SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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ACE AMERICAN INSURANCE COMPANY

Plaintiff,

- v -

ADIRONDACK INSURANCE EXCHANGE,

Defendant.

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INDEX NO. 652868/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 49, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 67

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 52, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff ACE American Insurance Company (hereinafter "ACE") commenced the instant action against defendant Adirondack Insurance Exchange ("Adirondack") to recover insurance payments it made to settle *Kieran Moran and Bernadette Moran v Town of Riverhead, Gladys Breitenbach, and Walter Breitenbach*, Supreme Court, Suffolk County, NYSCEF Index No. 03357/2011 (the "underlying action"). As one of Town of Riverhead's insurers, ACE alleges that Adirondack's insurance policy with Mr. and Mrs. Breitenbach obligated it to defend Town of Riverhead and exhaust policy limits before ACE became liable on its policy. In Motion Sequence 001, Adirondack moves for summary judgment dismissing the complaint pursuant to CPLR 3212; conversely, in Motion Sequence 002, ACE moves for summary judgment for reimbursement of the $1,000,000 payment it made in the underlying action. Each opposes the other's motion. For the following reasons, Adirondack's motion for summary judgment is granted and ACE's motion is denied. Accordingly, the complaint is dismissed.

BACKGROUND

In 2010, Walter Breitenbach struck a pedestrian, Kieran Moran, with his automobile while driving within the scope of his employment with Town of Riverhead ("Riverhead"). Moran sustained extremely serious injuries, including brain trauma, that ultimately proved fatal more than a year later. Prior to his death, however, Moran and his wife commenced a personal injury suit against Breitenbach, his wife Gladys Breitenbach, and Riverhead. Though they originally asserted causes of action against Riverhead for negligent hiring, supervision, and

training and negligence under a respondeat superior theory, Mrs. Moran (by this time, Kieran had passed away) later stipulated that she was pursuing damages against Riverhead only under a vicarious liability theory.

By 2015, interested parties—including ACE as an insurer of Riverhead, and Adirondack as the insurer of the Breitenbachs' automobile [1]—began settlement negotiations. Though the parties failed to agree to a settlement during this round of negotiations, they participated in a successful second round. According to the settlement produced there, Adirondack agreed to pay $750,000 on behalf of the Breitenbachs, Riverhead agreed to pay $50,000 separate and apart from its insurance; ACE agreed to pay $1,000,000 on behalf of Riverhead, and AIG (a separate insurer) agreed to bay $200,000 on behalf of Riverhead. In total, Mrs. Moran received $2,000,000 from the various defendants. Moran, Breitenbach, and Riverhead signed a Post-Mediation Agreement that described the terms of the agreement and released the parties from all future claims. The document provides:

> "No party to this agreement shall at any time hereafter make any claims against the other, institute any lawsuits against the other, or make any demands for payment from the other for any alleged reason or causes arising out of the facts and issues of the matter herein. Each party releases from the other any and all claims and/or liabilities from this matter." (NYSCEF doc. no. 29.)

Mrs. Moran also executed a New York General Release against the Breitenbachs and Riverhead. (NYSCEF doc. no. 31.) Neither the post mediation agreement nor the releases appear to implicate the rights of the insurers.[2] The Court So-Ordered the settlement agreement and discontinued the action with prejudice. (*See* NYSECF doc. no. 30.)

The Adirondack/Breitenbach Insurance Policies

On the date of the accident, Walter and Gladys Breitenbach were insured under an Adirondack Custom-Pac policy that contained an automobile and homeowners liability limit of $500,000. (NYSCEF doc. no. 44 at 1, Adirondack Policy.) The policy also contained a personal liability coverage with a liability limit of $1,000,000 in excess of the retained limit. In a section entitled "Personal Protector Endorsement (Personal Umbrella For Use With Custom-PAC Policy)," the insurance policy defines "Insured" to mean the individual named insured but also "4. Any other person or organization but only with respect to the legal responsibility for acts or omissions of [the insured]." (*Id.* at 94.) Under the "Coverage" provision, entitled "Insuring Agreement," Adirondack's policy states that "We will pay damages, in excess of the 'retained limit' for: 'Bodily injury' or 'property damage' for which an 'insured' becomes legally liable due to an 'occurrence' to which this insurance applies; and 'personal injury' for which an 'insured' becomes legally liable." "Retained Limit" is defined as: "the total limits of any "underlying insurance" or any other insurance that applies to an "occurrence." Lastly, under a provision entitled "Other Insurance," the policy states that "the coverage afforded by this endorsement is excess over any other valid and collectible insurance available to an 'insured' except insurance

[1] By this time, both of the Breitenbachs had passed away too. The estates of each were substituted into the action.
[2] As Adirondack raises the argument that the settlement and associated releases are binding against ACE, the Court will more fully address this issue in its "Discussion" Section.

written specifically to be excess over this endorsement." (*Id.* at 98.) With Adirondack paying $750,000 in the settlement, neither party disputes that the primary Custom-Pac policy was exhausted and that $250,000 in excess liability was paid.

The ACE/Riverhead's Insurance Policy

ACE provided a Public Entity "Retained Limits" Policy to Riverhead, as the policy's named insured, with an automobile liability limit of $1,000,000 per occurrence with a $150,000 self-insured retention limit. (NYCEF doc. no. 33, ACE insurance policy.) The policy was effective between December 31, 2009, and December 31, 2010. Parties do not dispute the policy was active when the Breitenbach/Moran accident occurred. The policy provides that ACE will indemnify Riverhead "for Damages and Claims Expenses in excess of the [$150,000] Retained Limit for which the Insured becomes legally obligated to pay because of a Claim arising out of an Accident taking place during the Policy Period for Bodily Injury or Property Damage." Furthermore, the policy, in a section entitled "Other Insurance," provides, in pertinent part, that, "[i]f insurance with any other Insurer is available to cover a Claim for an Insured for any coverage under this Policy whether on a primary, excess, or contingent basis, the insurance under this Policy is excess of and does not contribute with such other insurance." (*Id.* at ¶A[13].) Continuing, "It is also agreed that such other insurance is excess over the Retained Limit and we [ACE] will not make any payments until the other insurance and the Retained Limit have been exhausted." (*Id.*)

The Instant Motions

In Motion Sequence 006, in support of summary judgment, Adirondack asserts that: (1) the doctrine of subrogation cannot be invoked, as ACE has, where the payments sought to be reimbursed were made voluntarily; (2) ACE waived its right to recovery in the Post-Mediation Agreement; and (3) ACE had a contractual obligation to insure Riverhead *before* Adirondack's Umbrella/Excess Coverage policy was triggered. (NYSCEF doc. no. 35 at 8, 13, and 14.) ACE opposes the motion. Its position as to (1) is that ACE agreed to pay the $1,000,000 to limit Riverhead's (and by extension its own) liability should the matter go to a trial, meaning the payment cannot be considered "voluntary;" as to (2), ACE argues that the Post-Mediation Agreement binds only the named parties to the lawsuit, not the insurers, so ACE could not have waived its rights against Adirondack; and as to (3), it argues that *Adirondack's* policy is primary, the policy required Adirondack to defend Riverhead, and ACE's policy is excess of Adirondack's due to the terms of ACE's "Other Insurance" policy provision. In Motion Sequence 002, Adirondack and ACE essentially reaffirm their respective positions, only this time ACE argues its positions entitle it to summary judgment and Adirondack opposes.

DISCUSSION

The Doctrine of Subrogation

The equitable doctrine of subrogation applies where one party is compelled to pay the debt or obligations of a third party to protect his own rights. (*Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d 937, 937 [2d Dept 2010].) While its scope is broad, the doctrine cannot be

invoked where the party seeking reimbursement paid the debt or obligation voluntarily. (*Berm. Trust Co. v Ameropan Oil Corp.*, 698 NYS2d 691, 692 [2d Dept 1999].) To demonstrate that the payments were *not* made voluntarily but instead compelled, a party may point to its contractual obligations (*see Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 106 [2d Dept 2009]) or the need to protect its own legal or economic interests. (*See Markel Ins. Co. v American Guar. & Liab. Ins. Co.*, 111 AD3d 678, 681 [2d Dept 2013].) This rule ensures that "[o]ne cannot ask for subrogation with success, unless either he or his property was in some way lawfully answerable for the claim paid." (*Merchant Mut. Ins. Group v Traverlers Ins. Co.*, 24 AD3d 1179, 1181 [4th Dept 2005].) Accordingly, when an insurer who is not acting under a mistake of material fact or law assumes the defense and indemnification of the insured *when there is no obligation to do so*, that insurer becomes a volunteer with no right to recover the monies it paid on behalf of the insured. (*East 51st St. Dev. Co., LLC v Lincoln Gen. Ins. Co.* (2015 NY Slip Op 31245[U] [Sup. Ct. N.Y. County 2015] [Edmead, J.] *citing Merchant Mut. Ins. Group*, 24 AD3d at 1181.)

In Mot. Seq. 006, Adirondack argues that it is entitled to summary judgment because the payments that ACE made on behalf of Riverhead in the settlement were made voluntarily with full knowledge of the relevant facts and no allegations of fraud or mistakes of fact have been made. Essentially, Adirondack's position is that ACE believed Adirondack was liable to Riverhead, yet voluntarily made the payments anyway. If true, ACE would not be able to recover from Adirondack, regardless of whether Adirondack's policy required it to defend/indemnify Riverhead in the underlying action.

In support, Adirondack relies principally on *Philadelphia Indem. Ins. Co. v Harleysville Preferred Ins. Co.* (179 AD3d 959 [2d Dept 2020]), which it argues is analogous to the procedural posture presented in the instant motion. There, Harleysville Preferred Ins. Co., disclaimed coverage related to the underlying plaintiff's slip and fall at a group home; instead, Harleysville asserted that Philadelphia Indem. Ins. Co. was responsible for coverage under its own plan. (*Id.* at 961.) Nonetheless, Harleysville contributed $300,000 towards a settlement of the underlying action and sought to be reimbursed from Philadelphia. In holding for Philadelphia, the Appellate Division, Second Department determined that Harleysville made settlement payments voluntarily and thus was not entitled to reimbursement under a subrogation theory. (*Id.*)

From a certain perspective, *Philadelphia Indem.* might appear analogous to this case, perhaps because both involve insurers who settled underlying actions and then sought reimbursement. Yet the analogy ends there. Here, Adirondack—similar to Harleysville—disclaimed coverage; however, unlike Harleysville, it is not Adirondack—but ACE—who seeks reimbursement for settlement payments. For the analogy to be complete and for *Philadelphia Indem.* to preclude subrogation as a cause of action, Adirondack and ACE would have had to switch roles: *ACE* would have had to disclaim coverage, reverse its position by making payments anyway, and then seek reimbursement for those payments. Instead, ACE appears to have been consistent throughout both actions that Adirondack was obligated to defend Riverhead. Only after Adirondack disclaimed any coverage of Riverhead that might exist through its auto policy with Breitenbach did ACE enter settlement negotiations and agree to a $1,000,000 payment. As such, *Philadelphia Indem.* proves of little use to the motions at hand.

The more applicable and instructive line of cases are those involving a party that is forced to defend or pay a judgment when another insurer disclaims coverage. These cases uniformly hold that subrogation is a viable theory where the plaintiff provided its insured with a defense or made payments on a policy only after the defendant refused to participate in the defense and denied coverage. (*See United Fire Ins. Co. v CAN & Transcon. Ins. Co.*, 300 AD2d 1054 [4th Dept 2002] [holding that a plaintiff was not a volunteer where it was forced to pay the remaining settlement balance once defendants refused to pay despite their policy obligations]; *General Accident Ins. Co. v United States Fidelity & Guar. Co.*, 193 AD2d 135, 137 [3d Dept 1993]; *Hertz Corp. v Gov't Emples. Ins. Co.*, 250 AD2d 181 [1st Dept 1998] ["We find that since GEICO…declined to participate in the defense of the lawsuit or contribute to the settlement…Hertz's settlement of the personal injury action was not voluntary"]; *East 51st St. Dev. Co., LLC v Lincoln Gen. Ins. Co.*, 2015 NY Slip Op 31245[U] at *16.) As with cases like *Hamlet at Willow Cr. Dev.* (64 AD3d at 106), these require plaintiff-insurance companies to demonstrate the payments were not "voluntary" by pointing to contractual obligations on which they would be liable to their insured.

Although Adirondack disputes whether these cases apply here, it is clear they do. In July 2015, Riverhead and ACE tendered the defense and indemnification to Adirondack based on their belief that the Breitenbach policy covered entities who were legally responsible for Breitenbach's acts and omissions that lead to the accident. (*See* NYSCEF doc. no. 56, tender letter.) Subsequently, in August 2015, Adirondack replied, "[w]e are declining your tender as the Town is not entitled to a defense in this matter from our client or his insurers." (NYSCEF doc. no. 57, declining tender letter.) Critically, *in the absence of any other insurer*, ACE was indisputably obligated to provide coverage under its own policy. In this light, ACE's assertion that "$1,000,000 payment to settle the Underlying Action was in excess of its contractual obligations and fair share" does not indicate the absence of a contractual obligation to Riverhead, as Adirondack would have it, but rather indicates ACE's belief that the payment was in excess because Adirondack should have provided a defense and indemnification to Riverhead. (*See Metropolitan Prop. &Cas. Ins. Co. v GEICO Gen. Ins. Co.*, 186 AD3d 1513, 1514-1515 [2d Dept 2020]["the voluntary payment doctrine does not bar an excess insurance carrier that contributed to a settlement of an underlying action from seeking to recover its settlement contribution from a primary insurance carries"].) Accordingly, because these facts demonstrate ACE did not make the settlement payments voluntarily but rather to avoid a potentially more costly liability on its contractual obligations to Riverhead, Adirondack has not established that ACE is precluded from recovering under the subrogation doctrine. It is thus not entitled to summary judgment on this argument.

Whether ACE Released or Waived Its Right to Reimbursement

Adirondack contends that ACE waived its right to recovery in the Post Mediation Agreement and related settlement releases. It argues that all parties contributed to the settlement, the Agreement contained a provision that purportedly released all claims between the parties, and ACE did not insert a reservation clause specifically as to its rights against Adirondack. This argument, however, overlooks the fact that neither ACE nor Adirondack are signatories to the Agreement—only Moran and counsel for Riverhead and the estates of the Breitenbachs have

signed the agreement. As to the releases, Moran released the estates of Walter and Gladys Breitenbach from all claims she may have against them. The releases do not implicate the rights and claims of the insurers against each other. Each document merely reflects the respective payments of the ACE and Adirondack as part of the consideration for the settlement. Accordingly, the Court finds that ACE has not waived its rights to subrogation or contribution.

Whether the ACE and Adirondack Policies are Primary or in Excess

The parties' opposing summary judgment motions turn on whether one policy must be considered in excess to the other. As discussed *supra*, there is no dispute that Adirondack paid $500,000 under Breitenbach's primary policy and $250,000 under the Breitenbach umbrella policy. Likewise, there is no dispute that ACE paid $1,000,000 to settle the underlying action. The question, then, is whether ACE's policy (with its "Other Insurance" provision) is in excess of Adirondack's umbrella policy such that Adirondack is required to exhaust the umbrella policy limit before ACE becomes liable for any portion of the $1,000,000.

Where an insured has more than one potentially applicable policy on a claim, courts determine the insurers' respective obligations to the insured by applying a body of law developed to resolve "other insurance" disputes. (*See Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1999].) Because every insurer has the right to rely upon the terms of its own contract, the extent of the coverage provided by ACE and Adirondack is dictated by the purpose and risk that each policy was intended to cover and the relevant policy terms. (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008].) An umbrella insurance policy provides the insured with a "final tier" of coverage often at a reduced premium to reflect a smaller risk to the insurer. (*Id.*, citing *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373-374 [1985].) As such, they are regarded to be in excess over "any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses. [citation omitted]" (*Bovis*, 53 AD3d at 148.)

