SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK , IAS PART 11

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ADMIRAL INDEMNITY COMPANY, 270 WEST END TENANTS CORP. and HALSTEAD MANAGEMENT COMPANY, LLC,

Index No. 162526/14

Plaintiffs,

-against-

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA,

Defendant.

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JOAN A. MADDEN

In this declaratory judgment action, plaintiffs Admiral Indemnity Company ("Admiral"), 270 West End Tenants Corp. ("West End"), and Halstead Management Company, LLC ("Halstead") move for summary judgment and the issuance of an order declaring that (a) pursuant to the policy of liability insurance defendant Travelers Casualty Insurance Company of America ("Travelers") issued to Exceptional Contracting, LLC ("Exceptional") bearing policy number 1-680-8937N249-ACJ-09 ("the Travelers policy"), Travelers has a duty to defend West End and Halstead in the underlying personal injury action, *Skoczylas v. 270 West End Tenants Corp.*, filed under Index No. 157928/12 ("underlying action"); (b) Admiral, which issued policy number 21-2-2793-31-13 to West End ("the Admiral policy"), and Travelers, which issued the Travelers policy to Exceptional, are responsible for contributing equally to the defense of their mutual insureds West End and Halstead with regard the underlying action;(c) because the accident in the underlying action was caused or contributed to by Exceptional or its subcontractors, Travelers is obligated to share equally with Admiral in indemnifying their mutual

insureds West End and Halstead for any judgment or settlement obtained in the underlying action; (d) Travelers is obligated to reimburse Admiral for one half legal defense fees and costs that Admiral has expended to date in providing a defense to West End and Halstead in the underlying action. Travelers opposes the motion.

BACKGROUND

The underlying action seeks damages arising out of a construction accident. Henryk Skoczylas ("Skoczylas"), the plaintiff in the underlying action, alleges that he sustained injuries to his hand on July 27, 2012, when he was electrocuted when he moved BX electrical cable while picking a metallic corner bead[1] from the bottom of a pile of stored materials. At the time of his injuries, Skoczylas was employed as a carpenter by Exceptional, the contractor on a renovation project in Apartment 1S ("the Apartment") at 270 West End Avenue, New York, NY, a cooperative apartment building ("the Building") owned by West End and managed by Halstead.

West End, Halstead and the resident shareholders of the Apartment, Ed Rhubart ("Rhubart") and Alan Sirvint ("Sirvint"), are named as defendants in the underlying action. West End and Halstead asserted third party claims against Exceptional, Rhubart and Sirvint. Exceptional moved for summary judgment dismissing the third-party claims against it, and West End and Halstead opposed the motion and cross moved for various relief, including declarations with respect to insurance coverage and summary judgment against Exceptional for breach of contract for failure to procure insurance. By decision and order dated September 17, 2014 (hereinafter "the September 2014 order"), the court granted Exceptional's motion to the extent of dismissing the third party claims against it for common law contribution and indemnification on

[1]A corner bead is a material uses on the corner of walls in drywall construction.

the grounds that Skoczylas' injuries did not constitute "a grave injury" for the purposes of Workers' Compensation Law § 11, and also dismissed the third party claim for contractual indemnification as there was no agreement to indemnify. As for the third party claim alleging Exceptional's failure to procure insurance, the court denied summary judgment with respect to the claim, finding that while the additional insurance coverage obtained by Exceptional did not provide coverage regardless of the party at fault, issues of fact existed since "it has not been determined which entities or individuals, if any, were at fault, [and thus] it cannot be ascertained at this stage whether the coverage Exceptional obtained complies with its contractual obligation." The court similarly denied the cross motion by West End and Halstead for summary judgment on their breach of contract claim for failure to provide coverage.

This action, which was commenced on December 18, 2014, seeks declaratory relief against Travelers as to its duty to defend and indemnify West End and Halstead in the underlying action and as to the hierarchy of coverage obligations between Travelers and Admiral. Travelers answered the complaint and asserted various affirmative defenses, including that West End and/or Halstead are not covered as additional insureds under the relevant endorsement in the Travelers policy (i) to the extent that Exceptional did not agree to a "written contract requiring insurance" as defined under the Travelers policy to include West End and/or Halstead as additional insureds, and (ii) to the extent that injuries giving rise to the underlying action were not caused by the work of Exceptional or its subcontractors but arose out of the independent acts of West End and/or Halstead.

Plaintiffs now move for summary judgment, based on various documentary evidence, discovery in the underlying action, and the affidavit of Lydie Zahabian, who is employed as a

claims manager for Admiral's authorized representative, Clermont Specialities Managers, Ltd, which is handling the claims related to the underlying action. Unless otherwise indicated, the following facts are based on such evidence.

On March 1, 2012, Sirvint and Rhubart, the resident/shareholders of the Apartment, entered into an Owner/Contractor Agreement ("the Agreement") with Exceptional in connection with the renovation project. With respect to Exceptional's obligation to procure insurance, the Agreement reads in pertinent part:

> OTHER REQUIREMENTS:
> 1. Copy of contractor's liability insurance naming "270 West End Tenants Corp, Halstead Management Co. LLC, Terra Holdings,[2] Alan Sirvint & Edward Rhubart" as "additional insureds" in the minimum amounts of $1,000,000 bodily injury and $1,000,000 property damage.

At that time, Exceptional already had the Travelers policy, a commercial general liability insurance policy in effect (effective August 21, 2011 to August 21, 2012). On the same day that Rhubart and Sirvint entered into the Agreement with Exceptional, a certificate was issued naming West End, Halstead, Sirvint, Rhubart, and Terra Holdings as additional insureds under the Travelers policy. Exceptional's insurance broker provided the certificate to Halstead, as the certificate holder. The certificate indicates that Exceptional has a commercial general liability policy with $1 million per occurrence limits from Travelers for the period August 21, 2011 through August 21, 2012, during which period the alleged accident occurred. The certificate, consistent with the additional insured coverage provision in the Agreement, also provides that:

> Certificate holder is listed as additional insured per written contract along with the following: Halstead Management Company, LLC, 270 West End Tenants Corp., Terra Holdings, Apartment Owners: Edward Rhubart and Alan Sirvint.

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[2]Terra Holdings is Halstead's parent company.

The Travelers policy addresses additional insureds through a Blanket Additional Insured (Contractors Operations) coverage endorsement, which provides in pertinent part:

> 1. WHO IS AN INSURED – (Section II) is amended to include any person or organization that you [Exceptional, as the named insured] agree in a written contract requiring insurance to include as an additional insured on this Coverage Part, but:
> a) Only with respect to liability for "bodily injury", "property damage" or "personal injury"; and
> b) If, and *only to the extent that, the injury or damage is caused by acts or omissions of you* [Exceptional, as the named insured] *or your subcontractor in the performance of "your work"* to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with the respect to the independent acts of such person or organization....
>
> 5. ..."Written contract requiring insurance" means that part of any written contract or agreement under which you are required to include a person or organization as an additional insured on this Coverage Part, provided that the "bodily injury" and "property damage" occurs and the "personal injury" is caused by an offense committed:
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> a. After the signing and execution of the contract by you;
> b. While that part of the contract or agreement is in effect;
> c. Before the end of the policy period.

CGL Form, CG D2 48 08 05 ("Blanket Add'l Insured") (emphasis added).

Admiral issued the Admiral policy to West End for the period May 15, 2012 – May 15, 2013, and Halstead is also an insured under the policy. The policy's coverage A (Bodily Injury and Property Damage) insuring agreement affords coverage ($1 million per occurrence) for accidental occurrences that result in bodily injury, subject to various exclusions, conditions and other terms.

Subsequent to the filing of the underlying action, West End and Halstead tendered the matter to Admiral, which acknowledged its duty to defend, and retained defense counsel to represent them. After appearing in the underlying action, West End, on behalf of itself and

Halstead, tendered its defense to Exceptional pursuant to the Agreement between Exceptional and the resident/shareholders of the Apartment. In response to the tender, Travelers issued a letter dated January 20, 2014 rejecting the tender stating that its policy coverage was excess to West End and Halstead' s insurance through Admiral, and stating that the relevant endorsement would not provide any coverage to West End and Halstead "with respect to the independent acts or omissions of such person or organization" and otherwise reserved rights. Plaintiffs subsequently commenced this declaratory judgment action.

In support of the summary judgment motion, plaintiffs argue that under Travelers's blanket endorsement, West End and Halstead are covered as additional insureds since Exceptional entered into a written contract with the shareholders of the Apartment to provide insurance to West End and Halstead, and this contract falls within the endorsement's definition of a "written contract requiring insurance," and that the "injury or damage was caused by acts or omissions of (Exceptional) or [its] subcontractors in performance of (Exceptional's)'work.'" With respect to the duty to defend, plaintiffs argue that Travelers is obligated to defend West End and Halstead even though Exceptional is not a direct defendant in the underlying action, since Skoczylas is precluded under the Workers Compensation Law section 11 from suing Exceptional, as his employer, and that facts extrinsic to the complaint are sufficient to establish the potential negligence or omissions of Exceptional arising out of its work to potentially trigger coverage of West End and Halstead as additional insureds. In this connection, plaintiffs argue that even if coverage of certain claims "is debatable," Travelers is obligated to defend, and must look outside the four corners of the complaint, *citing* Fitzpatrick v. American Honda Motor Co., Inc., 78 NY2d 61 (1991).

Plaintiffs also argue that the discovery thus far in the underlying action confirms that negligent acts/omissions on the part of Exceptional and/or its subcontractors caused or contributed to Skoczylas' injuries, and submits excerpts from the deposition testimony of Skoczylas, Exceptional's owner, the building's superintendent, and an employee of an electrical contractor at the site, and the Apartment's shareholders in support of their position. In particular, plaintiffs assert that the deposition testimony indicates that Exceptional was responsible for supervising Skoczylas, that Exceptional's electrical subcontractor brought the injury producing BX cable to worksite and was responsible for maintaining the cable, and that neither West End, Halstead nor the Apartment's shareholders played an active role in the renovations. Accordingly, plaintiffs argue that this evidence sufficiently establishes Travelers duty to indemnify West End and Halstead for any judgment or settlement obtained in the underlying action. Plaintiffs further argue that their position is supported by the court's September 2014 order in the underlying action, which found that the Travelers policy provides coverage to West End and Halstead, as additional insureds, for accidental occurrences of bodily injury in the event that there is liability arising out of negligent acts /omissions of Exceptional and/or its subcontractors.

As for the hierarchy of coverage as between Admiral and Travelers, for defense and indemnification of West End and Halstead, plaintiffs contend that Travelers is obligated to share equally with Admiral in indemnifying West End and Halstead as each of the "Other Insurance" endorsements in the Admiral and Traveler policies is "mutually repugnant so as to cancel one another out each other out and render each insurer responsible on a co-primary basis for defending and indemnifying West End and Halstead."

Travelers opposes the motion, arguing that any declaration that Travelers has a duty to indemnify is premature since there has been no determination as to fault in the underlying action, and that there is evidence that certain building employees were working in the Apartment near a pile of materials from which Skoczylas removed the subject electrical cable and therefore may have been responsible for conditions causing accident. [3] As for the duty to defend, Travelers argues that the alleged "written contract of insurance requirement" was not proven since it was not submitted in proper form and the affidavit of Admiral's claims manager is insufficient as she lacks personal knowledge of the Agreement. Travelers alternatively argues that a hearing is required with respect to any claim for past defense costs.

With respect to the issue of the hierarchy of coverage, Travelers assert that the "other insurance" provision in the Admiral policy,[4] which provides that it is "excess of any other valid and collectable insurance, including its defense cost provisions" is trumped by the "other insurance" provision in the Travelers policy, which states that it is "excess over any valid and collectable 'other insurance' whether primary, excess, contingent or on any other basis that is

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[3]Travelers also argues the action is governed by New Jersey law since the named insured Exceptional has its principal place of business in New Jersey and the policy was issued in New Jersey by a New Jersey insurance agency so New Jersey is where the risk is principally located under the grouping of contacts analysis. However, Travelers points to no conflict between New York and New Jersey law and, in fact, with the exception of one footnote relies exclusively on New York law in its memorandum of law. Under these circumstances "a choice of law analysis is unnecessary." Tronlone v. Lac d'Amiante Du Quebec, 297 AD2d 528, 528 (1st Dept 2002), aff'd , 99 NY2d 647 (2003)(citation omitted); see generally, Matter of Allstate Insurance Co. (Stolarz-New Jersey Mfr. Ins. Co. 81 NY2d 219, 223 (1993)(noting that "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved").

[4]Travelers also asserts that plaintiffs fail to submit the "other insurance provision" in the Admiral policy with their motion papers; however, a review of the Admiral policy, which is attached as Exhibit B to plaintiffs' motion, refutes this assertion.

available to the additional insured," citing Lumbermens Mut. Cas Co v. Allstate Ins. Co., 51 NY2d 651 (1980); Hartford Underwriters Insurance Co. v. Hanover Ins. Co., 653 Fed Appx. 66 (2d Cir 2016).

In reply, plaintiffs argue that the request for indemnity is not premature since discovery in the underlying action shows that West End and Halstead did not cause or contribute to the underlying accident and their liability, if any, is based on strict liability under Labor Law § 241(6). As for the duty to defend, plaintiffs argue the genuineness of Agreement which provides the "written contract of insurance requirement" is undisputed, and note that the provision is referred to in the affidavit submitted by Travelers from its claim manager. Plaintiffs also argue that contrary to Travelers' position, the language of the "other insurance" provision in the Admiral policy, which contains language that it "shall be specifically in excess of any other policy by which another insurance has a duty to defendant a 'suit,'" and the provision in the Travelers policy "cancel out each other out and [so that] each insurer contributes in proportion to its limit amount of insurance," citing U.S. Fire Ins. Co v. Fed Ins. Co, 858 F2d 882, 885 (2d Cir 1988)(quoting Lumbermens Mut. Cas Co v. Allstate Ins. Co., 51 NY2d at 655).

DISCUSSION

"The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (1st Dept 2012) (internal quotation marks and citation omitted). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment." Id. "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient

to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 NY2d 72, 81 (2003). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

With respect to Traveler's duty to defend, "[i]t is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (internal citations and quotations omitted). BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708, 714 (2007); see also W & W Glass Systems, Inc. v. Admiral Ins. Co., 91 AD3d 530 (1st Dept 2012) "[I]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, a duty to defend exists." City of New York v. Certain Underwriters at Lloyd's of London, England, 15 AD3d 228, 230 (1st Dept 2005)(internal citations omitted). Moreover, the allegations in the complaint are not the "sole criteria for measure the scope of the duty to defend [and] an insurer must provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage." Fitzpatrick v. American Honda Motor Co., Inc., 78 NY2d at 66-67.

Under this standard, the court finds that Travelers owes a duty to defend West End and Halstead even though Exceptional is not named as a direct defendant in the underlying action since the facts establish the "reasonable possibility of coverage," as there is evidence that Skoczylas' injuries were the result of work he performed for Exceptional and that such injuries may be attributable to negligent acts/omissions on the part of Exceptional and/or its subcontractors. Furthermore, the Agreement between Exceptional and the Apartment's

resident/shareholder meets the definition of a written contract requiring the insurance, and contrary to Travelers' argument, the copy of the Agreement, together with the affidavit of Admiral's claims manager, are sufficient to demonstrate the existence and the authenticity of the Agreement.

When, as here, an insurer is found to have breached its duty to defend "the insured's damages are the expenses reasonably incurred by it in defending the action after the carrier's refusal to do so ..." National Fire Insurance Co. of Pittsburgh v. Greenwich Ins Co., 103 AD3d 473, 474 (1st Dept 2013)(internal citation and quotation omitted). Moreover, the insurer is liable from the date it refuses tender, which is this case is January 20, 2014, and is also entitled to interest from the date it paid each legal bill. Id. Travelers has requested and hearing as to the amount of reasonable expenses incurred by the insured from the date of its rejection of tender to date and Admiral does not oppose the request, which is granted as directed below.

As for the duty to indemnify, the court notes that this duty is "distinctly different from the [duty to defend]." Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985). Specifically, while "the duty to defend is measured against the allegations of the pleadings, the duty to pay is determined by the actual basis for the insured's liability to a third person." Id.; see also, BP Air Conditioning Corp. v One Beacon Insurance Group, 33 AD3d 116, 124 (1st Dept 2006), modified on other grounds, 8 NY3d 708 (2007)(holding that "a duty to defend an additional insured is not contingent on there having been an adjudication of liability giving rise to a duty to indemnify the additional insured").

While the evidence submitted on this motion supports plaintiffs' position that the injuries in the underlying action are covered by the Travelers policy by showing that Skoczylas

was injured in the course of his duties as an employee of Exceptional, and that West End and/or Halstead were not responsible for supervising the renovations in the Apartment or for performing work related to the BX Cable, which allegedly caused and/or contributed to Skoczylas' injuries, the right to be indemnified under the Travelers' policy depends on a factual finding that injuries or damages were caused by Exceptional's negligence/omissions or that of its subcontractors. In light of these unresolved factual issues regarding issues of liability, it is premature to grant a declaration with respect to West End and Halstead's right to indemnification. See Servidone Const. Corp. v. Security Ins Co of Hartford, 64 NY2d 419 (1985)(while plenary trial is not always necessary to determine if there is a covered loss triggering the duty to indemnify where coverage cannot be established as a matter of law summary judgment cannot be granted); Spoor-Lasher Co., Inc. v. Aetna Casualty and Surety Co., 39 NY2d 875 (1976)(where theory of liability in the underlying action has not been resolved "any determination as to the obligation of an insurer to indemnify its insured ... would be premature and must await the resolution of the underlying claim"); Virginia Surety Co., Inc. v. Travelers Property Cas. Co. of America, 34 Misc3d 1216(A), *6 (Sup Ct NY Co. 2012)(holding that it was premature to grant summary judgment on plaintiff's indemnification claim where there were unresolved factual issues as to cause of the underlying accident and thus whether the subject insurance endorsement providing coverage for liability "arising out of subcontractors work," applied); See generally 43 NYJur2d Declaratory Judgments § 101 (Nov 2016).

The final issue concerns the hierarchy of insurance coverage. As indicated above, both the Admiral and Travelers policies provide commercial liability insurance coverage for the same

risk and each contain "other insurance" provisions. The "other insurance" provision in the Travelers' policy provides as follows:

> The insurance provided to the additional insured by this endorsement is excess over any valid and collectible "other insurance," whether primary, excess, contingent or on any other basis, that is available to the additional insured for a loss we cover under this endorsement. However, if the "written contract requiring insurance" specifically requires that this insurance apply on a primary, non-contributory basis, this insurance is primary to "other insurance" available to the additional insured which covers that person or organization as a named insured for such loss, and we will not share with that "other insurance.[5]" But the insurance provided to the additional insured by this endorsement still is excess over any valid and collectible "other insurance," whether primary, excess, contingent or on any other basis, that is available to the additional insured when that person or organization is an addition insured under such "other insurance."

The Admiral policy's other insurance provisions provide:

> 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. Excess Insurance
>
> This insurance is excess over:
>
> (3) Any valid and collectable insurance including defense cost provisions. This insurance shall be specifically excess over any other policy by which another insurer has a duty to defend a "suit" for which this insurance may also apply.
>
> When this insurance in excess we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to

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[5]This clause is not applicable to this dispute as the written contract did not contain a provision specifically requiring that the insurance obtained by Exceptional apply on a primary non-contributory basis.

> defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Under New York law, there is a "well-settled equitable right to contribution, where there is concurrent insurance even in the absence of a policy provision for apportionment." Travelers Ins. Co. v. General Accident, Fire & Life Assur. Corp., 28 NY2d 458 (1971). In general, "where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its limit amount of insurance." Lumbermens Mut. Cas. Co. v. Allstate Ins. Co., 51 NY2d 651, 655 (1980); see also, Admiral Ins. Co. v. American Empire Surplus Lines Ins. Co., 96 AD3d 585, 589-590 (1st Dept 2012). On the other hand, this rule applies only where "neither policy contain[s] language specifically making one an excess insurer over all other excess insurers covering the same risk and neither contain[s] language the plain meaning of which would be distorted by the application of the general rule." Kansas City Fire & Mar. Ins. Co. V. Hartford Ins. Group, 57 NY2d 920, 922 (1982); see also, Lumbermens Mut. Cas. Co. v. Allstate Ins. Co., 51 NY2d at 68.

Here, the "other insurance" provisions in the Travelers policy and the Admiral policy provide the same level of coverage and cover the same risk, and each contain excess insurance clauses purporting to be excess to each other, and therefore each insurer is obligated to contribute equally to the cost of defense and, in the event that it is found that Travelers is obligated to indemnify West End and Halstead, then Travelers will be required to contribute equally with Admiral to any judgment or settlement obtained in the underlying action. See Admiral Ins. Co.

v. American Empire Surplus Lines Ins. Co., 96 AD3d at 589-590(substantially identical "other insurance" clauses in contractor's and subcontractor's excess liability policies canceled each other requiring each to contribute ratably to the cost of settlement of person injury action in excess of primary coverage); Lumber Mut. Ins. Co. v. Lumberment's Mut. Cas. Co., 186 AD2d 637 (2d Dept 1992), lv denied 81 NY2d 709 (1993)(holding that other insurance clauses in policies providing for excess coverage cancelled each other out and required each company to contribute to the cost of the settlement of the underlying claim on a pro rata basis).

Furthermore, Travelers' argument that the language in the "other insurance" provision in its policy trumps the provision in the Admiral policy as it contains specific words that it is excess over other insurance "whether primary, excess, contingent or on any other basis;" whereas the Admiral policy provides only that it is excess over "any valid and collectable 'other insurance,'" is without merit. Under the circumstances here, as discussed below, this difference in language does not warrant a finding that the Travelers policy is excess to the Admiral policy. In fact in State Farm Fire and Cas. Co. v. LiMauro, 65 NY2d 369, 378 (1985), which was decided after Lubermens, supra, the Court of Appeals found that the absence of the specific words "whether primary, excess or contingent" was not dispositive as to whether the policy was intended to be excess. The court held that

> The phrase 'whether primary, excess or contingent' does not add anything to the all inclusive 'other valid' phrase ... The super-escape phraseology may be more specific, but its listing of other coverage still falls within the ambit of the very broad phrase 'other valid' insurance."
>
> Id (internal citation and quotations omitted).

In addition, when the language in the Admiral policy that it is excess over "any valid and collectable 'other insurance,'" is read with the provisions that the policy is "specifically excess over any other policy by which another insurer has a duty to defendant a 'suit' for which this insurance may also apply," and that when the policy is excess, Admiral "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,'" it further supports the conclusion that the "other insurance" provisions in the two policies cancel each other out.

Moreover, to the extent Travelers relies on the Court of Appeals holding in Lumbermens, supra, that decision is not controlling here. At issue in Lumbermens was the amount of contribution each of three non-primary insurance policies was required with respect to a settlement of a personal injury action arising out of a car accident which was not covered by the primary policy. One policy issued by Allstate to the mother of the driver of the responsible automobile provided that its coverage would be "excess to other collectible insurance." 51 NY2d at 654. The second policy, issued by Allstate to the driver's father was denominated "an executive policy" and provided that it was in excess of "retained limits of underlying policies" listed on an attached schedule which included the Allstate policy issued to the driver's mother. Based on the specific reference in the executive policy stating that it was excess to the one issued to the driver's mother, the court found that the policy issued to the mother would need to be exhausted before the executive policy would be required to contribute.

The third policy, issued by Lumbermen's was called a "Catastrophic Policy," and provided for coverage up to $5 million but in excess of "'other valid and collectible insurance available to the insured, whether such other insurance is stated to be primary, contributing, excess

or contingent.'" Id. at 655. The court found that the Lumbermen's policy was excess to the other two excess policies, writing that "the parties to the Lumbermens contract did not bargain for ratable contribution with any of the Allstate Policies [and that]... [t]his 'Catastrophic Policy,' provides coverage in excess of all coverage available, including excess coverage. Presumably, the premiums for this policy reflected the rarity of Lumbermens' ultimate requirement to contribute to the settlement." Id, at 656.

Here, while the Travelers policy contains language like that it in the Lumbermens Catastrophic Policy, as discussed above, under the holding in LiMauro supra, such language alone is insufficient to render the Travelers policy excess to the Admiral policy. Moreover, both the Travelers and the Admiral policies are commercial liability policies and, unlike the executive policy in Lumbermens, neither specifically refers to the other policy.

Next, Hartford Underwriters Ins. Co. v. Hanover Ins. Co., 653 Fed Appx. 66, on which Travelers also relies does not support a finding that Travelers policy is excess to the Admiral policy. In that case, the United States Court of Appeals for the Second Circuit upheld that District Court's finding that an insurance policy issued by defendant Hanover was excess to the policy issued by plaintiff Hartford. The Hanover policy contained language similar to that in the Travelers policy stating that it was "*excess* over any other coverage, 'whether primary, excess, contingent or on any other basis." Id, at 68 (emphasis in original). While citing this provision in support of its finding that Hanover did not have to contribute ratably, the court's decision was based in part on language in the Hartford policy, which stated that Hartford would "*contribute* with other coverage 'on the same basis either excess or primary," Id, at 68 (emphasis in original). The court held that this language "contemplates contribution with other excess coverage while the

Hanover policy does not." Id. Notably, this language is absent from the Admiral policy. Furthermore, in finding that the Hanover policy indicated an intent to be excess to the Hartford policy, the court also relied on a provision in the Hanover policy providing that the insurer "has no duty to defend 'if any other insurer has a duty to defend.'" (Id, at 68). Significantly, the Admiral policy contains language which is substantially similar to this provision and states that the Admiral policy is "specifically excess over any other policy by which another insurer has a duty to defendant a 'suit' for which this insurance may also apply," and that when the policy is excess, Admiral "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.'"

Accordingly, based on the language of the "other insurance provisions" in the Travelers and Admiral policies, the court finds that Travelers and Admiral are each required to contribute to one-half the cost of defense and, in the event that Travelers is required to indemnify West End and Halstead, each insurer would be required to share equally in indemnifying West End and Halstead for any judgment or settlement obtained in the underlying action.

CONCLUSION

In view of the above, it is

ORDERED that plaintiffs' motion for summary judgment is granted to the extent of its claim seeking a declaration that Travelers Casualty Insurance Company of America is responsible for contributing equally with plaintiff Admiral Indemnity Company in the defense of their mutual insureds plaintiffs 270 West End Tenants Corp and Halstead Management Company, LLC against all claims asserting against them in the underlying action; and it is further

ADJUDGED AND DECLARED that defendant Travelers Casualty Insurance Company of America is obligated by the terms of the Travelers policy to contributing equally with plaintiff Admiral Indemnity Company in the defense of plaintiffs 270 West End Tenants Corp and Halstead Management Company, LLC against all claims asserting against them in the underlying action , and is obligated to reimburse plaintiffs for all costs and expenses incurred in the defense of the action from the date of rejection of tender on January 20, 2014, with interest from the date of payment of any legal bills; and it is further

ORDERED that plaintiffs shall seek a status conference before Judge Margaret A. Chan, the judge now presiding over this action and the scheduling of the hearing to determine the amount of attorneys' fees and defense costs incurred in defending the underlying action shall be addressed at such conference; and it is further

ADJUDGED AND DECLARED that in the event Travelers is found to be obligated to indemnify plaintiffs 270 West End Tenants Corp and Halstead Management Company, LLC with respect to the underlying action, Travelers shall be obligated to share equally with Admiral in indemnifying plaintiffs 270 West End Tenants Corp and Halstead Management Company, LLC for any judgment or settlement obtained in the underlying action;

ORDERED that the part of plaintiffs' motion for summary judgment seeking indemnification from Travelers Casualty Insurance Company of America is denied.

DATED: March 15, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

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MAR 31 2017
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Judgment