[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 104607/2007
SPECTOR, LINDA

vs.

CUSHMAN & WAKEFIELD
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT

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). _____

FILED

JUN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant Citibank's motion for an order pursuant to CPLR §3212 directing defendant/third-party defendant/second third-party plaintiff One Source Facility Service Inc. to pay Citibank's attorney's fees and costs incurred in defending the underlying personal injury action, within the $500,000 policy retention limit, is granted; and it is further

ORDERED that Citibank and One Source Facility Service Inc. shall appear for a hearing to determine the reasonable amount of Citibank's attorneys' fees, at Part 35, Room 438, 60 Centre Street, New York, New York, on **July 19, 2012, at 10:00 a.m.**; and it is further

ORDERED that One Source's cross-motion is granted to solely to the extent that One Source Facility Service Inc. and Golden Plow shall appear for a hearing on **July 19, 2012, at 2:15 p.m.** as to the amount of damages incurred in defending this action, including the reasonableness of the attorney's fees and costs, within the limits of $500,000 self-insured retention in One Source's insurance policy; and the cross-motion is otherwise denied; and it is further

ORDERED that counsel for One Source Facility Service Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 6/12/2012

HON. CAROL EDMEAD, J.S.C.

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

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 35

----------X

LINDA SPECTOR and PAUL SPECTOR,

Plaintiffs,

-against-

CUSHMAN &WAKEFIELD, INC., CITIBANK, R.S. STUART, OUTDOOR INSTALLATION LLC, d/b/a/ SPRING SCAFFOLDING, ONE SOURCE FACILITY SERVICES INC. and GOLDEN PLOW LLC,

Defendants.

----------X

CITIBANK, NA,

Third-Party Plaintiff,

-against-

ONE SOURCE FACILITY SERVICES, INC.,

Third-Party Defendant.

----------X

ONE SOURCE FACILITY SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

GOLDEN PLOW, LLC,

Second Third-Party Defendant.

----------X

Index No. 104607/07

DECISION/ORDER

Third-Party
Index No. 590275/08

Second Third-Party
Index No. 590616/08

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action by plaintiffs Linda Spector ("Linda") and Paul Spector (collectively, "plaintiffs"), defendant/third-party plaintiff Citibank moves for an order pursuant to

CPLR §3212 directing defendant/third-party defendant/second third-party plaintiff One Source Facility Service Inc. ("One Source") to pay Citibank's attorneys' fees incurred in plaintiffs' personal injury action (the "Spector litigation"), and to schedule a referee's hearing to determine the amount.

One Source opposes the motion and cross-moves for partial summary judgment directing defendant/second third-party defendant Golden Plow, LLC ("Golden Plow") to pay to One Source all reasonable attorneys' fees, and any verdict or settlement paid on One Source's claim for breach of the contract obligation to procure insurance.

Background Facts

Plaintiffs commenced this action for injuries Linda allegedly sustained on February 14, 2006 when she fell on black ice on a sidewalk abutting the premises owned by Citibank on First Avenue in New York. Citibank previously retained One Source to perform maintenance of the premises, including snow and ice removal, who in turn, subcontracted its snow removal duties at the subject location to Golden Plow.

Following the completion of discovery, Citibank, One Source, and Golden Plow each moved for summary judgment to dismiss the complaint and all claims asserted against them. On January 22, 2010, this court granted said parties' motions and dismissed the complaint and all cross-complaints as against them (the "January 2010 Order"). Upon plaintiffs' appeal, the First Department reversed the grant of summary judgment to Citibank.

Thereafter, as Citibank revived its third-party claims against One Source,[1] (and One

[1] The January 2010 Order did not address the merits of the parties' cross-claims and third-party claims for breach of contract and contractual indemnification. The Court stated that the contractual indemnification and

Source revived its second third-party claims against Golden Plow) both Citibank and One Source moved for summary judgment on those claims. By order dated December 16, 2011 (the "December 2011 Order"), this court denied One Source's motion to dismiss Citibank's contractual indemnification claim against it and also denied Citibank's cross-motion on its contractual indemnification claim against One Source, based on issues of fact as to Citibank's negligence and as to whether indemnification is triggered in this case. However, the Court granted the branch of Citibank's motion against One Source for breach of the obligation to procure insurance, on the ground that the policy procured by One Source had a $500,000 self-insured retention.[2]

On February 7, 2012 One Source filed a notice of appeal of the December 2011 Order as to *inter alia*, the issues of whether One Source has an obligation to indemnify Citibank, whether One Source breached insurance procurement obligation to Citibank, and whether Golden Plow is obligated to contractually indemnify One Source. Said appeal is currently pending.

In its motion for attorneys' fees, Citibank argues that it is entitled to reasonable attorneys' fees expended in the Spector litigation because it is a self-insured entity, [*i.e.*, does not have an insurance policy], and thus, the measure of damages is all monies Citibank expended in this case, namely, the amount of any verdict or settlement paid by Citibank and reasonable attorneys' fees.

---

footnote 1 contd.

breach of contract claims were moot as a result of the dismissal of the complaint (*Spector v Cushman & Wakefield, Inc.*, 2010 WL 363266 [Sup Ct, NY County 2010], *revd* 87 AD3d 422 [1st Dept 2011], *n 1*). However, in its December 2011 Order, the court, upon further review, concluded that contractual indemnification provisions at issue could be triggered even in the absence of negligence by either OneSource or Golden Plow.

[2] The court also held that Golden Plow was entitled to dismissal of One Source's contractual indemnification claim against it, as there was no evidence that Linda's accident was caused by Golden Plow's breach of "the Agreement or acts or failures to act by [Golden Plow]" (pg. 16) and that One Source was entitled to partial summary judgment on its failure to procure insurance claim against Golden Plow (pg. 17).

In opposition, One Source argues that the court should deny Citibank's motion as premature because of the pending appeal with respect to that portion of the December 2011 Order which is the subject of this motion.

In support of its cross-motion for summary judgment on its insurance procurement claim, One Source argues that the December 2011 Order granted One Source summary judgment on its insurance procurement claim against Golden Plow and stated that because One Source had its own insurance, its potential recovery for Golden Plow's breach was "limited to the out of pocket expenses not covered by its own insurance." However, argues One Source, to the extent that the its policy with American Home Assurance Company contains a self-insured retention endorsement of $500,000, One Source has no insurance coverage until that amount is exhausted. One Source's out of pocket expenses include the amounts of any verdict against or settlement made on behalf of One Source and attorneys' fees in connection with the Spector litigation within the limits of the $500,000 retention. And, if the court grants Citibank's motion, then the court should direct Golden Plow to pay directly to Citibank any damages judgment rendered against One Source.

Golden Plow opposes One Source's cross-motion, arguing that it is not obligated to contractually indemnify One Source for any verdict against or settlement made on behalf of One Source since the January 2010 Order granted summary judgment on liability in favor of Golden Plow, finding that plaintiff's incident did not arise from any negligence or breach of contract on the part of Golden Plow. Furthermore, the December 2011 Order, *inter alia*, dismissed One Source's contractual indemnification claim against Golden Plow. And, while the court granted One Source's summary judgment on its insurance procurement claim against Golden Plow, the

court, relying on the Court of Appeals' case *Inchaustegui v 666 5th Avenue Limited Partnership* (96 NY2d 111, 725 NYS2d 627 [2001]), expressly limited One Source's potential recovery to the out of pocket expenses not covered by any insurance, which do not include the amounts of a verdict or settlement, or attorneys' fees.

In addition, the indemnification provision in the Master Subcontract Agreement between One Source and Golden Plow is void and unenforceable under the General Obligations Law §5-322.1, and One Source is barred from asserting contractual indemnification and breach of contract claims based on *res judicata*, collateral estoppel, and the law of the case.

In its reply, Citibank argues that even though the Court's December 2011 decision is currently being appealed, there is no stay in place. And until there is such a stay, a hearing should be held as to the attorneys' fees. And, in opposition to One Source's cross-motion, Citibank argues that One Source, and not Golden Plow, is obligated to directly reimburse Citibank for One Source's breach of contract to procure insurance.

One Source argues, in response to Golden Plow's opposition, that contractual indemnification is not at issue in this motion. And, to the extent that One Source has no insurance until the self-retention limit is exhausted, the measure of its damages for Golden Plow's breach is not governed by *Inchaustegui* since *Inchaustegui*'s limitation on the measure of the damages to out-of-pocket expenses applies where the party intended to be insured has other [substitute] insurance. Further, One Source has no insurance until the retention endorsement in its policy is satisfied. The December 2011 Order specifically found that, in relation to Citibank, One Source breached its obligation to procure insurance [for the specified amount] *because the policy contained a $500,000* retention, and thus, One Source was required to *pay out $500,000*

before the policy paid any benefit. Thus, if the court grants Citibank's motion, it should also grant One Source's motion and direct Golden Plow to pay amounts, if any, that One Source is found to be obligated to pay to Citibank.

Discussion

1. Citibank's Motion

It is well established that where there is a breach of an agreement to procure insurance, and the non-breaching party has no substitute insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*see Kinney v Lisk Co.* [76 NY2d 215, 217, 557 NYS2d 283 [1990]; *Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999]). However, where the party intended to be insured has its own insurance policy covering the loss, the measure of damages is governed by the principle annunciated by the Court of Appeals in *Inchaustegui v 666 5th Avenue Limited Partnership* (96 NY2d 111, 725 NYS2d 627 [2001]).

In *Inchaustegui*, where a tenant, in violation of a lease agreement, failed to procure insurance on behalf of its landlord, the Court of Appeals held that "[a] landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant" (*id.*, at 114) (citations omitted). The Court held that because the landlord in that case procured its own insurance and therefore "sustained no loss beyond its out-of-pocket costs, [. . .] it may not now look to the tenant for the full amount of the settlement and defense costs in the underlying tort claim." Thus, the landlord's damages were limited to any out-of-pocket expenses, such as premiums and any additional costs incurred, including deductibles, co-payments and rate

increases in the landlord's insurance (96 NY2d 111).

The *Inchaustegui* Court placed great significance upon the landlord having procured its own insurance, and acknowledged that had the landlord been left uninsured, it could have recovered "*the full amount of the underlying tort liability and defense costs from the tenant*" (*see Murray v New York City Transit Authority*, 20 Misc 3d 5, 862 NYS2d 706, [NY Sup Ct, App Term 2008], *citing Inchaustegui*, at 114).

This principle has been applied by the courts in breach of contract actions based on a subcontractor's failure to procure insurance on behalf of a general contractor [or an owner], (*Amato v Rock-McGraw, Inc.*, 297 AD2d 217, 746 NYS2d 150 [1st Dept 2002] (limiting the amount and type of damages that may be recovered by a general contractor for its subcontractor's breach of obligation to procure insurance); *Wong v New York Times Co.*, 297 AD2d 544, 747 NYS2d 213 [1st Dept 2002]; *Sheppard v Blitman/Atlas Building Corp.*, 288 AD2d 33, 734 NYS2d 1 [2001]; *Trokie v York Preparatory School,* 284 AD2d 129, 726 NYS2d 37 [1st Dept 2001]).

In this case, it has been held that One Source failed to obtain the requisite insurance for Citibank's benefit. In its previous decision, this court found, based on a fair and reasonable interpretation of the contract consistent with the parties' purpose and intent, that One Source breached the insurance procurement provision by obtaining a policy with a $500,000 self-insurance retention. As such, a payment of $500,000 must be made before any benefit is paid [either to One Source or to Citibank as an additional insured] (see the December 2011 Order).

Unlike the landlord in *Inchaustegui*, Citibank has not obtained its own insurance policy.

And, the insurance policy, issued to One Source by American Home Assurance Company for the period June 30, 2005 through June 30, 2006,[3] which names Citibank as an additional insured, contains the self-insured retention endorsement which exposes Citibank to as much as $500,000 in expenses arising from the underlying personal injury action.

A *self-insured retention* represents a dollar amount of loss that is "retained" by the insured and not covered by insurance (*see*, Flory & Walsh, "Know Thy Self-Insurance (And Thy Primary & Excess Insurance)," 36 ABA Tort & Ins. L.J. 1005 [2000-2001]). Where a self-insured retention exists, the insured must exhaust the amount retained, before the insurer will respond to the loss, thereby rendering the insured liable for all costs, *including defense* and indemnity, *up to the applicable amount* (*see*, Flory & Walsh, *supra*; Bernstein, "Rearview Mirror Explains EPLI Shifts," National Underwriter Prop. & Cas.-Risk & Benefits Mgt., Vol. 106, No. 20, p. 20 [5/20/02]).[4] In this regard, the policy states that the insurer has the "right but not the duty to defend any 'suit' seeking those damages"(exhibit D to One Source's cross-motion).

Because of One Source's breach, Citibank actually has no insurance for any loss amount within the $500,000 self-insured retention. Therefore, Citibank is entitled to a judgment of

---

[3] The self-insured retention endorsement in the policy provides as follows:

"a. We will pay on behalf of the Insured those sums in excess of the 'Retained Limit' that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

***

"The "Retained Limit" [. . .] is $500,000 per 'occurrence' or offense" (exhibit D to One Source's cross-motion).

[4] In contrast to a *self-insured retention*, where a *deductible* exists, the insurer is usually contractually obligated to defend and pay for all costs until the claim is settled or adjudicated, at which time, the insurer deducts the applicable amount from the total defense costs and indemnity paid on behalf of the insured (*see*, Flory & Walsh, *supra*; *Bernstein, supra*). Where the claim amount is within the deductible, the insured must refund the amount to the insurer (*see*, Bernstein, *supra*; *see, also, Tokio Marine & Fire Ins. Co. v Insurance Co. of N. Am.*, 262 AD2d 103 [1st Dept 1999]).

liability against One Source for damages within the $500,000 limit for attorney's fees and costs Citibank incurred in defending the action (*see Murray v New York City Transit Auth.*, 20 Misc 3d 5, 862 NYS2d 706 [NY Sup Ct, App Term 2008], *citing Inchaustegui*, at 114; *see also Paljevic v WFC Tower D Co.*, 2002 WL 34705855 (Trial Order) [Supreme Court, New York 2002], *citing Kinney v G.W. Lisk Co.*, 76 NY2d 215; *see also, Federated Mut. Ins. Co. v Ace Hardware Corp.*, 190 F Supp2d 324 [NDNY 2002]).

And, as to any losses exceeding $500,000, Citibank's potential damages will be limited to any out-of-pocket costs that may have been incurred incidental to the policy (*see, Inchaustegui v 666 5th Avenue Limited Partnership*, 96 NY2d 111, 725 NYS2d 627 [2001]; *Wong v New York Times Co.*, 297 AD2d 544, 747 NYS2d 213 [1st Dept 2002]).

It is noted that this Court's previous determination denying Citibank's request for attorneys' fees was based on the attorneys' fees arising from indemnification provision. The December 2011 Order specifically stated that "[b]ecause there are questions of fact as to whether the indemnification provision will be triggered, Citibank's request for reasonable attorneys' fees is denied without prejudice to renewal after trial." However, the attorneys' fees sought herein arise as "damages" incurred as a result of One Source's failure to obtain proper insurance.

Therefore, Citibank's motion is granted and the court directs a hearing to determine the amount of Citibank's attorneys' fees.

2. One Source's Cross-Motion

In its previous Order, this court found that Golden Plow breached its obligation under its contract with One Source to obtain an insurance policy naming One Source as an additional

insured,[5] on the ground that Golden Plow failed to tender an insurance policy in response to One Source's motion. The Court held, however, that since One Source had its own insurance policy, its potential recovery is "limited to out-of-pocket expenses not covered by its own insurance" (the December 2011 Order, p. 17).

One Source argues that its damages resulting from Golden Plow's breach, *i.e.*, the out-of-pocket expenses include any [part of the] amounts of a verdict or settlement and attorneys' fees in connection with the Spector litigation up to the $500,000 retention.

As noted above, since One Source's own insurance requires One Source to pay out $500,000 before any benefit is paid, One Source actually has no insurance for the loss in the amount of up to $500,000. Therefore, as to the losses within that limit, the determination of One Source's damages for Golden Plow's failure to procure insurance is not controlled by *Inchaustegui v 666 5th Ave.* (96 NY2d 111). Instead, such losses are measured by any resulting damages flowing from the breach, which One Source may owe to plaintiff in the underlying tort action (*see Kinney v Lisk Co.*, 76 NY2d at 217, *supra*).

Indeed, absent Golden Plow's breach, One Source would not have been exposed to as much as $500,000 in expenses arising from the underlying tort action, including the defense expenses up to the retained amount (*Paljevic v WFC Tower D Co.*, 2002 WL 34705855 (Trial Order) Supreme Court, New York 2002], *citing Kinney v G.W. Lisk Co.*, 76 NY2d 215). Therefore, One Source is entitled to summary judgment against Golden Plow for its resulting

---

[5] The Master Subcontract Agreement between OneSource and Golden Plow states in pertinent part that "[f]or the purpose of this Agreement, Master Subcontractor will carry the types of insurance in at least the limits, which may be a combination of primary and excess coverage, specified in appended Schedule 18."
Schedule 18 – Master Subcontractor Insurance Requirements provides that:

> "General Liability and Excess Liability MUST be combined limited of $2,000,000, be Blanket contractual cover, broad form property damage, personal injury liability, products/completed operations and independent contractors."
> (Exhibit A to cross-motion).

damages for breach of the obligation to procure insurance, including the attorney's fees and costs it incurred in defending this action, within the limits of $500,000 retention (*see, Kinney v G.W. Lisk Co.*, 76 NY2d 215; *see also, Federated Mut. Ins. Co. v Ace Hardware Corp.*, 190 F Supp2d 324, *supra*).

Golden Plow's arguments that the doctrines of *res judicata*, collateral estoppel preclude One Source's claims for contractual indemnification and breach of contract, are unavailing. *Res judicata* and collateral estoppel are designed to limit or preclude relitigation of matters that have already been determined (*Fusco v Kraumlap Realty Corp.*, 1 AD3d 189, 767 NYS2d 84 [1st Dept 2003] *citing People v Evans*, 94 NY2d 499, 502, 706 NYS2d 678, 727 NE2d 1232). *Res judicata* precludes relitigation of claims, while collateral estoppel precludes relitigation of issues (*id.*). Insofar as the relief that One Source seeks in its cross-motion is reimbursement for the expenses it incurred in defending itself in the underlying tort action as a result of Golden Plow's breach in failing to procure proper insurance, this issue has neither been decided nor litigated in the prior proceeding, so as to be precluded by either *res judicata* or collateral estoppel.

Neither does the doctrine of the law of the case preclude the court from issuing a determination as to the relief sought by One Source in its cross-motion. This doctrine addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation prior to final judgment of the case (*People v Evans*, 94 NY2d 499 [2000]). The prior order stated that "[One Source's] potential recovery from Golden Plow is limited to its out-of-pocket expenses not covered by its own insurance [. . .] since OneSource has its own insurance policy." However, it did not address the issue of the absence of One Source's insurance coverage within the limits of the self-insured retention. Thus, it cannot be said that a [complete] judicial determination has been made as to One Source's measure of damages for Golden Plow's breach

of insurance procurement obligation.

However, One Source cites no New York precedent in support of its proposition that Golden Plow should be directed to pay any amounts owed to One Source directly to Citibank. Thus, this portion of One Source's cross-motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant Citibank's motion for an order pursuant to CPLR §3212 directing defendant/third-party defendant/second third-party plaintiff One Source Facility Service Inc. to pay Citibank's attorney's fees and costs incurred in defending the underlying personal injury action, within the $500,000 policy retention limit, is granted; and it is further

ORDERED that Citibank and One Source Facility Service Inc. shall appear for a hearing to determine the reasonable amount of Citibank's attorneys' fees, at Part 35, Room 438, 60 Centre Street, New York, New York, on **July 19, 2012, at 10:00 a.m.**; and it is further

ORDERED that One Source's cross-motion is granted to solely to the extent that One Source Facility Service Inc. and Golden Plow shall appear for a hearing on **July 19, 2012, at 2:15 p.m.** as to the amount of damages incurred in defending this action, including the reasonableness of the attorney's fees and costs, within the limits of $500,000 self-insured retention in One Source's insurance policy; and the cross-motion is otherwise denied; and it is further

ORDERED that counsel for One Source Facility Service Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: June 12, 2012

Hon. Carol Robinson Edmead, J.S.C.