United Natl. Ins. Co. v Travelers Prop. Cas. Co. of Am.
2018 NY Slip Op 32159(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 652639/2015
Judge: Melissa A. Crane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

----------x

UNITED NATIONAL INSURANCE COMPANY,

Plaintiff,

- against -

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ZURICH-AMERICAN INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendants.

----------x

DECISION AND ORDER

Index No. 652639/2015

MELISSA A. CRANE, J.:

In this insurance coverage dispute, plaintiff United National Insurance Company (United) moves, pursuant to CPLR 3212, for partial summary judgment on its third cause of action for equitable contribution and fifth cause of action for equitable subrogation against defendant Travelers Property Casualty Company of America (Travelers), on its sixth cause of action for equitable subrogation against defendant Zurich-American Insurance Company (Zurich), and on its seventh cause of action for a declaratory judgment. Zurich and defendant National Union Fire Insurance Company of Pittsburgh, PA (National) oppose the motion. Travelers opposes the motion and cross-moves for summary judgment dismissing the complaint and the cross claims against it.

BACKGROUND

A. The Underlying Action

Metropolitan Tower Life Insurance Company (Met Tower) is the former owner of a residential apartment building complex known as Peter Cooper Village and Stuyvesant Town (together, Stuyvesant Town) in New York, New York.

In June 2006, Rose Associates, Inc. (Rose), acting for Met Tower, hired Independent Temperature Control Services, Inc. (Independent) to remediate steam control stations located in

35 buildings at Stuyvesant Town for a contract price of $23.1 million (the Independent Contract) (affidavit of Duane C. Parker [Parker] [Parker aff], exhibit HH at 5). Independent subcontracted a portion of the remediation work to Phoenix Mechanical Piping, LLC (Phoenix) for $6.115 million (the Phoenix Subcontract). The Phoenix Subcontract provided that it was "subject to the same terms and conditions as . . . [Independent's] contract with Rose" (Parker aff, exhibit C at 2). According to Article 10 of the general conditions of the Independent Contract, Independent and its subcontractors were required to procure and maintain insurance naming Met Tower as an additional insured on any commercial general liability insurance and umbrella and excess liability insurance policies they obtained for the remediation work (Parker aff, exhibit HH at 45-47). Article 12 of the Phoenix Subcontract obligated Phoenix to purchase comprehensive general liability insurance with a minimum $1 million per occurrence limit of liability and an umbrella liability policy with a minimum of at least $4 million (Parker aff, exhibit C at 11).

United issued commercial insurance policy no. M5157124 to Phoenix Mechanical, Inc., in effect from November 11, 2005 through November 11, 2006, with a $1 million per occurrence limit of liability.[1] National issued commercial umbrella policy no. EBU 9036881 to Phoenix, in effect from November 11, 2005 through November 11, 2006, with a $1 million per occurrence limit on liability (the National Policy).

Travelers issued commercial insurance policy no. TC2J-GLSA-107T5973-TIL-06 to MetLife, Inc. (MetLife) and its subsidiaries, in effect from January 1, 2006 through January 1, 2007, with a $2 million per occurrence limit of liability (the Travelers Policy).[2] Zurich issued commercial umbrella liability policy no. AUC3750732 04 to MetLife, in effect from January 1, 2006 to January 1, 2007, with a $25 million per occurrence limit of liability (the Zurich Policy).

[1] Phoenix was a named insured under the United Policy (Parker aff, exhibit A at 3).
[2] Met Tower is wholly-owned subsidiary of MetLife (David Kong (Kong) aff, ¶ 2).

On October 30, 2006, Wojciech Rzymski (Rzymski), a steamfitter employed by Phoenix, sustained injuries in a construction-related accident that occurred in a storage room at 522 East 20th Street, a building within Stuyvesant Town (affirmation of United's counsel, exhibit Y at 2 and 7). Rzymski brought a Labor Law action against Met Tower, Independent, PCV St Owner LP, and Tishman Speyer Properties, L.P. titled *Rzymski v Metropolitan Tower Life Insurance Company, et al.*, Sup Ct, NY County, index No. 104591/2007 (the Rzymski Action). Independent commenced a third-party action for defense and indemnification against Phoenix, Sup Ct, NY County, index No. 590892/2009.

By letter dated August 31, 2007 to Phoenix and United, Travelers, as the general liability carrier for "MetLife, Inc., [its] subsidiaries and managing agents," demanded that Phoenix and United defend and indemnify it in the Rzymski Action as an additional insured on the United Policy (Parker aff, exhibit D at 1). On September 18, 2007, United advised Travelers that it was unable to accept its tender at the time and requested additional information, including a copy of the contract between Phoenix and MetLife (Parker aff, exhibit E at 1). Shortly thereafter, Travelers provided United with a contract between Rose and Phoenix, executed in April 2006, for the removal and replacement of a leaking or corroded pipe located in a chase between 380 First Avenue and 420 East 23rd Street for a contract price of $8,500 (the Rose Contract) (Parker aff, exhibit F at 5). Travelers allegedly failed to disclose the Phoenix Subcontract at that time. In November 2007, United accepted Travelers tender and agreed to "assume the defense and indemnification of Metropolitan Tower Life Insurance Company under a reservation of rights" (Parker aff, exhibit H at 2). United's reservation of rights letter referred specifically to two provisions in the United Policy, one of which was the additional insured endorsement.

In October 2009, Independent filed an action for a declaratory judgment against its insurance carrier, Utica National Assurance Company (Utica) (*Independent Temperature Control*

Services, Inc. v Utica National Assurance Company, Sup Ct, Queens County, index No. 29294/2009) (Parker aff, exhibit GG at 1). The complaint alleged that Utica had issued commercial general liability policy CPP 3904623 to Independent in effect from January 27, 2006 to January 27, 2007 with a $1 million per occurrence limit of liability. The complaint also alleged that Utica had refused to undertake Independent's defense in the Rzymski Action.

According to a settlement agreement executed in March 2011 between Independent, Met Tower, Phoenix and United (the Settlement Agreement), United agreed to defend and pay Independent's costs in the Rzymski Action (Parker aff, exhibit FF, at 2). Independent agreed to waive its claims against Phoenix, Met Tower and United related to Independent's defense costs in the Rzymski Action, discontinue its third-party complaint against Phoenix in the Rzymski Action, and discontinue a federal action Independent brought against United for defense and indemnification under the United Policy (*id.* at 1-2). Met Tower agreed to waive its claims against Independent related to its defense costs in the Ryzmski Action, and Met Tower and Independent stipulated to discontinue their cross claims against each other in that action (*id.* at 2-3). The Settlement Agreement further provided that if Rzymski was to prevail at trial against Independent and/or Met Tower, Independent would contribute $75,000 to satisfy the judgment or settlement in that action (*id.* at 4).

A jury trial in the Rzymski Action conducted in 2013 resulted in a judgment of $6,697,534.93 in favor of Rzymski against Met Tower and Independent.[3] After the jury rendered its verdict, outside counsel for Zurich, as MetLife's umbrella insurance carrier, negotiated a settlement for $5,770,885, without interest (the Rzymski Settlement). Each carrier funded the Rzymski Settlement as follows: (1) $1.075 million from United, which included $75,000 from

[3] Rzymski had previously obtained summary judgment on liability on the Labor Law § 240 (1) cause of action (*see Rzymski v Metropolitan Tower Life Ins. Co.*, 94 AD3d 629, 629 [1st Dept 2012]).

Independent, as per the Settlement Agreement; (2) $2 million from Travelers; (3) $1,695,885 from Zurich; and (4) $1 million from National (Parker aff, exhibit EE at 5-9). An appeal taken from the judgment was subsequently withdrawn (*see Rzymski v Metropolitan Tower Life Ins. Co.*, 120 AD3d 1099 [1st Dept 2014]).

B. United's Complaint

United claims that it paid out over $500,000 in defense costs in connection with the Rzymski Action and $75,000 over its per occurrence limit of liability. It commenced this action seeking reimbursement from Travelers, National and Zurich for their share of the costs United incurred on behalf of Met Tower in defending or settling the Rzymski Action. The complaint asserts the following causes of action: (1) equitable indemnity based on the residential projects exclusion contained in the United Policy; (2) equitable indemnity based on United's payment of $75,000 over its per occurrence limit of liability to satisfy the Rzymski Settlement; (3) equitable contribution for half of its defense costs from Travelers; (4) equitable reapportionment of its costs for defending Phoenix, Independent and Met Tower; (5) equitable subrogation of its costs for defending Phoenix, Independent and Met Tower; (6) equitable subrogation for United's contribution to the Rzymski Settlement; and (7) a declaratory judgment.

C. The Parties' Contentions

United argues that Travelers had a duty to defend its insured, Met Tower. While Travelers contributed the limits of its policy to fund the Rzymski Settlement, it failed to contribute to the defense costs once United assumed Met Tower's defense. United seeks to recover from Travelers its pro rata share of $411,333 on the third cause of action for equitable contribution. As to the fifth cause of action, United submits that it is entitled to full equitable subrogation based on Travelers' failure to disclose the correct, operative contract at issue in the Ryzmksi Action. Had Travelers done so, United would have determined that there was no coverage, because the work Rzymski

was engaged in fell under the residential projects exclusion endorsement in the United Policy. Even if the policy exclusion did not apply, United argues that it is entitled to recover three-fourths of the defense costs, or $463,200, from Travelers.

Travelers opposes the motion and argues that the complaint should be dismissed. First, Travelers asserts that Met Tower is an additional insured under the United Policy. The "other insurance" provision in the Travelers Policy rendered its policy as excess coverage and the United Policy as primary coverage. Because a primary insurer has the primary obligation to defend, Travelers has no obligation to reimburse United. Next, the equitable indemnity and equitable subrogation claims should be dismissed, because New York does not recognize those causes of action. Travelers also contends that the residential projects exclusion in the United Policy is inapplicable to commercial apartment buildings such as those at Stuyvesant Town. As to the equitable reapportionment claim, Travelers submits that the Court of Appeals has rejected claims for equitable allocation between primary and excess insurers.

In reply, United refutes Travelers' contention that it is an additional insured under the United Policy, and therefore, the "other insurance" provisions do not come into play. In addition, it argues that Met Tower does not qualify as a named insured under the Travelers Policy.

Zurich opposes United's motion on four grounds. First, United failed to disclaim coverage based on the residential projects exclusion, even though it has been in possession of the Phoenix Subcontract since October 2007. Nevertheless, United continued to defend Met Tower for six years, thereby waiving any right it had to disclaim coverage. Second, assuming that the policy exclusion precluded coverage, United's contributions to the Ryzmski Settlement, and its expenses incurred in defending Met Tower, were voluntary. Third, in an appellate brief filed in this action, United admitted that equitable subrogation was not the best "fit" because United, standing in for Met Tower as a potential additional insured, was essentially suing itself (Zurich memorandum of

law, at 11). Finally, Zurich argues that a coinsurer such as United has no right to assert a claim for equitable subrogation against another coinsurer.

United, in reply, repeats that it is entitled to reimbursement because of the residential projects exclusion, and because Met Tower was never its additional insured. United did not waive its right to seek reimbursement, because it specifically reserved its right to pursue this action. In addition, United maintains that an insurer may pursue equitable subrogation against a coinsurer.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d

253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

A. The First and Second Causes of Action for Equitable Indemnity

"[T]he right of indemnification springs conceptually from principles of equity and finds its expression in contract, express or implied" (*Morris v Snappy Car Rental*, 84 NY2d 21, 28 [1994]). The claim arises when there is a breach of a "duty owed the indemnitee by the indemnitor" (*Raquet v Braun*, 90 NY2d 177, 183 [1997]). However, "there is no recognized cause of action for equitable indemnity . . . under New York law" (*United Natl. Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 158 AD3d 593, 594 [1st Dept 2018] [affirming the dismissal of United's first and second causes of action against Zurich in this action]). Therefore, Travelers' motion, insofar as it seeks summary judgment dismissing the first two causes of action for equitable indemnity, is granted.

CPLR 3212 (b) allows the court to search the record and grant summary judgment "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment." Because United cannot maintain a claim for equitable indemnity, the court grants summary judgment to National as well. Consequently, the court dismisses the first and second causes of action against Travelers and National.

B. The Third Cause of Action for Equitable Contribution

An insurer must provide a defense when the facts and allegations in the complaint "bring the claim even potentially within the protection purchased" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal quotation marks and citation omitted]). "An insurer's duty to defend is liberally construed and is broader than the duty to indemnify" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). Thus, where there is a dispute over coverage, the court must "first look to the language

of the applicable policies" (*id.* [internal quotation marks and citation omitted]). "[W]here the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]). Any ambiguities must be resolved in the insured's favor and against the insurer (*id.*).

"Generally, where 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] [internal quotation marks and citation omitted]). Moreover, "[w]here 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 [or her] coinsurers for a ratable portion of the amount paid" (*id.* at 85).

Before determining whether the "other insurance" provision in the Travelers Policy applies, the court must first decide whether Met Tower qualifies an insured under that policy. It is well settled that coverage does not extend to a party who is not named, described or referred to as an insured or additional insured on an insurance policy (*see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004] [stating that "party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage"]. "[T]he party claiming insurance coverage bears the burden of proving entitlement" (*Tribeca Broadway Assoc.*, 5 AD3d at 200), by presenting sufficient "proof in evidentiary form" that the party is an insured (*Preferred Mut. Ins. Co. v Ryan*, 175 AD2d 375, 378 [3d Dept 1991]). An additional insured is "an 'entity enjoying the same protection as a named insured'" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [citation omitted]).

At issue is language contained in Section II of the Travelers Policy, that defines an named insured, in part, to include "[a]ny organization, partnership, joint venture or limited liability company you own, newly acquire or form and over which you maintain ownership or majority interest and for which you have agreed in writing before loss to provide insurance. . . ." (Affidavit of David Kong [Kong] [Kong aff], exhibit B at 174). Kong, a director for corporate risk management at MetLife, avers that Met Tower is a wholly-owned subsidiary of MetLife, as shown in the stock certificate submitted with his affidavit (Kong aff, exhibit A at 1). He states that MetLife supplied Travelers with a complete list of its subsidiaries to be included as named insureds on the Travelers Policy (Kong aff, ¶ 4). The list reveals that, as of June 30, 2005, Met Tower operated as a wholly-owned subsidiary of MetLife (Kong aff, exhibit C at 1-2). Joseph A. Combader (Combader), a claims manager at Travelers, avers that Met Tower, as MetLife's wholly-owned subsidiary, qualifies as a named insured under the Travelers Policy (Combader aff, ¶ 4).

United posits that Travelers ignores the conditional language in Section II, Paragraph 4, that extends coverage only "until the 90th day after [MetLife] acquire[s] or form[s] the organization or the end of the policy period, whichever is earlier," unless MetLife reports the acquisition or formation of that entity to Travelers in writing (Kong aff, exhibit B at 174). United submits that the declaration page in the Travelers Policy could have been amended to include Met Tower, but MetLife failed to do so.

Although Met Tower is not named on the declaration page, it qualifies as a named insured pursuant to Section II, Paragraph 4. "[T]he endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]). Here, the language in Section II, Paragraph 4 modifying the definition of "insured" is clear and unambiguous (*see Wright-Ryan Constr., Inc. v AIG Ins. Co. of Canada*, 647 F3d 411, 415-416 [1st Cir 2011]

[stating that "the definition of 'you' . . . unambiguous[ly] . . . refers solely to a person or organization listed as a Named Insured in the policy Declarations or 'qualifying as Named Insured' by virtue of being newly formed or acquired by a Named Insured"]). The provision plainly states that MetLife need only provide written notice within 90 days after it acquired or formed a wholly-owned entity or an entity in which it owned a majority interest. The evidence establishes that MetLife acquired stock in Met Tower three years before Travelers issued its policy, that Met Tower operated as MetLife's wholly-owned subsidiary as of June 2005, and that MetLife was not obligated to notify Travelers in writing of this acquisition before the Travelers Policy expired on January 1, 2007. Therefore, the fact that Met Tower is not listed as a named insured on the declaration page of the Travelers Policy is immaterial.

Next, the court must determine the application of the competing "other insurance" provisions in the United Policy and the Travelers Policy. "Where, as here, more than one policy covers the same risk, the court must "determine the insurers' obligations to the insured by applying a body of law developed to resolve 'other insurance' disputes" (*Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1999]). Generally, "'excess' [insurance] coverage covers the same types of claims as the primary policy, but for additional amounts" (*Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 339 [2000]). A "carrier whose coverage is rendered excess by reason of the competing 'other insurance' clauses will not become obligated to defend the insured until the other carrier's coverage has been exhausted" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa*, 65 AD3d 12, 13 [1st Dept 2009], *appeal withdrawn* 14 NY3d 796 [2010]).

The "other insurance" provision in Section IV – Commercial General Liability Conditions of the United Policy reads, in part:

"**4. Other Insurance**.

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
> This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> **b. Excess Insurance**
> This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> ***
>
> When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers."

(Parker aff, exhibit A at 24).

The "other insurance" clause of the Travelers Policy is found in Paragraph 4 of Section IV – Commercial General Liability Conditions. The relevant portion of that provision reads, in part:

> "**4. Other Insurance**
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
> This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we well share with all that other insurance by the method described in **c.** below."
>
> **b.** Excess Insurance
> This insurance is excess over:
>
> ***
>
> **(2)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

(Kong aff, exhibit B at 27). The Other Insurance – Additional Insured endorsement modifies Paragraph 4.b of Section IV as follows:

> **"b. Excess Insurance**
> This insurance is excess over any of the other insurance; whether primary, excess, contingent or on any other basis:
>
> ***
>
> **(5)** That is valid and collectible insurance available to you if you are added as an additional insured under any other policy."

(Kong aff, exhibit B at 73).

Based on the plain language of the "other insurance" provision in the Travelers Policy, the Travelers Policy provides excess coverage to the primary insurance from United (*see QBE Ins. Corp. v Public Serv. Mut. Ins. Co.*, 102 AD3d 442, 443 [1st Dept 2013]), provided that Met Tower is an additional insured on the United Policy. The additional insured endorsement of the United Policy states, in pertinent part:

> "This endorsement modifies insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> WHO IS AN INSURED (SECTION II) is amended to include the person or organization shown in the Schedule below, but only as respects liability imposed or sought to be imposed on such additional insured because of an alleged act or omission of the named insured.
>
> ***
>
> SCHEDULE
>
> Name of Person or Organization (Additional Insured)
> BLANKET WHERE REQUIRED BY CONTRACT AND ON FILE WITH COMPANY"

(Parker aff, exhibit A at 36). Therefore, Met Tower qualifies for coverage as an additional insured if (1) a contract that required insurance was (2) on file with United.

United presents two conflicting positions on Met Tower's status as an additional insured. First, United appears to concede the issue based on several statements made in this action. United's

response, dated December 14, 2015, to Interrogatory No. 21 of Travelers' First Set of Interrogatories reads:

> "MetLife Tower Life Insurance Company, defined by Travelers in these Interrogatories as 'MetLife,' is an additional insured under United National's policy issued to Phoenix Mechanical, Inc. United National's claim file . . . contain [sic] numerous statements to this affect [sic], including several status reports from defense counsel . . . The pertinent documents include United National's policy, the subject subcontract for the project, the pleadings in the *Rzymski* action, and possibly other records."

(affirmation of Travelers' counsel, exhibit 2 at 12-13). United answered, "[y]es," to Interrogatory No. 23, which asked if United had defended and/or indemnified Met Tower in the Rzymski Action as an additional insured under the United Policy (*id.* at 13). As for Interrogatory No. 24, which asked United to state whether "MetLife is not an additional insured under the United . . . Policy in connection with . . . the Underlying Action," United responded, "[n]ot applicable, see the response to Interrogatory No. 23" (*id.*). The court notes that Parker executed the verification annexed to United's responses (*id.* at 19). United's counsel also stated that "United . . . and Travelers both included [Met Tower] as an insured under their primary commercial general liability policies" (United's memorandum of law, at 15).

United attempted to retract these admissions by serving amended interrogatory responses six days before it filed this motion. The amended responses, though, were not sworn to by an "officer, director, member, agent or employee having the information" as CPLR 3133 (b) requires. Therefore, the "amendments", that were without leave of court, (*see* CPLR 3113 (c), are not amendments at all. Consequently, the court is constrained to examine United's original interrogatory responses.

Subject to certain statutory exceptions, "answers to interrogatories may be introduced only by an adverse party and not by the party responding to the interrogatories" (*United Bank. v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 263 [1976], *rearg denied*, 41 NY2d 901 [1977]).

United's responses "[constitute] admissions of a party and [are] admissible as evidence" (*Bigelow v Acands, Inc.*, 196 AD2d 436, 439 [1st Dept 1993]). Similarly, the admissions made by United's counsel are binding (*see Morel v Schenker*, 64 AD3d 403, 403 [1st Dept 2009]; *Walsh v. Pyramid Co. of Onondaga*, 228 AD2d 259, 260 [1st Dept 1996]). Nevertheless, they constitute informal judicial admissions, subject to rebuttal (*see Williamson v PriceWaterhouseCoopers*, 2006 NY Misc LEXIS 9636, *21 n 5, 2006 WL 6544389 [Sup Ct, NY County 2006]). However, United has failed to rebut.

United submits an affidavit from Parker, a senior claims examiner, to show that Met Tower does not qualify as an additional insured under the additional insured endorsement. Parker avers that neither United, nor its managing general underwriter, Atlantic Risk Specialists, Inc., were able to locate in the underwriting file any certificates of insurance related to the Phoenix Subcontract that named Met Tower as an additional insured or the contract implicated in the Ryzmski Action (Parker aff, ¶¶ 39, 40). Nor could they locate a request that United add Met Tower or Independent as additional insureds (*id.*, ¶ 40). Absent from Parker's affidavit, though, is an explanation for United's conflicting statements concerning Met Tower's status as an additional insured. As noted earlier, United admitted in its interrogatory responses that Met Tower was an additional insured. Parker verified that he had read United's interrogatory responses and that they were "true to [his] knowledge, information and belief" (affirmation of Travelers' counsel, exhibit 2 at 19). Nonetheless, in his affidavit, Parker concluded that Met Tower was not an additional insured.

It is well settled that "[i]ssues of witness credibility cannot be resolved on a motion for summary judgment" (*Medina v 203 W. 109th St. Realty Corp.*, 16 AD3d 220, 220 [1st Dept 2005]). Given the lack of explanation for the contradictory statements in United's interrogatory responses and Parker's averments, the court finds that United has not dispelled all questions of material fact as to whether Met Tower was an additional insured on the United Policy (*see Sevenson Envtl.*

Servs., Inc. v Sirius Am. Ins. Co., 74 AD3d 1751, 1752-1753 [4th Dept 2010] ["the fact that [a claims administrator] did not locate any documentation in . . . [the] underwriting file is, by itself, insufficient to establish as a matter of law that neither [the insurer] nor one of its agents possesses documentation naming plaintiffs as additional insureds"]). Because Travelers claims that there has been no discovery on this issue, United's motion and Travelers' cross motion are denied with leave to renew at the close of discovery.

To the extent Zurich claims that United waived its right to recovery by failing to timely disclaim coverage, the argument lacks merit. "Waiver 'is an intentional relinquishment of a known right and should not be lightly presumed'" (*EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010] [internal quotation marks and citation omitted]). "[W]here the issue is the existence or nonexistence of coverage . . . the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]). Because United's assertions concerning Met Tower's status as an additional insured and the applicability of the residential projects exclusion implicate the existence of coverage, it cannot be said that United waived its right to disclaim.

Likewise, Zurich's argument that United is precluded from recovery based on Insurance Law § 3420 (d) fails. "Insurance Law § 3420 (d) does not apply to claims between insurers" (*J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 271 [1st Dept 2009], *lv dismissed* 13 NY3d 889 [2009]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006], *rearg denied* 2007 NY App Div LEXIS 2811 [1st Dept 2007]). Moreover, if there is no coverage, as United suggests, then United was under no obligation to disclaim it (*National Union Fire Ins. Co. of Pittsburgh, Pa. v State Ins. Fund*, 18 AD3d 202, 204 [1st Dept 2005]).

Thus, United's motion and Travelers' cross motion for summary judgment on the third cause of action are denied without prejudice to renewal upon completion of discovery.

D. The Fourth Cause of Action for Equitable Reapportionment

As with the equitable indemnity claims, the equitable reapportionment claim is not a cognizable claim in this state (*see United Natl. Ins. Co.*, 158 AD3d at 594). Accordingly, the fourth cause of action is dismissed against Travelers and National.

E. The Fifth and Sixth Causes of Action for Equitable Subrogation

The equitable doctrine of subrogation "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). The doctrine "is 'applicable to cases where a party is compelled to pay the debt of a third person to protect his [or her] own rights, or to save his [or her] own property'" (*Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d 937, 937 [2d Dept 2010], quoting *Gerseta Corp. v Equitable Trust Co. of N.Y.*, 241 NY 418, 426 [1926]). Therefore, an insurer who pays a claim on behalf of its insured becomes equitably subrogated to the rights of its insured (*see General Sec. Ins. Co. v Nir*, 50 AD3d 489, 490 [1st Dept 2008]).

Contrary to Zurich's assertion, the court finds that an insurer may pursue a claim for equitable subrogation against a coinsurer (*see National Union Fire Ins. Co. of Pittsburgh, PA*, 248 AD2d at 85; *Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 312 [1st Dept 1984] [finding that, after settling an underlying personal injury action, plaintiff insurer could proceed against defendant coinsurer as an "equitable assignee or subrogee [of its insured] . . . [and] assert an equitable right of subrogation for pro rata contribution from a coinsurer"]).

With regard to Zurich's argument that United was a volunteer, the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). It is well settled that the "right of subrogation exists only for payments an insurer is contractually obligated to pay" (*Millennium Holdings LLC v*

Glidden Co., 146 AD3d 539, 546 [1st Dept 2017]). Thus, "when an insurer who is not acting under a mistake of material fact or law assumes the defense and indemnification of an insured when there is no obligation to do so, that insurer becomes 'a volunteer with no right to recover the monies it paid on behalf of [the] insured'" (*Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1180 [4th Dept 2005] [citation omitted]).

Here, issues of fact exist as to whether United's actions were truly voluntary. If Met Tower was an additional insured on the United Policy, then United cannot be deemed a volunteer, because it was obligated to provide Met Tower with a defense in the Rzymski Action. If, however, Met Tower did not qualify as an additional insured, then United was under no obligation to defend or indemnify Met Tower. Because there has been no determination on whether Met Tower was an additional insured, the applications for summary judgment are premature.

Therefore, United's motion and Travelers' cross motion for summary judgment on the fifth and sixth causes of action are denied without prejudice to renewal upon completion of discovery.

F. The Seventh Cause of Action for a Declaratory Judgment

Given the foregoing, United's motion seeking a declaration of the parties' rights is also denied as premature.

Accordingly, it is

ORDERED that the motion of plaintiff United National Insurance Company for summary judgment against defendant Travelers Property Casualty Company of America on the third, fifth, and seventh causes of action, and for summary judgment against defendant Zurich American Insurance Company on the sixth and seventh causes of action is denied without prejudice to renewal upon completion of discovery; and it is further

ORDERED that the motion of defendant Travelers Property Casualty Company of America for summary judgment dismissing the complaint and the cross claims asserted against it is granted

to the extent of dismissing the first, second and fourth causes of action against said defendant, and is otherwise denied as to the remaining causes of action without prejudice to renewal upon completion of discovery; and it is further

ORDERED that upon a search of the record, summary judgment is granted to defendant National Union Fire Insurance Company of Pittsburgh, PA dismissing the first, second and fourth causes of action against it; and it is further

ORDERED that the first, second and fourth causes of action are dismissed against defendants Travelers Property Casualty Company of America and National Union Fire Insurance Company of Pittsburgh, PA; and it is further

ORDERED that the remaining causes of action are severed and shall continue; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 15, Room 304, 71 Thomas Street, New York, New York, on September 21, 2018 at 9:30 AM/PM.

Dated: New York, New York
September 4, 2018

ENTER:

J.S.C.

HON. MELISSA A. CRANE