SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 154101/2013
EAST 51ST STREET
vs
ILLINOIS UNION INSURANCE
Sequence Number : 001
DISMISS

PART 35

INDEX NO. _____
MOTION DATE 8/8/13
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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Illinois Union Insurance Company pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint based on documentary evidence and for failure to state a cause of action is granted solely to the extent that East 51st's claim for an order declaring that it is entitled to designate counsel of its own choosing in the East 51st Street Affirmative Lawsuit, with reasonable attorneys' fees to be paid by Illinois Union, is severed and dismissed; and it is further

ORDERED that defendant Illinois Union Insurance Company shall e-file and serve its Answer within 20 days of the date of this order; and it is further

ORDERED that defendant Illinois Union Insurance Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 17, 2013, 10:00 a.m.

This constitutes the decision and order of the Court.

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

Dated: 9-11-2013

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

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

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EAST 51ST STREET, DEVELOPMENT CO., LLC,

Index No.: 154101/2013

Plaintiff,

Motion Seq. #001

-against-

ILLINOIS UNION INSURANCE COMPANY,

Defendant.

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

MEMORANDUM DECISION

In this action arising out the fatal 2008 crane collapse accident, plaintiff East 51st Street, Development Co., LLC ("East 51st") seeks a declaration against its insurer Illinois Union Insurance Company ("defendant" or "Illinois Union") that East 51st is entitled to designate defense counsel of its own choosing in two related actions (Index No. 650658/2011 and Index No. 150063/2010), further described below.

Illinois Union now moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint based on documentary evidence.

Factual Background[1]

The 2008 crane collapse accident gave rise to multiple lawsuits against East 51st, Reliance Construction Group, Ltd. ("RCG") (the construction manager), JOY Contracting ("JOY") (the superstructure contractor) and many other contractors involved at the site (the "Consolidated Crane Collapse Litigation"). In addition to the Crane Collapse Litigation filed by those affected by the collapse, a commercial action was commenced by RCG in 2008 against East 51st seeking to enforce a mechanic's lien for work performed at the project (Index No. 601342/2008) (the

[1] The Factual Background is taken in large part from the Complaint.

"2008 RCG Action"). RCG also commenced an action against James Kennelly and Benjamin Shaoul, as guarantors of the CMA (Index No. 601373/2008).[2]

Illinois Union, as East 51st's insurer,[3] appointed O'Melveny & Myers ("O'Melveny") to defend East 51st in the personal injury and property damage actions. However, a dispute between Illinois Union and East 51st arose as to whether Illinois Union was obligated to defend and indemnify East 51st in the 2008 RCG Action. Thus, in or about 2009, they entered into a "Non-Waiver Defense Funding Agreement," whereby it was agreed that Illinois Union would "pay all necessary and reasonable expenses" for East 51st's defense in such action, and that East 51st "shall assert counterclaims . . . pertaining to the obligation" of RCG to name East 51st as an additional insured under RCG's policies. It was also agreed that the Funding Agreement "shall not effect or in any way prejudice" East 51st's rights to coverage or Illinois Union's "rights or defenses as to any and all claims under the Policies, whether or not related to the Action or any of the underlying circumstances or event therein." In the 2008 RCG Action, O'Melveny interposed an Answer with counterclaims for, *inter alia*, breach of the Construction Management Agreement between RCG and East 51st (the "CMA"), indemnification, and wilful exaggeration of the lien.

In 2010, Illinois Union, through counsel Clyde & Company, LLP ("Clyde"), commenced a declaratory judgment action against JOY's insurer Lincoln General Insurance Company ("Lincoln") and RCG's insurers Axis Surplus Insurance Company ("Axis") and Everest National

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[2] In February 2010, RCG obtained judgments for more than $6 million against James Kennelly and Benjamin Shaoul.

[3] Illinois Union issued to East 51st a commercial general liability (primary) policy and an excess policy.

Insurance Company[4] seeking insurance coverage on behalf of East 51st (Index No. 150063/2010) (the "Lincoln General Insurance Action"). Based on this Court's decision in March 2011 and the Appellate Division, First Department's decision, it was declared that RCG's insurer Axis and JOY's insurer Lincoln, were obligated to defend East 51st and reimburse Illinois Union. Of note, the Appellate Division stated that Illinois Union's "intent to seek contractual indemnification from Reliance [RCG] and [JOY] created a potential conflict between East 51st Street and Lincoln General, giving East 51st Street the right to obtain independent counsel." (p. 6).

In 2011, and as a result of the damages East 51st sustained to the subject property and the losses expended in defending the numerous lawsuits, East 51st (through counsel Rex Whitehorn[5]) commenced an action against, *inter alia,* The City of New York, RCG, JOY, and Barker Steel Company ("Barker Steel"), for negligence and breach of insurance obligations (Index No. 650658/2011) (the "East 51st Affirmative Lawsuit"). Illinois Union retained Cozen O'Connor, LLP ("Cozen")[6] as its coverage counsel, who requested Mr. Whitehorn to permit Illinois Union to "associate" with East 51st in said Action so that Illinois Union could protect and enforce "its rights against others." Cozen also reserved Illinois Union's rights to deny East 51st coverage and "withdraw from East 51st's defense" if East 51st did "not fulfill its obligations" to cooperate pursuant to the controlling policies. Notably, five months thereafter, Cozen undertook the defense of Barker Steel in the East 51st Affirmative Lawsuit, and sought dismissal of same

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[4] The Complaint was signed by O'Melveny and Clyde appeared for the co-plaintiffs on appeal.

Allegedly, RCG also has an excess policy for $15 million from Illinois Union, which is excess to RCG's policy with Everest National Insurance Company.

[5] Rex Whitehorn was later substituted by McDonnell Daly, LLP by stipulation dated November 5, 2012.

[6] Cozen allegedly served as zoning counsel on the construction project to East 51st as well.

(notwithstanding its previous request to "associate" with East 51st in the Action). When RCG moved to dismiss the negligence and breach of contract claims as duplicative of the counterclaims East 51st asserted in the 2008 RCG Action, Mr. Whitehorn requested that O'Melveny address the issues presented by the counterclaims it interposed. However, as per Cozen, on behalf of Illinois Union, Illinois Union refused to direct O'Melveny to assist East 51st's affirmative claims (brought by Mr. Whitehorn). And, by order of this Court dated May 30, 2012, the negligence and breach of contract claims were dismissed as duplicative of the counterclaims interposed by O'Melveny. (The Court did not dismiss the 17th cause of action for negligence against RCG).

Also in 2011, when another action was commenced against East 51st (by Crave Foods Inc.) (Index No. 650650/2011), East 51st promptly forwarded the pleadings to Illinois Union. However, O'Melveny advised East 51st that Illinois Union determined that there was no coverage inasmuch as the named defendants, Kennelly and Shaoul and two other LLCs controlled by them, failed to previously request coverage or show that they were insureds under the Illinois Union policy, notwithstanding that Kennelly and Shaoul's entitlement to defense and indemnification coverage had already been established. East 51st was compelled to retain counsel to defend the matter.

On October 10, 2012, East 51st requested Illinois Union to designate McDonnell Daly, LLP as its defense counsel, which Illinois Union refused.

Based on the above, East 51st claims that it is entitled to designate defense counsel in both the Lincoln General Insurance Action and its Affirmative Lawsuit East 51st, with reasonable attorneys' fees to be paid by Illinois Union. East 51st alleges that O'Melveny has neglected to

represent East 51st's interest, and has promoted the interests of Illinois Union over those of East 51st. O'Melveny engaged in negotiations and proposed a settlement without East 51st's knowledge or consent. O'Melveny failed to raise any objection to Cozen's conflict of interest resulting from Cozen's request to associate with East 51st and in representing Barker's defense against East 51st's Action. Further, had O'Melveny aggressively pursued East 51st's counterclaims against RCG, the allegations and proof of RCG's breach would have relieved the guarantors of their obligation to pay under the CMA (Complaint, ¶50).

Not only did O'Melveny fail to submit the appropriate affidavit on its summary judgment motion for contractual indemnification against RCG, O'Melveny refrained from moving for common law indemnification so as to not implicate Illinois Union's excess policy to RCG, which excess policy is implicated by common law negligence claims. East 51st communicated an offer to Illinois Union to settle its claim against RCG within the limits of Illinois Union's excess policy. However, in order to control its excess policy exposure in East 51st's Affirmative Lawsuit, Illinois Union, *via* O'Melveny, refused to cede its negligence counterclaim in RCG's 2008 Action to East 51st's counsel as requested. Illinois Union manipulated East 51st's interest and blocked East 51st from being made whole through the "excess" policy of RCG.

Further, East 51st alleges that the $19 million insurance policy issued to RCG and the $10 million policy issued to RCG's subcontractor JOY were held inapplicable to East 51st's claims, and yet O'Melveny never moved for any relief arising from RCG's failures to both obtain proper insurance and to ensure that its subcontractor JOY obtained proper coverage.

And, if Clyde cannot collect payment from Axis on the inflated, $15 million legal bill presented on behalf of O'Melveny, Illinois Union will be pitted against East 51st for the proceeds

arising from RCG's policies.[7] Furthermore, pursuant to General Business Law ("GBL")§ 349, Illinois Union failed to advise East 51st of its entitlement to independent counsel.

In support of dismissal, Illinois Union argues that East 51st is already represented by counsel of its own choosing in the East 51st Affirmative Lawsuit, and thus, this portion of its request is moot. In any event, Illinois Union is not obligated under its policy to prosecute or fund East 51st's affirmative claims. And, pursuant to the "Transfer of Rights of Recovery Against Others to Us" condition in the policy, East 51st has transferred to Illinois Union any recovery rights it may have against responsible third parties. Thus, East 51st has no right to direct or control the Lincoln General Insurance Action. And, O'Melveny has been replaced with Clyde in the Lincoln General Insurance Action, and no legitimate criticisms have been alleged against Clyde. Thus, East 51st's request that it be permitted to replace counsel in the Lincoln General Insurance Action fails.

And, any request to replace O'Melveny with McDonnell Daly as East 51st's counsel in the Consolidated Crane Collapse Litigation lacks merit.

Further, Illinois Union argues, East 51st cannot rely on the First Department decision, as it did not hold that a conflict of interest existed between East 51st and Illinois Union, as claimed. Filing the counterclaims were necessary to preserve Illinois Union's rights and the Non-Waiver Funding Agreement, in which Illinois Union was granted the right (in the RCG Action) to file the counterclaim and East 51st agreed to not claim prejudice arising from any action by Illinois Union, bars East 51st's claims of prejudice arising from O'Melveny's interposing of the

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[7] East 51st also alleges that a partner with O'Melveny verbally abused East 51st's managing partner James Kennelly in the preparation of Kennelly's deposition.

counterclaims. And, summary judgment on the contractual indemnification claim against RCG was made pursuant to this Court's instructions, and the Court did not permit the parties to seek summary relief on issues involving negligence as "premature." Since Illinois Union's interest is aligned with East 51st's interest in minimizing its liability, East 51st failed to establish a divergence of interest between itself and Illinois Union to support the Complaint. O'Melveny's actions do not indicate a divergence of interest between an insured and its insurer. East 51st misconstrues the correspondence submitted, and ignores the significant successes achieved by O'Melveny thus far in favor of East 51st. And, granting the relief sought would significantly harm Illinois Union and East 51st in light of O'Melveny's integral involvement in this matter. While not successful in all of its efforts, O'Melveny secured additional insured status for East 51st under the Lincoln and Axis policies, a declaration that RCG is required to defend and indemnify East 51st for losses arising out of the collapse, dismissal of the emotional distress claims, successfully opposing New York Crane's Company's motion to dismiss in the Della Porta action[8], Lincoln's motions to settle the Rite Aid action, various orders to show cause to limit or present crane part inspections, and successfully pursuing discovery requests against the City of New York. At the Court's request, O'Melveny played a central role in the overall case management and administration of this litigation, including the resolution of 34 actions and conducting more than 100 depositions. O'Melveny has pursed coverage rights on East 51st's behalf, including rights under Illinois Union's policy with RCG. Thus, O'Melveny has not prioritized Illinois Union's interests over East 51st's. And, Illinois Union argues that since legal

[8] In 2008, John Della Porta and his wife commenced a personal injury Labor Law action against East 51st, RCG, JOY, and others (the "2008 Della Porta Action"). This action was settled in 2012.

expenses are outside the limits of Illinois Union's policies and do not erode coverage for purposes of settling or paying any judgment, the legal bills are of no moment. East 51's GBL claim lacks merit, as this consumer protection statute that gives a private right of action to persons injured by "deceptive conduct" does not cover the conduct alleged here.[9] Additionally, it has been held that even where a conflict of interest exists, an insurer has no affirmative duty to notify its insured of its right to independent defense counsel

In opposition, East 51st argues that the Funding Agreement, which applies only to such Action, was the result of Illinois Union's concern that the CMA could negatively affect East 51st's entitlement to coverage under RCG's primary and excess policies. The Funding Agreement was signed six weeks after O'Melveny appeared for East 51st in the 2008 RCG Action, and by its express terms, did not define the relationship between the parties for all purposes. Illinois Union has not shown that it has paid any indemnity on East 51st's behalf other than O'Melveny's legal bills. And, O'Melveny acquiesced in the dismissal of its own client's claims and have protected the interests of those parties adverse to East 51st. O'Melveny entered into secret settlements with parties against which East 51st has its own claims. For example, an e-mail indicates that O'Melveny accepted a $25,000 settlement offer from Langan Engineering Environmental Services ("Langan") without East 51st's consent. And, coupled with the allegations in the Complaint, East 51st has sufficiently supported its request for independent counsel.

In reply, Illinois Union argues that the evidence and case law show that no divergence of

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[9] No specific relief is sought under GBL, and East 51st's opposition papers do not address dismissal of the GBL allegations.

interest exists and Illinois Union has the right to control the defense of East 51st in the Crane Collapse Litigation. After Langan prevailed on its motion for summary judgment, Langan approached O'Melveny requesting that East 51st Street accept a modest settlement from Langan in exchange for East 51st Street giving up its rights to appeal the adverse summary judgment decision. At the time of O'Melveny's email with Langan, O'Melveny was generally aware that Illinois Union and East 51st had reached an agreement over the handling of settlement proceeds. In short, O'Melveny's e-mail to Langan's counsel in response to Langan's settlement proposal (Daly Aff. Ex. A) is entirely explainable.

Discussion

A motion to dismiss pursuant to CPLR 3211(a)(l) on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" *(DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001]; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action *(Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully

drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]).

As to East 51st's request for an "Order declaring that East 51st Street is entitled to designate counsel of its own choosing in the East 51st Street [Affirmative] Action . . . with reasonable attorneys' fees to be paid by Illinois Union . . .," dismissal of this request is warranted. Inasmuch as East 51st seeks a declaratory judgment, a "declaratory judgment is only appropriate where a justiciable controversy exists" (CPLR 3001 ["The supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy . . . ."]; *Bolt Associates v Diamonds-In-The-Roth, Inc.*, 119 AD2d 524, 501 NYS2d 41 [1st Dept 1986]). "One exists where there is an actual controversy affecting the parties' rights" (*Bolt Associates, supra, citing Subcontractors Trade Assn. v Koch*, 62 NY2d 422, 477 NYS2d 120, 465 NE2d 840). Here, the Complaint indicates, and it is uncontested that East 51st engaged Mr. Whitehorn to commence such Action and then replaced Mr. Whitehorn with McDonnell Daly. And, there is no indication that Illinois Union objected to this engagement. In fact, Illinois Union denies any obligation to prosecute such affirmative claims on East 51st's behalf. As such, there is no "justiciable controversy" over whether East 51st may designate counsel of its own choosing in East 51st Street Affirmative Lawsuit.

Furthermore, the Complaint fails to allege any factual or legal basis for Illinois Union to fund the expenses associated with East 51st's prosecution of affirmative claims against The City of New York, RCG, JOY and others. It is also uncontested that the documentary evidence, *i.e.*,

the Illinois Union policies at issue, provide that Illinois Union "has the right and duty to *defend* the insured against any 'suit' . . . ." (Exh. K to Illinois motion, Primary Policy, Section I.1(a)-Coverages) (emphasis added). Illinois Union's excess policy issued to East 51st likewise indicates that "Except as otherwise stated herein, and except with respect to (1) any obligation to investigate or defend any claim or suit, . . . the insurance afforded by this policy shall apply in like manner as the *underlying insurance* described in the Declarations."[10] (Excess Insurance Policy, Conditions, A.) (emphasis added)). The excess policy further provides " . . . legal expenses incurred by the insured with the consent of the company in the investigation or defense of claims . . . shall be borne by both the company and the insured . . . ." (Excess Insurance Policy, Conditions, F).

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). A reading of the pertinent sections of the policies at issue fail to demonstrate any obligation on behalf of Illinois Union to prosecute or fund the prosecution of affirmative claims on behalf of its insured, East 51st (*P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 882 NYS2d 34 [1st Dept 2009] (policy requiring defendant to defend a suit does not require defendant to either prosecute affirmative claims or reimburse plaintiff for the fees paid its counsel for such affirmative claims); *National City Bank v New York Cent. Mut. Fire Ins. Co.*, 6 AD3d 1116, 775 NYS2d 679 [4th

[10] The Declarations specify the name/address of named insured (*i.e.*, East 51st), policy period, insuring company (as Illinois Union), premium, underlying insurance, and monetary limits of insurance.

Dept 2004] (where an insurer fulfills its duty under the policy to provide a defense for an insured, hiring separate counsel to pursue an insured's affirmative cross claims is the insured's responsibility")). Therefore, Illinois Union's motion to dismiss East 51st's request for an order permitting it to designate counsel of its own choosing in the East 51st Street Affirmative Lawsuit, with reasonable attorneys' fees to be paid by Illinois Union, is granted.

As to East 51st's request for an "Order declaring that East 51st Street is entitled to designate counsel of its own choosing in the . . . Lincoln General [Insurance] Action, with reasonable attorneys' fees to be paid by Illinois Union . . .," Illinois Union's request to dismiss this request is *not* warranted.

As alleged by the Complaint, "pursuant to the terms of the [primary and excess] policies," Illinois Union appointed O'Melveny to defend the suits brought against East 51st and retained Clyde to commence suit against RCG and Joy's insurers. Consistent with this allegation, the primary policy requires Illinois Union (under certain circumstances) to defend East 51st against any suit seeking damages for bodily or property damage (Section 1, Coverages). The primary policy also provides that "If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring 'suit' or transfer those rights to us to enforce them." (Section IV, 8). Thus, East 51st Street has transferred to Illinois Union any recovery rights it may have against potentially responsible parties.

However, it is uncontested that the right of the insurer in the policy to defend any action or proceeding relating to the insured (and control same) is "overridden by the rights guaranteed to an insured under the law of this State when there is a conflict of interest between the insurance

company and the insured (*69th Street and 2nd Ave. Garage Associates, L.P. v Ticor Title Guarantee Co.*, 207 AD2d 225, 622 NYS2d 13 [1st Dept 1995], *citing Public Service Mutual Ins. Co. v Goldfarb*, 53 NY2d 392, 401, 442 NYS2d 422, 425 NE2d 810). Where "there is a conflict of interests between an insurance company and its insured, the insured has the right to independent counsel and implicitly that such counsel may be of the insured's choosing, with reasonable fees paid by the insurer" (*69th Street and 2nd Ave. Garage Associates, L.P. v Ticor Title Guarantee Co., supra* (holding that insured was entitled to recover for legal expenses incurred from its independent counsel where the interests of the insured and its insurer "diverged seriously")).

Assuming the truth of the allegations of the Complaint, East 51st sufficiently alleged a divergence of interests between it and Illinois Union to warrant independent counsel with reasonable fees to be paid by Illinois Union.

The Complaint alleges that East 51st commenced a legal malpractice lawsuit against Cozen, and that Cozen is defending Barker Steel against East 51st's claims in the East 51st Affirmative Lawsuit. Allegedly, Cozen, on behalf of Barker Steel, also sought dismissal of East 51st's claim in the East 51st Affirmative Lawsuit (Complaint ¶¶25-36). However, Cozen was also engaged by East 51st's insurer, Illinois Union, as coverage counsel to protect *Illinois Union's* interests in East 51st's Affirmative Lawsuit, and Cozen, on behalf of Illinois Union, has threatened to decline East 51st's defense unless East 51st cooperates with Illinois Union pursuant to the policies. Further, the Complaint alleges that the East 51st Affirmative Lawsuit implicates the excess policy Illinois Union issued to RCG, and that East 51st's offer communicated to Illinois Union as its insured to settle its affirmative negligence claim with RCG within the limits

of RCG's excess policy has been rejected (in that counsel on East 51st's negligence counterclaim will not cede this negligence claim to counsel on the affirmative negligence claim) (Complaint, ¶¶71-78) (*see e.g., 69th Street and 2nd Ave. Garage Associates, L.P. v Ticor Title Guarantee Co., supra* (finding a divergence of interests between the insurer and its insured because although "each wished to defeat the claim of the" adversary, the insurer, "having insured the title of a heavily mortgaged property, could proceed leisurely" and the insured "needed a quicker resolution to keep open the possibility of refinancing, to retain customers and employees, and to stay in business.")).

Additionally, East 51st also alleges that in the event Illinois Union cannot collect O'Melveny's $15 million legal bill from, *inter alia*, RCG's insurer, Axis, or Joy's insurer, Lincoln General for any number of reasons, and Clyde's attempts to collect the O'Melveny bill through the indemnification and/or hold harmless provisions of RCG's CMA, such attempt at collection will compete against East 51st's pursuit of proceeds from RCG's policies for damages it sustained from the collapse. That such defense costs will not erode the amount of coverage available to East 51st for settlements or judgments entered against it due to the "Supplemental Payments-Coverage A and B" does not establish, as a matter of law, that Clyde will not seek to collect the O'Melveny bill through the indemnification and/or hold harmless provisions of RCG's CMA or that Illinois Union's O'Melveny's bill will not be paid from Illinois Union's indemnity coverage for RCG.[11]

As pointed out by Illinois Union, and contrary to East 51st's contention, the Appellate

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[11] This section of the primary policy provides, "1. We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: a. All expenses we incur . . . These payments will not reduce the limits of insurance."

Division did not "specifically" state that a divergence of interests exists between East 51st, as insured, and Illinois Union, as insurer such that East 51st has a right to independent counsel (Complaint, ¶12). The Appellate Division stated that Illinois Union's "intent to seek contractual indemnification from Reliance [RCG] and Joy created a potential conflict between East 51st Street and *Lincoln General* [Joy's insurer], giving East 51st Street the right to obtain independent counsel."[12]

Illinois Union's claim that no divergence of interests exists since both it and it's insured, East 51st, share the common interest in minimizing East 51st's liability resulting from the crane collapse is insufficient to show that their interests are "squarely aligned." An alleged united interest in defending against an adverse claim exists in all cases in which the insurer defends its insured, and is insufficient to show that no conflict of interest exists (*69th Street and 2nd Ave. Garage Associates, L.P. v Ticor Title Guarantee Co., supra*).

It is noted that the bulk of the Complaint asserts allegations of O'Melveny's failures to, *inter alia,* adequately represent the interests of East 51st (¶¶97-103), including offering settlements without East 51st's consent (¶¶20-24), failure to oppose Cozen's role in the various matters (¶¶36), abandonment of East 51st's counterclaims to the detriment of East 51st's affirmative claims (¶¶41, 46-47), failure to pursue negligence-based indemnification claims (¶¶51-59), bill churning (¶¶60-70), failure to challenge RCG's breach of insurance obligations (¶¶79-85), and mistreatment of East 51st's manager (¶¶90-94). Yet, East 51st does *not*, in its

[12] However, it is noted that to the extent Illinois Union *also* sought contractual indemnification from RCG, it appears that the Appellate Division's finding of a potential conflict between East 51st Street and *Lincoln General* (insurer for Joy), likewise applies to the relationship between East 51st and Illinois Union as RCG's *excess* insurer, as East 51st appears to intimate. And, Illinois Union's moving papers explain that the Appellate Division's holding of a potential conflict between East 51st and Lincoln (as Joy's insurer) deprived Lincoln of the "right to appoint counsel to defend East 51st Street" (Illinois Insurance Memorandum of Law, p. 13).

"Wherefore clause" seek an order declaring that it is entitled to designate independent counsel, at Illinois Union's expenses, in the Consolidated Crane Collapse litigation. And, it is uncontested that O'Melveny no longer represents East 51st in the Lincoln General Insurance Action, as this matter was transferred to Clyde. Therefore, such allegations aimed at O'Melveny's actions and inactions are insufficient indicate a conflict of conflict of interest sufficient to entitle East 51st to independent counsel in the Lincoln General Insurance Action, as requested.

And, the Funding Agreement executed between Illinois Union and East 51st indicates that Illinois Union was authorized to file counterclaims in the RCG Action, and East 51st agreed to "not claim prejudice arising from any action or inaction by Illinois Union and/or its agents or attorneys with respect to the [RCG] Action." Therefore, such document bars East 51st from seeking independent counsel based on the alleged inaction or action by Illinois Union or O'Melveny regarding the counterclaims (Complaint, ¶¶37-50).

However, based on the allegations in the Complaint, and the absence of any documentary evidence to the contrary, plaintiff sufficiently stated a claim that it is entitled to independent counsel in the Lincoln General Insurance Action, with reasonable attorneys' fees to be paid by Illinois Union. Thus, the branch of Illinois Union's motion to dismiss such claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Illinois Union Insurance Company pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint based on documentary evidence and for failure to state a cause of action is granted solely to the extent that East 51st's claim for an order declaring that it is entitled to designate counsel of its own choosing in the East 51st Street

Affirmative Lawsuit, with reasonable attorneys' fees to be paid by Illinois Union, is severed and dismissed; and it is further

ORDERED that defendant Illinois Union Insurance Company shall e-file and serve its Answer within 20 days of the date of this order; and it is further

ORDERED that defendant Illinois Union Insurance Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 17, 2013, 10:00 a.m.

This constitutes the decision and order of the Court.

Dated: September 11, 2013

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

HON. CAROL EDMEAD