

**Certain Underwriters at Lloyd's London Subscribing
to Policy No. CMNY 00000598 v Covert Holdings,
LLC**

2020 NY Slip Op 31219(U)

May 6, 2020

Supreme Court, Kings County

Docket Number: 509684/19

Judge: Pamela L. Fisher

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.

At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of May, 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
Justice.

-----X
CERTAIN UNDERWRITERS AT LLOYD’S LONDON
SUBSCRIBING TO POLICY No. CMNY 00000598,

Plaintiff,

- against-

Index No. 509684/19

COVERT HOLDINGS, LLC and DB INSURANCE,
LTD. (F/N/A DONGBU INSURANCE CO, LTD.),

Defendants,

And

DONALD HOWARD and EVERYTHING IMPORTANT,
LLC,

Nominal Defendants.

-----X

The following e-filed papers read herein:

NYCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>18-19</u>	<u>37-38, 54</u>
Opposing Affidavits (Affirmations) _____	<u>38, 54</u>	<u>79</u>
Reply Affidavits (Affirmations) _____	<u>72</u>	<u>83</u>

Upon the foregoing papers in this insurance coverage dispute, defendants Covert Holdings, LLC (Covert) and DB Insurance, Ltd. (formerly known as Dongbu Insurance Co., Ltd) (DB Insurance) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211, dismissing the complaint.

Plaintiff, Certain Underwriters at Lloyd's London Subscribing to Policy No. CMNY00000598 (Lloyd's), cross-moves (in mot. seq. two) for an order, pursuant to CPLR 3212, granting it summary judgment: (1) declaring that it owed no duty to defend or provide indemnity coverage to Covert in the underlying consolidated actions, *Donald Howard v Covert Holdings, LLC and Papex Corp.*, index No. 3576/15; *Donald Howard v Deng Fei, Inc.*, index No. 501554/17; and *Donald Howard v Everything Important, LLC*, index No. 507772/17 (collectively, the Underlying Howard Action); (2) ordering Covert and DB Insurance to reimburse it for the costs it incurred in defending Covert in the Underlying Howard Action after November 3, 2016, with interest; and (3) ordering Covert and DB Insurance to reimburse it for the \$1 million it contributed to the settlement of the Underlying Howard Action with interest and costs.

Background

Howard's Trip and Fall Accident

This insurance coverage dispute arises out of a January 11, 2015 accident, in which Donald Howard (Howard) was allegedly injured when he tripped and fell on the sidewalk abutting the commercial property at 15-39 Covert Street in Queens (Property).

The Property

At all relevant times, the Property was owned by Covert. On the date of Howard's accident, Covert had leased the Property (with a shared address) to two separate tenants: (1) Deng Fei, Inc. (Deng Fei), and (2) Everything Important, LLC (Everything), each of which had its own garage door at the Property on Covert Street.

In its August 14, 2014 lease agreement with Covert (Deng Fei Lease), Deng Fei agreed “at Tenant’s sole cost and expense, to maintain commercial general liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death . . . occurring in or upon the demised premises.” The Deng Fei Lease also contained an indemnification provision in favor of Covert. During the relevant period, Lloyd’s issued general liability policy No. CMNY00000598 to Dang Fei (Lloyd’s Policy), which named Covert as an additional insured in form CG 20 11 01 96.

Covert had leased a portion of the Property to Everything, pursuant to a lease agreement, which similarly contained an indemnification provision in favor of Covert. Everything was insured under a general liability policy issued by Continental Casualty Company (Continental Casualty).

The Underlying Howard Action

On March 23, 2015, Howard commenced a personal injury action against Covert by filing a summons and a verified complaint, alleging that Covert was negligent in its ownership and maintenance of the sidewalk in front of the Property on the date that Howard tripped and fell. Notably, Howard’s complaint generally referenced the sidewalk abutting the Property address without specifying exactly where he fell.

By a June 11, 2015 letter, Covert’s claim administrator, York Risk Services (York), tendered Covert’s defense and indemnity to Deng Fei and its liability insurer, Lloyd’s. Specifically, the tender letter advised that “Mr. Howard by his attorney alleges he slipped and fell on the sidewalk to the premises at 15-30 Covert Street resulting in injuries” and

“[t]he lease reveals that you are responsible for maintenance and repair to said area and are not only to defend and indemnify Covert . . . but procure insurance for their benefit.”

