

National Union Fire Co. of Pittsburgh, Pa. v Merchants Mut. Ins. Co.
2016 NY Slip Op 31075(U)
June 7, 2016
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.,

Plaintiff,

Index No. 652489/2014

- against -

DECISION AND ORDER

MERCHANTS MUTUAL INSURANCE CO.,

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

Plaintiff National Union Fire Company of Pittsburgh, PA. (National Union) moves for leave to reargue, and, alternatively, to renew, this court's order, entered October 1, 2015 (the Prior Order), which denied National Union's cross motion for summary judgment on its complaint. The Prior Order held that National Union had not demonstrated its entitlement to judgment as a matter of law because of deficiencies in the record, primarily a primary and non-contributory endorsement (the Primary Endorsement) in the Merchants Policy, in which none of the spaces for date, named insured, or additional insured had been completed (see Merchants Policy at MU 86220509).

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the court and may be granted only upon a showing that the court "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision [internal quotation marks and citation omitted]"

(*Sachar v Columbia Pictures Indus., Inc.*, 129 AD3d 420, 421 [1st Dept 2015]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992])).

National Union also moves to renew, based on a notice to admit (exhibits 4 and 5 to Fuchs affirmation), dated after the Prior Order, which establishes that DDS Utilities, Inc. (DDS) is an additional named insured under the terms of the Merchants Policy, that Cincinnati Insurance Company is the underlying insurance to the Merchants Policy, and that the declarations page of the Merchants Policy, which the complaint mistakenly refers to as "Form No. 6106," is a part of the Merchants Policy.

It appears that the declarations page is actually MU 6108 not 6106, but the numbering is small, and the court incorrectly inferred that "Form No. 6106" referred to a missing endorsement on the declarations page where numerous endorsements are so designated by page number. These errors are inconsequential because they pertain only to whether the Cincinnati Policy is the underlying insurance to the Merchants Policy, a fact not in dispute.

The motion for leave to renew is denied. The declarations page states that the Cincinnati Policy is the underlying insurance to the Merchants Policy, and an endorsement to the Merchants Policy states that DDS is an additional insured under that policy. These facts, which the notice to admit would

further establish, do not demonstrate National Union's entitlement to judgment as a matter of law.

The principal ground for denying National Union's motion in the Prior Order involves the unresolved issue of priority of coverage as between the Merchants excess policy and the National Union primary policy. This issue depends upon the applicability of the Primary Endorsement.

Upon examination of the record, the court finds that there are issues related to the applicability of the Primary Endorsement that the court overlooked in the Prior Order, and that the parties did not raise. These issues further support the denial of summary judgment. In order to correct the error in the Prior Order as to the missing endorsement, and identify those issues, the motion for leave to reargue is granted, and, upon reargument, the Prior Order is vacated, and the decision and order contained in the decretal paragraphs below is issued in its stead.

Accordingly, it is

ORDERED that the motion brought by plaintiff National Union Fire Insurance Company of Pittsburgh, PA for leave to reargue and to renew this court's order, entered October 1, 2015, is denied as to renewal, and granted as to reargument, and, upon reargument, the order dated October 1, 2015 is vacated, and the following decision and order is issued in its stead:

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

The court now considers plaintiff's cross motion for summary judgment on its complaint, seeking a declaration that Merchants is obligated, under the doctrine of equitable subrogation, to reimburse National Union \$750,000, plus interest from the date of payment, 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.

National Union insured Lidestri pursuant to CGL Policy number GL 457-28-75 (exhibit E to complaint), issued to Lidestri.

Nonparty Cincinnati Insurance Company (Cincinnati) issued CGL policy number CPP1056880 (the Cincinnati Policy) to DDS. Merchants insured DDS pursuant to commercial umbrella insurance policy no. CUP9140753 (exhibit D to McCarter aff.), which provided excess coverage over the Cincinnati Policy.

National Union alleges that, prior to settlement, it 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 further alleges that Cincinnati defended Lidestri in the underlying action as an additional insured under its policy, and states that it is undisputed that Lidestri is an additional insured under the Cincinnati Policy (see Fuchs affirmation in reply, ¶ 13).

Merchants argues that Lidestri does not qualify as an additional insured under its policy (see Merchants brief at 8-12). However, it is unnecessary at this stage to determine whether Lidestri qualifies as an additional insured under the Merchants Policy.

The underlying action was settled for \$1.75 million. Cincinnati paid its per occurrence policy limit of \$1 million. National Union paid \$750,000.

National Union states that it paid the \$750,000 in order to take advantage of a favorable settlement offer and protect its insured against a potentially higher award. National Union argues that the Merchants Policy is primary over it pursuant to the Primary Endorsement, which allegedly supercedes Section IV of the National Union Policy, captioned "CGL Conditions," subdivision (4), captioned, "5. Other Insurance," and 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. The Third Party to whom this endorsement applies is: [left blank]. Absence of a specifically named Third Party above means that the provisions of this endorsement apply as required by written contractual agreement with any Third Party for whom you are performing work"

(exhibit E to complaint).

The Primary Endorsement then has a space for the name of the insured and "endorsement effective," both of which are blank.

The immediately preceding endorsement (the Effective Date Endorsement) in the Merchants Policy, which does not bear a Bate Stamp page number, provides that the Primary Endorsement (MU 86220509) "is added to the policy," and states the following: "endorsement effective: 4/09/10" (*id.*).

The Primary Endorsement also provides:

"[t]his endorsement forms a part of the Policy to which it is attached, effective on the Inception Date of the Policy unless otherwise stated herein. (The following information is required only when this endorsement is issued subsequent to the preparation of the Policy) [parentheses in original]"

(*id.*).

Applying the Effective Date Endorsement, it appears that the Primary Endorsement was issued subsequent to the preparation of the Merchants Policy. Therefore, in accordance with the language quoted above, the information that was omitted was in fact required.

A further issue is raised by the fact that the accident in the underlying action occurred on December 22, 2009, almost six months before the effective date of the Primary Endorsement. Applying this Effective Date Endorsement, at the time of the accident in the underlying action, the original section IV (5) provided that the Merchants Policy "is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis" (*id.* at CU00011204).

Because the parties have not raised any issue whether the Primary Endorsement was in effect at the time of the accident, or whether it otherwise applies, the court will not make any declaration as to whether the Primary Endorsement applies to this claim, or any effect of the Primary Endorsement being blank.

The issue of priority as between primary and excess carriers is subject to a standard stated in *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.* (53 AD3d 140 [1st Dept 2008]). In *Bovis*, a similar case involving priority of coverage as between primary and umbrella layers, the Appellate Division, First Department, held that "an umbrella or excess liability insurance policy

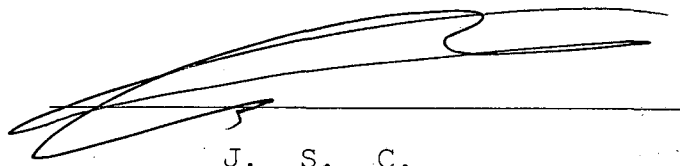
should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result" (*id.* at 142). In light of the uncertainty as to the applicability of the Primary Endorsement to this claim, it cannot be said as a matter of law that the terms of the Merchants Policy "plainly provide" that the Merchants Policy is primary to the National Union Policy.

Because the parties have not addressed the issue of the applicability of the Primary Endorsement, in light of the the Effective Date Endorsement, the court holds only that National Union has not demonstrated its entitlement to judgment as a matter of law, and, therefore, National Union's cross motion is denied;" and it is further

ORDERED that the cross motion of National Union Fire Insurance company of Pittsburgh PA for summary judgment is denied.

Dated: June 7, 2016

E N T E R:

A handwritten signature in black ink, appearing to be "J. S. C.", written over a horizontal line.