

**Liberty Ins. Underwriters Inc. v Plaza Condominium**

2023 NY Slip Op 31035(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 656871/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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LIBERTY INSURANCE UNDERWRITERS INC.,	INDEX NO. <u>656871/2017</u>
Plaintiff,	MOTION DATE <u>01/17/2023</u>
- v -	MOTION SEQ. NO. <u>007</u>
THE PLAZA CONDOMINIUM, THE BOARD OF MANAGERS OF THE PLAZA CONDOMINIUM, JOHN DOE NOS. 1-50,	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471

were read on this motion to AMEND ORDER AND FOR SUMMARY JUDGMENT.

In a decision and order dated October 13, 2022 (the “Summary Judgment Order” [NYSCEF 435]), the Court granted summary judgment to Plaintiff Liberty Insurance Underwriters Inc.’s (“Liberty”) on Count IV of its Complaint, and declared that there is no coverage under the applicable Liberty insurance policy for the Underlying Action (*Board of Managers of the Residential Section of the Plaza Condominium v Kristin Franzese, et al.*, Index No. 654394/2015, Supreme Court, New York County) by reason of the operation of the policy’s Prior Knowledge Exclusion. The Summary Judgment Order inadvertently did not address the branch of Liberty’s motion that sought summary judgment on Count XII, which seeks a declaration that Liberty is entitled to reimbursement of costs it has already incurred to defend the Underlying Action. Liberty now moves to amend the Summary Judgment Order to grant summary judgment on that claim. For the reasons that follow, the motion is granted.

Liberty established in its original summary judgment papers that it defended the Underlying Action subject to a reservation of rights, which included (implicitly at first, then explicitly) a right to recoup expenses if it were later determined that the Policy did not cover the Underlying Action (Count IV) or was rescinded (Count I) (NYSCEF 333 at 33-34). Liberty relied on several First Department cases for the proposition that once it had established lack of coverage it was entitled to a declaration of entitlement to recoup all payments that had been made to defend the Master Board and its then-President (*id.* [citing *Certain Underwriters at Lloyd's London v Advance Transit Co.*, 188 AD3d 523, 524 [1st Dept 2020] [“New York law...permits insurers to provide their insureds with a defense subject to a ‘reservation of rights to, among other things, later recoup their defense costs upon a determination of non-coverage’”]); *Am. Home Assurance Co. v Port Authority of N.Y. & N.J.*, 166 AD3d 464, 465 [1st Dept 2018]; *Certain Underwriters at Lloyd's London v Lacher & Lovell-Taylor, P.C.*, 112 AD3d 434, 434-35 [1st Dept 2013]).

In opposition to summary judgment on the recoupment claim, Defendants did not question the applicability of those cases. Instead, Defendants stated that Liberty “can only recover costs expended defending the Underlying Action if the Policy is rescinded or Liberty has no coverage obligation for the Action,” which it argued Liberty had not shown (NYSCEF 380 at 33). Given that the Court granted summary judgment in Liberty’s favor on the question of coverage, the straightforward conclusion – consistent with *Defendants’* position in opposition to summary judgment – is that Liberty was also entitled to the declaration of reimbursement sought in Count XII of the Complaint.

Defendants’ belated reliance upon *Am. W. Home Ins. Co. v Gjonaj Realty & Mgt. Co.*, 192 AD3d 28, 35-37 [2d Dept 2020] to obtain a different result is unavailing. In that case,

decided more than a year before Defendants' opposition to summary judgment here (NYSCEF 380), the Second Department held that recoupment of defense costs is available only if it is provided for under the terms of the insurance policy itself, and that a reservation of rights is insufficient to create such an entitlement. In doing so, the court noted the contrary First Department cases upon which Liberty relies and expressly "decline[d] to follow them" (*id.* at 37). Defendants' argument thus suffers from at least two distinct flaws: First, it raises an argument that Defendants did not present in opposition to summary judgment. Defendants cannot use the Court's inadvertent failure to address Count XII in its original summary judgment decision as an opening to raise new arguments that could have been raised in its summary judgment briefing. And second, it asks this Court to ignore binding First Department precedent in deference to a contrary decision from another Department, which this Court is not authorized to do. The Court has considered Defendants' remaining arguments and finds them to be unpersuasive.

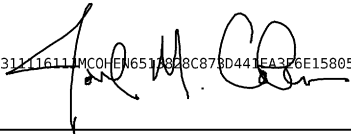
Accordingly, it is

**ORDERED** that Liberty's motion to amend the Court's October 13 Summary Judgment Order and grant summary judgment in Liberty's favor on Count XII of the Complaint is **GRANTED**; it is further

**ORDERED, ADJUDGED AND DECLARED** that Liberty is entitled to reimbursement of all payments made to defend the Master Condo and Kristin Franzese in the Underlying Action.

This constitutes the decision and order of the Court. The parties are directed to settle a judgment taking into account the Summary Judgment Order, as amended by the foregoing.

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JOEL M. COHEN, J.S.C.

3/31/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE