

Chipotle Mexican Grill, Inc. v RLI Ins. Co.
2018 NY Slip Op 34267(U)
October 26, 2018
Supreme Court, Queens County
Docket Number: Index No. 700712 2016
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

Date: October 25, 2018

CHIPOTLE MEXICAN GRILL, INC. CHIPOTLE
MEXICAN GRILL OF COLORADO, LLC and
CHIPOTLE SERVICES, LLC,

Plaintiffs,

Index
Number 700712 2016

-against-

Motion
Date August 15, 2018

RLI INSURANCE COMPANY and THE KOCH-
GLACKEN AGENCY a/k/a GLACKEN GROUP,
INC., PIECE MANAGEMENT INC., SIMON
PROPERTY GROUP, INC., THE RETAIL
PROPERTY TRUST, and AFMAT WAZADALLY,

Motion Seq.No. 9

Defendants.

FIREMAN'S FUND INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

RLI INSURANCE COMPANY,

Third-Party Defendant.

_____X

FILED
NOV 28 2018
COUNTY CLERK
QUEENS COUNTY

The following efile papers numbered 316-348, 361-372, 375 -379, 381 were read on this motion by third-party plaintiff, Fireman's Fund Insurance Company (FFIC), for, among other things, summary judgment declaring that plaintiffs "are additional insureds under the RLI Primary and Excess policies"; the cross motion by RLI Insurance Company (RLI) for, among other things, summary judgment declaring "that RLI has no obligation to indemnify (plaintiffs) in connection with (the settlement) of the underlying action"; and the cross

motion by plaintiffs for, among other things, “summary judgment against FFIC declaring that the FFIC and RLI Excess Policies are ... not excess to Chipotle’s Safety National Policy” of insurance.

	<u>Papers Numbered</u>
Notices of Motion and Cross Motion - Affirmations - Exhibits	E316-E348 E361-E372
Anwering and Reply Affirmations - Exhibits	E375-E379 E381

Upon the foregoing papers, it is ordered that this motion, and the two cross motions, are determined as follows:

Plaintiffs (Chipotle) hired Piece Management, Inc. (PMI) to do construction/repair work at plaintiff’s restaurant in Roosevelt Field Mall. PMI was the employer of one Afmat Wazadally, who allegedly fell from a ladder, and was injured, while working at said construction site on December 20, 2014. Wazadally sued plaintiffs, and another party, for his injuries, in this court, under Index No. 1064/2015. Chipotle was insured under an excess policy issued by FFIC. PMI was insured under a primary and excess policy issued by RLI. The RLI policy contained an additional insured endorsement, which plaintiff claims should have covered Chipotle. RLI refused to recognize Chipotle as an additional insured. When the underlying injury action was settled, FFIC paid a certain amount towards the settlement on behalf of Chipotle, which FFIC now looks to recover from RLI in the instant third-party action seeking a declaration that Chipotle was entitled to additional insured coverage from RLI, under its policy with PMI.

A previous cluster of motions for summary judgment, including, as relevant herein, a motion by Chipotle (Seq. 6) seeking a declaration that RLI was obligated to defend and indemnify Chipotle, on the ground that Chipotle was an additional insured under the RLI policy, and a motion by RLI (Seq. 7) seeking a declaration that it had no obligation to defend or indemnify Chipotle as an additional insured under the PMI policy in the underlying lawsuit, were decided by this court on July 9, 2018, and the decision was entered on July 17, 2018. The Chipotle motion was denied. The RLI motion was granted, and the action against RLI was dismissed.

Initially, a branch of the instant motion by FFIC, as a recent intervenor in this action, seeks summary judgment as to the “reasonableness of the settlement of the *Wazadally* action,” which branch is granted, as there appears to be no credible opposition thereto.

The second branch of the FFIC motion seeks the same relief as sought by Chipotle in the decided Seq. 6 motion, makes reference to said motion, propounds its factual and legal arguments of movants thereto, and adverts to the aforementioned reasoning and decision of the court therein. As the instant motion requests that the court “revisit” its said July 17, 2018-entered decision, and further admits that the appropriate means of doing so would be through a motion for leave to renew, the court will acquiesce to movant’s request, and converts the instant “summary judgment” motion into a CPLR 2221 (e) motion for leave to renew.

A motion for leave to renew must be based upon “new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]; *see Chan v Begum*, 153 AD3d 1223 [2d Dept 2017]; *Schwartz v Schwartz*, 153 AD3d 953 [2d Dept. 2017]). Such a motion is not a second opportunity to argue the same facts as presented in the first motion (*see Donovan v Rizzo*, 149 AD3d 1038 [2d Dept 2017]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436 [2d Dept 2007]).

The alleged facts proffered by FFIC in support of its instant motion, having to do with the “privacy” of PMI’s insurance information, as stated by the newly-proffered affidavit of ServiceChannel’s Vice President, allegedly “explaining” his deposition testimony, were available, and should have been known, to the movant at the time of the first motion, and no reasonable justification has been proffered for having failed to present such affidavit, or argue such contention, at that time (*see Constructamax, Inc. v Dodge Chamberlin Luzine Weber Assoc. Architects, LLP*, 157 AD3d 852 [2d Dept 2018]; *Puzhayeva v City of New York*, 151 AD3d 988 [2d Dept 2017]; *Stratton Oakmont, LLC v Tomlinson*, 149 AD3d 790 [2d Dept 2007]). While the requirement that a motion for leave to renew be based on new facts “is a flexible one,” the facts alleged to support the instant motion should not, for the reasons stated above, be considered “newly discovered,” and the court will not exercise its discretion in considering such evidence herein (*JRP Holding, Inc. v Pratt*, 113 AD3d 823, 824 [2014]; *see Serviss v Incorporated Vil. of Floral Park*, 2018 NY Slip Op. 05597 [2d Dept 2018]; *In re Defendini*, 142 AD3d 500 [2016]). Further, even if such information were to be considered, such “new facts” would not have changed the court’s finding on the prior motion. Consequently, FFIC’s motion for leave to renew the prior motion of the court is denied.

Based upon the same facts and law as were decisive in FFIC’s instant motion to renew, and in the previous, fully submitted and addressed, motion (Seq. 7) dismissing the complaint against it, RLI’s instant cross motion seeking, among other things, dismissal of FFIC’s complaint against it, is granted in all respects.

Plaintiff cross-moves for, among other things, first, the granting of FFIC’s instant motion seeking to declare Chipotle an additional insured under RLI’s policy, which branch

of the cross motion is denied, for the reasons as aforementioned in such motion; and second, “summary judgment against FFIC declaring that the FFIC and RLI Excess Policies are excess to the RLI Primary Policy, and not excess to Chipotle’s Safety National Policy.”

Chipotle purchased a Commercial General Liability policy from Safety National Casualty (Safety National Policy) with limits of \$1 million per occurrence and \$2 million in the aggregate, with a \$1 million general liability deductible. Chipotle also purchased a Commercial Liability Umbrella Policy from Scottsdale Insurance Company, with limits of \$5 million, which lists the Safety National policy as its “underlying policy.” Scottsdale’s Umbrella Policy was allegedly “exhausted,” through the payment of other claims, prior to the settlement in the *Wazadally* case. FFIC issued an Excess Liability Policy, with limits of \$20 million, listing the Scottsdale Umbrella Policy as the “First Underlying Insurance” for Chipotle.

As Chipotle has been determined not to be an “additional insured” on the RLI policy, its contention that it should be reimbursed by that policy for the initial \$1 million of its contribution to the settlement is without merit. Neither the RLI Primary, nor the RLI Excess, policy is available to Chipotle in this matter. With regard to the Safety National Policy and the FFIC Excess Policy, Chipotle contends that the Safety National Policy is excess to the FFIC policy, because the \$1 million deductible paid by Chipotle on the Safety National Policy was not to be considered “insurance,” so “cannot be ‘primary’ to the obligations of FFIC under its Excess Policy.” Chipotle argues that the FFIC policy’s “Other Insurance” clause states that such policy “applies excess of” any “‘Other Insurance’ not written by us,” but does not apply to “Underlying Insurance,” and that the policy issued by Safety National is “underlying insurance.” However, the definition of “underlying insurance,” per the FFIC Excess Policy, is “the policy or policies of insurance ... shown in our schedule of underlying insurance.” The Schedule of Underlying Insurance in the FFIC policy lists only the Scottsdale Umbrella Policy, and not the Safety National Policy. (Of note, the Scottsdale Umbrella Policy, employing the same definition of “underlying insurance” as the FFIC Excess Policy, lists the Safety National Policy in its “Schedule of Underlying Insurance.”) As such, Chipotle’s contention that the FFIC policy was not excess to the Safety National Policy is without merit.

Coverage afforded by an umbrella policy is excess coverage to any primary policy, and “any other insurance available to the Insured” language elsewhere in the insuring agreement cannot transform that policy into a policy of primary insurance (*Vassar Coll. v Diamond State Ins. Co.*, 84 AD3d 942, 944 [2d Dept 2011]; see *Jefferson Ins. Co. v Travelers Indem. Co.*, 92 NY2d 363 [1998]). A primary policy insurer must pay up to the limits of the policy before excess coverage becomes effective (see *Murnane Bldg. Contractors, Inc. v Zurich American Ins. Co.*, 107 AD3d 674 [2d Dept 2013]; *Vassar Coll. v Diamond State Ins. Co.*, 84 AD3d 942). Consequently, the branch of plaintiff’s cross motion, seeking summary judgment declaring that the FFIC Excess Policy is not excess to

Chipotle's Safety National Policy, is denied.

The parties' remaining arguments and contentions either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of FFIC's motion for summary judgment as to the "reasonableness of the settlement" is granted. The branch of its motion seeking leave to renew the prior decision, that Chipotle is not an additional insured under the RLI policies, is denied. The cross motion by RLI seeking summary judgment is granted in toto. Plaintiff's cross motion, seeking summary judgment declaring that the FFIC Excess Policy is not excess to Chipotle's Safety National Policy, is denied.

Dated: October 26, 2018



HON. CHEREÉ A. BUGGS, J.S.C.

FILED
NOV 28 2018
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