However, where both insurers have contracted to cover the same risk at the same level, i.e., both are considered excess policies, neither is permitted to argue that the other insurer must bear the entire risk. (*LiMauro*, 65 NY2d at 373-374.) In effect, the policies' "Other Insurance" provisions cancel each other out and both are liable on a pro rata basis. (*See Lumbermens Mut Casualty Co. v Allstate Ins. Co.*, 51 NY2d 651, 656 [1980]; *Utica Mut. Ins. Co. v Erie Ins. Co.*, 107 AD3d 1522, 1524 [4th Dept 2013].) In certain circumstances, the above-described rule must give way. Under *LiMauro*, where both policies purport to be excess coverage, the policy that contains language expressly denying obligations in contribution with other applicable policies—and thereby manifests a clear intent to be excess over other excess policies—only becomes liable once the other is exhausted. (*LiMauro*, 65 NY2d at 375-376; *Travelers Indem. Co. v Am. &Foreign Ins. Co.*, 286 AD2d 626, 626 [1st Dept 2001]; *United States Fire Ins. Co. v CAN & Transcon. Ins. Co.*, 300AD2d 1054, 1056 [4th Dept 2002].)

ACE contends that its "Other Insurance" provision, which expressly contains the same type of non-contribution provision referred to in *LiMauro*, transforms the policy into one that is in excess of Adirondack's, which does not contain the same language. From the Court's perspective, however, this argument misses the point. ACE's policy provides primary insurance

coverage to Riverhead; it is not an excess policy that manifests a clear intent to be over other excess policies. (*See 233rd St. Partnership, L.P. v Twin City Fire Ins. Co.*, 52 AD3d 292,293 [1st Dept 2008] [holding that defendant's insurance policy was not a true excess policy but rather one that "in certain circumstances, purports to shift losses to other available insurance" because, among other things, there was no primary insurance underlying the policy]; *Cheektowaga Cent. School Dist. V Burlington Ins. Co.*, 32 AD3d 1265, 1268 [4th Dept 2006] ["the Zurich policy was purchased for primary coverage, despite its "other insurance" clause whereby it would provide only excess coverage under certain conditions"].) *LiMauro* provides no guidance where the dispute is between a primary policy and excess policy. As the First Department noted in *Bovis Lend Lease*, "the Court of Appeals approach [in *LiMauro*] to the interpretation of excess clauses is to construe such a clause in a policy otherwise providing primary coverage *as addressed to insurance on the same level, not to higher levels of insurance* to avoid 'distorting the meaning of the terms of the policies.'" (53 AD3d at 150)

The conclusion that ACE's policy is primary becomes more apparent when considering that it requires Riverhead to pay a $150,000 retention limit before ACE becomes obligated to pay the $1,000,000 settlement fee. By contrast, the Breitenbach's only paid $258 for the Adirondack's umbrella policy. As described above, such large premiums like the one paid by Riverhead to ACE typically accompany primary policies—not excess or umbrella policies. (*See United States Fire*, 300 AD2d at 1056 [holding that a policy for a substantially smaller premium was one factor that indicated the policy was in excess of the other]; *Trishman Constr. Corp. v Great Am. Ins. Co.*, 53 AD3d 416, 420 [1st Dept 2008] [holding the premium for a primary policy was significantly higher than for a true excess policy despite the primary policy's small coverage limit].) Because Adirondack's umbrella policy is in excess of ACE's primary policy, ACE is not entitled to reimbursement of the settlement funds it paid. (*See Murnane Bldg. Contrs., Inc. v Zurch Am. Ins. Co.*, 107 AD3d 674, 676 [2d Dept 2013] ["if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective"].) The Court grants Adirondack's CPLR 3212 motion for summary judgment against ACE dismissing the complaint.

Accordingly, it is hereby

ORDERED that defendant Adirondack Insurance Exchange's motion pursuant to CPLR 3212 for summary judgment is granted and the plaintiff ACE American Insurance Company's complaint is dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment under CPLR 3212 is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendant shall serve a copy of this order along with notice of entry on all parties within ten (10) days of entry.

1/4/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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