East 51st St. Dev. Co., LLC v Lincoln Gen. Ins. Co.
2013 NY Slip Op 32400(U)
October 3, 2013
Sup Ct, New York County
Docket Number: 150063/2010
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 150063/2010
EAST 51ST STREET DEVELOPMENT
VS.
LINCOLN GENERAL INSURANCE
SEQUENCE NUMBER : 010
AMEND SUPPLEMENT PLEADINGS

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

In accordance with the accompanying Memorandum Decision, it is hereby

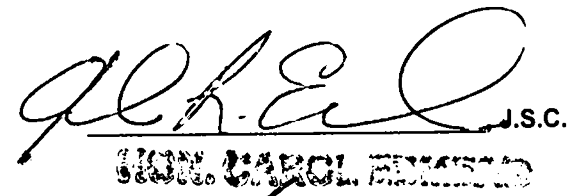
ORDERED that the motion by defendant Lincoln General Insurance Company pursuant to CPLR § 3025(b) for leave to amend its answer and cross-claim to the complaint in the form of the proposed First Amended Answer is granted, and such First Amended Answer is deemed served as of the date of service of this Decision and Order with notice of entry; and it is further

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

ORDERED that responsive pleadings or papers shall be served within 30 days of service of notice of entry of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: 10/3/13



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

---X

EAST 51st STREET DEVELOPMENT COMPANY, LLC
and ILLINOIS UNION INSURANCE COMPANY,

Index No.: 150063/2010

Plaintiff,

-against-

DECISION AND ORDER
Motion Seq. #010

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

Defendants.

---X

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) for leave to amend its answer and cross-claim to the complaint in the form of the proposed First Amended Answer.

Factual Background

This action by East 51st Street Development Company, LLC ("East 51st") and Illinois Union Insurance Company ("Illinois Union") (collectively, "plaintiffs") arises out of the crane collapse accident that occurred on March 15, 2008 in Manhattan.

By way of background, in one of the many cases arising from the crane collapse accident, on February 24, 2010, the Court (Karen S. Smith, J.) held that Lincoln General (as Joy's insurer which sought to intervene in the action and settle the case) was "released of its obligation to provide any further defense to defendants E. 51st St., RCG and Joy" upon its "payment of the full amount of coverage to settle" the damage claims made by Rite Aid and Juan Perez (Decision, p.

8) (hereinafter, "J. Smith's Order"). The decision was affirmed by Appellate Division, First Department on May 10, 2011 (the "May 2011 First Department Decision").

In 2010, East 51st and Illinois Union commenced this action against Lincoln General, Axis Surplus Insurance Company, Interstate Fire and Casualty Company ("Interstate")(RCG's insurer), and Everest National Insurance Company for a declaration that, *inter alia*, Lincoln General is obligated to pay all defense costs East 51st Street incurred and will incur regarding the tort actions commenced against East 51st until the date the conditions in the J. Smith's Order are satisfied. Lincoln General filed an Answer, and cross-claimed for declaration that, *inter alia*, Interstate is required to defend and provide primary indemnification coverage to East 51st. Interstate also filed an Answer, seeking a declaration that it owed no defense costs or indemnity payments to plaintiffs, and in the event East 51st is entitled to coverage under Interstate's policy, a declaration that such coverage is excess to any other primary insurance issued to East 51st (pp. 17-18).

Motion practice ensued, resulting in a decision by this Court dated March 4, 2011,[1] which, on appeal, was modified by the Appellate Division, First Department on February 5, 2013. On appeal, the First Department declared that, *inter alia*, "Lincoln General is obligated to provide primary coverage to East 51st Street and that Interstate has no duty to defend or provide coverage in the litigation. . . ." (the "February 5, 2013 Appellate Division Decision," p. 5). However, it was also determined that the insurance coverage provided to East 51st as an

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[1] In the order, this Court, *inter alia*, granted plaintiffs' motion for summary judgment declaring that Lincoln General has a duty to defend East 51st and to reimburse Illinois Union for past defense costs in the underlying crane collapse litigation from the date of the crane collapse (March 15, 2008) to the date that Lincoln General exhausted its policy limits; granted Lincoln General's motion for summary judgment declaring that Interstate is obligated to provide primary coverage to East 51st; and denied Interstate's motion for summary judgment dismissing the complaint and Lincoln General's cross-claims against it.

additional insured in Lincoln General's *and Interstate's* policies was primary to the policy issued by Illinois Union, but that Interstate's policy was exhausted upon its July 2009 settlement with RCG in a related federal court declaratory judgment action (February 5, 2013 Appellate Division Decision, p. 7).

Based on the February 5, 2013 Appellate Division Decision, Lincoln General now argues, in support of leave to amend, that Interstate is required to contribute to and share in the defense costs of East 51st from the date of the accident until it exhausted its policy in July 2009, that the proposed amendment has substantial merit so as to establish a *prima facie* right to the relief sought, and the proposed amendment is not prejudicial to Interstate, other defendants or plaintiffs. Lincoln General previously asserted a cross-claim for contribution against Interstate in its initial Answer, and this Court previously ruled against Interstate's motion to dismiss that cross-claim. Thus, all defendants and plaintiffs, have been aware of a cross-claim and will not be prejudiced or surprised by Lincoln General's assertion of legal arguments that are based on the very same claim. Lincoln General also submits a letter from East 51st's counsel to Lincoln General's counsel indicating that, while East 51st had not demanded Interstate to pay its defense costs, it would not object to Lincoln General's pursuit of contribution from Interstate. Thus, leave to amend its cross-claim against Interstate for contribution should be granted.

In opposition, Interstate argues that the Lincoln General improperly relies on dicta and interim findings in the First Department Decision, and ignores the First Department's express holding that Interstate settled its contractual obligations, thereby freeing itself of all of its "indemnification and defense obligations under the policy . . . ." and that Interstate had "no duty to defend or provide coverage in the litigation." Said Decision also noted that if an obligation to

[* 5]

cover East 51st, as an additional insured, existed, East 51st "would be subject to the contractor's conditional endorsement, and subject to its having been triggered by failure to the primary insured, Reliance, to comply with the terms of the endorsement." The First Department rejected plaintiffs' and Lincoln General's claims against Interstate, and the time for Lincoln General to appeal this determination expired. Thus, Lincoln General is barred by the doctrine of *res judicata* from alleging the cross-claim recast under a different legal theory. Leave to amend would prejudice Interstate which has already litigated the issue of Interstate's obligations to East 51st. In light of Lincoln General's misleading representations, Lincoln General's insistence that Interstate has a duty to defend and indemnify, which is contrary to the clear order from the First Department, constitutes frivolous litigation and is sanctionable as such. East 51st's counsel's letter also indicates the frivolous nature of Lincoln General's position throughout the litigation.

In reply, Lincoln General notes that the March 2011 Appellate Division Decision modified this Court's decision, but did not grant Interstate's motion to dismiss Lincoln General's cross-claim, which stands today. At the time of the February 5, 2013 Appellate Division Decision, Interstate and Lincoln General no longer had a continued duty to defend since they both exhausted their policies. The only difference in the exhaustion of policies regarding the defense is that Interstate had exhausted its policy prior to the summary judgment briefing to the motion court. If the exhaustion of Interstate's policy as of July 2009 had been the determining factor regarding coverage, the Appellate Division's determination that Interstate was a co-primary insurer of East 51st would have been inconsistent and superfluous. And, in response to Interstate's previous argument on appeal concerning its settlement with RCG as a payment of defense costs or reimbursement of a supplementary payment, the Appellate Division stated that

[* 6]

Interstate established that its policy was exhausted in July 2009 when it paid $1 million to RCG settlement of all of Interstate's defense and indemnification obligations.

Lincoln General argues that the finding that Interstate did not have an obligation to cover the cost of East 51st's defense or settlements incurred *after* Interstate's July 2009 settlement exhausted such obligations does not negate Lincoln General's cross-claim for amounts Illinois Union incurred in the defense of East 51st prior to the time of Interstate's exhaustion of its policy. The doctrine of res judicata does not apply to eliminate Interstate's obligations for costs incurred prior to the point the policy was exhausted.

Discussion

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 AD3d 507, 868 NYS2d 612 [2008]). "Mere delay is insufficient to defeat a motion for leave to amend" (*Kocourek citing Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34, 734 NYS2d 1 [2001]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Kocourek citing Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365, 841 NYS2d 277 [2007], *quoting Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 NYS2d 571, 429 N.E.2d 90 [1981]). "[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted" (*Megaris Furs, Inc. v Gimble Bros.*, Inc., 172 AD2d 209 [1st Dept 1991]). "[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion

for summary judgement" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

The party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Here, after holding that "Interstate has no duty to defend or provide coverage in the litigation" the February 2013 Appellate Division Decision explained:

> As is undisputed, 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*. . . .
>
> Interstate[] . . .admitted in its answer that East 51st Street was an additional insured under that policy [issued to Reliance]. . . .
>
> However, Interstate has demonstrated that its policy was exhausted upon its July 2009 settlement with Reliance of the declaratory judgment action commenced in federal court which sought defense and indemnity for several lawsuits relating to the crane accident . . . .

Thus, as relevant herein, the Appellate Division ruled as follows:
(1) Interstate "has" no duty to defend or cover East 51st
(2) Interstate's and Lincoln General's policies "were" primary to the policy issued by Illinois Union
(3) Interstate and Lincoln General "are" obligated to reimburse Illinois Union for defense costs
(4) However, Interstate showed that its policy was exhausted in July 2009

Notwithstanding the determined fact that Interstate's policy provided to East 51st was "primary"(P. 9), such policy had been previously exhausted in July 2009, and therefore, Interstate "has" no *continuing* duty to defend or cover East 51st.

Here, while the First Department held that Interstate's duties to defend and indemnify East 51st under its policy was extinguished, such duties were held to have existed *until* such extinguishment. To hold otherwise would be to ignore the Appellate Division's additional findings that Interstate's policy was primary and that Interstate is obligated to reimburse Illinois Union for defense costs, which this Court is not inclined to so ignore (*Dresser v Bedford Gardens Co.*, 74 AD2d 561, 424 NYS2d 281 [2d Dept 1980] (declining to adopt a conclusion that "renders the decision of the Civil Court internally inconsistent and completely meaningless")). The Appellate Division required both Lincoln General and Interstate, as co-primary insurers, to reimburse Illinois Union for East 51st's defense costs. Consistent with this holding, Lincoln General's claim that Interstate is obligated to *contribute* to East 51st's defense costs from the date of the incident (March 15, 2008) until the date Interstate exhausted its policy in July 2009 was only extinguished upon Interstate's full settlement of its policy limits in July 2009 has merit.

Contrary to Interstate's contention, the doctrine of *res judicata,* to the extent applicable

within the same action,[2] premised on the First Department's statement that Interstate has no duty to defend or provide coverage to East 51st in the litigation, *does not* bar Lincoln General's proposed claim that Interstate must contribute to East 51st's defense costs from the date of the incident until July 2009 (when Interstate's policy was exhausted). Under the doctrine of *res judicata*, "a party may not litigate a claim where *a judgment on the merits exists* from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Mays v New York City Police Dept.*, 48 AD3d 372, 852 NYS2d 106 [1st Dept 2008] *citing Matter of Hunter*, 4 NY3d 260, 269, 794 NYS2d 286, 827 N.E.2d 269 [2005] (emphasis added)). The doctrine of *res judicata* does not apply in the manner sought by Interstate. Lincoln General is not seeking a blanket declaration that Interstate has a duty to defend and cover East 51st. Lincoln General is seeking to pursue a claim against Interstate that reflects the First Department's rulings against Interstate under Interstate's policy which has been declared as "primary" and under which Interstate has been found obligated to reimburse Illinois Union for East 51st's defense costs through July 2009 when it exhausted its policy.

Therefore, Lincoln General's instant application for leave to assert a claim for contribution, alleging that "Interstate is obligated to contribute to the payment of East 51st

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[2] *E.g., Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269, 799 NYS2d 416 [1st Dept. 2005] (holding that leave to amend was not barred by res judicata or collateral estoppel, *to the extent, if any, the latter two doctrines may apply to a ruling made within the same litigation*) (emphasis added); *but see, People v Evans*, 94 NY2d 499, 502, 706 NYS2d 678, 727 NE2d 1232 [2000] ["law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation," and that it "has been aptly characterized as 'a kind of intra-action res judicata' "] [quoting Siegel, N.Y. Prac. § 448, at 723 (3d ed.)]).

Street's defense costs incurred from the date of the subject-matter accident until the date Interstate exhausted its policy in July of 2009," is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Lincoln General Insurance Company pursuant to CPLR § 3025(b) for leave to amend its answer and cross-claim to the complaint in the form of the proposed First Amended Answer is granted, and such First Amended Answer is deemed served as of the date of service of this Decision and Order with notice of entry; and it is further

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

ORDERED that responsive pleadings or papers shall be served within 30 days of service of notice of entry of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: October 3, 2013

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

HON. CAROL EDMEAD