SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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ASPEN SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

RLI INSURANCE COMPANY,

Defendant.

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INDEX NO. 652215/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

Upon the foregoing documents, plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied for the reasons stated hereinbelow.

Background

The Underlying Tort Claim

The instant action arises out of a tort claim pending in the Supreme Court of the State of New York, New York County, with the caption Patalano v Alphonse Hotel Corp., Index No. 154217/2013 (the "Patalano Action"). This Court has noted that "the core facts are undisputed" in the Patalano Action (NYSCEF Doc. 3, at 1).

On October 12, 2020, Michael Patalano ("Patalano") suffered injuries when a stair collapsed while he was working for Transel Elevator & Electric, Inc. ("Transel") (NYSCEF Doc. 1, at 2). Ironshore Indemnity, Inc. ("Ironshore") had issued a commercial general liability policy (the "Ironshore Policy") to Transel. Aspen Specialty Insurance Company ("Aspen"), on behalf of its insured, Alphonse Hotel Corporation ("Alphonse"), sought coverage for the Patalano Action under the Ironshore Policy. However, Ironshore denied coverage (NYSCEF Doc. 1, at 2-3).

Pertinent Prior Decisions

In a July 7, 2015 Decision and Order in Aspen Specialty Insurance v Ironshore Indemnity, Index No. 160353/2014, this Court ruled in favor of Aspen, holding, in pertinent part, that Alphonse is an Additional Insured ("AI") on Ironshore Indemnity Incorporated's commercial general liability insurance policy for the Patalano Action (NYSCEF Doc. 2). This Court outlined its reasoning as follows: "the phrase 'caused by' in the AI endorsement did not materially differ from the phrase 'arising out of,' and, therefore, that Patalano was injured while working for Transel at

Alphonse's hotel sufficiently triggered additional insured coverage under Ironshore's policy" (NYSCEF Doc. 3, at 4).

In a December 9, 2015 Decision and Order, this Court held that Ironshore's policy was primary for Alphonse in the Patalano Action (NYSCEF Doc. 37).

In its June 6, 2017 Decision and Order in Burlington Ins. Co. v NYC Transit Auth., 29 NY3d 213 (2017), the Court of Appeals held the following, in pertinent part:

> We conclude that where an insurance policy is restricted to liability for any bodily injury "caused, in whole or in part," by the "acts or omissions" of the named insured, the coverage applies to injury proximately caused by the named insured. The Appellate Division erroneously interpreted this policy language as extending coverage broadly to any injury causally linked to the named insured, and wrongly concluded that an additional insured may collect for an injury caused solely by its own negligence, even where the named insured bears no legal fault for the underlying harm. We reject this "but for" causation formulation of the policy and, on this appeal, reverse the Appellate Division's denial of summary judgment in favor of the insurance company on the issue of coverage.

Burlington Ins. Co. v NYC Transit Auth., 29 NY3d, at 317. According to this Court, the rule stated in the above excerpt from the Burlington decision applied to Aspen Specialty Insurance v Ironshore Indemnity, Index No. 160353/2014, and "would result in a finding that Alphonse is not an AI under Ironshore's policy for the Patalano lawsuit" (NYSCEF Doc. 3, at 4).

In a January 26, 2018 Decision and Order in Aspen Specialty Insurance Company v Ironshore Indemnity Incorporated and Transel Elevator, Inc., Index No. 160353/2013 (Motion Seq. 003), this Court denied Ironshore's CPLR 221(e) motion to renew its prior CPLR 3211(1) and (7) motion to dismiss the complaint, for reconsideration of this Court's prior dispositive orders (NYSCEF Doc. 3). That Decision and Order stated the following, in pertinent part: "Although Burlington represents a change in the law that would change this Court's prior determination (CPLR 221[e]), Ironshore's motion is untimely, as there has been a final determination of the insurance coverage issues herein and the case has been "marked disposed" in this Court as of December 2016" (NYSCEF Doc. 3, at 4).

In a March 21, 2018 Decision and Order in Aspen Specialty Insurance v Ironshore Indemnity, Index No. 160353/2014 (Motion Seq. 006), this Court denied Ironshore's CPLR 2221(d) motion to renew and reargue this Court's determination that Alphonse is an AI on the Ironshore Policy for the Patalano Action; additionally, this Court denied Ironshore's alternative request to place the matter on the active calendar and for partial summary judgment (NYSCEF Doc. 4). This Court reiterated its holding from its January 26, 2018 Decision and Order, namely "that there has been a final determination of the insurance coverage issues herein," and Ironshore failed to "timely appeal to the Court of Appeals from the First Department's affirmance of this Court's coverage determination" (NYSCEF Doc. 4). This Court also stated that "Alphonse is entitled to indemnification, as well as defense, therein" (NYSCEF Doc. 4).

The Instant Action

On May 7, 2018, plaintiff, Aspen, commenced the instant civil insurance coverage action for declaratory relief to determine the respective rights and duties of Aspen and defendant, RLI Insurance Company ("RLI"), arising out of their priority of coverage (NYSCEF Doc. 1). Aspen claims that this Court's holding that Alphonse is an AI under the Ironshore Policy is now law of the case (NYSCEF Doc. 1, at 3).

