

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PHILADELPHIA INDEMNITY INSURANCE
COMPANY,

Plaintiff,

**FILED
AND
ENTERED
ON Dec 1 20 11
WESTCHESTER
COUNTY CLERK**

- against -

DECISION

Sequence No. 3 and No. 4

Index No. 22586/10

HARLEYSVILLE INSURANCE COMPANY,
Defendant.

-----X
LIEBOWITZ, J.

The following documents numbered 1 to 70 were read in connection with plaintiff's motion for an Order pursuant to CPLR §3212 awarding it summary judgment declaring that defendant is obligated to indemnify its insured CDT Real Estate Management Corp. ("CDT") on an equal basis with plaintiff for a jury verdict rendered against CDT, and for an Order pursuant to CPLR §3212 awarding it summary judgment declaring that plaintiff is entitled to reimbursement from defendant for one half of the defense costs and fees incurred by plaintiff in defending CDT, and defendant's cross-motion for an Order pursuant to CPLR §3212 declaring that defendant does not have any obligation to pay plaintiff the monies it seeks, or in the alternative, compelling plaintiff to provide it with discovery.

Notice of Motion, Affidavits and Supporting Papers	1-29
Notice of Cross Motion, Affidavits and Supporting Papers	30-59
Answering Affidavits and Supporting Papers	
Reply Affidavits and Supporting Papers	60-70

Keoni May sustained injuries after he slipped and fell on ice while walking down a stairway. Mr. May thereafter brought a lawsuit in Westchester County against Hartsdale Manor Owners Corp. and CDT entitled Keoni May v. Hartsdale Manor Owners Corp. and CDT Real Estate Management Corp., Index No. 7619/09. A jury trial ensued and judgment was rendered in favor of Keoni May and against CDT in the amount of \$342,600.00.

CDT, through its agent, provided notice of the litigation to both plaintiff and defendant in June 2009. Plaintiff had previously issued a primary commercial general liability policy to Hartsdale Manor Owners Corp. c/o CDT Real Estate Management Corp., effective dates 7/1/2008 to 7/1/2009. Likewise, defendant had previously issued a primary commercial general liability policy to CDT, effective dates 4/24/2008 to 4/24/2009.

Both insurance policies contain the following “Other Insurance” clause: “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.” Paragraph c. “Method Of Sharing” specifically states that “[i]f all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.”

Plaintiff agreed to defend CDT under a Reservation of Rights to pursue the other insurance available to CDT as specified in the “other insurance” clause of the insurance policy. Defendant has neither agreed to defend their insured CDT, nor have they denied coverage on this claim. Plaintiff now seeks summary judgment declaring that defendant is obligated to provide a

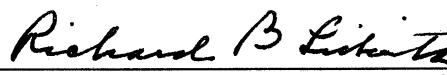
defense to and indemnify CDT pursuant to the terms of the insurance agreement between defendant and CDT. Defendant cross-moves for summary judgment as well.

In State Farm Fire & Cas. Co. v. LiMauro, 65 N.Y.2d 369, 374-375 (1985), the Court of Appeals held that when two insurers cover the same risk at the same level they must share the risk. See also, State Farm Fire Casualty and Ins. Co. v. Travelers Property Casualty Ins. Co., 300 A.D.2d 571 (2nd Dept 2002). In this instance, both insurers have identical “other insurance” clauses, which effectively negate the contention of excess coverage for each policy. *Id.* As such, the policies issued by plaintiff and defendant function as co-primary policies and share the risk equally pursuant to their respective policy. Therefore, plaintiff’s motion for summary judgment is granted in all respects, and defendant’s cross-motion is denied in all respects.

Plaintiff is directed to settle an Order on Notice within ten days of today’s date.

This constitutes the Decision of this Court.

Dated; White Plains, New York
November 30, 2011



RICHARD B. LIEBOWITZ
SUPREME COURT JUSTICE

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