claims that it tendered to Howell on May 3, 2012 via correspondence from Costco's third-party administrator for liability claims.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue

of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Starr's Motion To Dismiss

Starr moves to dismiss the fifth party complaint pursuant to CPLR 3211(a)(1) and (7) on the ground that no justiciable controversy exists because Starr has agreed to indemnify and defend Costco. Starr claims that it withdrew its reservation of rights in an email dated July 17, 2014 and agreed to assume Costco's primary defense with respect to the first party action. Starr also alleges that it agreed to reimburse Costco's reasonable post-tender defense costs.

In opposition, Costco claims that Starr has not agreed to reimburse Costco for all reasonable post-tender costs that Costco is entitled to pursuant to its subcontract with Howell. Costco claims that it tendered to Howell on May 3, 2012 and that a justiciable dispute exists regarding the date from which Costco is owed reimbursement for all defense costs incurred herein. Costco also claims that Starr has refused to sign a stipulation regarding the assumption of Costco's defense and indemnification. In connection with this dispute, Costco returned a check for $2,208.50 in August 2014 from Starr for defense costs.

In reply, Starr claims that the only alleged justiciable controversy raised by Costco relates

to the reimbursement of defense costs to Costco in the first party action. Starr further claims that Costco did not tender the defense of its first party action until April 15, 2014 (affirmation of Costco's counsel in support of Costco's cross-motion, exhibit I). Starr claims that Costco is not entitled to recover for pre-tender defense costs under New York law. Starr alleges that Costco, as an additional insured, had an independent duty to provide notice to Starr.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"(*id.* at 87-88). A party is "not entitled to reimbursement of defense costs incurred before tendering the defense" (*Liberty Ins. Underwriters, Inc. v Arch Ins. Co.*, 61 AD3d 482, 483, 877 NYS2d 44 [1st Dept 2009]). "Notice provided by an insured in accordance with the policy terms will not be imputed to another insured" (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44, 752 NYS2d 286, [1st Dept 2002]).

Here, the date of tender is April 15, 2014.[1] Costco's claim that the date of tender should run from the date it tendered to Howell (May 3, 2012) fails because Costco did not tender to Starr. As an additional insured on Merendino's policy with Starr, Costco was required to tender

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[1]The letter from Costco's counsel Robert Walker, dated April 15, 2014, references another letter dated April 2, 2014 (*see* affirmation of Zurich's counsel in Support of Zurich's Cross-Motion, exhibit G). The April 2, 2014 letter appears to demonstrate tender to Starr but Costco's memorandum of law states "By letter dated April 15, 2014, Costco tendered its defense and indemnification in this action directly to Starr and Zurich" (Costco's Memorandum of Law in Support of its Cross-Motion at 4). Therefore, the Court will use that date.

directly to Starr[2] (*see Travelers Ins. Co.*, 300 AD2d at 44 [holding that notice by another insured does not provide timely notice to insurance company where additional insured did not provide notice]). Further, "the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts and is applicable to an additional insured" (*Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145, 672 NYS2d 33 [1st Dept 1998] [holding that the notice requirement applies to an additional insured even if an insurance policy requires only a named insured to provide notice of an occurrence]). In opposition to Starr's motion, Costco provided no case law or practical argument in direct support of its position that tendering to Howell, which was insured by Zurich, was sufficient notice to Starr.

Therefore, the fifth party action against Starr is dismissed because no justiciable controversy exists between Costco and Starr as Starr has agreed to assume Costco's primary defense and is not obligated for pre-tender defense costs (before 4/15/14).

Zurich's Cross-Motion

Zurich cross-moves for summary judgment dismissing all causes of action against it in the fifth party complaint, declaring that Zurich has no current or past obligation to defend or indemnify Costco, declaring that the Zurich Policy applies excess to the Starr Primary Policy and Starr Excess Policy, and awarding Zurich attorneys' fees, costs and expenses.

