

American Empire Surplus Lines Ins. Co. v Certain Underwriters at Lloyds of London

2022 NY Slip Op 31657(U)

May 19, 2022

Supreme Court, New York County

Docket Number: Index No. 653949/2018

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X **INDEX NO.** 653949/2018

AMERICAN EMPIRE SURPLUS LINES INSURANCE
COMPANY,

04/21/2022,
04/21/2022,
04/21/2022

Plaintiff,

MOTION DATE 04/21/2022

- v -

MOTION SEQ. NO. 003 004 005

CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,
STATE FARM FIRE AND CASUALTY COMPANY

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 206, 211, 213, 216, 219, 222, 225, 228, 231, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 380, 381, 384, 387, 390, 397, 398, 399, 400

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 209, 212, 214, 217, 220, 223, 226, 229, 232, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 382, 385, 388, 391, 393, 394, 395, 396

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 207, 208, 210, 215, 218, 221, 224, 227, 230, 233, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 383, 386, 389, 392, 401, 402, 403

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff, American Empire Surplus Lines Insurance Company (American Empire) commenced this action seeking liability insurance coverage from Certain Underwriters at

Lloyd's of London (Lloyds)) and State Farm Fire & Casualty Company (State Farm) for Summit Development Corp. dba Summit Waterproofing & Restoration Co. (Summit), 560 Associates Delaware, LLC (560 Associates), and Newmark Family Properties, LLC (Newmark) in connection with an underlying lawsuit styled *Daniel Horacio Pinales Melo v. 560 Associates Delaware LLC, Newmark Family Properties LLC and Summit Development Corp.*, which is pending in the Supreme Court of New York, Bronx County .

This action arises out of an alleged July 24, 2017 accident when Daniel Horacio Pinales Melo (Melo), purports to have been injured when he fell from a sidewalk bridge while dismantling and helping to load it into a truck at a construction project located at 560 Broadway, New York, New York.

American Empire seeks coverage, on a primary and non-contributory basis, for the underlying defendants as additional insureds on the Commercial General Liability Policy that Lloyds issued to Everest Scaffolding, Inc. (Everest) based on Everest's written agreement that its Commercial General Liability insurance would name Summit and the owner of 560 Broadway as additional insureds, that the insurance would be primary and non-contributory, the Additional Insured Endorsement and "other insurance" language in the Lloyds Policy.

American Empire also seeks coverage, on a primary and non-contributory basis, for the underlying defendants as insureds on the Commercial Auto Liability Insurance Policy that State Farm issued to Everest, because the underlying defendants face vicarious liability in the underlying action for the use of a vehicle by an insured on the State Farm Policy and, thus, fall within the definition of "insured."

PENDING MOTIONS

On September 21, 2021, Lloyds moved for summary judgment and related relief. On September 30, 2021, American Empire and State Farm also moved for summary judgment and related relief.

On April 20, 2022, the motions were marked submitted and the court reserved decision. The motions are consolidated herein for determination and granted to the extent set forth below.

ALLEGED FACTS

It is alleged in the underlying action that, on July 24, 2017, Melo was injured when he fell from a sidewalk bridge while dismantling and helping to load portions of it into a truck, at a construction project located at 560 Broadway, New York, New York. Melo, an employee of Everest, was dismantling portions of the sidewalk bridge, which Everest had erected outside of the building pursuant to a contract between Everest and American Empire's named insured, Summit. Summit had been retained by 560 Associates c/o Newmark to perform exterior façade restoration on the building and had, in turn, retained Everest to erect and dismantle the sidewalk bridge used at the jobsite.

In 2017, Melo commenced the underlying action, alleging negligence and violation of New York Labor Law §§ 200, 240, and 241(6). On or about January 8, 2018, Summit commenced a third-party action against Everest, styled *Summit Development Corp. v. Everest Scaffolding, Inc.*, wherein Summit asserts causes of action for contractual indemnification, common-law indemnification, and breach of contract for failure to procure insurance.

On November 2, 2016, Everest issued a proposal to Summit in connection with the erection of scaffolding/the sidewalk bridge at the Building (the "Proposal"). The Proposal provides, in part:

7. Customer's insurance shall include contractual liability coverage and additional insured coverage for the benefit of Everest on its Commercial General Liability Policy and any Excess Policy and shall specifically include coverage in connection with any claims arising out of the Customer's work at the jobsite, the use of the leased equipment and/or the operation of the hoist after erection and before dismantling. The insurance required to be carried by Customer shall be as primary and non-contributory to any other valid or collectible insurance and shall have limits of at least \$1,000,000 per occurrence and a \$2,000,000 aggregate.*

* * *

*Everest insurance covering Summit shall be provided with coverage mentioned in #7, naming Summit and Building owner as additional insured.

Kostas Fakiris, owner of Summit, testified during his deposition in the underlying action that Summit performed work at 560 Broadway and hired Everest to perform the scaffolding work associated with it. He further testified that he had worked with Everest for approximately 15 years, and that he always made "edits" to Everest's proposals – including adding language that required Everest to obtain insurance for Summit's benefit such as the language contained in the Proposal and making Summit and the project owner additional insureds. As was their custom and practice, Fakiris made edits to the Proposal submitted by Everest (including the insurance requirement), signed the Proposal, and sent the fully executed copy back to Everest. After that, Everest obtained the necessary permits and began work.

Everest's owner, Jimmy Downes, testified during his deposition in the underlying action that it was Everest's intention to fulfill the insurance procurement requirements in the Proposal. On the date of the accident, Everest employees were dismantling a sidewalk bridge and loading it into a truck owned by Everest.

American Empire issued Commercial General Liability Policy No. 17CG0211123 to Summit for the period April 1, 2017 to April 1, 2018 (American Empire Policy). The American

Empire Policy has a limit of \$1 million each occurrence (\$2 million general aggregate limit per project). The American Empire Policy contains an “other insurance” provision which 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....

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

* * *

(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.

Lloyds issued a Commercial General Liability Policy to Everest, bearing Policy No. B080117739U16, for the period July 29, 2016 to July 29, 2017 (Lloyds Policy). The Lloyds Policy has a \$2 million per occurrence limit and a \$4 million general aggregate limit. The Insuring Agreement in the Lloyds Policy provides, in part:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

The Underwriters Policy contains an Additional Insured Endorsement that provides:

ENDORSEMENT #2

BLANKET ADDITIONAL INSURED

It is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract.

The Underwriters Policy also contains an Endorsement that provides, in relevant part:

ENDORSEMENT #23

PRIMARY AND NON-CONTRIBUTORY

Where required by written contract, it is agreed that this policy shall be primary to any insurance carried by an additional insured, and any insurance carried by such additional insured shall not be called upon to contribute to any claim covered under this policy, provided that the claim arises directly from work performed by the Named Insured or others working directly on behalf of the Named Insured and provided further that the "occurrence" that gives rise to such claim happened subsequent to the execution of the written contract.

State Farm issued Policy No. 201 0413-A29-32, with a liability limit of \$1 million each accident, to Everest for the period July 29, 2016 to July 29, 2017.

Pursuant to endorsement, the State Farm Policy provides, in part:

1. LIABILITY COVERAGE

a. Insuring Agreement and Supplementary Payments are replaced by the following:

Insuring Agreement

l. We will pay damages an insured becomes legally liable to pay because of:
a. bodily injury to others;

* * *

caused by an accident that involves a vehicle for which that insured is provided Liability Coverage by this policy.

2. We have:

* * *

b. the duty to defend an insured in any claim or lawsuit, with attorneys chosen by us;...

* * *

for damages payable under this policy’s Liability Coverage.

The State Farm Policy defines “insured” as, among other things:

Insured means:

1. you for:

a. the ownership, maintenance, or use of:

(1) your car;

* * *

2. any *person* for his or her use of:

a. your car;

* * *

3. any other person or organization vicariously liable for the use of a vehicle by an insured as defined in 1. or 2. above, but only for such vicarious liability. This provision applies only if the vehicle is neither owned by, nor hired by, that other person or organization

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must

be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]).

“On a motion for summary judgment, the court’s function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court’s role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

American Empire is Entitled to Summary Judgment Declaring That State Farm Has a Duty to Defend and Indemnify the Underlying Defendants in Connection with The Underlying Action

Pursuant to the State Farm Policy’s Insuring Agreement, State Farm agreed to pay damages an insured becomes legally liable to pay because of bodily injury to others caused by an accident that involves a vehicle for which that insured is provided Liability Coverage by the policy. State Farm has the duty to defend an insured in any claim or lawsuit for damages payable under the policy’s Liability Coverage.

Melo’s accident occurred when Everest employees were dismantling a sidewalk bridge and loading it into Everest’s truck. It is well settled that where an accident results from an act of

loading or unloading of a covered auto, the claim comes within the scope of the auto liability coverage as long as there is a causal connection between the accident and the movement of goods to or from the vehicle. *See, Eagle Ins. Co. v. Butts*, 707 N.Y.S.2d 115, 116 (2d Dep't 2000); *Argentina v. Emery World Wide Delivery Corp.*, 93 N.Y.2d 554, 558 (1999); *Cosmopolitan Mut. Ins. Co. v. Baltimore & O.R.R.*, 18 A.D.2d 460 (1st Dep't 1963); *Paul M. Maintenance, Inc. v. Transcontinental Ins. Co.*, 300 A.D.2d 209 (1st Dept. 2002).

The State Farm Policy defines "insured" to include, among other things, any person or organization vicariously liable for the use of a vehicle by an insured. Melo seeks damages for injuries he allegedly incurred when he fell while loading Everest scaffolding onto Everest's truck. Melo's claims under Labor Law §§ 240 and 241(6) seek to impose vicarious liability on owners and general contractors for injuries sustained by workers at a construction site. *See e.g., Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 350 (1998); *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 179 (1990).

The First Department's decision in *Paul M. Maintenance* is directly on point. In that case, a subcontractor's employee was injured when a piece of equipment fell on him while he was loading the employer's truck. The employee asserted Labor Law claims against the general contractor, which in turn sought coverage from the subcontractor's auto liability insurer. The Court determined that the general contractor qualified as an insured based upon the conduct of an insured because the employee was seeking damages for vicarious liability under Labor Law § 240 for the injuries resulting from the conduct of the subcontractor. Thus, the general contractor was entitled to summary judgment declaring that the subcontractor's insurer was required to defend and indemnify it in the underlying litigation.

The underlying defendants in this case face similar claims based upon Everest's negligent loading of the truck and must therefore qualify as insureds under the State Farm Policy for any vicarious liability imposed upon them in this regard. The claims in the underlying complaint premised on Labor Law §§ 240 and 241(6), and allegations pertaining to conduct attributable to Everest, trigger State Farm's duty to defend allegations of vicarious liability for Everest's conduct, because an insurer must defend because the complaint suggests a reasonable possibility of coverage. *See, Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875, 876 (1976); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 648 (1993).

Furthermore Pursuant to 11 NYCRR 60.1.1 State Farm is prohibited from excluding from insurance coverage accidents that occur while loading or unloading a vehicle such as the Everest truck.

However, there is no insurance coverage afforded by the Lloyds policy to Everest Summit, 560 Associates or Newmark based upon the "Auto" exclusion.

By letter dated November 27, 2018, Lloyds disclaimed insurance coverage to Everest, Summit, 560 Associates and Newmark based upon the auto exclusion contained in the Underwriters Policy. The Lloyds Policy excludes coverage to an insured for: "Bodily Injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading." As discussed above, the accident arose from the use, loading the Everest truck. Based upon the terms of the Underwriters Policy and *Zurich American Insurance Company v. Ace American Insurance Company*, 165 A.D.3d 558 (1st Dept. 2018) the auto exclusion excludes coverage for the Underlying Action. This point is conceded by

American Empire in its reply memorandum of law wherein they acknowledge that the exclusion applies to the extent that Melo's accident arose out of the loading of Everest's truck.

Finally, the coverage afforded to the underlying defendants under the State Farm Policy is primary to American Empire's CGL Policy

Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage, priority of coverage is determined by comparison of the 'other insurance' clauses. *Sport Rock Int'l v. Am. Cas. Co. of Reading*, 65 A.D.3d 12, 18 (1st Dept. 2009). When one policy contains an applicable excess "other insurance" clause and the other does not or contemplates contribution with other applicable policies, the excess clause in the first policy is given effect and the second policy will apply on a sole primary basis. *Id.*

The American Empire Policy contains an "other insurance" provision which provides that, if other valid and collectible insurance is available to the insured for a loss American Empire covers, the American Empire insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, if the loss arises out of the maintenance or use of autos, and to any other primary insurance available to the insured covering liability for damages arising out of the operations for which it has been added as an additional insured. The State Farm Policy does not contain any "other insurance" provision. Accordingly, the State Farm Policy affords primary coverage below the American Empire Policy, and the American Empire Policy does not apply to this claim unless the State Farm policy limits have been exhausted.

Based on the foregoing American Empire's motion for summary judgment is granted as to State Farm and denied as to Lloyds. For the same reasons State Farm's motion for summary judgment is denied, and Lloyds motion for summary judgment is granted.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor and a declaratory judgment is granted as to State Farm and denied as to Lloyd's; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to a judgment declaring that Defendant State Farm Fire and Casualty is obligated to defend and indemnify the Underlying Defendants in the Underlying Action; and declaring that the coverage afforded by State Farm is primary to the coverage afforded by American Empire; and ordering State Farm to reimburse American Empire for the reasonable attorneys' fees and costs it has incurred in providing the Underlying Defendants with a defense in the Underlying Action; and it is further

ORDERED that Lloyd's motion for summary judgment is granted to the extent of dismissing each of plaintiff's claims as against Lloyds; and it is further

ADJUDGED and DECLARED that Lloyds does not owe insurance coverage to Summit Development Corp, 560 Associates Delaware LLC and Newmark Family Properties, LLC with respect to is *Daniel Horacio Pinales Melo v. 560 Associates Delaware LLC, et al. v. Everest Scaffolding, Inc.*, and venued in Supreme Court, Bronx County under Index No.: 28072/2017E; and it is further

ORDERED that Lloyds is granted summary judgment on its cross-claims against State Farm; and it is further

ADJUDGED and DECLARED that State Farm's insurance policy numbered 201 0413-A29032 affords Everest, Summit, 560 Associates and Newmark insurance coverage with respect to is *Daniel Horacio Pinales Melo v. 560 Associates Delaware LLC, et al. v. Everest Scaffolding,*


Inc., and venued in Supreme Court, Bronx County under Index No.: 28072/2017E on a primary and non-contributory basis with respect to Lloyds

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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5/19/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: