

**East 51 St. Dev. Co., LLC v Lincoln Gen. Ins. Co.**

2013 NY Slip Op 33086(U)

December 5, 2013

Supreme Court, New York County

Docket Number: 150063/2010

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 150063/2010
EAST 51ST STREET DEVELOPMENT
vs.
LINCOLN GENERAL INSURANCE
SEQUENCE NUMBER : 011
DISMISS

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

Motion sequence 011 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion by Lincoln General Insurance Company pursuant to CPLR §§ 3025(b) and 3211(a) to dismiss the new cross-claim asserted against it by co-defendant Interstate Fire and Casualty Company is denied; and it is further

ORDERED that Lincoln General Insurance Company shall file a response to such cross-claim within 30 days of the date of service of this Order with notice of entry; and it is further

ORDERED that Lincoln General Insurance Company 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.

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

Dated: 12-5-2013

HON. CAROL EDMEAD 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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
EAST 51 STREET DEVELOPMENT COMPANY, LLC  
and ILLINOIS UNION INSURANCE COMPANY,

Index No. 150063/2010

Motion Seq. No. 011

Plaintiffs,

-against-

LINCOLN GENERAL INSURANCE COMPANY, AXIS  
SURPLUS INSURANCE COMPANY, INTERSTATE  
FIRE AND CASUALTY COMPANY and EVEREST  
NATIONAL INSURANCE COMPANY,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, defendant Lincoln General Insurance Company (“Lincoln General”) moves pursuant to CPLR §§ 3025(b) and 3211(a) to dismiss a new cross-claim asserted against it by co-defendant Interstate Fire and Casualty Company (“Interstate”).

*Factual Background*

This action arises from the March 15, 2008 tragic crane collapse accident during the construction of a high-rise building in Manhattan, which caused seven fatalities, serious injuries to many individuals, and multi-million dollars in property damage. Numerous personal injury and property damage lawsuits were brought against plaintiff East 51st Street (“East 51<sup>st</sup> Street”), the owner of the property on which the accident occurred, Reliance Construction Ltd. (“RCG”), the construction manager on the project, and Joy Contractors, Inc. (“Joy”), the superstructure subcontractor.

In 2010, East 51st Street and Illinois Union Insurance Company commenced this action

against Lincoln General, Interstate, AXIS Surplus Insurance Company (“AXIS”) and Everest National Insurance Company (collectively, “plaintiffs”) alleging, *inter alia*, that such defendants have a duty to defend the claims against East 51st Street based on the insurance policies they issued. As against Interstate and Lincoln General, plaintiffs seek a declaration as to the duty to defend and indemnify, and asserted causes of action to recover defense costs already expended in the defense of East 51<sup>st</sup> Street.

Thereafter, in May 2010, Interstate filed an Answer and counterclaim for a declaration that it owed no defense costs or indemnity to plaintiffs due to East 51<sup>st</sup> Street’s breach of Interstate’s Policy’s cooperation condition precedent to coverage, that Interstate’s policy limits have been exhausted due to payments it already made, and that in the alternative, its policy was excess to any other policy issued to East 51<sup>st</sup> Street.

On June 1, 2010, Lincoln General answered the complaint, and cross-claimed against Interstate, *inter alia*, for a declaration that Interstate, as a primary and/or co-primary insurer of East 51<sup>st</sup> Street, was obligated to provide primary coverage to East 51<sup>st</sup> Street, and that Interstate is required to defend and indemnify East 51<sup>st</sup> Street for the underlying claims. According to Lincoln General, Interstate did not answer Lincoln General’s cross-claim.

By Order of Appellate Division dated February 5, 2013, it was determined that “the insurance policies issued by AXIS and Interstate to Reliance and the policy issued by Lincoln General to Joy were primary to the policy issued by Illinois Union to East 51st Street. AXIS, Interstate and Lincoln General therefore are obligated to reimburse Illinois Union for defense costs.” However, the Appellate Division also held that Interstate’s “policy was exhausted upon its July 2009 settlement with Reliance of the declaratory judgment action commenced in federal

court . . . .”

Thereafter, by Order dated October 3, 2013, this Court granted Lincoln General leave to amend its cross-claim against Interstate, and on October 4, 2013, Lincoln General filed its Answer and amended cross-claim against Interstate alleging that Interstate, as a co-primary insurer of East 51st Street, is obligated to reimburse Illinois Union for defense costs from the date of the accident until the date it exhausted its policy, and that Interstate is obligated to contribute to the payment of East 51st Street’s defense costs incurred from the date of the accident until Interstate’s policy was exhausted.

On October 22, 2013, Interstate filed its Answer to Lincoln General’s amended cross-claim and asserted new cross claims, including a cross-claim, for the first time, against Lincoln General alleging that Lincoln General is obligated to provide defense and indemnification to East 51<sup>st</sup> Street, and demanding reimbursement and/or contribution from Lincoln General.

In support of dismissal of Interstate’s new cross-claim, Lincoln General argues that Interstate failed to obtain Lincoln General’s consent or seek leave of Court to file such a cross-claim as required under CPLR 3025(b). To add such a cross-claim for the first time at this stage of the proceedings will significantly prejudice the substantial right of Lincoln General to oppose the filing of such an untimely claim for reimbursement or contribution against Lincoln General. Therefore, Interstate’s filing of such cross-claim is a nullity, and subject to dismissal pursuant to CPLR 3211(a).

In opposition, Interstate contends that this Court’s October 3, 2013 order granted Lincoln General permission to amend its Answer to assert new claims against Interstate, and directed

Interstate to serve a responsive pleading to such new claims within 30 days. Thus, a new responsive pleading was authorized. Further, CPLR 3011 authorizes that an Answer to be served to a cross-claim where a responsive pleading has been directed. CPLR 3019(d) directs that a cross-claim shall be considered as if it were a complaint, and pursuant to CPLR 3019(b), a cross-claim may include “any cause of action” by a defendant against another defendant. And, under CPLR 601(a), a defendant setting forth a cross-claim may join as many claims as it may have against an adverse party. A motion or stipulation is not necessary under these circumstances. Therefore, Lincoln General’s motion should be denied.

In reply, Lincoln General contends that it originally asserted a cross-claim against Interstate in June 2010 alleging that Interstate is obligated to provide primary coverage to East 51st Street for the underlying accident. And, on October 4, 2013, Lincoln General filed its amended cross-claim against Interstate, asserting that Interstate is obligated to provide primary coverage to East 51st Street for the incident through the time in which Interstate exhausted its applicable policy, after the Court granted Lincoln General leave to amend its cross-claim against Interstate *via* the October 3, 2013 Order. However, it was not until October 22, 2013 that Interstate asserted a cross-claim against Lincoln General. The October 3, 2013 Court Order did not provide leave for Interstate to add a new cross-claim against Lincoln General. Thus, Interstate inappropriately added a new cross-claim against Lincoln General without consent or leave of court in response to Lincoln General’s amendment of its previously set forth cross-claim against Interstate.

#### *Discussion*

Under CPLR 3019(d), a cross-claim, such as the one amended by Lincoln General as

against Interstate, shall be “treated, as far as practicable, as if it were contained in a complaint.” Here, Lincoln General was granted leave to amend its cross-claim against Interstate, and in so doing, triggered a responsive pleading in accordance with CPLR 3025 (d), which provides that except “where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. . . .” Notably, CPLR 3011 provides that there “shall be a complaint and an answer [and] [a]n answer may include . . . a cross-claim against a defendant . . . .” And, in this regard, CPLR 3019, which governs “cross-claims” provides that a cross-claim “may be any cause of action in favor of one or more defendants . . . against one or more defendants . . . [and] . . . may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.”

This Court permitted Lincoln General to amend its pleading in accordance with the Appellate Division decision, and assert the claim that Interstate is obligated to contribute to the payment of East 51<sup>st</sup> Street’s defense costs incurred from the date of the accident until the date Interstate exhausted its policy in July 2009. However, this Court also directed that a “responsive” pleading be filed by Interstate (*see e.g.*, McKinney’s CPLR § 3019, C3025:21, Patrick M. Connors, Response to Amended Pleading Required. “Whenever an amended pleading is served . . . and it is one that would have required a responsive pleading if originally served, *see* CPLR 3011, the amended one requires a responsive pleading”)). Notably, Lincoln General sought its amendment in light of the Appellate Division’s determination that Interstate’s policy was primary, and the Appellate Division likewise determined that Lincoln General’s policy (issued to Joy) was also “primary to the policy issued by Illinois Union to East 51st Street,”

thereby obligating Lincoln General (along with Interstate) to reimburse Illinois Union for defense costs. As might be expected, Interstate's Amended Answer also references the Appellate Division's order.

Therefore, in light of this Court's order directing parties to file responsive papers to Lincoln General's amended pleading, and the above CPLR provisions 3025 (d) and CPLR 3019, Interstate need not have sought consent or leave to include with its Amended Answer a cross-claim against Lincoln General.

Therefore, dismissal of the new cross-claim asserted by Interstate against Lincoln General for failure to seek consent or leave to assert such a cross-claim is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

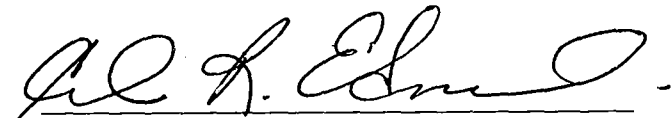
ORDERED that the motion by Lincoln General Insurance Company pursuant to CPLR §§ 3025(b) and 3211(a) to dismiss the new cross-claim asserted against it by co-defendant Interstate Fire and Casualty Company is denied; and it is further

ORDERED that Lincoln General Insurance Company shall file a response to such cross-claim within 30 days of the date of service of this Order with notice of entry; and it is further

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This constitutes the decision and order of the Court.

Dated: December 5, 2013

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

**HON. CAROL EDMEAD**