

**Matter of Cosmopolitan Ins. Co. v Blackman  
Plumbing Supplies, Inc.**

2012 NY Slip Op 31194(U)

May 1, 2012

Supreme Court, New York County

Docket Number: 42638/80

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 042638/1980  
COSMOPOLITAN MUTUAL INS.CO  
vs.  
REED, CORNELIA  
SEQUENCE NUMBER : 016  
RESTORE ACTION TO CALENDAR

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

is decided in accordance with the annexed decision.

*g*

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MAY - 2 2012

MOTION DEPARTMENT OFFICE  
NYS SUP. CT. CLERK'S OFFICE - CIVIL

**FILED**

MAY 07 2012

Dated: 5/11/12

NEW YORK  
COUNTY CLERK'S OFFICE CK, 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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
In the Matter of the Liquidation of

COSMOPOLITAN INSURANCE COMPANY,  
  
-against-

Index No. 42638/80  
  
**DECISION/ORDER**

Claim of: Blackman Plumbing Supplies, Inc.  
-----X

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for :

\_\_\_\_\_ Papers

Numbered **FILED**  
  
MAY 07 2012  
  
NEW YORK  
COUNTY CLERK'S OFFICE

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

The Superintendent of Finance of the State of New York (f/k/a the Superintendent of Insurance), as Liquidator (the "Superintendent" or "Liquidator") of Cosmopolitan Insurance Company ("Cosmopolitan"), hereby moves to restore this matter to active status and upon restoration, moves for an order disallowing the remaining claims of the claimant Blackman Plumbing Supplies, Inc. ("Blackman") and releasing the \$6 million which, pursuant to court order, was to be made available for those claims and finally, dismissing those claims pursuant to CPLR §3126 and Insurance Law Article 74 based upon the failure of claimant Blackman to provide proof of their claims in liquidation. Blackman cross-moves for an order declaring that the Liquidator is obligated to reimburse Blackman for any cost incurred in defending the underlying personal injury actions where exposure to asbestos has been alleged to have occurred

between 1975 and 1980, to indemnify Blackman for any liability on these asbestos claims and to reimburse Blackman for its fees and costs incurred to date in defending and settling the personal injury actions for the claims submitted to the Liquidator. For the reasons set forth more fully below, the Liquidator's motion is granted and Blackman's cross-motion is denied.

The relevant facts are as follows. Blackman is a seller and/or installer of plumbing materials and was issued certain liability insurance policies by Cosmopolitan, a now-insolvent insurer. Blackman has been named as a defendant in hundreds of lawsuits as a result of alleged exposure to asbestos. The relevant policies here were issued from 1975-1980. Neither party has found copies of the policies other than a poor microfiche copy of a policy providing coverage from September 11, 1976 through September 11, 1977. The Liquidator has long ago reserved his rights with respect to coverage on the ground that Blackman failed to provide copies of the insurance policies under which they claim.

The procedural history is as follows. By order dated October 24, 1980, this court approved the liquidation of Cosmopolitan. The order authorized the Liquidator to require the claimant to file proofs of claim and further require such additional "information as the Liquidator deems necessary to determine the validity of the claim." Certain claims by Blackman were subsequently allowed but there are hundreds more pending.

On October 24, 2000, the Liquidator petitioned for an Order setting a bar date which would bar creditors and policy holders from presenting new claims after a certain date. By order dated October 15, 2002, the court set a bar date of September 30, 2002. That order also required that the New York Property/Casualty Insurance Security Fund make \$6 million available for the payment of such claims as may subsequently be determined to be covered under the relevant

policies. The order also directed the Superintendent to search for the relevant insurance policies. Along with the instant motion, the Liquidator submits an affidavit stating that such a search was conducted and no such policies were found.

The Liquidator's motion is granted because Blackman fails to establish it that the claims fall within the scope of the alleged insurance policies. "In a dispute over insurance coverage, the insured bears the initial burden of establishing that the loss claimed falls within the scope of the policy." *Bread & Butter, LLC v Certain Underwriters at Lloyd's, London*, 78 A.D.3d 1099 (2d Dept 2010). Without producing the relevant policies, Blackman is unable to prove that it had coverage for the claims at issue. Although the parties agree that there were policies in effect between September 11, 1975 and October 17, 1980 and that those policies did not contain an asbestos exclusion, those facts are insufficient to establish coverage for the relevant claims. Coverage cannot be determined without the policies. Blackman's argument that the language of the policy is construed against the insurer is correct, but that argument assumes that there is language available to construe. Without the policies, Blackman cannot show that it had coverage for the relevant type of injuries during the relevant time period.

Accordingly, the Liquidator's motion is granted. This motion is hereby restored to active status and, upon restoration, the remaining claims against Blackman are disallowed and dismissed. In addition, the New York Property/Casualty Insurance Security Fund is ordered to release the \$6 million that was to be made available for those claims. Blackman's cross-motion seeking a declaration that the Liquidator is obligated to reimburse Blackman for any cost incurred in defending the underlying personal injury actions where exposure to asbestos has been alleged to have occurred between 1975 and 1980, to indemnify Blackman for any liability on

these asbestos claims and to reimburse Blackman for its fees and costs incurred to date in defending and settling the personal injury actions for the claims submitted to the Liquidator is denied. This constitutes the decision, order and judgment of the court.

**FILED**

Dated: 5/1/12

Enter: PK MAY 07 2012  
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