By an August 24, 2015 letter, Lloyd’s counsel responded that “[i]n accordance with your letter dated June 11, 2015, please be advised that this office has been retained to handle the defense and indemnification of Covert . . .” Notably, at that time, Lloyd’s and its counsel did *not* undertake Covert’s defense under any reservation of rights.

The file was transferred to Lloyd’s counsel, which undertook Covert’s defense in the Underlying Howard Action. Lloyd’s counsel answered the complaint in the Underlying Howard Action on behalf of Covert, but did not assert a third party complaint against Deng Fei, despite the indemnification provision in the Deng Fei Lease in favor of Covert.

Approximately one year later, on June 17, 2016, Howard was deposed, and identified the precise spot where he fell on the sidewalk at the Property in photographs. On August 30, 2016, Covert produced Duvi Brunner, the Property manager, for a deposition. About two weeks later, on September 14, 2016, Lloyd’s counsel obtained an affidavit from Juana Collado (Collado), who attested that she witnessed Howard trip and fall on the sidewalk in front of the garage door closest to Wyckoff Avenue at the Property. After Howard’s fall, Collado had taken pictures of Howard as he laid on the sidewalk. Based on the foregoing evidence, it became apparent that Howard actually tripped and fell on the sidewalk in front of the garage on that portion of the Property leased and maintained by *Everything*, rather than Deng Fei.

Two months later, by a November 3, 2016 letter, Lloyd's claims manager advised York that "through recent discovery, it has been determined that Mr. Howard did not fall in front of our insured's (garage) bay door, rather he fell in front of the (garage) bay of the neighboring tenant[,] Everything . . ." Lloyd's claim manager provided York with the photographs and deposition transcripts, as proof, and demanded that York "immediately assume the defense of [its] insured . . ."

York, in a November 11, 2016 letter, responded that there was coverage for Covert under the Lloyd's Policy based on Howard's allegations in the complaint against Covert. In the letter, York advised Lloyd's that "Deng Fei and/or its insurer assumed handling of the file for the defense and indemnity of Covert . . ." and that "[n]o reservation of rights was issued, and the tender acceptance was unconditional."

In response, Lloyd's claim administrator sent Covert a December 20, 2016 reservation of rights letter, advising that it will continue to provide Covert with a defense in the Underlying Howard Action *subject to a reservation of its rights* to deny coverage and bring a declaratory judgment action. Lloyd's December 2016 reservation of rights letter reiterated that "recent discovery and deposition testimony . . . revealed that the accident location at issue was not on the sidewalk in front of Deng Fei's leased premises . . ." Notably, in the December 2016 letter, Lloyd's claim administrator advised Covert that it had the right to select its own counsel and that Lloyd's would pay for that independent counsel, subject to its right to seek reimbursement for such defense costs if there is no coverage under the Lloyd's Policy. Covert did not retain its own counsel to assume its

defense in the Underlying Howard Action, despite Lloyd's attempt to relinquish control over the litigation file.

Thereafter, on January 13, 2017 and March 22, 2017, Howard commenced two additional personal injury actions against Deng Fei and Everything, respectively, alleging that each of them owned, operated and/or maintained the Property on the date of Howard's trip and fall accident. By an August 15, 2017 order on consent, Howard's three personal injury actions against Covert, Deng Fei and Everything were consolidated (hereinafter, the Underlying Howard Action). Lloyd's counsel did not amend Covert's answer to assert cross claims for indemnification against Deng Fei and/or Everything.

On September 14, 2018, Lloyd's counsel, who continued to represent *both* Deng Fei and Covert in the Underlying Howard Action, moved for summary judgment dismissing the complaint in the Underlying Howard Action as against Deng Fei. Notably, Lloyd's counsel did not file any motion on behalf of Covert.

By a January 18, 2019 order, the court (Rivera, J.) granted Deng Fei's summary judgment motion dismissing the complaint against Deng Fei in the Underlying Howard Action based on evidence proving that Howard did not fall on the sidewalk in front of Deng Fei's portion of the Property.

Five days later, on January 23, 2019, Lloyd's counsel sent a letter to York and Everything's insurer, Continental Casualty, advising them that "it is apparent that either Continental Casualty or [DB Insurance] should be providing defense and indemnification

to Covert . . .” and that Lloyd’s is no longer required to do so based on the disposition of Deng Fei’s summary judgment motion.

In a February 26, 2019 letter, York, on behalf of DB Insurance, allegedly refused to assume Covert’s defense and indemnity in the Underlying Howard Action.