Zurich claims that the contract between Howell and Merendino required Merendino to add Howell and Costco as additional insureds on Merendino's umbrella policy on a primary and

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[2]Costco did not tender to Zurich on May 3, 2012 either. However, because this section of the decisions discusses Starr's motion, it is only relevant that Costco did not tender to Starr in May 2012.

non-contributory basis. Zurich argues that the Zurich Policy should apply *only* after both the Starr Primary Policy and the Starr Excess Policy have been exhausted. Zurich claims that the Starr Primary Policy provides limits of $1 million for each occurrence and $2 million in the aggregate. The Starr Excess Policy has limits of $8 million for each occurrence.

Zurich argues that the Court should view the Zurich Policy as excess to the Starr Excess Policy. Zurich maintains that it was the intent of the contract between Howell and Merendino that the Starr Excess Policy would apply to any loss involving Merendino before the Zurich Policy applied. Zurich maintains that because plaintiff was working for Merendino when the alleged injuries took place, the Starr Excess Policy must apply before the Zurich Policy.

In opposition, Starr claims that Zurich's motion regarding the priority of coverage is premature because there is no indication that a potential judgment would exhaust the Starr Primary Policy. Starr claims that Zurich's cross-claim is unnecessary.

Starr further claims that Zurich mischaracterizes the Starr Excess Policy as umbrella coverage instead of excess to the Zurich Policy. Starr claims that the terms of the policies, rather than the contracts between Howell and Merendino, should guide the Court's determination of the priority of coverage. Starr concludes that the Starr Excess Policy only applies in excess of the Zurich Policy with limits of $1 million. Starr claims that the Insuring Agreement in the Starr Excess Policy clearly establishes that the Starr Excess Policy is excess to the Zurich Policy.

"The anomaly involved in establishing a pecking order among multiple insurers covering the same risk arises from the fact that . . . the insurers contract not with each other but separately with one or more persons insured" (*State Farm Fire and Cas. Co. v LiMauro*, 65 NY2d 369, 372, 492 NYS2d 534 [1985]). "[E]ach attempts by specific limitation upon the rights of its insured to

distance itself further from the obligation to pay than have the others. The result has been characterized as a court's nightmare filled with circumlocution" (*id.*). The instant case is no different.

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage (including a given policy's priority vis-a-vis other policies) is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage" (*Bovis Lend Lease LMB, Inc. v Great American Ins. Co.*, 53 AD3d 140, 144, 855 NYS2d 459 [1st Dept 2008]). "Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage . . . priority of coverage . . . among the policies is determined by comparison of their respective 'other insurance clauses" *(Sport Rock Intern. Inc., v American Casualty Co. of Reading, PA*, 65 AD3d 12, 18, 878 NYS2d 339 [1st Dept 2009]). "An 'other insurance' clause limits an insurer's liability where other insurance may cover the same loss" (*id.* [internal quotations and citation omitted]). "This may be accomplished by providing that the insurance provided by the policy is excess to the insurance provided by other policies, in which case the 'other insurance' clause is known as an excess clause" (*id.*). "In order to determine the priority of coverage among different policies, a court must review and consider all the relevant policies at issue" (*BP Air Conditioning Corp. v One Beacon Ins. Grp.*, 8 NY3d 708, 716, 840 NYS2d 302 [2007]).

As an initial matter, a priority of coverage determination is not premature because the insurance carriers (Starr and Zurich) are parties to this declaratory judgment action.

The Court must look to the terms of the insurance contracts from Starr and Zurich to determine the extent of the coverage rather than the contracts between Howell, Merendino and

Costco. The priority of coverage "turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance" (*Bovis,* 53 AD3d at 148) [internal quotations and citation omitted]). The presence of an "Other Insurance" provision in an insurance policy does "not transform a policy which was clearly intended to be excess into a lower-tier policy, as indicated by the comparatively small premium" (*Tishman Constr. Corp. of New York v Great American Ins. Co.*, 53 AD3d 416, 420, 861 NYS2d 38 [1st Dept 2008]).

The Zurich Policy "AI Other Insurance Endorsement" provides that:

> "This insurance is excess over: Any of the other insurance, whether primary, excess, contingent or on any other basis, available to an additional insured, in which the additional insured on our policy is also covered as an additional insured by attachment of an endorsement to another policy providing coverage for the same occurrence, claim or suit. This provisions does not apply to any policy in which the additional insured is a Named Insured on such other policy and where our policy is required by written contract or written agreement to provide coverage to the additional insured on a primary and non-contributory basis."

(affirmation of Zurich's counsel, Exhibit J at 43).

The Starr Excess Policy provides that:

> "If other insurance applies to 'Ultimate Net Loss' that is also covered by this Policy, this Policy will apply excess of, and will not contribute to, the other insurance. Nothing herein will be construed to make this Policy subject to the terms, conditions and limitations of such other insurance. However, other insurance does not include . . . Insurance held by a person(s) or organization(s) qualifying as an additional insured in 'Underlying Insurance', but only when the written contract or agreement between you and the additional insured requires a specific limit of insurance that is in excess of the Underlying Limits of Insurance. However, the Limits of Insurance afforded the additional insured in this paragraph shall be the lesser of the following: (a) the minimum limits of insurance required in the contract or agreement between you and the additional insured; or (b) The Limits of Insurance shown in the Declarations of this Policy "

(affirmation of Zurich's Counsel, exhibit K at 12).

Here, the priority of coverage will be as follows: Starr Primary Policy, Zurich Policy and Starr Excess Policy. The Starr Policy provided $1 million in coverage for each occurrence and a $2 million aggregate limit with a premium of $42,900 (affirmation of Starr's counsel in support of Starr's Motion, exhibit D at 4). The premium for the Zurich Policy was $491,954 (affirmation of Zurich's counsel in support of Zurich's Cross-Motion, exhibit J at 7) for $1 million in coverage and a $2 million aggregate. The Starr Excess Policy premium was $30,817 for $8 million in coverage (*id.* exhibit K at 2-3). The language of the Starr Excess Policy, including the provision "We will pay on behalf of the Insured, the 'Ultimate Net Loss' in excess of the 'Underlying Insurance' (*id.* at 8), makes it evident that the Starr Excess Policy was intended to be excess coverage. Further, the Starr Excess Policy is excess because the premium amount for the Starr Primary Policy was greater than the Starr Excess Policy's premium despite the fact that the Starr Excess Policy provided $8 million in coverage.

Zurich's claim that the Zurich AI Other Insurance Endorsement renders the Zurich Policy excess to all other policies fails because the intent of the Zurich Policy was to function as a primary policy for Howell. Further, Zurich relies on the contract between Howell and Merendino, which does not control the extent of coverage (*see Bovis*, 53 AD3d at 144). Given the amount of premium paid by Howell on the Zurich Policy and the amount of coverage provided, the Zurich Policy was clearly intended to function as primary insurance for Howell with Costco as an additional insured.

Zurich's attempts to rely on the alleged carve-out in the Starr Excess Policy also fail. The alleged carve-out applies only when there is a written contract between "you and the additional insured." Here, Costco did not have a contract with Merendino; only Howell had a written

agreement with Costco.

Put simply, the Zurich Policy's clause that purportedly makes it excess to other policies under certain circumstances does not transform the Zurich Policy into an excess policy requiring it to apply after the Starr Excess Policy. Therefore, the Zurich Policy applies after the Starr Primary Policy, but before the Starr Excess Policy.

Pre & Post-Tender Costs Reimbursement by Zurich

Zurich claims that Starr's agreement to reimburse Costco for post-tender defense costs renders Costco's claim for post-tender defense costs against Zurich moot.

In opposition, Costco claims that Starr has agreed to pay only a small portion of Costco's defense because Costco's defense tender was made to Howell in 2012. Costco claims that counsel for Howell indicated that Zurich would be assuming Costco's defense. Later, Costco claims that counsel for Howell informed Costco that Zurich had changed its position and would not assume Costco's defense. Costco claims that based on these conversations, Zurich was aware of Costco's tender to Zurich. Costco maintains that the claim for defense and indemnity against Zurich is not moot because of the outstanding defense costs sought by Costco dating back to 2012.

Despite Costco's contention, its claims against Zurich fail. Zurich admits that it may owe contractual indemnity to Costco if Howell is adjudged to owe contractual indemnity to Costco, but Zurich does not have a direct obligation to Costco. As discussed above, Costco admits that it did not tender directly to Zurich until April 15, 2014 (*see Travelers Ins. Co.*, 300 AD2d at 44) and Starr has agreed to reimburse Costco's defense costs from the date of tender. The letter cited

by Costco, dated May 3, 2012, only evidences a tender to Howell and not to Zurich. Therefore, Zurich does not have an obligation to reimburse Costco's pre or post-tender defense costs and that branch of its motion is granted.[3]

Zurich's Motion for Summary Judgment

Zurich's motion for summary judgment dismissing all causes of action against it is denied. The branch of Zurich's motion seeking a declaration that it has no current obligation to defend or indemnify Costco is granted because Starr has assumed the defense of Costco and there has been no finding of liability against any defendant in the underlying first party action. The branch of Zurich's motion seeking a declaration that it has no obligation to reimburse Costco's defense costs is granted because Zurich has no obligation to reimburse Costco's pre-tender defense costs. The branch of Zurich's motion seeking a declaration that the Zurich policy applies excess to the Starr Excess Policy is denied. Zurich's request for an award of attorneys' fees, costs and expenses is denied.

Costco's Cross-Motion

Costco cross-moves for summary judgment on (1) its fourth party complaint against Howell and Merendino and (2) on its fifth party complaint against both Starr and Zurich. Costco

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[3]Zurich curiously claims that Costco first tendered its defense to Zurich by letter dated April 2, 2014 (*see* Zurich's Memorandum of Law in Support of Zurich's Cross-Motion at 22). However, the citation Zurich provides "Smith Aff., Ex. I." is not a letter dated April 2, 2014. The April 2, 2014 letter appears to be exhibit G to the Smith Affirmation, but that letter is not addressed to Zurich. Nevertheless, as discussed above, the Court adopts April 15, 2014 as Costco's tender date because that is when Costco claims it tendered directly to Zurich and Starr.

seeks indemnification, including any defense costs and attorneys' fees against Howell, Merendino, Starr and Zurich.

Merendino opposes Costco's cross-motion and cross-moves for summary judgment dismissing the third party complaint brought by Howell and the fourth party complaint. Merendino argues that the antisubrogation rule bars these actions. Howell opposes Costco's motion and also suggests that the antisubrogation rule applies.

Zurich's opposition claims that Costco's cross-motion is premature because there has been no finding of liability.

Zurich's argument is correct."In the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification would be premature" (*Bovis Lend Lease LMB, Inc. v Garito Contr. Inc.*, 65 AD3d 872, 875, 885 NYS2d 59 [1st Dept 2009]; *accord Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471, 997 NYS2d 32 [1st Dept 2014] ["the duty to indemnify requires a determination of liability"]).

Here, there has been no determination of liability as to the owner (Costco), general contractor (Howell) or the subcontractor (Merendino). Therefore, Costco's claims for indemnification are premature. Further, to the extent Costco seeks to be provided with a defense, Starr has already agreed to provide Costco with a defense without any reservations.

Accordingly, it is hereby

ORDERED that the motion by Starr to dismiss the fifth party action against it and any and all cross-claims against it is granted, and all claims and cross-claims against Starr are severed and dismissed; and it is further

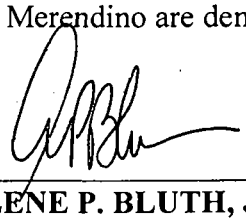
ORDERED that the branches of cross-motion by Zurich seeking to dismiss all causes of

action against it, a declaration that the Zurich Policy applies in excess to the Starr Primary Policy and the Starr Excess Policy, and for attorneys' fees, costs and expenses are denied; and it is further

ORDERED that the branches of Zurich's cross-motion seeking a declaration that it has no current obligation to defend or indemnify Costco, that it has no obligation to reimburse Costco's defense costs are granted; and it is further

ORDERED that the cross-motions by Costco and Merendino are denied as premature.

Dated: May 16, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC