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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Justice

Index Number : 600292/2009

TRANSCONTINENTAL INSURANCE

vs.

TWIN CITY FIRE INSURANCE

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

...tion to/for _____

No(s). _____

No(s). _____

No(s). _____

upon the foregoing papers, it is ordered that this motion is

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/7/12

HON. JUDITH J. GISCHE J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

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Transcontinental Insurance Company, American Casualty Company of Reading, PA, International Storage Systems, Inc. and Heatley Installations, Inc.,

Plaintiffs,

-against-

Twin City Fire Insurance Company,

Defendant.

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Decision/Order
Index No.: 600292/09
Seq. No. : 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m [3212] DKE affirm, exhs, memo [sep back]	1
Def's n/x-m [3212] aff in supp & opp w/ KB affid, PK affid, NPC affirm, exhs, memo [sep back]	2
Pltf's aff. in opp. x-mo. & reply in supp w/DKE affirm.	3
Def's NPC reply affirm.	
Transcript.	

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Transcontinental Insurance Company ("Transcontinental"), American Casualty Company of Reading, PA ("ACC"), International Storage Systems, Inc. ("ISS") and Heatley Installations, Inc. ("Heatley") (collectively "Plaintiffs") seeking a judgment declaring that Twin City Fire Insurance Company ("Twin City" or Defendant") is obligated, pursuant to the terms of a Twin City Policy ("policy" or "Twin City Policy"), to indemnify Heatley for the entire amount of a settlement made in an underlying Labor Law

action ("underlying action" or "Bartlett action"). Plaintiffs move for summary judgment (CPLR § 3212), against defendant, seeking such a declaration and also for a money judgment, in the amount of $3.725 million, representing the contribution made by Transcontinental and ACC to settle the underlying action. Defendant cross-moves for summary judgment (CPLR § 3212) requesting that: [1] the court dismiss plaintiffs' complaint, [2] there be a declaration that the Twin City policy limits are only $100,000, and [3] sanctions be awarded pursuant to NYCRR § 130-1.1 et. seq. Since issue has been joined, but the note of issue has not yet been filed, this motion can be considered on the merits. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Background

Underlying action

In the related underlying action, entitled *Bartlett v. American Real Estate Holdings, LP, et al,* Supreme Court, New York County, Index No. 116610/2003. Mark Bartlett ("Barlett"), a Massachusetts resident, sought damages for personal injuries, suffered on November 12, 2001, in an on-the-job injury occurring in Farmingdale, NY. Bartlett was an employee of Heatley, a sole proprietorship located in Massachusetts. ISS, a defendant in the Bartlett action, impleaded Heatley as a third-party defendant, seeking among other things, common-law indemnification.

On February 5, 2008, the Hon. Walter B. Tolub granted Bartlett summary judgment on liability, against ISS, pursuant to Labor Law § 240(1). He also denied Heatley's motion to dismiss the third-party complaint.

The underlying action was, thereafter, settled with Bartlett for $3.825 million. After trial on the third party complaint, the court found that plaintiff suffered a "grave injury." As

a consequence, ISS was entitled to indemnification from Heatley for the accident. Twin City paid $100,000 towards the overall settlement with Bartlett, while Transcontinental and ACC paid the additional $3.725 million dollars.

A dispute arose in the underlying action between the insurance carriers for ISS (Transcontinental and ACC) and Heatley (Twin City) regarding the limits of coverage under the policy. Twin City claimed that pursuant to the terms of the policy, the limits were $100,000. However, Transcontinental and ACC, took the position that the Twin City policy limits were unlimited, pursuant to the requirements of the New York Workers Compensation Laws.

This Action

The dispute between the carriers in the Bartlett action resulted in this declaratory judgment action being commenced. Plaintiffs now seek a declaration regarding the policy limits of the Employers' Liability Policy issued by Twin City to Heatley in the underlying action. Plaintiffs maintain that, pursuant to the Workers Compensation law there are no liability limits to the Twin City policy. Therefore, Transcontinental and ACC seek indemnification and reimbursement of the $3.725 million they spent to settle the Bartlett action.

Plaintiff claims that its cross-motion for summary judgment must be granted because (i) New York law requires unlimited coverage for "Item 3.A. States" and the plain language of the Twin City Policy, specifically the operation of paragraphs A.2. or A.4 of "Part Three - Other States Insurance," requires Twin City to treat New York as an Item 3.A. State. It further argues that because Heatley satisfied its obligation under the policy of notifying Twin City that it was working in New York, it thereby triggered unlimited liability

coverage under the Worker's Compensation Laws.

Twin City claims that the express provisions of the policy limit liability to $100,000 and that such limits apply regardless of whether New York is a 3.C. State and/or treated as a 3.A. State under the policy. Twin City also claims that it never received notice that Heatley was working in New York, but even if it did, unlimited coverage would not be triggered in the absence of a renegotiated premium for a New York endorsement providing vastly increased coverage over the original policy.[1]

The Twin City Policy

Twin City issued a Workers' Compensation and Employers' Liability policy to Heatley under policy number 02WECGO0502, effective October 26, 2001 to October 26, 2002. The information page, form WC000001A of the policy, sets forth the named insured, Heatley, and its mailing address, at 42 Thacher Street, Attleboro, Massachusetts 02703. Item 2 states the policy period, October 26, 2001 to October 26, 2002. The Information Page, item 3, states the following regarding the available coverages:

> **3. A. Workers Compensation Insurance:** Part One of the policy applies to the Workers Compensation Law of the states listed here: MA
> **B. Employers Liability Insurance:** Part Two of the policy applies to work in each state listed in Item 3.A. The limits of our liability under Part Two are:
> **Bodily Injury by Accident** $100,000 each accident
> **Bodily Injury by Disease** $500,000 policy limit
> **Bodily Injury by Disease** $100,000 each employee
> **C. Other State Insurance:** Part Three of the policy applies to the states, if any, listed here:

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[1] It is acknowledged that the likelihood of this dispute arising in future cases has been largely ameliorated by the passage of Workers Compensation Law § 50(2) which now requires that out of state employers operating in New York State to maintain Workers Compensation Insurance through a policy issued under the law of this state.

ALL STATES EXCEPT ND, OH, WA, WV, WY, AND STATES DESIGNATED IN ITEM 3.A. OF THE INFORMATION PAGE.

The Workers' Compensation and Employers' Liability Insurance Policy Form, WC000000A, states in the GENERAL SECTION, A. the Policy, as follows:

> The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.
>
> PART ONE - WORKERS' COMPENSATION INSURANCE provides coverage for compensation claims made by employees of the insured.
>
> PART TWO - EMPLOYERS LIABILITY INSURANCE typically applies to third-party claims brought against the insured as a third-party defendant in actions originally commenced by the insured's employees for common law contribution/indemnification claims. Section A.2. states that this coverage is provided for employment "necessary or incidental to your work in a state...listed in Item 3.A. of the Information Page." As previously mentioned, the limits for this coverage are listed on the Information Page 3.B. as $100,000 each accident. Section G. of PART TWO entitled "Limits of Liability" underscores this:
>
> G. Limits of Liability
>
> Our liability to pay for damaged is limited. Out limits of liability are shown in Item 3.B. of the information Page - They apply as explained below.
>
> 1. Bodily Injury by Accident. The limit shown for "bodily injury by accident - each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident.
>
> * * *
>
> 3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

PART THREE - OTHER STATES INSURANCE states that:

A. How This Insurance Applies

1. This other state insurance applies only if one of more states are shown in Item #.C. of the Information Page.

2. If you begin work in any one of those states after the effective date of this policy and are not insured or self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page.

* * *

4. If you have work[ed] on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

B. Notice
Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.

The policy concludes with several Massachusetts endorsements. No endorsements for New York or any other 3.C. state listed on the Information Page are included in the policy.

DISCUSSION

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must

then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003). Interpretation of contracts usually presents an issue of law for the court to resolve. W.W.W. Assoc. v Giancontieri, 77 N.Y.2d 157, 162 (1990).

Unsubscribed Transcripts

The court first addresses the parties' disagreement regarding what deposition transcripts can be considered on this motion. Defendant's arguments, that plaintiffs may not rely on either defendant's witness, Patricia Kenny's unsigned deposition transcript, or that of Thomas Heatley, in connection with these motions for summary judgment, is rejected.

Thomas Heatley's deposition transcript was sent to him for signature on April 29, 2011. He did not respond and, therefore, his deposition is deemed executed pursuant to CPLR § 3116. Zabari v. City of New York, 242 A.D.2d 15 (1st Dept. 1998).

Patricia Kenny did sign her deposition, but she used her errata sheet to substantively change some of the prior testimony she gave under oath. Because these substantive changes were unaccompanied by any explanation, let alone a specific explanation, they are of no legal effect. Riley v. ISS International Service System, 284 A.D.2d 320 (2nd Dept. 2001). Thus, plaintiffs are free to rely on the testimony as actually given at the examination before trial in connection with these motions.

Twin City's Responsibility Under the Policy

The primary dispute between the parties in this action is whether Twin City is only required to pay $100,000 toward the Bartlett settlement, in accordance with the stated policy limits, or it is required to pay the full settlement amount, of $3.825 million, consistent with New York State mandates that there be no limit on liability for employees subject to the New York State Worker's Compensation Laws. See: Preserver Ins. Co. v. Ryba, 10 N.Y.3d 635 (2008), The New York Manual for Workers' Compensation and Employer's Liability Insurance (2008); see also Oneida Ltd. Utica Mutual Ins. Co., 263 A.D.2d 825 (3rd Dept. 1999); Ohio Casualty Ins. Co v. Transcontinental Ins. Co., 372 Fed. Appx. 107, 111 (2d Cir. 2010).

The crux of plaintiffs' argument is that if New York is either listed in Item 3.A. of the policy, or should be listed in Item 3.A. of the policy, either by operation of paragraphs A.2. or A.4. of part Three of the policy, then the stated policy limits of Item 3.B. do not apply (see: Plaintiffs' Memorandum of Law, p. 10). For the reasons set forth below, the court rejects this argument.

As a general matter, "Workers' Compensation policies are no more than contracts, and as such are governed by the ordinary rules of contractual construction." Comm 'rs of the State Ins. Fund. v. Photocircuits Corp., 20 A.D.3d 173 (1st Dept. 2005). The language of an insurance policy will be given its plain meaning. Acorn Ponds, Inc. v. Hartford Ins. Co., 105 A.D.2d 723, 724 (2nd Dept. 1984); West 56th Street Assoc. v. Greater N.Y. Mutual Ins. Co., 250 A.D.2d 109, 112 (1st Dept, 1998); Caporino v. Travelers Ins. Co., 62 N.Y.2d 234, 239 (1984).

Under the express language of the policy, a 3.A. State is subject to the 3.B. liability

limitations of $100,000. New York is clearly a 3.C. State. Under certain circumstances New York is treated as a 3.A. State. Even if New York is treated as a 3.A. State, as plaintiffs contend, the express policy language still limits the liability to $100,000.

Plaintiffs' further argument, that if New York is a 3.A. State, then the express policy limitations must be disregarded in favor of the New York Workers Compensation Law, was expressly rejected by the Court of Appeals in Preserver Ins. Co. v. Ryba, *supra*.

The insurance policy considered in Preserver Ins. Co. v. Ryba was virtually identical with the policy language at issue in this case. Like this case, Preserver Ins. Co. v. Ryba involved a policy underwritten and delivered in a State other than New York. In both Preserver Ins. Co. v. Ryba and this case New York was a 3.C. State with the right, upon meeting certain conditions, to become a 3.A. State. Like this case, Preserver Ins. Co. v. Ryba involved an accident occurring while an employee was performing work in New York State, which resulted in a grave injury to the employee.

The Court of Appeals framed the dispute and resolution of Preserver Ins. Co. v. Ryba as follows:

> At the heart of this dispute between two insurers—in a case where a construction worker allegedly suffered a grave job site injury—is the question whether the employers' liability insurance coverage is limited to $100,000, as specified in the policy, or unlimited. In this case we conclude that it is limited. Preserver Ins. Co. v. Ryba, Id. at 638.

In deciding the issue, the court made the following analysis:

> Despite this clear limitation on coverage, Northern asks us to construe this contract to require Preserver to provide unlimited employers' liability coverage as if the policy were underwritten in New York, where the New York Manual requires that

> insurance policies provide unlimited employers' liability coverage. Northern's argument rests first on the fact that New York is included as an Item 3.C. state, and second on the provision of "Part Three—Other States Insurance" that if work begins in a 3.C. state "all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page." In short, according to Northern, being listed as a 3.C. state is the same as being listed as a 3.A. state, and East Coast is entitled to coverage as if the policy were underwritten in New York. This argument misapprehends the plain language of the policy as well as the Manual.
>
> Including New York as "a 3.C. state" means what the policy says it means: that if an accident occurs in such a state, all provisions of the policy will apply. This includes the stated limitation of coverage for employers' liability insurance to $100,000 per accident.
>
> Nothing in the policy suggests that this cap evaporates when an accident occurs in a 3.C. state. Nor, significantly, does Part Two provide—as Part One does—that employers' liability insurance will conform to the workers' compensation laws of the state where the injury occurs. This conclusion is fortified by Part Two's "Exclusions," stating that this portion of the policy does not cover "any obligation imposed by a workers compensation . . . or any similar law." Plainly, nothing in the insurance contract supports Northern's argument for unlimited liability.
> Preserver Ins. Co. v. Ryba, id. at 642-643.

The same analysis applies here; even if New York is a 3.C. State that should be treated as though it were a 3.A. State, the express financial liability limits of the policy apply.

Plaintiffs attempt to distinguish Preserver Ins. Co. v. Ryba by arguing because Twin City was "on notice" of work being performed in New York, a different result should ensue. In making this argument, plaintiffs rely on certain *obiter dicta* in Preserver Ins. Co. v. Ryba, that there was no New York endorsement in the policy at issue there because the insurer

was never informed that work was being performed in New York. The precise language is as follows:

> The Preserver policy lacks any New York endorsements, precisely because New York is an Item 3.C. state. Here, even if Preserver is bound by the New York Manual, its employers' liability insurance for Ryba's injury should be capped at $100,000 because Preserver was not informed that East Coast was operating in New York. That being so, Preserver was not required to move New York from a 3.C. state to a 3.A. state, and not required to add an endorsement providing unlimited employers' liability insurance for injuries in New York. Preserver Ins. Co. v. Ryba, Id. at 644-645.

This language in the decision does not support plaintiffs arguments. Preserver Ins. Co. v. Ryba does not hold that notice alone would automatically trigger unlimited liability coverage under the policy. As Twin City points out, once they are notified that different coverage is required, with increased potential liability, they would have the right to negotiate premiums for any New York endorsement that would be required. This is a matter of basic contract law and common sense.

Even if notice alone would trigger increased obligations on the part of the insurer under the policy, the "notice" claimed in this case did not rise to that level. There is no evidence presented that Heatley notified Twin City that it would be working in New York State. That conclusion is reached even considering Thomas Heatley's deposition as part of the record on this summary judgment motion. That conclusion is reached even considering that Carey, Richmond & Viking Insurance ("CRV") is Twin City's agent and that notice to CRV is notice to Twin City.

Thomas Heatley telling Twin City's agent, CRV, that it would be doing jobs all over

New England in 1994 (7 years before the accident) is insufficient notice, because New York is not part of New England. Heatley asking CRV whether his coverage was national in 1998 (3 years before the accident) does not identify any actual work that will take place in New York State. Thomas Heatley's statement that he believed that CRV "knew" about the "possibility" of work in New York is not even admissible evidence, because Mr. Heatley cannot testify about what was in someone else's mind. In any event, when asked point blank at this deposition whether he informed Twin City that he was working in New York, Mr. Heatley said no.

Thus, the only claim that Twin City "knew" about the work performed in New York occurred only in the context of telling it about Bartlett's accident, after it had already occurred. That could not have been what the parties reasonably intended by the requirement of notice in Part three, B of the policy which provides "Notice: Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page." Notice of the accident did not inform Twin City that Heatley was doing work in New York or seeking a New York endorsement for all of Heatley's New York work. It was simply notice of a particular accident that occurred in New York.

Part 130 Sanctions

Defendant also moves for sanctions against plaintiffs for even having brought this action. It claims that Preserver Ins. Co. v. Ryba is dispositive of the issues and, therefore, this action is frivolous. Pursuant to 22 NYCRR §130-1, sanctions can be imposed when conduct complained of is "frivolous." The Rules define conduct as frivolous if:

> Conduct is frivolous within the meaning of Part 130 if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

The decision to impose or not impose sanctions lies within the court's sole discretion Liddle & Robinson v. Shoemaker, 276 A.D.2d 335 (1st Dept. 2000). In deciding whether they are to be imposed, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (Uniform Rules of Trial Court Part 130.1-1 et seq).

The court denies the motion for sanctions because the conduct complained of was not frivolous within the meaning of the court rule. The fact that a party dos not ultimately prevail in an action does not necessarily mean that the action was frivolous. Gelobter v. Fox, 80 A.D.3d 829 (2nd Dept. 2011). At bar, the plaintiffs seek to claim that they fall within an exception to Preserver Ins. Co. v. Ryba. While the court does not agree with their position, it is not a sanctionable event.

CONCLUSION

In accordance with the foregoing, it is hereby:

ORDERED that the plaintiffs', Transcontinental Insurance Company, American Casualty Company of Reading, PA, International Storage Systems, Inc. and Heatley Installations, Inc., motion for summary judgment, against defendant, Twin City Fire

Insurance Company, is denied; and it is further

ORDERED that defendant, Twin City Fire Insurance Company's, cross-motion for summary judgment dismissing plaintiffs', Transcontinental Insurance Company, American Casualty Company of Reading, PA, International Storage Systems, Inc. and Heatley Installations, Inc., complaint, is granted; and it is further

ORDERED, DECLARED AND ADJUDGED that the plaintiffs', Transcontinental Insurance Company, American Casualty Company of Reading, PA, International Storage Systems, Inc. and Heatley Installations, Inc., complaint is hereby dismissed; and it is further

ORDERED, DECLARED AND ADJUDGED that defendant, Twin City Fire Insurance Company, is only obligated pursuant to the terms of policy number 02WECGO0502 to pay One Hundred Thousand Dollars ($100,000), for the accident involving Mark Bartlett occurring on November 12, 2001; and it further

ORDERED the defendant, Twin City Fire Insurance Company's, cross-motion for sanctions is denied; and it further

ORDERED that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

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

Dated: New York, NY
February 7, 2012

So Ordered:

Hon. Judith J. Gische, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).