SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INTERSTATE FIRE & CASUALTY

Plaintiff,

- v -

ASPEN INSURANCE UK LIMITED; ASPEN SPECIALTY INSURANCE COMPANY; ASPEN AMERICAN INSURANCE COMPANY; STANDARD WATERPROOFING CORP.

Defendant.

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INDEX NO. 153512/2017

MOTION DATE 06/13/2019, 07/31/2019, 08/05/2019

MOTION SEQ. NO. 002; 003; 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 96, 97, 98, 99

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for DISMISSAL.

In this action for declaratory relief that stems from plaintiff Interstate Fire & Casualty's ("Interstate") defense of defendant Standard Waterproofing Corp. ("Standard") in an underlying construction defect action, *Board of Managers of Fifteen Madison North Condominium v Madison Park Owner LLC, et. al.*, Index No. 652052/2011 (the "Underlying Action"), plaintiff now moves for partial summary judgment against defendant Aspen Insurance UK Ltd ("Aspen UK") pursuant to CPLR 3212 for: (1) a declaration that Aspen UK had a duty to defend Standard in the Underlying Action; (2) granting plaintiff a money judgment for Aspen UK's share of the costs that plaintiff incurred in the Underlying Action; and (3) awarding plaintiff pre-judgment interest from the date of each payment made in defense of Standard in the Underlying Action (motion sequence 003).

Defendants Aspen UK, Aspen Specialty Insurance Co., and Aspen American Insurance Co. (collectively "Aspen") and Standard move separately in motion sequences 002 and 004 to dismiss this action pursuant to CPLR 3211(a)(10) for

failure to join Liberty Mutual Insurance Company ("Liberty") and Imperium Insurance Company ("Imperium") as necessary parties (NYSCEF ## 36 and 100 – Notice of Motion). The motions are opposed.

The Decision and Order is as follows:

FACTS

As a matter of background, Standard was contracted to perform water-proofing work as part of a condominium conversion project at 15 East 26th Street in the city, county, and state of New York. Standard was hired by the condominium sponsor, Madison Park Owner LLC ("MPO" or "Sponsor") and by the project construction manager, G Builders (NYSCEF #62 – Standard's Written Agreements and Change Orders). Standard's duties on the project included removal and replacement of existing roofs and installation of insulation and waterproof membrane; removal and reconstruction of brick; parapet replacement; furnishing and installation of all roofing components, accessories, flashing, counterflashing, pitch pockets, reglets, coping, closures, caulking, metal cladding and insulation for waterproofing; thermal and moisture protection; and creation of masonry window openings (*id.*). Standard worked on the project between December 2005 and Fall of 2007 (NYSCEF #75 – Standard's Response to Pl's First Interrogatory at ¶¶5-6).

However, the water-proofing did not work as planned, and the condominium occupants experienced water damage in their units, reporting the damage to the Condominium Board in 2009 (NYSCEF #24 at ¶16). In 2011, the Condominium Board retained Rand Engineering and Architecture, P.C. ("Rand") to inspect the building. Rand reported numerous issues with the building, including water infiltration relating to Standard's work. Thus, in 2011, the Condominium Board filed the Underlying Action against MPO, amongst other defendants (NYSCEF #59 – Underlying Action Complaint). MPO, in turn, initiated a third-party action against Standard on March 12, 2012, for indemnification for the Condominium Board's claims of construction defects (NYSCEF #60 – Underlying Action Third Party Complaint).

Standard maintained Commercial General Liability (CGL) insurance with four different entities between 2006 and 2014: (1) plaintiff Interstate between March 30, 2006 and October 22, 2007; (2) defendant Aspen between October 22, 2007 and October 22, 2009; (3) non-party Imperium between October 22, 2009 and October 22, 2010; and (4) non-party Liberty between October 1, 2010 and October 1, 2014 (NYSCEF ##41-47 – Tender Letters and Disclaimer Letters between Interstate, Aspen, Imperium, and Liberty).

Standard turned to Interstate to defend it in the Underlying Action pursuant to the terms of their GCL policy agreement. Interstate agreed to defend Standard

under a reservation of rights to disclaim coverage under the terms, conditions and exclusions of the Interstate policies (NYSCEF #24 at ¶23).

Aspen, Imperium, and Liberty disclaimed their obligations to defend Standard and have rejected the attempts by Interstate to obtain their participation in the Underlying Action (NYSCEF ##41-47). Aspen argued in its disclaimer that: (1) there are no allegations of an occurrence resulting in property damage during the Aspen policy periods; and (2) the "Continuous and Progressive Exclusion" applies because any alleged property damage at the Condominium took place prior to the Aspen Policies incepting on October 22, 2007 (NYSCEF #47 at 13).

