Peerless Ins. Co. v Evanston Ins. Co.

2013 NY Slip Op 30635(U)

March 27, 2013

Sup Ct, Suffolk County

Docket Number: 12-6350

Judge: W. Gerard Asher

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[* 1]

SHORT FORM ORDER

INDEX No. 12-6350

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5/22/12
ADJ. DATE 11/20/12
Mot. Seq. #002 - MotD

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PEERLESS INSURANCE COMPANY,

Plaintiff,

- against -

EVANSTON INSURANCE COMPANY, FRANK GAGLIANO, GREGORY ADLER, SECOND GENERATION RECYCLING INC. d/b/a PLANET EARTH RECYCLING and PLANET RECOVERY, INC. and DONALD OSTERLOH,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 21-27; Replying Affidavits and supporting papers 28-31; 32-33; Other plaintiff's memorandum of law; plaintiff's reply memorandum of law; letter dated July 25, 2012 from Callan, Koster, Brady & Brennan, LLP to the court, w/att.; letter dated July 25, 2012 from Mound Cotton Wollan & Greengrass to the court; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212, granting partial summary judgment against defendant Evanston Insurance Company (i) declaring that Evanston Insurance Company has a duty to defend defendant Donald Osterloh in the underlying wrongful death action entitled *Calixte v Villegas* (Sup Ct, Nassau County, Index No. 11-3536), and (ii) declaring that the

insurance policy issued by the plaintiff is excess to the insurance policy issued by Evanston Insurance Company and that Evanston Insurance Company must reimburse the plaintiff for the costs incurred in defending Donald Osterloh in the underlying action, is granted to the extent indicated below, and is otherwise denied.

This insurance coverage dispute arises from a motor vehicle accident which took place on Sunrise Highway in Amityville, New York on October 25, 2010. The accident occurred when a westbound school bus collided with a tanker truck which was exiting a driveway in front of the commercial property known as 199 Sunrise Highway (New York State Route 27). It appears that the operator of the school bus, Piters Calixte, died as a result of the accident.

Defendant Donald Osterloh is the owner of the property. At the time of the accident, Osterloh leased the northernmost portion of the property, known as 199C Sunrise Highway, to defendants Frank Gagliano and Gregory Adler. Gagliano and Adler are the principals of defendant Second Generation Recycling Inc. d/b/a Planet Earth Recycling and Planet Recovery, Inc. ("Planet"), which operates a recycling facility on the property.

In effect on the date of the accident (in accordance with the parties' lease)[1] was a commercial liability policy issued by defendant Evanston Insurance Company ("Evanston"), designating Planet as the named insured and Osterloh as an additional insured. The additional insured endorsement provides, in relevant part, as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises (Part Leased to You):
   199C Sunrise Highway
   Amityville, NY 11701

2. Name of Person or Organization (Additional Insured):
   E.D. Sage Inc. & Donald Osterich [sic]

* * *

WHO IS AN INSURED (Section II) is amended to include as an insured the person or

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[1] As provided in the lease, "Tenant covenants to provide * * * a comprehensive policy of liability insurance * * * protecting Landlord and Tenant and any designee of Landlord against any liability whatsoever occasioned by accident on or about the demised premises or the building in which the demised premises is a part, or any appurtenances thereto."

organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule * * *.

The Evanston policy's Commercial General Liability Coverage Part also provides, in relevant part, as follows:

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

* * *

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) Any valid and collectible insurance available to you covering liability for damages arising out of your premises, operations, products and/or completed operations.

* * *

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each party contributes equal amounts until it has paid its applicable

limit of insurance or none of the loss remains, whichever comes first.

Also in effect on that date was a commercial liability policy issued by the plaintiff, Peerless Insurance Company ("Peerless"), designating Osterloh and E.D. Sage Inc. as named insureds and covering all of Osterloh's commercial properties, including the leased premises. The Peerless policy's Commercial General Liability Coverage Form provides, in relevant part, as follows:

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

* * *

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies * * *.

b. Excess Insurance

This insurance is excess over:

* * *

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A and B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit".

In or about February 2011, Molide Calixte, as the administrator of the decedent's estate, commenced a wrongful death action naming Osterloh and Planet as defendants, among others. As pleaded in the complaint, the accident took place "at or near westbound New York State Route 27 in front of 199 New York State Route 27 also known as Sunrise Highway."

On or about April 6, 2011, Osterloh tendered the suit to Peerless. It is undisputed that Peerless proceeded to undertake the defense of its insured. However, after reviewing a copy of the lease, Peerless tendered Osterloh's defense and indemnification to Gagliano and Adler. They, in turn, denied any obligation to defend or indemnify Osterloh. By letter dated November 22, 2011, Evanston likewise declined the tender. Taking the position that the accident did not occur within the leased premises, Evanston asserted that Osterloh is an additional insured "only with respect to liability arising out of the ownership, maintenance or use" of the leased premises and, therefore, is not entitled to coverage. This action followed.

