

<b>Gemini Ins. Co. v Golden Ins. Co.</b>
2021 NY Slip Op 32597(U)
December 5, 2021
Supreme Court, New York County
Docket Number: Index No. 656516/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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GEMINI INSURANCE COMPANY,	<b>INDEX NO.</b>	<u>656516/2019</u>
Plaintiff,	<b>MOTION DATE</b>	_____
- v -	<b>MOTION SEQ. NO.</b>	<u>001</u>
GOLDEN INSURANCE COMPANY, A RISK RETENTION GROUP,	<b>DECISION + ORDER ON MOTION</b>	
Defendant.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 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, 51, 53, 55, 56

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

In motion sequence number 001, defendant Golden Insurance Company (Golden) moves for summary judgment pursuant to CPLR 3212, dismissing plaintiff Gemini Insurance Company's (Gemini) complaint.

### Background

This insurance action arises from an underlying action brought by nonparty David Trinidad, an employee of nonparty Sam Maintenance Service, Inc. (Sam Maintenance), for personal injuries he allegedly sustained while working at the premises located at 150-13 89<sup>th</sup> Street, Queens, New York (Premises) (Trinidad Action). (NYSCEF Doc. No. [NYSCEF] 10, Complaint ¶16; see also NYSCEF 32 and 33, Complaint and Amended Complaint [Trinidad Action].) In the Trinidad Action, Trinidad asserts claims for negligence and violations of the New York Labor against 150-13 89<sup>th</sup> LLC (Owner) and NY Developers & Management Inc. (Management), among others. (NYSCEF 33, Amended Complaint [Trinidad Action].) Owner and Management commenced a third-

party action against Sam Maintenance for contractual and common law indemnification, common law contribution, and failure to procure insurance. (NYSCEF 34, Third-Party Action Complaint [Trinidad Action].)

On July 13, 2017, Owner, Management, and Sam Maintenance entered into a trade contract whereby Sam Maintenance agreed to defend, indemnify, and hold Owner and Management harmless “from and against all claims, losses, liability, damage, costs, liens and expenses” connected with or arising out of the work being performed at the Premises (Trade Contract). (NYSCEF 17, Trade Contract ¶11.)<sup>1</sup> The Trade Contract required Sam Maintenance to obtain insurance for the benefit of Owner and Management. (*Id.* ¶ 16 and ex C.) Sam Maintenance procured an insurance policy from plaintiff Golden, which includes an endorsement amending the who are insureds provision to “to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.” (NYSCEF 12, Golden Policy, Endorsement 13.) Owner procured its own insurance policy from Gemini, which included an endorsement naming Management as a named insured in addition to Owner. (NYSCEF 13, Gemini Policy, Endorsement 40.)

On March 27, 2018, nonparty Vela Insurance Services (Vela), an authorized administrator for Gemini, tendered this matter on behalf Owner and nonparty NY Developers & Managers, Inc. (Managers), demanding that Sam Maintenance cover

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<sup>1</sup> There is a question as to whether Management executed the Trade Contract, and if so, when. This is addressed below.

Owner and Managers as additional insureds under the Golden Policy. (NYSCEF 15, Tender Letter.) On April 4, 2018, Golden's attorneys denied tender to Owner, Managers, Trinidad, and "any other individual or entity in relation to any coverage allegedly owed to [Management] and/or [Owner]." (NYSCEF 16, Denial Letter.) Specifically, the denial letter states,

"[p]ursuant to the above endorsement, no coverage, neither defense nor indemnity, nor any benefit under the Policy is owed to either [Owners] or [Management], as an additional insured under the Golden Policy. The above-referenced endorsement requires privity of contract between the entity seeking additional insured status and the Golden named insured. Please be advised that the contract provided does not contain any signature or execution in relation to [Management]. As such [Management] would not be entitled to additional insured status. Further, the entity noted on the contract is not the same entity as set forth in the above-referenced litigation. The New York Corporate Database lists two distinct separate entities, one entitled [Managers] and the other entitled [Management]. Notwithstanding the lack of execution of the contract, and thus privity, the entity noted in the contract is not the entity which has been sued and which potentially might have been subject to additional insured status. There is no insurance obligation as to [Managers]."

(*Id.*) On March 29, 2019, Golden acknowledged that it would recognize Owner as an additional insured under its policy. (NYSCEF 38, Golden Acknowledgment Letter.)

Golden continued to maintain that it would not provide coverage, defense, or indemnity to Manager or Management. (*Id.*)

On June 19, 2019, Management's counsel sent Golden a copy of a full executed Trade Contract. (NYSCEF 19, Bosner E-mail [1:30PM].) In response, Golden's counsel asked for an affidavit from Yoel Gruber, Management's President, affirming that Trade Contract was executed by him prior to September 27, 2017, the date of Trinidad's accident. (NYSCEF 19, Simon E-mail [5:02PM].) Gemini submitted Guber's affidavit, dated March 5, 2020, on March 6, 2020 in connection with this motion. (NYSCEF 45, Guber aff.)

On November 5, 2019, Gemini commenced this action seeking a (1) declaration that Management is an addition insured under the Golden Policy; Golden is required to defend Owner and Management in the Trinidad Action; Golden is required to indemnify Owner and Management in the Trinidad Action; Golden is obligated to defend and indemnify Owners and Management in the Trinidad Action on a primary and non-contributory basis; and (2) for monetary damages against Golden for all defense costs incurred by Gemini in defending Owner and Management in the Trinidad Action. (NYSCEF 10, Complaint.) Golden asserts two counterclaims for a declaratory judgment, declaring that (1) the Golden Policy is excess to that of the Gemini Policy; and (2) coverage is not owed to Management. (NYSCEF 11, Answer with Counterclaims.) Golden now moves for summary judgment.

## **Analysis**

### Priority of Coverage

Both the Gemini and Golden Policies contain “Other Insurance Provisions” The Gemini Policy provides:

#### **“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 Paragraph 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 Paragraph c. below.

##### **b. Excess Insurance**

(1) This insurance is excess over:

- a. Any of the other insurance, whether primary, excess, contingent or on any other basis:
    - i. That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
    - ii. That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
    - iii. That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
    - iv. If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I Coverage A – Bodily Injury And Property Damage Liability.
  - b. Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, 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.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- a. The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
  - b. The total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part."

(NYSCEF 13, Gemini Policy at 11-12.)

The Golden Policy provides:

**“G. Other Insurance**

This insurance is excess over other insurance, including any form of self insurance, and shall not contribute with any other insurance, whether primary, excess, contingent or on any other basis. However, this provision will not apply if the other insurance is specifically written to be excess of this policy.

When this insurance is excess, we will have no duty to defend the ‘insured’ against any ‘suit’ if any other insurer has a duty to defend. 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 12, Golden Policy at 5.)

“[A]n insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies.” (*Utica Mut. Ins. Co. v Govt. Empls. Ins. Co.*, 98 AD3d 502, 503 [2d Dept 2012] [internal quotation marks and citation omitted].) Reviewing the plain language of the Golden Policy, it does not contemplate contribution while the Gemini Policy does: “we will share with all that other insurance by the method described in Paragraph c. below.” (NYSCEF 13, Gemini Policy at 11.) Thus, pursuant to *Utica*, the Gemini Policy must be exhausted first. The fact that the Gemini Policy provides that it is excess over “[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement” (*id.*) does not alter the fact that the Gemini policy contemplates contribution.

Gemini asserts that its policy was specifically written to be in excess of the Golden Policy. Gemini relies on the affidavit of Vela's Vice President, Gemini's quote proposal and a Construction Survey Report to support this proposition. However, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." (*Gilbane Bldg. Co./ITDX Constr. Corp v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 137 [2018].) There is no ambiguity here as the Gemini Policy is clear on its face. Thus, the court will not consider the extrinsic evidence presented. Gemini's argument that discovery is needed is unpersuasive, as the plain meaning of the policies determines priority of coverage without the need to incorporate the intent.

Gemini also asserts that the "other insurance" provisions in both policies are irreconcilable because the policies would have a co-defense obligation. Gemini argues it is incorrect to render its policy primary and Golden in excess based on the contribution language alone. However, this argument is in direct conflict with the law. The case cited by Gemini, *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140 (1st Dept 2008), did not involve an insurance policy with contribution language.

Finally, Gemini asserts that the purpose of the Golden Policy was to provide primary coverage to Sam Maintenance, Owner, and Management. Relying on *Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co.*, 99 NY2d 391 (2003), Gemini argues that, when a general contractor engages a subcontractor and requires the subcontractor to procure insurance on its behalf, such provision is presumed to require obtaining primary insurance. The *Pecker* Court's decision hinged on a provision in the insurance policy which stated that "additional insureds coverage would only be excess, unless [insured]

'ha[d] agreed in a written contract for this insurance to apply on a primary or contributory basis.'" This provision does not exist in either policy at issue here, and thus, this court is not required to look to the underlying contract between the insureds like the *Pecker* Court did. Golden's motion for summary judgment is granted in that the Golden Policy is excess to that of the Gemini Policy.

#### Management as an Additional Insured under the Golden Policy

As detailed above, Golden acknowledges that Owner is an additional insured under the Golden Policy in excess of the Gemini Policy, but there is a dispute as to whether Management is an additional insured. Specifically, Golden questions when Management executed the Trade Contract. In his March 5, 2020 affidavit, Gruber affirmed that he executed the Trade Contract "between 7/18/2017 and 4/09/2018." (NYSCEF 45, Gruber aff ¶5.) The date of Trinidad's alleged accident was September 27, 2017. (NYSCEF 33, Amended Complaint [Trinidad Action] ¶ 47.) Golden asserts that, if the Trade Contract was signed by Management after the occurrence, there is no coverage.

The Golden Policy provides that an additional insured is "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." (NYSCEF 12, Golden Policy, Endorsement 13.)

However, when an insurance policy only requires a contract in writing and not a signed or executed contract, coverage exists. (*Zurich Am. Ins. Co. v Endurance Specialty Ins. Co.* 145 AD3d 502, 503-504 [1st Dept 2016].) The Golden Policy does

not explicitly state that the contract or agreement must be executed or signed, only that it must be “in writing.” Golden’s reliance on *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570 (1st Dept 2006) is misplaced as the question in that case was whether a written contract existed at all. Here, there is no dispute that there is a written contract; the fact of when it was signed by Management has no bearing on this issue as the Golden Policy does not require a signed contract just one that is in writing. Further, *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131 (2018) is inapplicable as the party seeking coverage as additional insured had no written contract or agreement with the policy holder. Therefore, Golden is not entitled to summary judgment on this issue. However, the court exercises its discretion under CPLR 3212 (b) and grants summary judgment in favor of Gemini as to its requested relief for a declaration that Management is an additional insured under the Golden Policy.

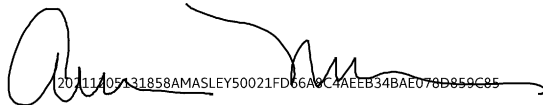
Accordingly, it is

ORDERED that defendant Golden Insurance Company’s motion for summary judgment is granted, in part, and it is further

ADJUDGED and DECLARED that the Golden Insurance Company’s Commercial General Liability Policy, bearing policy number GIC1301374, is excess to that of the Gemini Policy; and it is further

ORDERED that summary judgment is granted, in part, to plaintiff Gemini Insurance Company; and it is further

ADJUDGED and DECLARED that NY Developers & Management Inc. is an additional insured under the Golden Insurance Company's Commercial General Liability Policy, bearing policy number GIC1301374.

  
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12/5/2021

DATE

ANDREA MASLEY, 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