

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ARCH INSURANCE COMPANY,  
  
Plaintiff,

-v-

HARLEYSVILLE WORCESTER INSURANCE  
COMPANY and ILLINOIS UNION INSURANCE  
COMPANY,  
  
Defendants.

13 Civ. 7350 (DLC)

OPINION & ORDER

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HARLEYSVILLE WORCESTER INSURANCE  
COMPANY,  
  
Third-Party Plaintiff,

-v-

ERIE PAINTING AND MAINTENANCE, INC.,  
  
Third-Party Defendant.

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APPEARANCES:

For Plaintiff Arch Insurance Company

Diane K. Kanca  
Edward G. Warren  
Voute Lohrfink Magro & McAndrew, LLP  
170 Hamilton Avenue  
White Plains, NY 10601

For Defendant Illinois Union Insurance Company

Ryan K. Cummings  
Hodgson Russ, LLP  
The Guaranty Building  
140 Pearl Street, Suite 100  
Buffalo, NY 14202

For Defendant Harleysville Worcester Insurance Company

Lance J. Kalik  
Tracey K. Wishert  
Riker Danzig Scherer Hyland & Perretti, LLP  
Headquarters Plaza  
One Speedwell Avenue  
Morristown, NJ 07962

DENISE COTE, District Judge:

Plaintiff Arch Insurance Company ("Arch") brings a declaratory judgment action against Illinois Union Insurance Company ("Illinois Union"), and Harleysville Worcester Insurance Company ("Harleysville") (collectively, "Defendants"), seeking indemnification for payments Arch made to settle a claim for personal injuries brought by Enio Antonio Rodrigues ("Rodrigues"), an employee of the Defendants' insured, Erie Painting & Maintenance, Inc. ("Erie Painting"), against Arch's insured, the New York State Thruway Authority ("Authority") ("Rodrigues Incident"). Rodrigues sustained injuries when he fell from a trailer while performing work under a contract between Erie Painting and the Authority. Illinois Union has moved to dismiss Arch's Second Amended Complaint ("SAC"). For the following reasons, the motion is granted.

BACKGROUND

The following facts are uncontroverted or taken in the light most favorable to Arch. Erie Painting contracted with

the Authority to perform painting work. Among other things, Erie Painting's contract with the Authority required Erie Painting to defend and indemnify the Authority for any accident or injuries arising out of work performed. See New York State Thruway Authority v. Erie Painting and Maintenance, Inc., No. 27722/11 (Sup. Ct. June 17, 2013) ("Supreme Court Indemnity Opinion").

At the time of the Rodrigues Incident, the Authority was insured by Arch under a New York Owners and Contractors Protective Liability Policy (the "Arch OCPL Policy"). The Arch OCPL Policy was procured for the Authority's benefit by Erie Painting pursuant to a requirement in Erie Painting's contract with the Authority. The policy provides coverage for a one-year term, from April 4, 2008 through April 4, 2009. It also provides that the "Location of Covered Operations" is "route 8, 10, 12, 28 & 30 Hamilton & Oneida Counties, NY," and the "Description of Operations" is "Painting 18 bridges." It further provides that Arch would pay a premium of \$5,250 in exchange for an aggregate coverage limit of \$2,000,000. And it identified as the "Designated Contractor" "Erie Painting & Maintenance."

The Arch OCPL Policy provided for coverage for bodily injury as follows:

We will pay those sums that the insured [i.e., the Authority] becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured

against any "suit" seeking those damages . . . . This insurance applies to "bodily injury" and "property damage" only if (1) The "bodily injury" and "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and arises out of (a) Operations performed for you by the "contractor" named in the Declarations under the designated contract, including your general supervision of these operations; or (b) The existence of any condition in any portion of a state highway included under the designated contract with the "contractor" named in the declarations.

(Emphasis supplied.)

The Arch OCPL Policy also contains an "Other Insurance" clause, which addresses the policy's relationship with Erie Painting's other insurers. The "Other Insurance" clause provides that its coverage is "primary," and that Arch will not seek contribution from Erie Painting's insurers. The clause reads in relevant part:

The insurance afforded by this policy is primary insurance and we will not seek contribution from any other insurance available to you except if the other insurance is provided by a contractor other than the designed "contractor" for the same operation and job location designated in the Declarations.

If the other insurance is available, we will share with that other insurance by the method described below. If all of the other insurance permits contribution by equal shares, we will follow this method also . . . . If any of the other insurance does not permit contribution by equal shares, we will contribute by limits.

(Emphasis supplied.)

The second relevant policy in place at the time of the

Rodrigues Incident is a Commercial General Liability policy issued by Illinois Union to Erie Painting ("Illinois Union CGL Policy"). The policy period associated with that policy ran from September 1, 2009 through September 1, 2010. The Illinois Union CGL Policy provides for two million dollars of general liability insurance to Erie Painting including, "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'" The Illinois Union CGL policy carried a \$70,388 premium. Unlike the Arch OCPL Policy, the Illinois Union CGL policy is not expressly restricted in scope to risks arising out of any particular Erie Painting contract.

The Illinois Union CGL Policy contains an "auto" exclusion provision, which provides that "[t]his insurance does not apply to . . . [b]odily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'" (Emphasis supplied.) "Auto" is defined in the Illinois Union CGL Policy as "a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But 'auto' does not include 'mobile equipment.'" (Emphasis supplied.)

The third relevant policy in place at the time of the Rodrigues Incident was a Commercial Automobile Policy issued by

Harleysville to Erie Painting (the "Harleysville CAP"). The Harleysville CAP covers risks arising out of the use of an "auto." The Harleysville policy provides as follows:

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance, or use of a covered "auto."

The policy covered the period from September 1, 2008 through September 1, 2010. It also contains a "mobile equipment" exclusion. The Harleysville CAP defines "mobile equipment," with certain exceptions, as "[v]ehicles . . . maintained primarily for purposes other than the transportation of persons or cargo."

Erie Painting was required to name the Authority as an additional insured on both of its liability policies. On November 18, 2009, Rodrigues was working for Erie Painting painting bridges along a New York highway when he fell off of a trailer.<sup>1</sup>

Following the Rodrigues Incident, Rodrigues sued the Authority in the New York Court of Claims seeking damages for his injuries ("Underlying Action"). Both of Erie Painting's insurers, Illinois Union and Harleysville, disclaimed coverage and did not provide a defense or indemnification because of their application of certain exclusions in their respective policies to the trailer from which Rodrigues fell. Illinois Union claimed

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<sup>1</sup> The trailer is not described in the SAC, but Arch contends that it was being used as a "work platform" at the time of the

that the trailer constituted an "auto," and disclaimed coverage on the basis of the "auto" exclusion in its policy.

Harleysville, on the other hand, stated that the trailer was not an "auto" (which would have triggered its coverage obligation), but instead a piece of "mobile equipment," and on March 22, 2010, disclaimed coverage on the basis of the Harleysville CAP "mobile equipment" exclusion.

Arch tendered a defense to the Authority, and ultimately paid \$500,000 in 2013. Arch now contends that the trailer is properly characterized as either a "work platform," in which case the Illinois Union CGL Policy would apply, or an "auto," in which case the Harleysville CAP would apply.

Arch filed this action on October 18, 2013, and filed the SAC on March 17, 2014. Illinois Union moved to dismiss the SAC on March 28. Arch has opposed the motion and Harleysville has opposed it in part. Harleysville opposes Illinois Union's contention that the "auto" exclusion in the Illinois Union CGL Policy applies to the trailer in the Rodrigues Incident, but joins Illinois Union's argument that Arch has waived any right to seek contribution from Erie Painting's insurers. Harleysville contends that success on that argument would result in the dismissal of Arch's action against Harleysville as well. Illinois Union's motion to dismiss was fully submitted on May 9.

## DISCUSSION

When deciding a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., a court must "accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." LaFaro v. New York Cardiothoracic Group, PLLC, 570 F.3d 471, 475 (2d Cir. 2009). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). A complaint must do more, however, than offer "naked assertions devoid of further factual enhancement." Id. (citation omitted). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id.

"For purposes of a motion to dismiss, we have deemed a complaint to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference, as well as ... documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000) (citation omitted). The Arch OCPL Policy, the Illinois Union GCL Policy, and the Harleysville CAP were all clearly relied upon by Arch in bringing this action, and the terms of those contracts may

be relied upon to resolve this motion.

Illinois Union also attaches to its motion to dismiss an array of extrinsic documents, including a verified bill of particulars from the Underlying Action, and two excerpts of depositions taken of Rodrigues in connection with the Underlying Action. These extrinsic materials are not incorporated into the SAC by reference, nor were they relied upon by Arch in commencing this action. They will not be considered at this stage of the litigation.