By a March 5, 2019 letter, Lloyd’s counsel advised Covert that Lloyd’s had agreed to provide it with defense coverage in the Underlying Howard Action “subject to a full reservation of [its] rights and interests under the Policy and the law[,]” including “the right to deny coverage, if the liability of Covert . . . did not arise out of the ownership, maintenance or use of that part of the premises leased to Deng Fei . . .” Lloyd’s further advised that it “**den[ies] any obligations to continue to provide defense coverage to Covert . . .**” and that Lloyd’s “now withdraw[s] from any further payment of the defense counsel’s fees and costs and tender[s] the defense and payment . . . back to Covert . . . and its insurer.” Lloyd’s counsel warned that if Covert or DB Insurance did not voluntarily assume the defense of Covert in the Underlying Howard Action, Lloyd’s would file a declaratory judgment action.

The Underlying Howard Action was settled on June 11, 2019, one day before the trial was scheduled to begin, and roughly one month before Lloyd’s commenced this declaratory judgment action against Covert and DB Insurance. Lloyd contributed \$1 million to the settlement on behalf of Covert. The settlement agreement specifically stated that “*[t]his settlement extinguishes all claims and cross claims in this underlying PI

action.” Thus, Lloyd’s counsel, on behalf of Covert, explicitly waived Covert’s claim for indemnification against Everything.

The settlement agreement further provides that “[Lloyd’s] contribution to the settlement on behalf of Covert . . . does not waive [Lloyd’s] rights to seek reimbursement of the \$1 million settlement contribution from Covert[’s] insurer [DB Insurance] . . .” and that “[Lloyd’s] \$1 million contribution to the settlement of the Howard case is not a voluntary payment and [Lloyd’s] reservation of rights set forth above *was communicated to counsel for [DB Insurance] and agreed to by counsel for [DB Insurance] prior to the mediation*” (emphasis added).

This Declaratory Judgment Action

Meanwhile, on May 1, 2019, Lloyd’s had commenced this declaratory judgment action by filing a summons and a verified complaint against Covert and its liability insurer, DB Insurance. Lloyd’s also named Howard and Everything as “nominal defendants.” Lloyd’s complaint seeks: (1) a declaration that it has no obligation to defend or indemnify Covert in the Underlying Howard Action because the accident did not occur on the premises leased to Deng Fei, and (2) “reimbursement of the fees and costs they have paid for the defense of Covert . . .” (complaint at ¶ 1). Notably, since the complaint was filed one month before the June 11, 2019 settlement of the Underlying Howard Action, it does not contain any allegations or demands regarding the \$1 million settlement that Lloyd’s paid on Covert’s behalf.

Defendants' Dismissal Motion

On July 2, 2019, Covert and DB Insurance filed a pre-answer motion to dismiss the complaint on the grounds that: (1) Lloyd's accepted Covert's tender of defense and indemnity without any reservation of rights; (2) Lloyd's and its counsel took complete control over Covert's litigation file, and did not handle the file in the best interest of Covert; and (3) after mishandling the file, and prejudicing Covert and DB Insurance, Lloyd's is estopped from returning the damaged file back to Covert and its insurer, DB Insurance, as a matter of law.

Covert and DB Insurance argue that Lloyd's did not reserve its rights in its December 2016 letter because "[r]eserving a right is something an insurer would do before, or at least contemporaneously with, committing to defend and indemnify Covert." They contend that Lloyd's December 2016 reservation of rights letter was "grossly untimely" because "[i]t cannot occur after claims and defenses, discovery, and depositions have been completed." They further assert that "Covert did nothing to mislead Lloyd's, and the fact that *two tenants shared the same street address* (albeit in separate buildings), was evident from the beginning."

Lloyd's Opposition and Summary Judgment Cross Motion

Lloyd's opposes defendants' dismissal motion and cross-moves for summary judgment: (1) declaring that Lloyd's owes no duty to defend or provide indemnity coverage to Covert in the Underlying Howard Action; (2) ordering Covert and DB Insurance to reimburse it for the costs it incurred in defending Covert in the Underlying

Howard Action after November 3, 2016, plus interest; and (3) ordering Covert and DB Insurance to reimburse it for the \$1 million that Lloyd's contributed to the settlement of the Underlying Howard Action on behalf of Covert, plus interest.

Lloyd's contends that it "owe[s] no duty to defend or provide indemnity coverage to Covert, because the alleged accident giving rise to the underlying action did not occur on the premises leased by [Lloyd's] insured." Lloyd's asserts that "[n]o discovery is necessary, because the salient facts are not in dispute . . ." since the court in the Underlying Howard Action already determined that Howard was not injured on the portion of the Property that Covert leased to Deng Fei.

Lloyd's argues that it is not equitably estopped from denying coverage to Covert because "estoppel cannot be used to create coverage where none exists" and Lloyd's lacked actual or constructive knowledge of an available defense until the time of its December 2016 reservation of rights letter. Lloyd's argues that it "timely reserved rights to deny coverage when it learned that the accident did not occur on premises leased to its insured, which facts were not known when [it] assumed the defense of Covert." Lloyd's further contends that its December 2016 reservation of rights was timely because "the Underlying Lawsuit was still in its nascent stages, as relevant parties had yet to be named as defendants, discovery was not complete, and trial was two and a half years away."

Lloyd's, in opposition to defendants' dismissal motion, argues that it is "based solely upon the speculation of counsel, for which there is no evidence whatsoever." Lloyd's argues that defense counsel's *opinion* that Covert suffered prejudice as a result of

Lloyd's defense of Covert is insufficient to dismiss the complaint. Lloyd's also contends that Covert suffered no prejudice, since Covert had the option of retaining its own counsel to protect its legal interests, at Lloyd's expense, between December 2016 and the scheduled trial of the Underlying Howard Action in June 2019. Although Lloyd's now seeks reimbursement of the \$1 million settlement that it made on behalf of Covert, Lloyd's argues that "at no point were Covert's assets imperiled because . . . the Underlying Action settled without Covert contributing any funds whatsoever."

Defendants' Opposition and Reply

Covert and DB Insurance, in reply, argue that Lloyd's opposition "*avoids the actual legal issue*: whether Lloyds and its counsel mishandled Covert's defense to the point where *irreparable harm* occurred." Covert and DB Insurance argue that Covert had a contractual right to indemnity under the Deng Fei and Everything Leases, and that Lloyd's "completely upset that right of indemnity . . ." by failing to assert cross claims for indemnification against either of those tenants. Covert and DB Insurance argue that "the failure to transfer risk to either or both of these tenants is *exactly* how Covert and/or DB Insurance are prejudiced."

Regarding the \$1 million settlement, Covert and DB Insurance contend that "Lloyd's settled the underlying case without a rational basis to apportion most of the liability onto landlord Covert" and "Lloyd's is barred from shifting its arbitrary settlement allocation onto Covert or DB Insurance." They argue that "Lloyd's already *waived* Covert's right to assert [indemnification] claims . . ." by entering into the settlement

agreement on Covert's behalf and "by Lloyd's intentional omission, Lloyd's is *estopped* from demanding payment from the defendants herein . . ." Contrary to the language in the settlement agreement, Covert and DB Insurance contend that "DB [Insurance] did not participate in the settlement negotiations or contribute to the settlement."

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

In contrast, a dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]). Dismissal results only if the

movant demonstrates conclusively that the plaintiff has no cause of action, or that “a material fact as claimed by the pleader to be one is not a fact at all” (*id.* at 1182).

Here, Lloyd’s demonstrated its prima facie right to summary judgment declaring that it owed no duty to defend or provide indemnity coverage to Covert in the Underlying Howard Action because discovery revealed that Howard’s alleged trip and fall accident did not occur on the premises leased by Lloyd’s insured, Deng Fei. For that reason, the complaint in the Underlying Howard Action was summarily dismissed against Deng Fei.

While Lloyd’s seeks reimbursement of the costs it incurred in defending Covert in the Underlying Howard Action *after November 3, 2016*, with interest, Lloyd’s is only entitled to reimbursement as of December 20, 2016, the date on which Lloyd’s sent Covert a reservation of rights letter. Lloyd’s disclaimer was timely because it was sent within a reasonable time after Lloyd’s learned that there was no coverage, after having conducted discovery in the Underlying Howard Action. Lloyd’s disclaimed coverage and attempted to return Covert’s defense back to Covert in 2016, when the Underlying Howard Action was in its early stages, both Deng Fei and Everything had not yet been named as defendants and discovery was not complete.

Covert and DB Insurance’s contention that the complaint should be dismissed because Lloyd’s is equitably estopped from seeking reimbursement of the costs it incurred in defending Covert in the Underlying Howard Action is rejected.

The Court of Appeals has long recognized that the principles of equitable estoppel may preclude an insurer from disputing coverage in an appropriate case:

“such as where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense. In such circumstances, though coverage as such does not exist, the insurer will not be heard to say so . . .” (*Albert J. Schiff Assoc v Flack*, 51 NY2d 692, 699 [1980]; *see also O’Dowd v American Surety Company of New York*, 3 NY2d 347, 355 [1957]).

The Second Department has repeatedly applied the principles of equitable estoppel to preclude insurers from denying coverage where those insurers controlled a party’s defense with knowledge of facts constituting a basis to deny coverage, and failed to timely do so, resulting in prejudice to the party (*see Mazl Building, LLC v Greenwich Insurance Company*, 162 AD3d 655, 658 [2018]; *Daimler Chrysler Insurance Company v Zurich Insurance*, 72 AD3d 730, 732 [2010]; *Serio v United States Fire Insurance Company*, 41 AD3d 459, 461 [2007]; *State Farm Mutual Automobile Insurance v Vitiello*, 289 AD2d 393, 393 [2001]; *Utica Mutual Insurance Company v 215 West 91st Street Corp.*, 283 AD2d 421, 422-423 [2001]; *Brooklyn Hospital Center v Centennial Insurance Company*, 258 AD2d 491, 491-492 [1999]; *Indemnity Insurance Company v Charter Oak Insurance Company*, 235 AD2d 521, 522 [1997]; *Hartford Insurance Group v Mello*, 81 AD2d 577, 578-579 [1981]).

Here, Lloyd’s lacked knowledge of facts constituting a basis to deny coverage when it assumed Covert’s defense in August 2015. Lloyd’s first learned that Howard did not trip and fall on that portion of the Property leased by its insured, Deng Fei, when its counsel

participated in discovery in the Underlying Howard Action from June 2016 to September 2016. After unsuccessfully attempting to return Covert's defense back to York in November 2016, based on the evidence adduced during discovery, Lloyd's sent Covert the December 20, 2016 reservation of rights letter, in which Lloyd's disclaimed coverage, advised Covert that it had the right to select its own counsel and that Lloyd's would pay for that counsel, subject to its right to seek reimbursement.

Thus, Covert could have assumed control over its defense as early as November 2016, by retaining its own counsel, but refused to do so. Instead, Lloyd's counsel was compelled to continue defending Covert in the Underlying Howard Action, subject to its December 2016 reservation of right letter, until Lloyd's settled the Underlying Howard Action on June 11, 2019. Based on these facts, Lloyd's is not equitably estopped from denying coverage because it timely disclaimed coverage, attempted to return control over Covert's defense and reserved its rights within a reasonable time after Lloyd's learned that there was no coverage. Accordingly, denial of defendants' dismissal motion is warranted.

While Lloyd's is entitled to reimbursement of certain defense costs, there are factual questions regarding whether or not Lloyd's is also entitled to reimbursement of the \$1 million settlement that it paid on behalf of Covert in the Underlying Howard Action, which preclude summary judgment. Lloyd's reserved its rights in the settlement agreement to seek reimbursement from DB Insurance, and the settlement agreement states that Lloyd's \$1 million contribution to the settlement "is not a voluntary payment and [Lloyd's] reservation of rights . . . was communicated to counsel for [DB Insurance] and agreed to

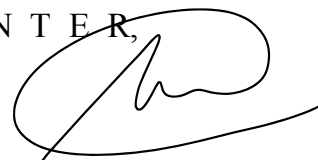
by counsel for [DB Insurance] prior to the mediation.” However, defendants contends that DB Insurance did not participate in the settlement negotiations. The record is inadequate regarding the extent of DB Insurance’s involvement in, and prior knowledge of, the \$1 million settlement. There is also a question of fact as to whether Lloyd’s counsel had a rational basis to settle the Underlying Howard Action without preserving Covert’s right to pursue an indemnification claim against Everything. Accordingly, it is

ORDERED that Covert and DB Insurance’s motion (in mot. seq. one) to dismiss the complaint is denied; and it is further

ORDERED that Lloyd’s cross motion (in mot. seq. two) for summary judgment is only granted to the extent that: (1) it is declared that Lloyd’s owed no duty to defend or provide indemnity coverage to Covert in the Underlying Howard Action, and (2) Covert and DB Insurance must reimburse Lloyd’s for the costs it incurred in defending Covert in the Underlying Howard Action from December 20, 2016 through June 11, 2019, plus interest. Lloyd’s summary judgment motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.