

**Hunter Roberts Constr. Group, L.L.C. v Travelers  
Indem. Co.**

2016 NY Slip Op 31323(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 103583/12

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 19

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 HUNTER ROBERTS CONSTRUCTION GROUP,  
 L.L.C., GOUVERNEUR HEALTHCARE SERVICES,  
 INC., an operating division of New York City Health  
 and Hospitals Corporations, DORMITORY  
 AUTHORITY OF THE STATE OF NEW YORK,  
 CITY OF NEW YORK and NEW YORK CITY  
 HEALTH AND HOSPITALS CORPORATION,

Plaintiffs,

Index No. 103583/12

-against-

THE TRAVELERS INDEMNITY COMPANY,  
 EVEREST NATIONAL INSURANCE COMPANY,  
 J. PETROCELLI CONTRACTING, INC., STARR  
 INDEMNITY & LIABILITY COMPANY,  
 NATIONAL CASUALTY COMPANY and  
 R. SMITH RESTORATION, INC.,

Motion Sequence No. 005

Defendants.

-----X  
**KELLY O'NEILL LEVY, J.:**

This is a declaratory judgment action seeking defense and indemnification in an action captioned *Smith v Hunter Roberts Constr. Group, L.L.C.*, Index No. 102928/11 (Sup Ct, NY County) (hereinafter, the underlying action). Defendant Travelers Indemnity Company (Travelers) moves, pursuant to CPLR 2221 (d), for leave to reargue the court's decision and order dated October 6, 2015 (hereinafter, the prior decision).

**BACKGROUND**

In the underlying action, the plaintiffs, the estate of Richard Smith and Richard Smith's wife, Mary Smith, allege that, on January 19, 2011, Richard Smith fell to his death from the roof of the Gouverneur Healthcare Services (GHS) facility located at 227 Madison Avenue in Manhattan. It is undisputed that the City of New York (the City) is the owner of the premises,

and that New York City Health and Hospitals Corporation (HHC) operates the GHS facility. The Dormitory Authority of the State of New York (DASNY) hired Hunter Roberts Construction Group, L.L.C. (Hunter Roberts) as the construction manager for the construction project on the premises. DASNY also hired J. Petrocelli Contracting, Inc. (Petrocelli) as a general contractor for the project. R. Smith Restoration, Inc. (RSR) was the roofing subcontractor hired by Petrocelli, and Richard Smith was its owner. The plaintiffs seek recovery against Hunter Roberts, GHS, DASNY, the City, and HHC under Labor Law §§ 240 (1), 241 (6); 200 and in common-law negligence. Mrs. Smith also asserts a derivative claim for loss of consortium. In their answers, Hunter Roberts, DASNY, the City, and HHC assert, among other claims, claims for contractual indemnification against Petrocelli. Petrocelli commenced a third-party action against RSR, seeking contribution, contractual indemnification, and common-law indemnification. Hunter Roberts and GHS subsequently brought a second third-party action against RSR, also seeking contribution, contractual indemnification, and common-law indemnification.

In this action, plaintiffs Hunter Roberts, GHS, DASNY, the City, and HHC seek declarations that they are additional insureds under Travelers' and Everest's policies, that they are entitled to indemnification in the underlying action from Travelers and Everest, and that the policies issued to plaintiffs are excess over the policies issued by Travelers and Everest. In addition, plaintiffs seek declarations that they are additional insureds under policies issued by Starr and NCC; that Starr owes a defense and indemnification in the underlying action; that NCC owes plaintiffs indemnification in the underlying action; and that Starr and NCC are obligated to reimburse plaintiffs for defense costs, fees, and expenses in the underlying action.

Zurich North American Insurance Company (Zurich) issued a commercial general liability policy to Hunter Roberts, policy number GLO 3867383-03, for the period from January 1, 2011 through January 1, 2012 (prior decision at 8).

Travelers issued a commercial general liability policy, policy number DTNY-CO-0297P163-IND-10, to Petrocelli, effective November 1, 2010 through November 1, 2011 (Premisler affirmation in support of motion to reargue, exhibit 3). Travelers' policy contains a blanket additional insured endorsement that provides, in pertinent part, as follows:

“WHO IS AN INSURED – (SECTION II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by ‘your work’ for that additional insured”

(*id.*). Travelers' policy includes an endorsement, which provides in part that:

“Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought specifically requires that this insurance apply on a primary or non-contributory basis. When this insurance is primary and there is other insurance available to the additional insured from any source, we will share with that other insurance by the method described in the policy”

(*id.*). Travelers' policy also contains an “other insurance” provision, which provides, in relevant part, that:

“Excess Insurance

This insurance is excess over any of the ‘other insurance’, whether primary, excess, contingent or on any other basis:

\* \* \*

- (5) That is available to the insured when the insured is an additional insured under any other policy, including any umbrella or excess policy”

(*id.*).

Starr Indemnity & Liability Company (Starr) issued a commercial general liability policy to RSR, policy number WCSICON30008610, for the period from April 1, 2010 through April 2, 2011 (*id.*). Starr’s policy contains the following language as to who is an insured:

- “A. **Section II – Who Is An Insured** is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person’s or organization’s status as an insured under this endorsement ends when your operations for that insured are completed”

(*id.*). Starr’s policy includes a primary and non-contributory condition endorsement, which provides, in pertinent part, that:

- “1. The following is added to paragraph 4.a of the Other Insurance condition:

This insurance is primary insurance as respects our coverage to the additional insured, where the written contract or written agreement requires that this insurance be primary and non-contributory. In that event, we will not seek contribution from any other insurance policy available to the additional insured on which the additional insured is a Named Insured.

2. The following is added to paragraph 4.b of the Other Insurance condition:

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’”

(*id.*).

Plaintiffs, Travelers, Everest, and Starr previously moved for summary judgment in this action. As relevant here, Travelers cross-moved for summary judgment, seeking, among other things, a declaration that Travelers' policy did not provide the sole primary coverage for plaintiffs. Travelers argued that Zurich and Starr also had primary duties to defend and/or indemnify plaintiffs in the underlying action (*id.*, exhibit 4 [Travelers' memorandum of law in support of cross motion for summary judgment at 17]). In reply, Travelers contended that Zurich is, at the very least, a coinsurer of plaintiffs.

In the prior decision, the court: (1) granted plaintiffs' motion to the extent of declaring that Hunter Roberts, DASNY, the City, and HHC are additional insureds under Travelers' and Everest's policies and referring the issue of past defense costs to a Special Referee; (2) denied Travelers' cross motion except to the extent of dismissing GHS's claims against it; (3) granted Everest's cross motion to the extent of dismissing GHS's claims against it and declaring that Everest's policy was excess to Travelers' and Starr's policies; and (4) denied Starr's cross motion seeking dismissal of all claims against it and a declaration that it had no duty to defend or indemnify Hunter Roberts, DASNY, the City, HHC or Petrocelli in the underlying action. The court also ordered plaintiffs to add Zurich as a party plaintiff to this action.

Travelers now argues that the court misapprehended and/or overlooked the facts and law which demonstrate that Travelers' policy does not provide the sole primary coverage for Hunter Roberts, DASNY, the City, and HHC. Specifically, Travelers contends that Starr has a duty to defend Hunter Roberts, DASNY, the City, and HHC in the underlying action, and, therefore,

under no circumstances would Travelers provide sole primary coverage for these entities.

Moreover, Travelers maintains that the record demonstrates that Starr has the sole primary duty to defend Petrocelli in the underlying action.

In opposition, Starr contends that: (1) Travelers' motion did not request any relief against Starr; and (2) a priority of coverage determination with respect to Starr is premature pending the appearance of Zurich in this action. NCC also maintains that the priority of coverage analysis should await Zurich's appearance in this action.

### DISCUSSION

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [internal quotation marks and citations omitted]).

The court grants leave to reargue the prior decision, but adheres to its prior determination. As discussed below, Travelers has failed to demonstrate that the court misapprehended or overlooked the facts or the law.

First, Travelers has failed to demonstrate that the requested declaration would resolve anything between the parties. “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed legal relation either as to present or prospective obligations” (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010], quoting *James v Alderton Dock Yards*, 256 NY 298, 305 [1931], *rearg denied* 256 NY 681 [1931]). “[T]he point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts . . .” (*id.* at 100).

Courts have issued declarations that an insurance policy provides sole primary<sup>1</sup> coverage (*see e.g. New York State Dormitory Auth. v Scottsdale Ins. Co.*, 27 AD3d 1102, 1102 [4th Dept 2006]). However, Travelers has not cited any case, and the court’s research has not revealed any cases in which courts have declared that an insurance policy *does not* provide the sole primary coverage. In this court’s view, a declaration that Travelers’ policy does not provide sole primary coverage would not serve a practical end in stabilizing the parties’ present or prospective obligations. In other words, that there may be more than one primary policy does not determine how the insurance policies interrelate or the insurers’ obligations to the insureds (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1999] [“When an insured has more than one potentially applicable policy for a claim, courts determine the insurers’ obligations to the insured by applying a body of law developed to resolve ‘other insurance’ disputes”]; *see also*

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<sup>1</sup>“Primary insurance is coverage that attaches immediately upon the happening of an occurrence that is covered under the terms of the policy” (Ostrager and Newman, *Insurance Coverage Disputes*, § 6.03 [a] at 450 [15<sup>th</sup> ed Supp 2011]). “Excess or secondary insurance is coverage that attaches only after a predetermined amount of primary coverage has been exhausted” (*id.*).

Ostrager and Newman, Insurance Coverage Disputes, § 11.01 at 966 [15<sup>th</sup> ed Supp 2011]).<sup>2</sup>

Second, Travelers' request for a determination as to priority of coverage among Travelers, Zurich, and Starr is premature until Zurich appears in this action. "In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]; see also *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 147-148 [1st Dept 2008]). Travelers contends that Zurich, Starr, and Travelers are coinsurers (Premisler affirmation in support of motion to reargue, exhibit 4 [Travelers' memorandum of law in support of cross motion for summary judgment at 17 ["the Zurich/Hunter [Roberts] Policy is *primary* and under no circumstances would Travelers have the sole duty to defend or indemnify [plaintiffs]"] . . . "any possible obligation of Travelers to defend or indemnify [p]laintiffs in the [u]nderlying [a]ction is subject to and limited by the duties and obligations of Starr to also defend and/or

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<sup>2</sup>To the extent that Travelers argues that (1) it was seeking a declaration that Starr (among others) has a primary duty to defend and, thus, Travelers was not the sole primary insurer (Premisler reply affirmation, ¶ 6), and (2) Starr's policy provides the sole primary coverage to Petrocelli, i.e., a defendant in this action (Travelers' memorandum of law in support of motion to reargue at 12), the court finds that Travelers did not request this relief in its cross motion. "Reargument is never a vehicle for seeking new forms of relief" (*Fox v Schrader Corp.*, 36 AD2d 591, 591 [1st Dept 1971]). CPLR 2214 (a) states that "[a] notice of motion shall specify . . . the relief demanded and the grounds therefor." Indeed, Travelers' notice of cross motion for summary judgment and memorandum of law in support of its cross motion for summary judgment requested declarations that Travelers' policy does "[n]ot [p]rovide the [s]ole [p]rimary [i]nsurance" for plaintiffs (Premisler affirmation in support of motion to reargue, exhibits 3 [Travelers' notice of cross motion for summary judgment at 2], 4 [Travelers' memorandum of law in support of its cross motion for summary judgment at 16-17]). Travelers also points out that its cross motion papers included a general prayer for relief (see *Tirado v Miller*, 75 AD3d 153, 158 [2d Dept 2010] ["(t)he presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced"]). However, "[w]hether to grant such relief is discretionary with the court" (*HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 775 [2d Dept 1991]).

indemnify said parties on a *primary* basis”] [emphasis added]).

“[W]here insurance policies provide coverage for the same interest and against the same risk, concurrent coverage exists and two or more primary insurers will be held to be coinsurers” (*National Union Fire. Ins. Co. of Pittsburgh, Pa. v Hartford Ins. Co. of Midwest*, 248 AD2d 78, 84 [1st Dept 1998], *affd* 93 NY2d 983 [1999]). “Where two or more insurers bind themselves to the same risk and one pays the whole loss, the paying insurer has a right of action against his coinsurers for a ratable portion of the amount paid” (*id.* at 85). Moreover, “[w]hen more than one primary insurer is potentially obligated to indemnify an insured for a claim either because of concurrent coverage . . . , defense obligations must be apportioned horizontally among the primary insurers” (Ostrager and Newman, *Insurance Coverage Disputes*, § 6.02 at 438 [15<sup>th</sup> ed Supp 2011]).