In a case grounded in diversity jurisdiction, a federal court "must apply the choice of law analysis of the forum state." GlobalNet Financial.Com, Inc. v. Frank Crystal & Co., Inc., 449 F.3d 377, 382 (2d Cir. 2006); see generally Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938). The parties all assume (and Arch contends) that New York law governs here. "Under New York choice of law rules . . . where the parties agree that New York law controls, this is sufficient to establish choice of law." Fed. Ins. Co. v. Am. Home Assurance Co., 639 F.3d 557, 566 (2d Cir. 2011). Such agreement can be implicit. Id. Therefore, New York law will be applied.

The standard for interpreting terms in an insurance contract is well settled under New York law:

When a dispute arises involving the terms of an insurance contract, New York insurance law provides that an insurance contract is interpreted

to give effect to the intent of the parties as expressed in the clear language of the contract. When the provisions are unambiguous and understandable, courts are to enforce them as written . . . .

Whether a contract is ambiguous, however, is a threshold question of law to be determined by the court. An ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006) (citation omitted)

#### I. Contribution

Illinois Union asserts first that Arch is seeking contribution from the Defendants despite the explicit bar in the Arch policy. Arch admits that, because of the terms of the Arch OCPL Policy, it cannot "seek contribution from other insurers" of Erie Painting, specifically, Harleysville and Illinois Union.

"[U]nder New York law, an insurer has a right in equity to collect a ratable contribution from any other insurer who is also liable for the same loss." Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 89 (2d Cir. 2002). "[T]here is a well-settled equitable right to contribution, where there is concurrent insurance, even in

the absence of a policy provision for apportionment.” U.S. Fire Ins. Co. v. Fed. Ins. Co., 858 F.2d 882, 885 (2d Cir. 1988) (citation omitted). Contribution principles apply when the party seeking restitution shares partial responsibility for the underlying payment but has paid more than a proportional share. “[W]here a party is held liable at least partially,” contribution is “the only available remedy.” Glaser v. M. Fortunoff of Westbury Corp., 71 N.Y.2d 643, 646 (1988). “When more than one primary insurer is potentially obligated to indemnify an insured for a claim either because of concurrent coverage or because the damage for which coverage is sought implicates several policy periods, defense obligations must be apportioned horizontally among the primary insurers.” Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 6.02 (16th ed. 2013) (hereinafter “Ostrager & Newman”).

“The rights and obligations of co-insurers depend, principally, on the specific language of the insurance contracts.” Id. § 11.01. Courts look to “the plain language” of insurance contracts to determine whether contribution is appropriate. U.S. Fire Ins., 858 F.2d at 885. In particular, “[w]here the same risk is covered by two or more policies, each of which was sold to provide the

same level of coverage . . . allocation of coverage . . . among the policies is determined by comparison of their respective 'other insurance' clauses." Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, PA, 65 A.D.3d 12, 18 (2009). "[A]n 'other insurance' clause may limit the insurer's liability by providing that, if other insurance is available, all insurers will be responsible for a stated portion of the loss' an 'other insurance' clause of this kind is known as a pro rata clause." Id. (citation omitted).

The terms of the Arch OCPL Policy unambiguously demonstrate that Arch had an obligation to indemnify the Authority for the Rodrigues Incident claim. As described above, the Arch OCPL Policy provides that Arch "will pay those sums that the insured [i.e., the Authority] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Arch concedes in its SAC that "Arch was obligated to provide the [Authority] with a defense." Indeed, no other construction is possible given the terms of the Arch OCPL Policy. Rodrigues suffered "bodily injury" for which the Authority became "legally obligated to pay" any damages. Arch's coverage obligation was triggered by the Rodrigues Incident.

The "Other Insurance" clause of the Arch OCPL Policy confirms that Arch had an obligation to cover damages arising out of the Rodrigues Incident. First, the "Other Insurance" clause states that "[t]he insurance afforded by this policy is primary insurance." It is well established that "[p]rimary insurance is coverage that attaches immediately upon the happening of an occurrence that is covered under the terms of the policy." Ostrager & Newman § 6.03(a). "'[P]rimary' insurance refers to the first layer of insurance coverage that attaches immediately upon the occurrence of a policy-defined liability or loss." Ali v. Fed. Ins. Co., 719 F.3d 83, 90 (2d Cir. 2013). "The word 'primary' is used . . . to distinguish coverage which attaches immediately upon the happening of an occurrence, from excess coverage, which attaches only after a predetermined amount of 'primary' coverage has been exhausted." Am. Home Assur. Co. v. Republic Ins. Co., 984 F.2d 76, 77 (2d Cir. 1993). As a result of being a primary insurer, Arch unambiguously had an obligation to defend and indemnify the Authority for Rodrigues Incident.

Finally, Arch's obligation to cover the claims arising out of the Rodrigues Incident is further demonstrated by the provision in its "Other Insurance" clause providing for "pro rata" distribution of payments with other insurers of

"contractor[s] other than the designated 'contractor.'" See generally Ostrager & Newman § 11.02(a) ("Pro rata clauses usually provide that if other insurance exists, the insurer will pay its pro rata share of the loss . . . ."). That clause states that "[if] the other insurance is available . . . [and] permits contribution by equal shares, we will follow this method also." Since Erie Painting was the designated contractor, this provision of the policy does not permit Arch to seek pro rata distribution of payments in this case. But, the existence of this clause further confirms that Arch's policy contemplated that Arch would make payments to the Authority in the first instance.

In sum, the terms of the Arch OCPL Policy unambiguously demonstrate that Arch may not seek contribution from the Defendants for its payment to the Authority in connection with the Rodrigues Incident. The policy establishes both that Arch was a primary insurer for the Authority for this accident and that it could not seek contribution from other insurers for an injury to an Erie Painting employee.

## II. Indemnification

Arch concedes it cannot seek contribution from the Defendants, but asserts that it is entitled to indemnification. Arch argues that its policy was part of a

"belt-and-suspenders" approach to coverage, in which its policy functioned as "last resort" coverage in the event that Erie Painting's insurers were unable or refused to provide coverage for a claim arising out of Erie Painting's work. Arch does not rely on insurance contract language for this proposition. Arch relies instead on the disparity in premiums charged for its policy (\$5,250) and Illinois Union's policy (\$70,388). Arch contends that, given this disparity, equity requires it to be fully indemnified by Illinois Union and/or Harleysville for its payment in connection with the Rodrigues Incident.

The principle of equitable indemnification, also known as common-law indemnification, allows a non-culpable party who has been compelled to make a payment "to shift the entire burden" to the liable party and obtain full reimbursement. Frank v. Meadowlakes Dev. Corp., 6 N.Y.3d 687, 691 (2006) (citation omitted). The New York Court of Appeals has explained the distinction between contribution and indemnification in the tort context:

In the classic indemnification case, the one seeking indemnity had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party. In other words, where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. Conversely, where a party is held liable at least partially because of its own negligence,

contribution against other culpable tort-feasors is the only available remedy.

Glaser, 71 N.Y.2d 643 at 646 (citation omitted) (emphasis supplied). Courts in other jurisdictions have applied the equitable indemnification doctrine in the insurance context. See, e.g., Grinnell Mut. Reinsurance Co. v. Ctr. Mut. Ins. Co., 658 N.W.2d 363, 378 (2003) (applying North Dakota law). The touchstone of an indemnification action is the absence of any responsibility to pay on the part of the party seeking indemnification. See, e.g., Glaser, 71 N.Y.2d at 646. Where one is held "at least partially" responsible for a payment, the doctrine of contribution applies instead. Id.

Arch does not dispute that its indemnification claim lies only when "an insurer covers a loss it was not obligated to cover." But, as explained above, the Arch OCPL Policy made it a primary insurer for the Authority and required it to provide insurance for the Rodrigues Incident. Arch cannot rewrite the unambiguous terms of its policy through reliance on extrinsic evidence. "When the provisions are unambiguous and understandable, courts are to enforce them as written." Parks Real Estate Purchasing Grp., 472 F.3d at 42. Thus, the doctrine of indemnification is unavailable to Arch.

Arch's reliance on the disparity of the premiums to

escape the consequences of its obligation to provide insurance coverage to the Authority fails. Under New York law, "premium size may be an important factor in determining priority of coverage." U.S. Fire Ins., 858 F.2d at 885. Even in those circumstances, however, it is only a component of the analysis. The analysis must also consider "whether premium disparity instead reflects disparities in the degree of risk covered." Id. "In evaluating the significance of the amount of the premium, it is clearly important to measure that premium against the . . . coverage provided by that policy." Northbrook Excess & Surplus Ins. Co. v. Chubb Grp. of Ins. Companies, 496 N.Y.S.2d 430, 433 (1st Dept. 1985). As noted above, the policies at issue here provided different coverage.

In any event, while priority of coverage may be an important component of any contribution calculation, Arch is not entitled to contribution. Given Arch's unambiguous duty to provide insurance coverage to the Authority, its request for indemnification fails. Any disparity in premium amounts cannot salvage the claim for indemnification.

#### CONCLUSION

The Defendants' March 28, 2014 motion to dismiss Arch's Second Amended Complaint is granted. A scheduling order

will address the remaining claims in the case.

SO ORDERED:

Dated: New York, New York  
July 7, 2014

  
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DENISE COTE  
United States District Judge