

Zurich Am. Ins. Co. v Liberty Mut. Fire Ins. Co.

2019 NY Slip Op 30861(U)

April 3, 2019

Supreme Court, New York County

Docket Number: 160188/2014

Judge: Anthony Cannataro

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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ZURICH AMERICAN INSURANCE COMPANY, STAHL REAL ESTATE COMPANY, 277 PARK AVENUE, LLC, and CASSIDY TURLEY NEW YORK, INC.	INDEX NO.	<u>160188/2014</u>
	MOTION DATE	<u>12/12/2018, 12/12/2018</u>
Plaintiffs,	MOTION SEQ. NO.	<u>004 005</u>

- v -

LIBERTY MUTUAL FIRE INSURANCE
 COMPANY, JPMORGAN CHASE BANK, NA,
 and BRIAN GRAY,

DECISION AND ORDER

Defendants.

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 004)
 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 173, 176, 177, 178, 180, 181, 185, 186, 187,
 191

were read on this motion REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 005)
 159, 160, 161, 162, 163, 164, 165, 166, 167, 175, 179, 182, 188, 189, 190

were read on this motion REARGUMENT/RECONSIDERATION.

In its decision dated August 13, 2018, this Court granted plaintiffs' motion for summary judgment seeking a declaratory judgment to the extent of declaring that plaintiff 277 Park Avenue, LLC (277 Park Avenue), and plaintiff Cassidy Turley New York, Inc. (Cassidy Turley) are additional insureds under the insurance policy issued by

defendant Liberty Mutual Fire Insurance Company (Liberty Mutual) to defendant JPMorgan Chase Bank, NA, (Chase), and that defendants have a duty to defend in the underlying action, *Brian Gray v Stanley Stahl et al.* (index No. 110738/2011). Liberty Mutual now moves for leave to reargue pursuant to CPLR 2221, arguing that in holding it liable for the defense costs in the underlying action, this Court overlooked the fact that plaintiffs did not seek, and are not entitled to, a declaration regarding a duty to defend plaintiff Stahl Real Estate Company (Stahl). Liberty Mutual also argues that this Court overlooked Liberty Mutual's argument regarding the policy deductible in its agreement with Chase. Plaintiffs separately move for leave to reargue pursuant to CPLR 2221, arguing that the Court overlooked and misapplied the pertinent caselaw in denying the branch of their summary judgment which sought a declaration that defendants have a duty to indemnify plaintiffs. These reargument motions, sequence numbers 004 and 005, are consolidated for decision herein.

Upon reargument, it is undisputed among the parties that Liberty Mutual does not have a duty to defend Stahl, and that Liberty Mutual's duty is limited to defending 277 Park Avenue and Cassidy Turley in the underlying action. As such, Liberty Mutual is liable to reimburse Zurich American Insurance Company (Zurich) only for the defense costs of those two parties.

In the next portion of its reargument motion, Liberty Mutual argues that even if 277 Park Avenue and Cassidy Turley are additional insureds under Liberty Mutual's policy with Chase, Liberty Mutual's duty to defend them is subject to the policy's \$1 million deductible, and Zurich, as plaintiffs' insurer, is required to provide the first \$1 million toward the defense of the underlying action. Contrary to Liberty Mutual's contention, it is Chase, not Zurich, that would be liable for the defense costs within the deductible, as Chase's contractual duty to defend 277 Park Avenue and Cassidy Turley, per the lease in effect between them, is not subject to any deductible (*see Inner City*

Redevelopment Corp. v Thyssenkrupp Elevator Corp., 78 AD3d 613 [2010]); *Hoverson v Herbert Constr. Co.*, 283 AD2d 237 [2001]). Therefore, upon reargument, it is the Court's view that Liberty Mutual and Chase share the duty to defend 277 Park Avenue and Cassidy Turley in the underlying action. The apportionment of their liability is subject to the policy agreement in effect between them, but the issue of that apportionment is not properly before the Court on this motion or in this case and will be for those defendants to resolve amongst themselves.

Lastly, plaintiffs' seek to reargue that portion of this Court's August 13, 2018 order which denied the branch of plaintiffs' summary judgment motion seeking indemnification from defendants for any settlement or judgment in the underlying action. Plaintiffs argue that the General Obligations Law does not apply because the agreements between the parties merely allocate insurance risks between the parties. While that is valid principle in the cases cited by plaintiffs, it does not apply here. Chase's insurance policy with Liberty Mutual insures Chase only for actions arising from Chase's own negligence. However, it does not cover the breadth of the indemnity liability provided for in Chase's lease, which requires indemnity regardless of fault. As such, summary judgment on the issue of indemnity was properly denied because, but for the General Obligations Law, there remain possible outcomes in this case in which, per the agreements, Chase would bear the ultimate responsibility for indemnification payment, regardless of fault (*see Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 540 [2013]; *see also Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 161 [1977]).

Accordingly, it is

ORDERED that plaintiffs' and defendant's motions for leave to reargue are granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated August 13, 2018; and it is further

ORDERED that the plaintiffs' motion for summary judgment is granted only to the extent of granting the branches of their motion which seeks a declaration that plaintiffs 277 Park Avenue, LLC and Cassidy Turley New York, Inc. are additional insureds under the insurance policy Liberty Mutual Fire Insurance Company issued to JPMorgan Chase Bank, NA and that JPMorgan Chase Bank, NA and Liberty Mutual Fire Insurance Company have an obligation to defend 277 Park Avenue, LLC and Cassidy Turley New York, Inc., subject to the terms of the insurance policy in effect between them, against all claims asserted against 277 Park Avenue, LLC and Cassidy Turley New York, Inc. in the underlying action, *Brian Gray v Stanley Stahl et al.* (index No. 110738/2011), and it is further

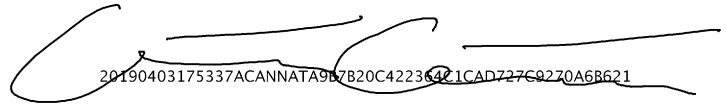
ADJUDGED AND DECLARED that 277 Park Avenue, LLC and Cassidy Turley New York, Inc. are additional insureds under the insurance policy Liberty Mutual Fire Insurance Company issued to JPMorgan Chase Bank, NA and that defendants Liberty Mutual Fire Insurance Company and JPMorgan Chase Bank, NA are to defend 277 Park Avenue, LLC and Cassidy Turley New York, Inc. against all claims asserted against them in the underlying action, and that defendants JPMorgan Chase Bank, NA and Liberty Mutual Fire Insurance Company, subject to the terms of the insurance policy in effect between them, are obligated to reimburse Zurich American Insurance Company for all costs and expenses that it has incurred in its defense of 277 Park Avenue, LLC and Cassidy Turley New York, Inc. in that action; and it is further

ORDERED that upon reargument, the determination in this Court's order dated August 13, 2018 which denied the branch of plaintiffs' motion seeking summary judgment declaring that defendants are obligated to indemnify 277 Park Avenue, LLC and Cassidy Turley New York, Inc. in the underlying action is adhered to, and counsel

are directed to appear for a status conference in Room 490, 111 Centre Street on May 1, 2019 at 2:15PM.

4/3/2019

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE