New York State Ins. Fund v Everest Natl. Ins. Co.
2013 NY Slip Op 33025(U)
December 2, 2013
Sup Ct, NY County
Docket Number: 403198/09
Judge: Richard F. Braun
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN, J.S.C.
Justice

PART 23

Index Number : 403198/2009
NEW YORK STATE INSURANCE FUND
vs.
EVEREST NATIONAL INS. COMPANY, et al.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 6/13/13
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion and cross motion ~~to~~/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1, 1a
Notice of Cross-Motion Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3

Upon the foregoing papers, it is ordered that this cross motion is withdrawn in part, by Stipulation of this date. RL 6/13/13

It is further

ORDERED that the motion is granted to the extent of awarding Plaintiff summary judgment declaring that Defendant Everest National Insurance Company is obligated to afford indemnity to the TBTA, MTA, NYCTA, and City of New York in the amount of $2,000,000, and must reimburse Plaintiff the amount of $1,500,000, and the balance of the cross motion is denied, and it is further ORDERED that the Clerk shall enter judgment accordingly, and the remaining claims are severed and shall continue. This constitutes the decision and order of this Court. See separate Opinion.

Settle judgment in conformity with 22 NYCRR 202.48(a).

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

Dated: New York, New York, November 26, 2013 — [signature], 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~~ JUDGMENT ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

5/D

[* 2]

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

NYSIF
v.
Everest Nat'l Ins. Co. et al.

INDIVIDUAL ASSIGNMENT PART 23

STIPULATION

INDEX NO. 403198/04

MOTION CALENDAR NO.

DATE 6/13/17

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

Everest withdraws only that portion of its cross-motion for summary judgment seeking dismissal of Plaintiff's complaint. All other portions, including but not limited to, the portion seeking a declaration, remain.

Date: 6/13/17

Attorney for Plaintiff

Attorney for Defendant Everest

So Ordered.

Attorney for Defendant

ENTER: _____

J.S.C.

SC-8G (rev 2/86)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

----------X

NEW YORK STATE INSURANCE FUND,

Index No. 403198/09

Plaintiff,

OPINION

-against-

EVEREST NATIONAL INSURANCE COMPANY, LIBERTY INSURANCE UNDERWRITERS, INC., MARIA R. PEREIRA, Administratrix of the Estate of MANUEL PERIERA, Deceased and MARIA R. PEREIRA, Individually,

Defendants.

----------X

RICHARD F. BRAUN, J.:

This is an action for a declaratory judgment. Defendant Everest National Insurance Company (Everest) asserts three counterclaims for declaratory relief. Plaintiff New York State Insurance Fund (NYSIF) moves for summary judgment declaring that defendant was obligated to afford indemnity to nonparties Triboro Bridge & Tunnel Authority (TBTA), Metropolitan Transit Authority, New York City Transit Authority, and the City of New York (together, the additional insureds) in the amount of $2 million for settlement of the underlying action, and that NYSIF is entitled to reimbursement from Everest of $500,000 of the $950,000 that NYSIF paid to settle the underlying action. Defendant Everest cross-moved for summary judgment dismissing the complaint against cross-movant and for an order that plaintiff return $500,000 to cross-movant. The first branch of the cross motion was withdrawn by stipulation.

This action involves a dispute between NYSIF and Everest, two insurers, over whether Everest is obligated to contribute $1 million or $2 million in insurance coverage toward the $3.45 million settlement in an underlying action. Plaintiff's position is that Everest, the excess insurer, was

required to contribute $2 million. Everest contends that its contributory amount was $1 million.

Nonparty El Sol Contracting and Construction Corp. (El Sol) was hired by TBTA to perform work on a bridge project. El Sol entered into a contract with TBTA (the Contract) which required El Sol to procure primary commercial general liability (CGL) insurance in El Sol's name, with a limit of liability of $2 million per occurrence for bodily injury and property damage, and an additional insured endorsement naming the TBTA and the MTA including its subsidiaries and affiliates. El Sol procured a primary CGL policy from Liberty, with a $1 million limit of insurance per occurrence, and an excess commercial liability policy from Everest. El Sol also procured an automobile and employer liability policy from NYSIF.

Most unfortunately, El Sol's employee, the tort victim in the underlying action, fell and died at work, which prompted the underlying action. The additional insureds commenced a third-party action against El Sol for contractual and common law indemnification. The underlying action settled for $3,450,000. Defendant Liberty Insurance Underwriters, Inc. (Liberty) contributed $1 million to the settlement, exhausting the limits of its primary policy. Everest paid another $1,500,000, and NYSIF paid the remaining $950,000 of the total. Everest and NYSIF each reserved the right to litigate against the other concerning which was responsible to pay the third million of the settlement.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012]; *see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27

AD3d 224, 226 [1st Dept 2006]; *see Vega v Restani Constr. Corp.*, 18 NY3d at 503).

"An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy" (*Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 [1st Dept 1998]). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured." (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011].)

> As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. It is well settled that [a] contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion. Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity. If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer

(*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citations and quotation marks omitted, and alterations in original]).

Regarding limits of coverage for additional insureds, the Everest policy provides:

> SECTION II—WHO IS AN INSURED
>
> The following persons and organizations are insured under this insurance:
>
> 1. Any person or organization qualifying as such under the 'first underlying insurance'.

2. Any additional insured qualifying as such under the 'first underlying Insurance', but only:

a) To the extent of the insurance provided the additional insured under 'the first underlying insurance' and not otherwise excluded by this policy; and

b) Where coverage is required to be provided to an additional insured under a contract or agreement. However, the Limits of Insurance afforded the additional insured in this paragraph shall be the lesser of the following:

i. The minimum limits of insurance required in the contract or agreement between you and the additional insured; or

ii. The Limits of Insurance shown in the Declarations of this policy

The crux of the dispute between the parties is as to the interpretation of Section II, 2(b)(i).

In moving, NYSIF argues that Section II is unambiguous and should be read as containing a $10 million per occurrence limit that is lowered to the $2 million minimum limit of insurance required in the Contract, but NYSIF maintains that Everest improperly attempts to set off from the $2 million lower limit of coverage the $1 million per occurrence limit that was available from the Liberty policy where Everest's policy's language does not provide for such a reduction. NYSIF's analysis provides for coverage for the additional insureds of $1 million under the Liberty primary policy, which is undisputed, and $2 million under the Everest excess policy, for a total of $3 million in coverage from those insurers, plus only $450,000, not $950,000, from NYSIF. NYSIF contends that the fact that El Sol secured greater total insurance coverage than the $2 million required by the Contract does not entitle Everest to reduce its policy's coverage.

In opposition, Everest argues that Section II is unambiguous as to the amount to which an addition insured is entitled, which, Everest states, is a total of $2 million in coverage from "the

policies" issued to El Sol. Everest contends that, after application of the $1 million limit of the Liberty policy, the additional insureds were entitled to a limit of liability of $1 million under the Everest policy. Quoting Section II, Everest argues that the provision "plainly states in clear terms that an additional insured is entitled to 'the lesser of . . . [t]he minimum limits of insurance required in the contract or agreement' between the named insured and the additional insured[s] thereunder or the Limits of Insurance shown in the Declarations of the [Everest] policy." Everest also argues that New York courts have examined similar provisions and found them to be unambiguous. Everest states that because there is nothing ambiguous about Section II, it must be applied according to its plain language, and that "the amount of insurance that El Sol was required to obtain on behalf of the additional insured[s] is to be satisfied [by the limits of liability of both the Liberty and Everest polices], with the total amount that can be obtained under those two policies being the $2 million amount set forth in the contract." Everest argues that the additional insureds were not entitled to additional insured coverage of $1 million under the Liberty policy and another $2 million under the Everest policy, because the Everest policy limited the coverage to which they were entitled to the amount set forth in the Contract, which was satisfied by the application of the limits of the Liberty policy and of $1 million of the limits of the Everest policy.

The parties dispute the significance of two cases that Everest relies on, *Metropolitan Transp. Auth. v Zurich Am. Ins. Co.* (*Metropolitan*) (68 AD3d 610 [1st Dept 2009]) and *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*(*Bovis*) (53 AD3d 140 [1st Dept 2008]). Neither case supports Everest's position. *Metropolitan* did not have its own provision limiting the policy limits so that the Court (and this court) interpreted the underlying policy's clause in light of the excess policy's follow the form clause (*Metropolitan*, 68 AD3d at 610). Here, Everest's excess policy has it own provision

to be interpreted. In *Bovis*, the excess policy specified that the amount of coverage for the additional insured's was not "in excess of" the amount agreed to be provided in the contract provision for insurance (*Bovis*, 53 AD3d at 156 n 14). Although the policy here could have been written in that way, the policy was not. It states that the excess insurer itself shall provide coverage in the amount agreed to in the Contract: $2,000,000.

Based on the plain language of Section II, the only provision that the parties dispute, and agree is unambiguous, though interpret differently, the average insured could reasonably expect $2,000,000 in coverage under the Everest policy. Therefore, this court in its separate November 26, 2013 decision and order granted the motion and declared in NYSIF's favor. The remaining balance of the cross motion was denied.

Dated: New York, New York
December 2, 2013

RICHARD F. BRAUN, J.S.C.