Pennsylvania Lumbermens Mut. Ins. Co. v Zurich American Ins. Co.
2013 NY Slip Op 33053(U)
December 6, 2013
Sup Ct, Kings County
Docket Number: 501652/2012
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of November, 2013.

P R E S E N T:

HON MARK I. PARTNOW,
Justice.

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PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY,

Plaintiff,

- against -

Index. No. 501652/12

ZURICH AMERICAN INSURANCE COMPANY, SCOTT N. RESNICK, S. DONADIC, INC., COFFEY CONTRACTING INC., PHILIP GALLAGHER, and MARY KATHERINE GALLAGHER,

Defendants.

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The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	6
Surreply and Response Affidavits (Affirmations)	7
Other Papers	

Upon on the foregoing papers, Pennsylvania Lumbermens Mutual Insurance Company (plaintiff) moves, pursuant to CPLR 3212, for summary judgment on its declaratory judgment against Zurich American Insurance Company (defendant), and defendant cross-moves for summary judgment.

Background

Pennsylvania Lumbermens Mutual Insurance Company ("PLM") and Zurich American Insurance Company ("Zurich") are both insurers of two of the defendants in an underlying personal injury lawsuit ("the underlying lawsuit"). The plaintiffs in the underlying lawsuit, Philip and Mary Gallagher, sued both the general contractor and subcontractor of a building site that Philip Gallagher was hired to inspect after he fell during the inspection and sustained serious injuries.

The general contractor, S. Donadic, Inc. ("Donadic"), carried both primary insurance and an "umbrella" policy through PLM. The subcontractor, Coffey Contracting, Inc. ("Coffey"), carried Comprehensive General Liability ("CGL") insurance through Scottsdale Insurance ("Scottsdale") and "umbrella" insurance through Zurich. Pursuant to an agreement between Donadic and Coffey, Coffey was required to add Donadic as an additional insured on both the Scottsdale GCL policy and the Zurich umbrella policy in order to indemnify Donadic for any damages due to "injury, sickness, illness or death of any person…and any other claim 'arising out of, in connection with, or as a consequence of the performance or nonperformance of the Subcontractors Work.'"

PLM, expecting that the damages in the underlying lawsuit would exceed the coverage under Coffey's Scottsdale GCL policy, brought this suit asking that the court find that PLM is not required to contribute to any possible damages unless the coverage limit of the Zurich umbrella policy is reached first. Zurich argues that PLM must contribute ratably to any damages that exceed the coverage limit of the Scottsdale primary policy. PLM filed a motion for summary judgment in support of its case and Zurich then cross-moved for summary judgment.

Discussion

The Summary Judgment Standard

"Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2011], citing *Andrew v Pomeroy*, 35 NY2d 361, 364 [1974]). A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denying the motion regardless of the sufficiency of any opposition (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]). Thus, when the parties agree that there are no issues of material fact, the case can properly be resolved on summary judgment.

Plaintiff's Assertion of Non-Contribution

(1)

The defendants in the underlying lawsuit both obtained two coverage levels of insurance: primary and umbrella. Each umbrella policy contained "excess" terms. "Excess" terms (also called "other insurance" clauses) are words in an insurance policy contract which state that

damages are not available under the policy until the coverage levels of other insurance policies that cover the same risk have been met.[1] The general rule when two insurance policies both cover the same risk on the same level is that "excess" terms cancel each other out, and each insurer must then contribute to the damages in proportion to their coverage limits (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373-74 [1985] [hereinafter "*LiMauro*"]).

When insurers that cover the same risk disagree about whether they cover that risk at the same level, however, the court must consider "the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance" to avoid distorting the "meaning of the terms of the policies involved." (*LiMauro*, 65 NY2d at 374 [citations omitted]). The court must interpret the "plain meaning" of the language in the contract (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655 [1980] [hereinafter "*Lumbermens*"]). An insurance policy which states it is "excess" to other policies but which "contemplates contribution with other excess policies or does not by the language used negate that possibility...must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies" (*LiMauro*, 65 NY2d at 375-76). A policy that is not required to contribute damages until the limits of all other policies have been exceeded is referred to as a "senior non-contributing" policy.

The two cases that provide the most guidance in resolving the instant controversy are *Lumbermens* and *LiMauro*. In *Lumbermens*, the Court of Appeals examined the plain meaning of the terms in two insurance policies (one issued by Lumbermens and one by Allstate), which both purported to be "excess" insurance. The court found that the senior non-contributing policy

[1] For example, the "other insurance" clause or excess terms in the PLM policy here states, "This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis."

was the Lumbermens policy, which stated that coverage is provided "in *excess of 'any other valid and collectible insurance* available to the insured, *whether such other insurance is stated to be primary, contributing, excess or contingent*'" (*Lumbermens*, 51 NY2d at 655 [emphasis added]). Important to the court's decision was that the Lumbermens policy "specifically provided coverage in excess of all other coverage available, *including excess coverage*" (*Lumbermens*, 51 NY2d at 656 [emphasis added]). The language in the Allstate policy, however, ("The insurance afforded under this policy shall apply as excess insurance, not contributory to other collectible insurance (other than insurance applying as excess to Allstate's limit of liability hereunder) available to the Insured and covering loss against which insurance is afforded hereunder.") did not negate an intention to contribute (*Lumbermens*, 51 NY2d at 654-55). Thus, the coverage limits of the Allstate policy had to be satisfied before the Lumbermens policy was required to contribute to the damages.

In *LiMauro*, decided five years later, the Court of Appeals examined the terms in two insurance policies—one issued by State Farm Fire & Casualty Company ("Fire") and the other by Aetna—and found that the Fire policy's language negated any intention to contribute with any other policy (other than policies specifically purchased as excess over the Fire policy) (*LiMauro*, 65 NY2d at 376-77). The Fire policy stated, "If *other collectible insurance* with any other insurer *is available* to the Insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of...the limit of liability hereunder), *the insurance hereunder shall be in excess of, and shall not contribute with, such other insurance*" (*LiMauro*, 65 NY2d at 376-77 [emphasis added]). Although Aetna argued that the Fire policy must contribute because it did not contain the same "excess" provision as in the Lumbermens policy (in *Lumbermens*), the language of the Fire policy was enough to find that it was non-contributing

(*LiMauro*, 65 NY2d at 378). The Aetna policy,[2] on the other hand, did *not* negate an intention to contribute with other policies (*LiMauro*, 65 NY2d at 376-77). The *LiMauro* court emphasized that the juxtaposition of clauses in the Aetna policy "strongly suggests" that Aetna meant for the policy to be excess over all other insurance *only* in relationship to one of the covered risks (i.e., to damages caused by a policyholder on non-owned vehicles) (*LiMauro*, 65 NY2d at 376). Therefore, Fire did not have to contribute to the damages until the coverage limits of the Aetna policy were reached.

For the purposes of the instant case, it is important to note that neither *Lumbermens* nor *LiMauro* articulated a bright-line rule for what language has to be included in order for a policy to be senior non-contributing.

(2)

The issue that this court must decide on summary judgment is the "pecking order" of two of the four insurance policies issued to the defendants which cover the same risk in an underlying personal injury lawsuit.[3] Summary judgment is appropriate in this case because the parties have stipulated to the material facts of the case. Examining the intended purpose of each policy leads to the conclusion that PLM's policy covers risk at a higher level than the Zurich policy, and thus PLM is not required to contribute ratably to the damages. There are two relevant factors in this analysis: 1) the premium paid for each policy; and 2) the policy's stated coverage and the "wording of its provision concerning excess insurance" (*LiMauro*, 65 NY2d at 374). Although none of the documents submitted in this case contain information about the

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[2] "If the Insured has other insurance against a loss covered by the Liability Coverage of this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance" (*LiMauro*, at 376).

[3] The Court of Appeals has cynically compared the process of determining the pecking order to the "struggles which often ensue when guests attempt to pick up the tab for their dinner companions" (*LiMauro*, 65 NY2d at 372, quoting *Insurance Co. of N. Am. v Continental Cas. Co.*, 575 F2d 1070, 1071 [1978]).

premium paid for each policy, the policies' stated coverage and excess provisions provide sufficient information to grant the plaintiff's motion for summary judgment. The PLM policy in this case expressly states that it "shall not contribute" with any other insurance, and is "excess" to other insurance, including other excess insurance. The Zurich policy states that it is excess to "other insurance," but does not have the "shall not contribute" language found in the PLM policy and does not specifically state that it is excess to other excess policies. To find that the PLM policy must contribute with the Zurich policy would "distort the meaning of the terms" of both policies (*LiMauro*, 65 NY2d at 374).

(3)

The language in the PLM policy negates the possibility of contribution with other carriers. The PLM policy states in relevant part:

> *This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis*. This condition will not apply to insurance specifically written as excess over this Coverage Part. [emphasis added]

The PLM policy contains both the non-contributory language *as well as* specifically referring to other excess insurance policies. Thus, it is similar to the policies that were found to be senior non-contributing coverage in both *LiMauro* and *Lumbermens*.

Zurich argues that the PLM policy is similar to the Allstate policy in *Lumbermens*, which the court in that case found did not negate an intention to contribute. The language in the Allstate policy, however, was materially different from the PLM policy in the instant case. Specifically, the PLM policy firmly states that the policy is excess to and will not contribute "with any of the other insurance, *whether primary, excess, contingent or on any other basis*." The Allstate policy in *Lumbermens* stated, "The insurance afforded under this policy shall apply as excess insurance, not contributory to other collectible insurance…available to the Insured and

covering loss against which insurance is afforded hereunder" (*Lumbermens*, 51 NY2d at 654-55). Even though the Allstate policy contained the "non-contributing" language found in the PLM policy, it did not definitively state that it was "excess" to any other excess policy. The Allstate policy left open the possibility that Allstate would contribute if the insured had another policy that covered risk at the same level. The PLM policy here does not leave open the possibility of contribution unless the insured *specifically* names the PLM policy when purchasing additional insurance coverage.

The PLM policy is also similar to the U.S. Fire policy in *Argonaut Ins. Co., Inc., v U.S. Fire Ins. Co.*, 728 F. Supp. 298 [S.D.N.Y. 1990] [hereinafter "*Argonaut*"], which the court found to be senior non-contributing coverage. The U.S. Fire policy stated: "If other collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder...the insurance hereunder shall be in excess of, and not contribute with, such other insurance" (*Argonaut*, 728 F. Supp. at 300). The court, finding that the "other insurance" clause in the U.S. Fire policy was "virtually identical in wording to the excess policy in *LiMauro*," held that this language was sufficient to show that the U.S. Fire policy was intended to function as senior non-contributing insurance (*Argonaut*, 728 F. Supp. at 301).

The PLM policy at issue contains similar language to the senior non-contributing policies in *Lumbermens*, *LiMauro*, and *Argonaut*. Based on this case law, the PLM policy shows a clear intention to not contribute with any other insurance policy, including other "excess" or umbrella policies. Further, Zurich's argument that the PLM policy did not intend to be senior non-contributing because it was purchased before the Zurich policy is not relevant to this analysis. *Argonaut* briefly mentioned the purchase order of the policies at issue, but the holding of the

case was not dependent on this fact.[4] Additionally, the agreement between Coffey and Donadic required Coffey to indemnify Donadic by listing him on Coffey's insurance policies. Thus, it was contemplated by the parties that Coffey's policies would cover Donadic, even if Donadic already had his own insurance coverage.

(4)

The language in the Zurich policy does *not* negate the possibility of contribution with other carriers. The Zurich policy states in relevant part:

> *If other insurance applies to damages that are also covered by this policy, this policy will apply excess of the other insurance.* Nothing herein will be construed to make this policy subject to the terms, conditions and limitations of such other insurance. However, this provision will not apply if the other insurance is written to be excess of this policy…[other insurance means] a policy of insurance providing coverage that this policy also provides. *Other insurance includes any type of self-insurance or other mechanisms by which an insured arranges for funding of legal liabilities. Other insurance does not include underlying insurance or a policy of insurance specifically purchased to be excess of this policy providing coverage that this policy also provides*. [emphasis added]

The Zurich policy is similar to the Allstate policy in *Lumbermens*, the Aetna policy in *LiMauro*, and the Argonaut policy in *Argonaut*, all of which were found to be below the senior non-contributing level of insurance. The *Argonaut* court specified that in order to "trump" the U.S. Fire policy, "there must be some indication, apart from the pervasive 'excess to all' insurance language, that the Argonaut policy was purchased specifically to function as coverage senior to the level of risk insured by U.S. Fire" (*Argonaut*, 728 F. Supp. at 302). The Zurich policy here contains only this "pervasive" language—"this policy will apply excess of the other insurance"—and thus contains no indication that it was purchased to be senior non-contributing insurance.

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[4]"While not relied upon in arriving at this conclusion, the result would appear to draw further support from the fact that had Argonaut truly intended to be excess of U.S. Fire, such intention might easily have been indicated in a specific fashion within the Argonaut policy at the time of its issuance." (*Argonaut*, 728 F. Supp. at 303).

Zurich argues, however, that its policy is similar to the Lumbermens policy that the court found was senior non-contributing coverage in *Lumbermens*. The Zurich policy, however, is materially different from the Lumbermens policy. While the senior non-contributing policy in *Lumbermens* stated that it was in excess of any other excess policy, the Zurich policy states only that it is excess to "other insurance," and its definition of "other insurance" does not include other excess insurance. The plain meaning of the Zurich policy precludes any possibility that it intended to be senior non-contributing insurance.

Further, the New Jersey case law cited by Zurich does not support its argument that the canceling rule should apply here. In *Sunoco Products Co., Inc. v The Fire & Cas. Ins. Co. of Conn.*, 337 N.J. Super. 568 [App. Div. 2001] [hereinafter "*Sunoco*"], the court analyzed two policies. One policy in *Sunoco* was similar to the PLM policy in the instant case (it contained both the non-contributing and the "excess to excess" language) and the other policy was similar to the Allstate policy in *Lumbermens* (it contained only the non-contributing language) (*Sunoco*, 337 N.J. Super. at 576). The court found that the policies were "virtually identical" and both expressed an intention to not contribute to damages until the limits of the other policies were reached (*Sunoco*, 337 N.J. Super. at 577). This holding is at odds with New York case law, which emphasized the importance of the "excess to the excess" language in *Lumbermens* (*Lumbermens*, 51 NY2d at 656).

Should the court accept the authority of the holding from the persuasive, but not binding, New Jersey precedent, Zurich's argument is still flawed. Even if the PLM policy is virtually identical to the Allstate policy in *Lumbermens*—which is an argument not supported by New York case law—the PLM and Zurich policies do not cancel each other out. The Zurich policy contains none of the relevant language discussed in the New York cases (the "non-contributing"

language in *LiMauro* and the "excess to excess" language in *Lumbermens*), and is not similar to either policy in *Sunoco*, therefore showing no clear intention to not contribute to damages.

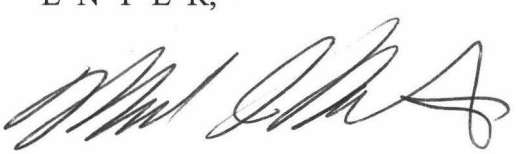
Finally, Zurich's reliance on *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140 [1st App. Div. 2008] [hereinafter "*Bovis*"], is also misguided. In *Bovis*, the court held that the "other insurance" provisions in two policies cancelled each other out when one policy was similar to the PLM policy at issue and the other was similar to the Lumbermens policy in *Lumbermens* (*Bovis*, 53 AD3d at 146-47). Again, the Zurich policy contains none of the relevant language indicating that there is no intention to not contribute. *Bovis* is therefore distinguishable from the instant case.[5] Thus, the Zurich policy must cover the damages up to its coverage limit, and only then is PLM required to contribute.

Summary

In sum, the motion of plaintiff Pennsylvania Lumbermens Mutual Insurance Company for summary judgment is granted, and the cross-motion of Zurich American Insurance Company for summary judgment is denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.
HON. MARK I. PARTNOW
Justice N.Y.S. Supreme Court

[5] The other two cases cited by Zurich are also not pertinent to this case. *Public Service Mut. Ins. Co. v Fireman's Fund American Ins. Co.*, 82 AD2d 403 (1st App. Div. 1981), was decided before *LiMauro*, and is not binding on this court because it is the 1st Appellate Division. Further, both policies at issue in *U.S. Fire Ins. Co. v Federal Ins. Co.*, 858 F.2d 882, 886 (2nd Cir. 1988), contained the non-contributing language and were found to cancel each other out; the Zurich policy does not contain the non-contributing language.