By way of this action, Peerless seeks judgment (i) declaring that Evanston has breached its duty to defend Osterloh in the underlying suit; (ii) declaring that its policy is excess to and does not contribute with the Evanston policy or alternatively, (iii) declaring that Evanston has a duty to contribute on a pro rata basis to the costs of Osterloh's defense and indemnity in the underlying suit; and (iv) declaring that Evanston is liable to Peerless for all and/or half the costs incurred in Osterloh's defense to date.[2]

Now, in response to Peerless's motion for summary judgment, Evanston agrees, "subject to its full reservation of rights, to share in the defense of Osterloh in the underlying action," but continues to contest the issue of "allocation of coverage."

As Evanston no longer disputes that it has a duty to defend Osterloh, this case no longer presents a genuine controversy relative to that issue (*see* ***New York Pub. Interest Research Group v Carey***, 42 NY2d 527, 399 NYS2d 621 [1977]). "In order to maintain an action for a declaratory judgment, a party must present a concrete, actual controversy for adjudication" (***Fragoso v Romano***, 268 AD2d 457, 702 NYS2d 333 [2000]). Consequently, that branch of the motion which is for summary judgment declaring that Evanston has such a duty is denied as moot, and the analysis proceeds to the issue of priority of coverage.

Where, as here, there are multiple insurers covering the same risk, a court will look to the "other insurance" provisions in the policies to determine the insurers' respective obligations.

> New York applies "a functional analysis to separate lines of insurance, and an insurance policy should be read in light of the role it is to play" (*Graphic Arts Mut. Ins. Co. v Bakers Mut. Ins. Co.*, 45 NY2d 551, 558). We seek the purpose of the insurance policy, in part, by reference to the commonsense meaning of the terms that describe the policy's coverage vis-à-vis other insurance (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 656-657).

(***Jefferson Ins. Co. v Travelers Indem. Co.***, 92 NY2d 363, 372, 681 NYS2d 208, 213 [1998]). As a general rule, unless it would distort the plain meaning of the policy terms involved, where two or more policies cover the same risk and each purports to be excess, the excess clauses negate each other and

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[2] Upon review of the court's records, it appears that the underlying action was marked "disposed" on February 19, 2013.

each insurer is required to contribute in such proportion as its policy limit bears to the total of the policy limits (***State Farm Fire & Cas. Co. v LiMauro***, 65 NY2d 369, 492 NYS2d 534 [1985]; ***Lumbermens Mut. Cas. Co. v Allstate Ins. Co.***, 51 NY2d 651, 435 NYS2d 953 [1980]). However, if one party's policy is primary relative to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective (*see* ***Great N. Ins. Co. v Mount Vernon Fire Ins. Co.***, 92 NY2d 682, 685 NYS2d 411 [1999]).

Here, since it is apparent that the Peerless policy and the Evanston policy cover the same risk, it is incumbent on the court to compare the "other insurance" clauses in the two policies (*see id.*).

So compared, it is evident that the Evanston policy is primary and that the Peerless policy is excess. The relevant clause in the Peerless policy provides that its coverage is excess to "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured." This language unambiguously applies to a named insured who is an additional insured in another policy. Since Osterloh is an additional insured under the Evanston policy, the Peerless policy provides him with coverage excess to that provided him under the Evanston policy (*see* ***QBE Ins. Corp. v Public Serv. Mut. Ins. Co.***, 102 AD3d 442, 958 NYS2d 103 [2013]). While Evanston contends that the relevant clause in its policy, providing that its coverage is excess to "[a]ny valid and collectible insurance available to you covering liability for damages arising out of your premises, operations, products and/or completed operations," cancels out the relevant clause in the Peerless policy and obligates the insurers to share equally in the defense on a primary basis, the court is unpersuaded. Specifically, the court cannot agree that the term "you" as employed in that clause–a term expressly defined as "the Named Insured shown in the Declarations and any other person or organization qualifying as a Named Insured under this policy"–refers to Osterloh or to any insured other than Planet. Since Planet is not an insured under the Peerless policy, the Peerless policy does not constitute "valid and collectible insurance" available to Planet within the meaning of that clause and the clause is not triggered, rendering the Evanston policy primary.

Accordingly, Peerless is entitled to the entry of judgment in its favor declaring that the insurance coverage provided by Peerless is excess to that provided by Evanston and that Evanston must fully reimburse Peerless for all defense costs incurred (*see* ***Osorio v Kenart Realty***, 48 AD3d 650, 852 NYS2d 317 [2008]).

The court directs that the claims as to which summary judgment was granted are hereby severed and that any remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: March 27, 2013

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**