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

PRESENT: LOUIS B. YORK PART 2
J.S.C. Justice

Index Number : 104141/2011
200 FIFTH AVENUE OWNER, LLC
vs.
NEW HAMPSHIRE INSURANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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).

Dated: 6/5/12

LBY
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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200 FIFTH AVENUE OWNER, LLC and STRUCTURE TONE, INC.,

Plaintiffs,

Index No.: 104141/11

-against-

DECISION

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant.

LOUIS B. YORK, J.:

Defendant insurer moves, pursuant to CPLR 3212, for an order: (1) declaring that plaintiff 200 Fifth Avenue Owner, LLC (200 Fifth) does not qualify as an additional insured under defendant's policy; (2) declaring that defendant's policy is a true excess policy that will only be triggered upon the exhaustion of plaintiff Structure Tone, Inc.'s (Structure Tone) primary policy issued by nonparty AIG; (3) and declaring that defendant has no duty to defend or indemnify plaintiffs in the underlying personal injury action which was settled for $1.7 million, which is within the limits of the policy issued by AIG.

Plaintiffs cross-move, pursuant to CPLR 3212, for an order: (1) declaring that 200 Fifth and Structure Tone are additional insureds under defendant's policy; (2) declaring that defendant

is to provide coverage after the Interstate Insurance Company (Interstate) policy and before the AIG policy; and (3) declaring that defendant is to defend and indemnify plaintiffs in the underlying personal injury action.

BACKGROUND

The underlying personal injury action was commenced by Matthew Webber (Webber) on August 25, 2008, for an accident that occurred on July 28, 2008 at a construction site owned by 200 Fifth. Webber was employed at the time by Empire City Iron Works (Empire City), and was moving and erecting steel at the site when the incident took place. Webber fell off a scaffold, thereby sustaining serious spinal injuries. His action named 200 Fifth and Structure Tone as co-defendants.

On the date of the accident, Structure Tone was insured by AIG under a general commercial liability insurance policy, with a $2 million limit per occurrence. Empire City was insured under a primary general commercial liability insurance policy issued by Interstate, with limits of $1 million per occurrence, and under an umbrella insurance policy issued by defendant, with limits of $5 million per occurrence.

In response to AIG's tender letter dated September 19, 2008, Interstate disclaimed coverage in letters dated October 16 and

October 17, 2008 to Empire City and AIG respectively. Motion, Ex. C.

On January 13, 2009, 200 Fifth and Structure Tone commenced a third-party action in the underlying lawsuit against Empire City, asserting contractual indemnity claims. Motion, Ex. D. Thereafter, 200 Fifth and Structure Tone commenced the instant declaratory judgment action against defendant, seeking a declaration that they are additional insureds under defendant's policy, entitling them to defense and indemnification in the underlying personal injury action.

The underlying personal injury action was settled by 200 Fifth and Structure Tone for $1.75 million.

Defendant maintains that, under the terms of its umbrella policy, 200 Fifth does not qualify as an additional insured, because Empire City, defendant's named insured, did not enter into any written agreement with 200 Fifth requiring Empire City to name 200 Fifth as an additional insured. Moreover, defendant claims that its policy is a pure excess policy and does not take over when the primary insurer disclaims coverage based on a late notice, and, in addition, that its policy would not come into play until the $2 million AIG limitation has been exhausted, which did not occur in the instant matter.

Empire City's general commercial liability insurance policy with Interstate defines "additional insureds" as:

> 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.

Defendant's umbrella policy issued to Empire City defines "insured" to include any person or organization included in the Interstate policy as an additional insured. Motion, Ex. H. Pursuant to the "Other Insurance" provision of defendant's policy, defendant agreed to the following:

> If other valid and collectible insurance applies to a loss that is also covered by this policy, this policy will apply excess of the other insurance. However, this provision will not apply if the other insurance is specifically written to be excess of this policy.

In its "Limits of Insurance" section, defendant's policy states, in pertinent part:

> D. If the applicable Limits of insurance of the policies listed on the Schedule of Underlying Insurance or of other insurance providing coverage to the Insured are reduced or exhausted by payment of one or more claims that would be insured by your policy, we will:
>
> 1. In the event of reduction, pay in excess of the reduced underlying Limits of insurance; or
> 2. In the event of exhaustion of the underlying

> Limits of insurance, continue in force as underlying insurance.
>
> E. Retained Limit
>
> We will be liable only for that portion of damages in excess of the Insured's Retained Limit which is defined as the greater of either:
>
> 1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable Limits of any other underlying insurance providing coverage to the insured; or
> 2. The amount stated in the Declarations as Self Insured Retention as a result of any one Occurrence not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other underlying insurance providing coverage to the Insured; and then up to an amount not exceeding the Each Occurrence Limit as stated in the Declarations.

According to the provisions of the AIG policy issued to Structure Tone, the "Other Insurance" provision states:

> The insurance is excess over any of the other insurance whether primary, excess, contingent or on any other basis:
>
> (1) Unless such insurance is specifically purchased as excess of this policy, or
>
> (2) You are obligated by contract to provide primary insurance.

On October 29, 1993, Empire City entered into a written agreement with Structure Tone wherein Empire City was obligated to purchase $4 million in general commercial liability insurance and to name Structure Tone as an additional insured on such policy. This agreement did not require Empire City to name 200 Fifth as an additional insured. The purchase orders between

Structure Tone and Empire City for the job site that was the subject of the underlying personal injury action require Empire City to name Structure Tone as an additional insured under its insurance policies.

It is defendant's contention that Empire City entered into two written agreements relating to the instant matter: the first agreement, entered into with Structure Tone in 1993, obligated Empire City to procure $4 million in insurance and name Structure Tone as an additional insured; and the second, the purchase orders for the work relating to the underlying personal injury action, also only required Structure Tone to be named as an additional insured. According to defendant, there is no written agreement between Empire City and 200 Fifth requiring that 200 Fifth be named as an additional insured under Empire City's policies. Hence, since Empire City was never obligated to, nor did, name 200 Fifth as an additional insured, defendant is not obligated to defend or indemnify 200 Fifth.

With respect to Structure Tone, defendant asserts that, as a pure excess insurance policy, it does not "drop down" to become the primary policy where the primary insurer disclaims coverage. Defendant claims that it is a true excess policy, which does not come into play until and unless the primary policy is exhausted.

In opposition to the instant motion, and in support of their cross motion,[1] 200 Fifth and Structure Tone argue that, pursuant to its contract with Structure Tone, Empire City is:

> bound to Structure Tone for the performance of the Work in the same manner as Structure Tone is bound to the Owner [200 Fifth] under Structure Tone's contract with the Owner.

As a consequence, 200 Fifth maintains that it is an additional insured under defendant's policy with Empire City.

In addition, 200 Fifth and Structure Tone claim that the AIG policy is excess over the Interstate and defendant's policies, based on the language of the AIG policy quoted above. Therefore, even though AIG disclaimed coverage, its coverage was excess coverage and defendant's policy takes over.

Plaintiffs argue, with respect to the priority of coverage, that the AIG policy states that it is excess coverage over any other policy issued for the same event, unless such other policy is specifically stated to be excess over AIG's policy. It is plaintiffs' position that the clause in defendant's policy is, pursuant to Endorsement 4 of defendant's policy, a follow-form insurance, providing coverage after Interstate but before AIG.

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[1] 200 Fifth and Structure Tone have submitted two documents, one in opposition to defendant's motion and one in support of their cross motion; however, the arguments appearing in these documents are virtually the same, and the court will discuss them collectively.

Endorsement 4 of defendant's policy states:

> PERSONAL INJURY FOLLOW-FORM ENDORSEMENT
>
> This insurance does not apply to Personal Injury. However, if insurance for such personal injury is provided by a policy listed in the Schedule of Underlying Insurance:
>
> 3. This exclusion shall not apply; and
> 4. The insurance provided by our policy will not be broader than the insurance coverage provided by the policy listed in the Schedule of Underlying Insurance.
>
> All other terms and conditions of this policy remain unchanged.

Interstate is listed as an underlying insurance policy.

The court notes that the AIG policy was written on March 26, 2008, the AIG policy on July 1, 2008, and defendant's policy, entitled an excess umbrella policy, on July 22, 2008.

Plaintiffs further maintain that defendant's policy states that, if the underlying insurance policy limits are exhausted, it will remain in force as underlying insurance. To plaintiffs, this indicates that defendant's policy must pay before AIG's policy pays.

In opposition and reply, defendant claims that 200 Fifth and Structure Tone's argument that 200 Fifth is an additional insured, based on the above-quoted section of the contract between Empire City and Structure Tone, disregards the provisions of defendant's policy, quoted above, that requires that an

additional insured be a person or entity with whom Empire City has agreed, in writing in a contract, to be included as an additional insured. It is defendant's contention that a general clause mandating that Empire City perform work in a similar manner to that required by Structure Tone under its agreement with 200 Fifth is not a written agreement that specifies that 200 Fifth be named an additional insured. Further, defendant' s policy requires that Empire City make such written commitment to the putative additional insured; in the instant case, no such agreement exists between Empire City and 200 Fifth.

Defendant also claims that, contrary to the opposition argument, the clear language of the AIG policy, quoted above, states that it is not excess insurance coverage if another policy was specifically acquired as excess coverage. As previously noted, defendant's policy was issued after AIG's policy. According to defendant, the clear terms of its policy state that it is excess umbrella coverage, thereby making the AIG policy the primary policy. Furthermore, the fact that the premium for its policy is relatively small ($28,300.00 for $5 million in coverage), provides further evidence that it is an excess insurance 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant's motion is granted and plaintiffs' cross motion is denied.

200 Fifth is not an "additional insured" under defendant's policy.

> By the plain terms of the policies issued, [200 Fifth] is not an additional insured because [Empire City] had no written contracts with [200 Fifth]. Moreover, even if [200 Fifth] were found to be a third-party beneficiary of [Structure Tone's contract with Empire City], that would simply mean that [200 Fifth] has standing to sue [Structure Tone and Empire City] for breach of the

> provisions in those contracts requiring that they procure insurance covering [200 Fifth] as an additional insured. It would not mean that the policies should be rewritten to name [200 Fifth] as an additional insured [internal citation omitted].

Linarello v City University of New York, 6 AD3d 192, 195 (1st Dept 2004).

The clause under consideration in the *Linarello* case is identical to the one in the instant matter, and plaintiffs have failed to adduce any evidence that defendant's policy incorporated the provisions of the contract between Structure Tone and 200 Fifth.

Plaintiffs' argument is that the contract between Empire City and Structure Tone incorporates by reference the contract between 200 Fifth and Structure Tone, thereby rendering Empire City liable under that contract. However, the contract between Empire City and Structure Tone only obligates Empire City to the provisions of the 200 Fifth/Structure Tone contract dealing with the standards of work, not the insurance coverage provisions. Moreover, defendant's policy requires a written contract between Empire City, its named insured, and the entity claiming additional insured status, which does not exist in the case at bar.

The case cited by plaintiffs in support of their position,

Carlisle SoHo East Trust v Lexington Insurance Company, 49 AD3d 272 [1st Dept 2008]), is distinguishable from the instant matter. In that case, the subcontract agreement was specifically incorporated by reference into the insurance policy, which is not the situation here. Moreover, the policy under scrutiny in *Carlisle* stated that an "additional insured" would include "any person or entity that is required to be so named in a covered written contract with [the named insured]." *Id.* at 272. In the case at bar, to be considered an additional insured, 200 Fifth would need to have a written contract directly with Empire City, which it did not have.

As a consequence of the foregoing, the court concludes that 200 Fifth is not an additional insured under defendant's policy with Empire City and, therefore, is not entitled to the relief that it seeks.

The court also finds that defendant has no duty to defend or indemnify Structure Tone, because its policy is excess over the Interstate and AIG policies, whose limits have not been exhausted.

The court finds plaintiffs' initial argument, that defendant's policy "drops down" to become primary coverage because of Interstate and AIG's disclaimer, to be unpersuasive.

Courts have consistently held that an excess insurance policy's coverage will not drop down just because the primary insurer becomes insolvent. *Ambassador Associates v Corcoran,* 168 AD2d 281 (1st Dept 1990), *affd* 79 NY2d 871 (1992); *Zurich-American Insurance Company v Mead Reinsurance Corp.*, 161 AD2d 403 (1st Dept 1990). In other words, simply because the primary insurer is unable to pay does not automatically trigger the excess insurer's obligations.

In the case at bar, the limits of coverage under the terms of the primary insurance policy were not reached; the limits were $2 million and the underlying personal injury action settled for $1.75 million. Since defendant's policy is excess to the primary policy, and those limits must be exhausted before defendant is required to contribute under the terms of its policy, plaintiffs' "drop down" argument is unavailing. *Village of Brewster v Virginia Surety Company,* 70 AD3d 1239 (3d Dept 2010); *see also Federal Insurance Company v Estate of Gould,* 2011 WL 4552381, 2011 US Dist LEXIS 114000 (SD NY 2011).

The court is also unpersuaded by plaintiffs' arguments regarding defendant's follow-form endorsement.

An excess policy may be written in two forms: as a stand-alone policy or as a policy that 'follows form'

> ... [A] follows form excess policy incorporates by reference the terms of the underlying policy and is designed to match the coverage provided by the underlying policy. In the event of a conflict in terms between a following form excess policy and primary policy, the terms of a following form excess policy control to the extent that the coverage is invoked. Following form excess policies also commonly contain unique provisions that the underlying primary policy does not contain, such as additional exclusions or additional coverage.

23-145 Holmes' Appleman on Insurance 2d ed § 145.1 (2008).

> An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage (including a given policy's priority vis-à- vis other policies) is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage. As the Court of Appeals has stated, New York law 'recognize[s] the right of each insurer to rely upon the terms of its own contract with its insured'.

Bovis Lend Lease LMB, Inc. v Great American Insurance Company, 53 AD3d 140, 145 (1st Dept 2008).

In the present case, defendant's follow form provision states that it will only apply to claims based on personal injuries if the underlying policy, in this case, the Interstate policy, provides for such coverage, but that defendant's coverage will be no broader than that of the underlying policy. In no way does defendant's follow form provision state that it will become a primary insurer or that its coverage comes into play prior to AIG's. As stated above, the terms of the insurance policy that

has a follow form provision prevails over the terms of the policy whose form it follows.

Furthermore,

> [a]n umbrella insurance policy provides the insured with 'final tier ... coverage at a premium reduced to reflect the lesser risk to the insurer.' '[U]mbrella coverages ... are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses' [internal citations omitted].

Bovis Lend Lease LMB, Inc. v Great American Insurance Company, 53 AD3d at 148.

Based on the terms of the insurance policies under scrutiny in the instant action, the court concludes that defendant's policy, based on its provisions and minimal premiums, is a true final tier policy whose obligations will not come into play until the other policies' coverage has been exhausted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion is granted; and it is further

ADJUDGED and DECLARED that plaintiff 200 Fifth Avenue Owner, LLC does not qualify as an additional insured under defendant's policy; and it is further

ADJUDGED and DECLARED that defendant's policy is a true

excess policy that will only be triggered upon the exhaustion of plaintiff Structure Tone, Inc.'s primary policy issued by AIG; and it is further

ADJUDGED and DECLARED that defendant has no duty to defend or indemnify plaintiffs in the underlying personal injury action; and it is further

ORDERED that plaintiffs' cross motion is denied.

Dated: 6/5/12

ENTER:

Louis B. York, J.S.C.

LOUIS B. YORK
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).