RLI Ins. Co. v Navigators Ins. Co.
2018 NY Slip Op 31390(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 652471/2011
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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RLI Insurance Company

Index No. 652471/2011

v.

Navigators Insurance Co. et al

Defendants.
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MELISSA A. CRANE, J.

This is an insurance coverage dispute that presents the question: when does the primary insurer's duty to defend end? Given the current procedural posture of the underlying case, the policy language at issue, and the reasonable expectations of the insured, the court holds that the primary insurer's duty to defend ends at the conclusion of the litigation or upon settlement.

The facts of the underlying case involve a terrible tragedy. On the morning of February 13, 2008, Julie Simon and her husband Charlie were driving to a new office building in Nassau County to hang wallpaper. Julie was driving.

When they were unable to enter the building through the front entrance, Julie drove the vehicle through an opening in a fence onto the upper deck of a parking garage that was still under construction, adjacent to the building. When the vehicle was about halfway between the opening gate in the fence and the leading edge of the parking deck, Julie lost control of the car. The vehicle slid on ice until it reached the edge of the incomplete parking deck, broke through the steel cable guardrail system that was intended to protect individual workers, and fell approximately 32 feet to the lower level

of the garage. Charles was injured when he jumped out of the vehicle before it fell. Julie fell with the vehicle and died at the scene.

Charles subsequently commenced suit in 2009 against, among others, Granite Building 2, LLC (Granite) the defendant Lalezarian Properties, LLC (hereinafter Lalezarian), the property manager, Kulka Construction Corp. and Kulka Contracting, LLC (hereinafter together the Kulka defendants), the construction manager, Canatal Industries, Inc. (hereinafter Canatal), the structural steel subcontractor, MCLO Structural Steel Corp. (hereinafter MCLO), the installer of the structural steel, and FXR Construction, Inc., doing business as DEV Construction (hereinafter FXR), the concrete subcontractor. The venue of this action was Nassau County.

On September 8, 2011, RLI Insurance Company (RLI) filed this action (Action No. 1) against various insurance companies seeking additional insured coverage on behalf of its named insured, Granite. Various parties to this action also asserted cross claims, including against the proponent of this motion, State National Insurance Company (State National).

While Action No. 1 proceeded through initial motion practice, the Appellate Division, Second Department issued a decision in the underlying action that defendant MCLO was free of liability (See *Simon v Granite Bldg.*, 114 AD3d 474 (February 13, 2014). As a result, the court in Action No. 1 extinguished defendant Arch Insurance Company's duty to defend.

On April 2, 2015, Scottsdale Insurance Company (Scottsdale) filed Action No. 2 in which it sought a declaration that it had no duty to defend or indemnify Granite or Kulka Contracting in the underlying case, and that the Scottsdale policy was excess over

policies that RLI, Navigators, State National and The Insurance Company of the State of Pennsylvania had issued.

In June 2015, the underlying action was tried before a jury. On June 16, 2015, the jury returned a verdict of $9,435,000. The jury apportioned fault: 60% to Granite, 30% to Kulka and 10% to FXR. On April 22, 2016, the trial court in the underlying action reduced the jury verdict to $4,967,500. Subsequently, the parties in the underlying action stipulated to reduce damages further. On May 24, 2016, Granite appealed the order in the underlying action that had denied its motion for a judgment notwithstanding the verdict. This appeal is pending. After the jury's award, on August 19, 2016, State National tendered its policy limits of $1,000,000, as well as 195,913.46 representing its share of interest and costs, to plaintiff's counsel in the underling action. On March 17, 2017, the court in the underlying action entered judgment in favor of plaintiff. Granite claims it is also pressing an appeal of that judgment, based upon the trial court's failure to apply the "storm in progress" doctrine. (Keane Aff., 11/18/2016, at ¶ 6).

There is no opposition to that part of State National's motion to consolidate Action No. 1 with Action No. 2, for joint discovery and trial. Moreover, to consolidate these cases has great merit. Both involve insurance for the same underlying accident. Consequently, judicial economy and the risk of inconsistent decisions favor consolidation. It is also cheaper for the parties to litigate these issues one time, before one court. Accordingly, the court grants the motion to consolidate.

State National also seeks summary judgment in its favor and a declaration that it has no further obligation to pay statutory interest or costs and no further obligation to defend or indemnify Granite or any other defendant in the underlying action. It is

undisputed that State National is Granite's primary insurer as Granite is an additional insured under State National's policy covering FXR. According to that policy, State National's "duty to defend ends when [it has] used up the applicable limit of insurance in the payment of judgments or settlements." (insurance policy, Exhibit A to State National's motion, section [I][A][1][a][2)])

State National points to the judgment in the underlying action and that it has tendered its policy limits to underlying plaintiff's counsel to argue that the applicable limit of insurance has been "used up" to pay the judgment, at least partially. RLI contends that, while State National's indemnity obligation may be limited to liability of $1,000,000, State National's duty to defend is unlimited in that State National's duty to defend applies not just to the $1,000,000 to which State National is exposed, but to the entire amount to which Granite is exposed (i.e. approx. 5 million).

RLI's position makes sense. It is undisputed that State National provides insurance on the primary level and has the concomitant duty to defend. A duty to defend usually includes the duty to pay for an appeal (*Brassil v Maryland Cas. Co.*), 210 NY 235 (1914); *Fidelity Gen. Ins Co., v Aetna Ins. Co.*, 27 AD2d 932 [2d Dep't 1967]; *see also Associated Automotive Inc. v Acceptance Indem Ins. Co*, 705 F Supp 2d 714, 724 [SD Tex. 2010]["absent an express provision in the policy to the contrary, an insurer's duty to defendant encompasses a duty to appeal an adverse judgment against the insured as long as there are reasonable grounds to believe that the insured's interest would be furthered by the appeal"). Thus, a "primary insurer may not walk away from the insured by paying relatively low limits into court and abandon the insured with a substantial judgment simply because the cost of appeal or other handling may be formidable. The insured's

interests may demand continued protection despite the threatened exhaustion of the primary limits" (*Gross v Lloyds of London Ins. Co.*, 121 Wisc. 2d 78 {Supreme Court of Wisconsin 1984) *citing* 7C J. Appelman, *Insurance Law and Practice*, sec 4684 at 80-82 [Berdal ed. 1979]) *see also, Auto Ins. Co., of Hartford v Cook*, 7 NY3d 131, 137 [2006]).

Consequently, the primary insurer's tender of policy limits to an injured plaintiff is insufficient to discharge the duty to defend where, in tendering limits, the insurer does not obtain some form of peace for its insured (*see California Cas Ins Co., State Farm Mut. Auto. Ins. Co.*, 185 Ariz 165, 913 P2d 505, 508 (Arizona Ct of Appeals 1996), such as an agreement from plaintiff not to "execute on the individual assets of the insured" (*Virginia Surety Ins. Co., v. RSUI Indem., Co.*, 2009 WL 4282198 at * 7 [D. Ariz. November 25, 2009]). Thus, it can only be that the "payment of judgment or settlements" language in the policy "contemplates payment upon the conclusion of the litigation or termination of the claim by settlement" (*Gross*, 121 Wisc. at 86).[1]

Here, State National does not argue that there is no merit to Granite's appeal. When it tendered its policy limits to underlying plaintiff's counsel, it did not obtain a release from plaintiff, or even an agreement not to proceed against Granite's assets. In other words, it did nothing to buy Granite peace. This is why the case State National primarily relies upon, *In Re 51st St. Crane Collapse Litig.*, 84 AD3d 512, 513 [1st Dep't 2011], is distinguishable. There, the insurer paid its policy limits to settle certain actions and obtained releases for its insureds. Here, there was no release or end to the litigation for Granite.

1 The parties did not cite any New York cases directly on point and research did not reveal direct New York case law either.

Primary insurance has the first duty to defend and indemnify. Because an excess carrier does not have this first duty, an excess policy bears a comparatively modest premium (*see Bovis Lend Lease LMB, Inc v Great Am Ins Co.*, 53 AD3d 140, 148 (1st Dep't 2008). It therefore defeats the reasonable expectations of the insured, who has paid a larger premium to obtain coverage for litigation costs, to cut off funding for those costs post judgment, where there is a valid reason to appeal or otherwise delay satisfying the judgment.

ACCORDINGLY, it is

ORDERED that the court grants that part of State National's motion to consolidate *Scottsdale Ins. Co., v RLI Ins. Co., et al*, Index No. 153250/2015 with this action under Index No. 652471/2011; and it is further

ORDERED that the parties are directed to serve a copy of this order and a copy of the new caption upon the County Clerk within 45 days from the date of this order; and it is further

ORDERED that, upon receipt of this order and the copy of the new caption, the clerk is directed to amend the caption to reflect the new caption; and it is further

ORDERED that the court denies that part of defendant State National's motion for summary judgment, and it is

ADJUDGED, DECLARED AND DECREED that State National still has an obligation to pay statutory interest, costs and still has a duty to defend Granite Building 2, LLC, Kulka Contracting, LLC and FXR Construction, Inc in connection with the underlying action, *Charles Simon v Granite Building 2, LLC*, Index No. 22101-08, commenced in Supreme Court, Nassau County.

Dated: January 12, 2018
New York, NY

ENTER:

Melissa A. Crane, J.S.C.