“The rights and obligations of co-insurers depend, principally, on the specific language of the insurance contracts” (*id.*, § 11.01 at 966). In *Turner Constr. Co. v Kemper Ins. Co.* (341 Fed Appx 684, 687 [2d Cir 2009]), cited by the court in the prior decision in denying Travelers’ request for a declaration that Travelers’ policy does not provide the sole primary coverage, the Second Circuit Court of Appeals held, citing *BP A.C. Corp.*, that “no other insurer is currently a party, and issues regarding contribution and the allocation of the costs of defense among insurers should be reserved to proceedings in which those other insurers are parties.”

Here, Zurich was apparently not made a party to this action until after Travelers’ motion for leave to reargue the prior decision was made. As argued by Starr and NCC, priority of coverage among Travelers, Zurich, and Starr is best left to proceedings in which Zurich is a

party; issues regarding contribution<sup>3</sup> and the allocation of defense costs among the alleged coinsurers must await further motion practice (*see generally B.G. Yenny Constr. Co., Inc. v One Beacon Ins. Group*, 50 AD3d 1477, 1479 [4th Dept 2008] [“Pursuant to the ‘other insurance’ and ‘method of sharing’ provisions of those policies, both One Beacon and Selective have an obligation to provide primary coverage and to share equally in the costs of plaintiff’s defense and indemnification in the underlying action”]; *Atlantic Mut. Ins. Co. v Atlantic Natl. Ins. Co.*, 38 AD2d 517, 518 [1st Dept 1971], *aff’d* 33 NY2d 817 [1973] [where two policies contained excess “other insurance” clauses, they effectively cancelled each other out, leaving both policies to be treated as primary insurance where they assumed the same risk; “and both must contribute, pro rata, toward payment of the cost of settlement and legal fees and other expenses of the litigation”] [internal quotation marks and citation omitted]).<sup>4</sup>

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<sup>3</sup>Contribution has been defined as follows: “[w]here one of two or more potentially liable insurers pays a loss, whether in satisfaction of a judgment or in settlement of a claim, it may then seek payment from the other insurers of their fair share of the loss . . . the payment sought is referred to as a ‘contribution’” (15 Couch on Ins. § 217:4 [3d ed 2014]). “In the insurance context, the right to contribution among insurers arises in two basic circumstances: 1) an insurer of a joint tortfeasor has paid all, or greater than its share, of a loss; 2) a single insured is covered by concurrent or ‘double’ insurance, and one insurer paid all, or greater than its share, of a loss” (*id.*).

<sup>4</sup>Although Travelers also points out that the court determined priority issues concerning Travelers and Everest, the court had the relevant policies at issue to issue a declaration, i.e., Travelers’ and Everest’s policies, and both Travelers and Everest were parties to this action (*see BP A.C. Corp.*, 8 NY3d at 716). Nevertheless, the court could not properly issue a declaration as to priority among Travelers, Zurich, and Starr, since Zurich was not a party (*see id.*). Moreover, Everest’s policy is a true excess policy. “A true excess policy (such as the typical umbrella policy) is conditioned on the existence of an underlying primary policy, while a primary policy with an excess other insurance clause is a device by which a primary insurer seeks to limit[ ] or eliminate its liability where another primary policy covers the risk, thereby making it secondary coverage” (*Hartford Underwriters Ins. Co. v Hanover Ins. Co.*, 122 F Supp 3d 143, 155 [SD NY 2015] [internal quotation marks and citation omitted]). “As a rule . . . excess and umbrella policies are regarded as excess over and above *any* type of primary coverage . . . because

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that the motion (sequence number 005) of defendant Travelers Indemnity Company for leave to reargue the court's decision and order dated October 6, 2015 is granted, and upon reargument, the court adheres to its prior determination; and it is further

**ORDERED** that this matter is adjourned to September 7, 2016 at 9:30 a.m. in Part 19 (111 Centre Street, Room 1164B) for status conference.

This constitutes the decision and order of the court.

Dated: July 14, 2016

ENTER:

  
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**HON. KELLY O'NEILL LEVY** J.S.C.

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umbrella policies are not an attempt by a primary insurer to limit a portion of its risk by labeling it 'excess' nor a device to escape responsibility" (15 Couch on Ins. § 220.41 [3d ed 2014] [emphasis supplied]). Furthermore, "a primary insurer has a duty to defend without any entitlement to contribution from an excess insurer" (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005] [internal quotation marks and citation omitted]).