The instant action for declaratory relief against Aspen and Standard was initiated on April 14, 2017 (NYSCEF #1 – Complaint). The Underlying Action was resolved by sealed settlement on December 19, 2017 and discontinued with prejudice (NYSCEF #24 – Amended Complaint).

DISCUSSION

Defendants Aspen's and Standard's Motions to Dismiss

Defendants move to dismiss on the theory that Imperium and Liberty are necessary parties. CPLR 3211(a)(10) allows a party to move to dismiss on the basis that "the court should not proceed in the absence of a person who should be a party". CPLR 1001 defines necessary parties as either "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or [persons] who might be inequitably affected by a judgment in the action", adding that the parties "shall be made plaintiffs or defendants" (*see 27th St. Block Assn. v Dormitory Auth.*, 302 AD2d 155, 160 [1st Dept 2002]). CPLR 1003 states that "[n]on-joinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of [CPLR 1001]."

Defendants claim that Imperium and Liberty are necessary parties under either standard. Defendants argue that if this court found that there was a duty for Aspen to defend and indemnify Standard, then this court would not be able to allocate liability for that coverage without also needing to allocate liability to Liberty and Imperium, whom defendants claim have the same obligation to defend and indemnify Standard. Defendants claim that if Interstate is owed contribution, then Liberty and Imperium are necessary parties who can accord plaintiff complete relief. Defendants argue that without being able to fully apportion liability among all four insurers in one matter, there is no way to ensure that each insurer contribute its fair share of the total obligation. Defendants claim that proceeding with this action without Liberty and Imperium would not serve judicial economy (*see New York v Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469, 475

[1979]). Defendants add that this would create "circuity of litigation" wherein this suit would apportion liability between Aspen and Interstate, and then a separate court in a second lawsuit would apportion liability between Interstate, Aspen, Liberty, and Imperium (*Karama Supermarket v Frawley Plaza Assocs.*, 200 AD2d 355, 356 [1st Dept 1994]). The defendants assert that this risks creating inconsistent judgments.

Additionally, defendants claim that Liberty and Imperium would be inequitably affected by a judgment in Interstate's favor in this matter. Defendants claim that the Liberty and Imperium policies and disclaimers are virtually identical to Aspen's policy and disclaimer, and thus any decision on the scope of Aspen's policy and disclaimer will affect Liberty and Imperium.

Plaintiff counters that defendants cannot succeed on the first CPLR 1001(a) prong because Imperium's and Liberty's absence from this action does not prevent the court from granting complete relief. Interstate claims that Imperium and Liberty are not needed for the court to declare that Aspen's policies are triggered, and that Aspen has a duty to defend Standard. Additionally, Liberty and Imperium are not needed for the court to grant plaintiff a money judgment against Aspen for Aspen's share of Standard's defense costs and any covered indemnity costs. Plaintiff argues that these matters simply do not involve Imperium or Liberty.

Plaintiff further claims that Imperium and Liberty will not be prejudiced here because defense and indemnity costs will be allocated exclusively between plaintiff and defendants; Imperium and Liberty will have no determination made against them.

Further, plaintiff argues that defendants' assertion that a determination regarding Aspen's policy will be binding on Imperium's and Liberty's policy is fallacious. Plaintiff points to *State Farm Fire & Casualty Co. v LiMauro* (65 NY2d 369, 373 [1985]) which recognized "the right of each insurer to rely upon the terms of its own contract with its insured." All four insurance companies issued different policies, covering different policy periods when different events were happening at the condominium to give rise to the underlying claim against Standard. As such, Imperium's and Liberty's policies would need to be construed against the specific factual background at issue during their respective policy periods. Thus, any judgment against defendants will not bind Imperium and Liberty.

Plaintiff further argues that as the insurer who covered one-hundred percent (100%) of Standard's defense and settlement costs, it has the right to seek contribution from Standard's other insurers at its discretion. Plaintiff claims that it identified defendant Aspen as the most viable contributor because its policy period immediately followed plaintiff's. Thus, between plaintiff's and Aspen's policies, Standard was covered the entire time it worked on the building. Additionally,

plaintiff claims that defendant Aspen's coverage continued through the date when the alleged construction defects at the building became known to the unit owners. Plaintiff accepted the disclaimers of Imperium and Liberty on this basis. Plaintiff additionally argues that defendants may simply implead Imperium and Liberty and that plaintiff has no intention to oppose such an approach.

Plaintiff is correct; defendants' motions are denied. Imperium and Liberty are not necessary parties. First, complete relief can be accorded to the existing parties without Imperium's and Liberty's inclusion. Plaintiff determined that Imperium's and Liberty's policies would not cover Standard's liability in the Underlying Action, whereas plaintiff concluded that Aspen was the insurer during the relevant time period. Thus, as between plaintiff and defendants, complete relief can be determined here – either Aspen was required to defend Standard and it owes plaintiff for its litigation and settlement coverage or it does not. If defendants determine that Imperium and Liberty are responsible for coverage, they may implead them in this matter or may seek contribution from them in a separate action. However, complete relief between plaintiff and defendants can be determined in this matter without the other two insurers.

Second, a determination in this matter will not prejudice Imperium or Liberty. Imperium and Liberty maintained their own individual policies with Standard, operating at different times and with differing circumstances. The declaratory relief sought here would not impinge on Imperium's or Liberty's rights. As such, there is no basis to find that Imperium or Liberty are necessary parties. Accordingly, defendants' motions to dismiss must be denied.

Plaintiff Interstate's Summary Judgment Motion

Plaintiff moves in motion sequence 003 for partial summary judgment against defendant Aspen UK. Plaintiff does not move against the other defendant Aspen entities or Standard in its motion.

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and

award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Aspen UK's Duty to Defend

Plaintiff first argues that it is entitled to a declaration that Aspen UK had a duty to defend Standard in the Underlying Action. Plaintiff argues that the duty to defend in New York is "exceedingly broad" and that where the allegations of the underlying complaint "suggest... a reasonable possibility of coverage", the insurer must assume the duty (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). Even where the underlying complaint does not contain allegations within the coverage of the policy, but the insurer knows of extrinsic facts that speak to a possibility of coverage, the insurer has a duty to defend (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 67-68 [1991]). However, extrinsic facts cannot be used to avoid the duty to defend (*see id.* ["the courts of [New York] have refused to permit insurers to look beyond the complaint's allegation to avoid their obligation to defend"]). Indeed, "the insurer must afford a defense to the insured for covered as well as non-covered claims if the latter are intertwined with covered claims" (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 41 [1st Dept 2005]).

The pleadings in the Underlying Action allege that the renovation work "caused the condominium and its unit owners' significant injury and damage" (NYSCEF #59 – Underlying Action Complaint at ¶1). The third-party complaint in the Underlying Action impleaded Standard, alleging that Standard's work and culpable conduct led to the condominium damage (NYSCEF #60 at ¶30).

Aspen UK's policy with Standard reads as follows regarding the obligation to defend:

> "1. Insuring Agreement
>
> a. We will pay those sums that the insured 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. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.
>
> b. This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; (2) The "bodily injury" or "property damage" occurs the policy period . . ." (NYSCEF #63-64 – Aspen CGL Policies).

GCL policies such as Aspen UK's cover consequential property damage caused by a contractor's faulty workmanship as "property damage" caused by an "occurrence", even if the cost of repairing the defective work itself is not covered (*see George A. Fuller Co. v U.S. Fid. and Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994] [the GCL policy "does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product"]).

As such, the pleadings in the Underlying Action created a reasonable possibility of coverage, triggering Aspen UK's duty to defend. As there was a reasonable possibility that the claim involved consequential damage, Aspen UK was required to defend its insured Standard in the Underlying Action.

Aspen UK's Duty to Reimburse Interstate for Defense Costs

As Aspen UK had a duty to defend Standard, it is obligated to reimburse Interstate for a portion of the defense costs. Where more than one insurer provides coverage for a claim, but only one insurer pays the entire loss, "the one so paying has a right of action against his coinsurers for a ratable proportion of the amount paid by him because he has paid a debt which is equally and currently due by the other insurers." (*Zurich-American Ins. Cos. v. Atlantic Mut. Ins. Cos.*, 139 A.D.2d 379, 387 [1st Dept 1988]; *see also National Union Fire Ins. Co. v. Hartford Ins. Co.*, 248 A.D.2d 78, 85 [1st Dept 1998]). To determine each insurer's share of the common insured's defense, New York courts have applied a pro-rata allocation to successive insurers so that each insurer pays in proportion to its time on the risk. (*see Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 NY2d 208, 225 [2002] [affirming time on the risk allocation among successive insurers]). Nonetheless, where an insurer fails to undertake the common insured's defense and the other insurer is forced to defend alone and then seek reimbursement, as here, New York courts have applied the allocation method most favorable to the insurer who properly defended (*State of N.Y. Ins. Dep't, Liquidation Bureau v. Generali Ins. Co.*, 44 A.D.3d 469 [1st Dept 2007] [holding that an insurer's unjustified refusal to defend, which required another insurer to pay for the insured's entire defense, justified use of equal shares where that allocation method was most favorable to the insurer that paid]).

Here, plaintiff paid $315,749.83 to defend Standard in the Underlying Action (not including the amount plaintiff paid to settle the claims against Standard Waterproofing). The Interstate Policies were in effect for approximately nineteen months, from March 30, 2006 through October 22, 2007, whereas Aspen UK's policies were in effect for twenty-four months, from October 22, 2007 through

October 22, 2009. Thus, Interstate's share is 44% and Aspen UK's share is 56%. As such, Aspen UK is liable to plaintiff Interstate for $176,819.90 in damages.

Plaintiff is also entitled to prejudgment interest as of right at the statutory rate of 9% per annum running from the date each invoice was paid as per CPLR 5001(b) and CPLR 5004. Plaintiff provides a detailed spreadsheet calculating interest from the date of each payment until July 15, 2019 (NYSCEF #80 – Interest Spreadsheet). Per plaintiff's calculation, it is entitled to $74,690.65 in interest from Aspen UK until July 15, 2019. As such, Aspen UK's liability regarding defense costs is $251,510.55 as of July 15, 2019. However, as additional time has run, plaintiff must recalculate the interest due up to the entry of this judgment.

Aspen UK's Opposition

Aspen UK's opposition to plaintiff's motion can be found in its reply papers regarding its motion to dismiss (NYSCEF #96 – Aspen's Reply at 10). Aspen UK did not submit a direct opposition to plaintiff's motion. Aspen UK's opposition effectively rehashes its argument that a decision in this case in the absence of Imperium and Liberty will prejudice the non-parties.

Aspen UK again claims that a declaration in this matter would inequitably affect Liberty and Imperium since those parties in a materially similar situation to Aspen UK (*id.* at 11). As addressed above, this is untrue – Aspen UK was the insurance provider during the relevant timeframe of the construction project and before the condominium owners became aware of their damage. This is a major factual difference that creates a major distinction between Aspen UK and the other insurers.

Aspen UK then claims that plaintiff does not "seem to understand" what the term "pro rata" means (*id.*). Aspen UK again claim that the court cannot fairly allocate costs without the other two insurers participating in this matter. Aspen UK then claims that plaintiff is requesting an allocation of 66%-33% Aspen UK to Interstate. This is simply belied by plaintiff's motion which clearly requests an allocation of 56%-44% Aspen UK to Interstate based on the coverage period.

Aspen UK claims that since plaintiff seeks a monetary judgment and that doing so would "lock in" an amount of defense costs that would preclude Liberty and Imperium from ever having the opportunity to litigate whether the costs plaintiff seeks are accurate, relevant, or reasonable and that if there is a second lawsuit between Aspen UK and the non-party insurers, that there is a risk of inconsistent judgments. As addressed, there is no risk of this here – there are major factual differences between Aspen UK's liability and the potential liability of Imperium and Liberty. As such, the risk of inconsistent decisions is scant.

Finally, Aspen UK claims that plaintiff's request for 9% interest is improper and that is unclear how an assessment of interest would be handled in a separate suit between Aspen, Liberty, Imperium, and Interstate. The court will not repeat itself – this issue has been addressed.

CONCLUSION

Defendants' respective motions to dismiss are denied. Plaintiff Interstate's motion for partial summary judgment is granted. Plaintiff is granted declaratory relief against only Aspen UK and only with regards to Aspen UK's duty to defend Standard. This matter remains unresolved with regards to Aspen Specialty Insurance Co., Aspen American Insurance Co., and Standard.

Accordingly, it is ORDERED that defendants' respective motions to dismiss (motion sequences 002 and 004) are denied; it is further

ORDERED that plaintiff Interstate Fire and Casualty's motion for partial summary judgment (motion sequence 003) is granted; it is further

ORDERED, DECLARED, and ADJUDGED that Aspen Insurance UK Limited had a duty to defend Standard Waterproofing Corp. in the Underlying Action titled *Board of Managers of Fifteen Madison Square North Condominium v Madison Park Owner LLC, et. al.*, Sup Ct, NY County, Index No. 652052/2011; it is further

ORDERED, DECLARED, and ADJUDGED that Aspen UK is liable for fifty-six percent (56%) of the defense costs incurred by Interstate Fire and Casualty in its defense of the Underlying Action; it is further

ORDERED, DECLARED, and ADJUDGED that Aspen UK is obligated to remit to Interstate Fire and Casualty the amount of $176,819.90 for costs incurred by Interstate in defending the Underlying Action, plus interest at the statutory rate of 9%; it is further

ORDERED that Interstate Fire and Casualty submit a Settle Order recalculating the statutory interest owed to it by Aspen UK pursuant to CPLR 5001(b) based on each date of payment until entry of judgment at the statutory rate of nine percent (9%); and it is further

ORDERED that Interstate Fire and Casualty shall serve a copy of this order with notice of entry upon defendants and the Clerk of the Court within 7 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

10/25/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE