

Country-Wide Ins. Co. v Excelsior Ins. Co.
2015 NY Slip Op 32646(U)
September 1, 2015
Supreme Court, New York County
Docket Number: 158326/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 35

Index Number : 158326/2013
COUNTRY-WIDE INSURANCE COMPANY
vs.
EXCELSIOR INSURANCE COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

is decided in accordance with the annexed decision.

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

Dated: 9/11/15

PK, J.S.C.

1. CHECK ONE: CASE DISPOSED
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

CYNTHIA S. KERN
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 158326/2013

DECISION/ORDER

EXCELSIOR INSURANCE COMPANY and
PEERLESS INSURANCE,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking a declaratory judgment that it is entitled to reimbursement from defendants with respect to its defense and indemnification of the party's mutual insured in an underlying personal injury action. Both parties now move for summary judgment. For the reasons set forth below, plaintiff's motion is denied and defendants' motion is granted.

The undisputed facts are as follows. This is an action by one insurer, plaintiff Country-Wide Insurance Company ("Country-Wide"), to recover from another insurer, defendant Excelsior Insurance Company ("Excelsior"), the costs associated with defense and indemnification of their mutual insured in a personal injury action. The two insurers respectively insured Truck-Rite Distribution Systems Corporation ("Truck-Rite"). Specifically,

Truck-Rite had a general liability policy with defendant Excelsior and a motor vehicle liability policy with plaintiff Country-Wide.

Sometime in 2011, an employee of Truck-Rite who was injured on the job while he was unloading a trailer sued the owner of the trailer, R&L Carriers, Inc. ("R&L"). R&L, in turn, brought a third-party action against Truck-Rite asserting claims for contribution, indemnification and breach of contract. Country-Wide defended Truck-Rite in the third-party action. Excelsior, on the other hand, denied Truck-Rite's tender of defense on the ground that the third-party claims were excluded under its policy's "auto" exclusion.

Following a liability trial in the main action, the jury apportioned 35% of the fault to R&L, 60% to Truck-Rite and 5% to plaintiff. Thereafter, pursuant to a short form order dated November 8, 2013, the court granted a motion by R&L for partial contractual indemnification against Truck-Rite finding that "Truck-Rite is obligated to indemnify R&L for the 60% share of liability that was apportioned against it by the jury." On November 8, 2013, prior to the start of the damages phase of the trial, the parties entered into a total settlement in the sum of \$1,175,000 with R&L paying \$390,000 and Truck-Rite paying \$785,000 directly to plaintiff. Truck-Rite's share of the settlement proceeds were paid by Country-Wide.

Thereafter, R&L moved against Truck-Rite for an order awarding it 60% of its reasonable attorney's fees, which it incurred in the defense of the underlying action and for 100% of the fees, costs and expenses it incurred in connection with the third-party action. Truck-Rite cross-moved for an order directing R&L to pay it a refund of the \$80,000 it paid over its 60% share of the settlement, which represented additional attorney's fees. The court denied R&L's motion and granted Truck-Rite's cross motion.

Country-Wide now brings the instant action against Excelsior for a judgment declaring that Excelsior is primarily obligated to indemnify Truck-Rite for the settlement of the underlying third-party action in the sum of \$785,000, plus legal fees. In the alternative, Country-Wide seeks a judgment declaring that it and Excelsior are primary co-insurers and, as such, Excelsior is responsible to reimburse Country-Wide for the settlement of the underlying action in proportion to the limits of coverage in Country-Wide's and Excelsior's respective insurance policies, plus their proportionate share of attorney's fees. Country-Wide also seeks such judgment against, and has named Peerless Insurance ("Peerless") as a defendant in this action, on the ground that Excelsior's initial disclaimer letter to Truck-Rite was written on Peerless letterhead.

Both parties now move for summary judgment. The threshold issue for the court is whether coverage for Country-Wide's direct settlement payment to plaintiff employee in the underlying action—which operated as an indemnification of R&L—is excluded by Excelsior's policy.

"To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies to the particular case." *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652 (1993); *Bell Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003). As a result, "policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer." *Bell Painting Corp.*, 100 N.Y.2d at 383. If an exclusion in a policy is found to be ambiguous by the court, and could be construed against the insurer drafter

and in favor of potential coverage for the policyholder, the court will find in favor of the insured. *Continental*, 80 N.Y.2d at 655 (insurer required to defend based on ambiguous exclusion); *Bell Painting*, 100 N.Y.2d at 388 (insurer required to defend and indemnify based on ambiguous exclusion). An exclusion will be found to be ambiguous when “reasonable minds can disagree whether the exclusion applies” to the circumstances of the case. *Id.* at 387.

In the present case, contrary to Excelsior’s contention, its policy does not unambiguously exclude R&L’s claim against Truck-Rite for contractual indemnification in the underlying third-party action. Excelsior contends that R&L’s claim is excluded under its policy’s auto exclusion, which provides that the policy 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.” The court agrees that this exclusion unambiguously excludes Truck-Rite’s employee’s direct claims against R&L in the underlying action. However, R&L’s claim for contractual indemnification against Truck-Rite in the third-party action is not a claim based on bodily injury arising out of the use of an auto. On the contrary, it is a claim that Truck-Rite is liable to R&L pursuant to a contract between the parties wherein Truck-Rite agreed to indemnify R&L “against any and all claims asserted against [R&L] arising from the actions, omissions or negligence of [Truck-Rite’s] employees, agents or servants.” Thus, as this contractual indemnification claim is distinctly different from the plaintiff’s direct bodily injury claim, Excelsior’s auto exclusion does not relieve Excelsior from its obligation to defend and indemnify Truck-Rite in the underlying third-party action.

However, notwithstanding the fact that R&L’s claims were not excluded under the Excelsior policy, Country-Wide is not entitled to reimbursement from Excelsior as Excelsior has

established that its policy unambiguously provides that it provides only excess coverage for the underlying action. The Excelsior policy includes an “other insurance” clause that provides:

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or any other basis: . . .

(d) If the loss arises out of the maintenance of use of aircraft, “autos” or watercraft to the extent not subject to Exclusion g. of Section 1 – Coverage A – Bodily Injury and Property Damage Liability.

The policy further provides that when the insurance is excess, Excelsior will have no duty to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit.” Moreover, the policy states that when the insurance is excess over other insurance, Excelsior is only responsible to cover such loss to the extent that the amount of such loss exceeds the sum of “[t]he total amount that all such other insurance would pay for the loss in the absence of this insurance.”

Here, the Excelsior policy is excess over Country-Wide’s policy in this matter as the loss—Truck-Rite’s indemnification of R&L for 60% of the settlement funds—“arises out of” the use of an “auto”. R&L’s contribution and indemnification claims arise out of Truck-Rite’s use of R&L’s trailer, which falls within the definition of “auto” as defined by the policy. Unlike the exclusionary language itself, the Excelsior policy’s “other insurance” provision unambiguously provides that Excelsior insurance would be excess in this instance. Accordingly, as Country-Wide also had a duty to defend Truck-Rite in the underlying third-party action, Excelsior, as the excess carrier, did not have a duty to defend. Further, as it is undisputed that the settlement amount paid by Country-Wide did not exceed its policy limits, Excelsior is not liable to