Aspen claims that RLI has refused to acknowledge that RLI is next in line to provide coverage beyond Ironshore's $1,000,000.00 policy limit for Alphonse's benefit (NYSCEF Doc. 1). Aspen quotes from the RLI Policy's "Other Insurance Amendatory Provision," which states, in pertinent part, that the RLI Policy "will apply as primary insurance, excess of scheduled underlying insurance, to additional insureds and other insurance which may be available to such additional insured will be non-contributory" (Exhibit 4, NYSCEF Doc. 5, at 17).

Thus, Aspen seeks a judgment in its favor against RLI declaring that (1) the RLI Policy is next in order of priority to cover any loss arising out of the Patalano Action; and (2) RLI must make available its policy up to its limits to cover any loss arising out of the Patalano Action should a need arise that requires such payments (NYSCEF Doc. 1, at 10).

On June 21, 2018, RLI answered the complaint with various admissions, denials, thirty-three Affirmative Defenses, and a counterclaim (NYSCEF Doc. 12). RLI seeks a judgment (1) declaring that RLI has no obligation to defend or indemnify Alphonse in the Patalano Action under the RLI Excess Policy; (2) declaring that RLI has no other obligations to plaintiff whatsoever; (3) declaring that, even if it is determined that RLI has a duty to provide AI coverage to Alphonse in the Patalano Action, the Aspen policy is primary to any obligation that RLI owes; (4) dismissing the instant complaint, with prejudice, against RLI; and (5) awarding expenses, costs, and attorney's fees to RLI.

In a July 10, 2018 reply to RLI's counterclaim, Aspen asserted that RLI is not entitled to the relief that it seeks (NYSCEF Doc. 13).

Aspen's Instant Motion for Summary Judgment

Aspen now moves, pursuant to CPLR 3212, for summary judgment in its favor against RLI "on all remaining Counts in [plaintiff's] Complaint," namely, declaring that (1) the RLI policy is next in priority to cover any loss arising out of the Patalano Action; and (2) RLI must make available its policy up to its limits to cover any loss arising out of the Patalano Action if necessary (NYSCEF Doc. 16).

Aspen cites the New York Court of Appeals decision in Matter of Viking Pump, Inc. 27 NY3d 244, 264-65 (2016), which rejected an argument similar to that which RLI presents, namely "that the Aspen policy must come next, based on its mistaken view that all potentially applicable horizontal layers of coverage must be exhausted before any vertical layers of coverage are triggered" (NYSCEF Doc. 17, at 4). Aspen asserts that that New York Law resolves issues such as the instant matter by comparing the subject "Other Insurance" provisions. Thus, Aspen asserts that the RLI Policy states that it "will apply as primary insurance" after the exhaustion of the Ironshore Policy; the Aspen Policy, however, states that it is "excess over" any available

"primary insurance" (NYSCEF Doc. 17, at 4-5). Aspen quotes the following from the Aspen Policy:

> (1) This insurance is excess over:
>
> ***
>
> (b) Any other primary insurance available to you covering liability . . . for which you have been added as an additional insured by attachment of an endorsement.
>
> (2) 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.

(NYSCEF Doc. 17, at 16). Thus, Aspen asserts the following as the proper order of payment:

> (1) the Ironshore Policy pays up to that policy's limits, because the Hotel is an Additional Insured under that policy, and because the policy is primary insurance; then (2) the RLI Policy pays up to that policy's limits, because it covers the same insureds and occurrences as the Ironshore Policy, and because it applies as primary insurance; and then (3) excess policies, like the Aspen Policy, pay the remainder, up to their limits.

(NYSCEF Doc. 17, at 17). Aspen further asserts that RLI could have intervened, pursuant to CPLR 1012, in the Ironshore Action, but failed to do so (NYSCEF Doc. 17, at 13).

RLI's Instant Cross-Motion for Summary Judgment

RLI now opposes Aspen's instant motion for summary judgment and cross-moves, pursuant to CPLR 3212(e), for summary judgment dismissing plaintiff's claims against defendant and declaring that the excess liability policy that defendant issued to Transel does not provide AI coverage to Alphonse arising out of the Patalano Action, or, alternatively, that any coverage that the RLI excess policy afforded to Alphonse applies excess to Aspen's primary policy (NYSCEF Doc. 27).

RLI rejects Aspen's assertion that, in RLI's words, "'law of the case' can travel to future cases involving different parties" (NYSCEF Doc. 28, at 6). RLI asserts that the RLI Policy's "Other Insurance" endorsement "*only applies* to make RLI's excess policy 'primary and non-contributory' to other policies if the underlying trade contract expressly requires that Transel procure excess insurance on a primary, non-contributory basis" (NYSCEF Doc. 28, at 7). RLI claims that the underlying trade contract does not provide for such a requirement (NYSCEF Doc. 28, at 7). RLI quotes the following, in pertinent part, from the RLI Policy's "Other Insurance" and "Other Insurance Amendatory" clauses, respectively:

> K. Other Insurance – If other insurance, whether collectible or not, is available to the insured covering a loss also covered by this policy, the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.
>
> It is understood that Section IV. CONDITIONS, K. OTHER INSURANCE is amended as follows: To the extent required under written contract and provided by the underlying insurance, this policy will apply as primary insurance, excess of scheduled underlying insurance, to additional insured and other insurance which may be available to such additional insureds will be noncontributory

(NYSCEF Doc. 28, at 9-10). Thus, RLI claims that the subject Transel-Alphonse contract is "silent with respect to 'priority' of coverage of additional insured and only provides that the Owner and Alphonse be named as co-insured" and, thus, does not "trigger the endorsement" (NYSCEF Doc. 28, at 28 and 30).

Aspen's Reply to RLI's Cross-Motion

In reply to RLI's cross-motion, Aspen claims that RLI's assertions "would require this Court to disregard the policies' Other Insurance clauses" (NYSCEF Doc. 48, at 6). Aspen asserts that the RLI Policy insures "any person or organization qualifying as an insured person under the terms of the underlying insurance" and that RLI coverage "follow[s] the underlying insurance in all respects" (NYSCEF Doc. 48, at 5). Aspen further asserts that "New York courts consistently have held that coverage exists under a follow-form excess policy so long as it exists under the underlying policy" (NYSCEF Doc. 48, at 5).

Aspen also claims that RLI references case law such as Matter of Midland Insurance Company, 861 NYS2d 922 (Sup Ct, NY County 2008)—which held that "New York cases give an excess policy following form the same interpretation given to the underlying policy which it follows" (Id., at 928)—that in fact affirms Aspen's "follow form" interpretation (NYSCEF Doc. 48, at 7-8). While RLI asserts that Cristal USA Inc. v XL Specialty Insurance Company, 2017 Md App LEXIS 210 (Ct Spec App Feb. 24, 2017), "categorically rejected Aspen's argument," Aspen notes that the court in the immediately aforementioned case held that "even though an excess insurer is not bound by a primary insurer's own interpretation of its policy (which could be incorrect), the excess insurer is bound by a court's analysis of the underlying policy's language" (NYSCEF Doc. 48, at 9).

Additionally, Aspen reaffirms that, though RLI alleges that the underlying maintenance contract must specify the order of priority between Aspen and RLI's policies, New York law "dictates" that a comparison of "other insurance clauses" guides priority of coverage between two policies "each of which was sold to provide the same level of coverage," Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa., 65 AD3d 12, 18 (1st Dept 2009) (NYSCEF Doc. 48, at 14). Aspen asserts that, contrary to RLI's arguments, the endorsement has been triggered (NYSCEF Doc. 48, at 14-15).

RLI's Reply in Further Support of Its Cross-Motion

RLI claims that Aspen has "abandoned its 'law of the case' argument because on its face this doctrine cannot apply to RLI because it was not a party to the prior DJ Action" (NYSCEF Doc.

50, at 5). RLI further asserts that the "RLI Policy's incorporated or 'follow form' language does not bind RLI to Ironshore's *outcome* in the prior DJ Action" (NYSCEF Doc. 50, at 5). RLI thus rejects Aspen's interpretation of "in all respects" in the RLI Policy's provision that it is "subject to all of the conditions, agreements, exclusions, and limitations of and shall follow the underlying insurance in all respects" to include the outcome in the prior DJ action (NYSCEF Doc. 50, at 8). Additionally, RLI asserts that Aspen's "'equity' argument is a thinly veiled attempt to assert 'collateral estoppel' [which Aspen does not directly name] for the first time" (NYSCEF Doc. 50, at 12). RLI claims that "'equity' does not support this Court's application of overruled precedent to arrive at a conclusion that is directly contrary to Court of Appeals precedent" (NYSCEF Doc. 50, at 13).

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

Aspen has met its burden to establish that no material issue of fact exists in the instant matter. This Court finds that its prior ruling that Alphonse is an AI under the Ironshore Policy is now "law of the case." New York law provides that a comparison of "other insurance clauses" guides priority of coverage between two policies "each of which was sold to provide the same level of coverage," Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa., 65 AD3d 12, 18 (1st Dept 2009). Here the two policies at issue were both "excess." According to the amendment to Section K of the RLI Policy, that "policy will apply as primary insurance, excess of scheduled underlying insurance, to additional insured and other insurance which may be available to such additional insureds will be noncontributory." This clearly indicates that RLI insurance is "primary" to Aspen's "excess" insurance.

This Court has considered RLI's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, the motion of plaintiff, Aspen Specialty Insurance Company, for summary judgment is hereby granted, and the cross-motion of defendant, RLI Insurance Company, for summary judgment is hereby denied. Accordingly, the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant declaring that (1) the RLI Policy is next in priority after the Ironshore Policy to cover any loss arising out of the action entitled Patalano v Alphonse Hotel Corp., Index No. 154217/2013 (the "Patalano Action"); and (2) RLI must make available its policy up to its limits to cover any loss arising out of the Patalano Action, if necessary, before the Aspen Policy is triggered.

11/2/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE