UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LEXINGTON INSURANCE COMPANY,

Plaintiff,

-against-

11 Civ. 391 (DAB)
ORDER

TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY LIMITED, as successor to Nichido Fire & Marine Insurance Company Limited,

Defendant.
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DEBORAH A. BATTS, United States District Judge

Now before the Court is Plaintiff Lexington Insurance Company's ("Plaintiff" or "Lexington") Motion for Judgment on the Pleadings as to its First Cause of Action against Tokio Marine & Nichido Fire Insurance Company Limited, as successor to Nichido Fire & Marine Insurance Company Limited ("Defendant" or "Tokio") pursuant to Federal Rule of Civil Procedure 12(c).

Plaintiff's First Cause of Action seeks a declaration that its obligation to provide excess insurance coverage to Port Authority was not contingent upon exhaustion of the limits of the underlying primary insurance policy.

For the reasons below, Plaintiff's Motion for Judgment on the Pleadings as to its First Cause of Action is hereby GRANTED.

I. FACTUAL BACKGROUND

In May 2001, Port Authority's primary carrier, American Home Assurance Company ("American Home"), issued a primary policy to Port Authority and Plaintiff issued part of two layers of excess property coverage to Port Authority (the "Lexington First Layer Coverage" and the "Lexington Second Layer Coverage"). (Compl. ¶¶ 22, 26, 32.) The American Home primary policy had a per occurrence limit of $10 million. (Compl. ¶¶ 22 25.) The Lexington First Layer Coverage provided a per occurrence limit equal to an $11.5 million part of a $40 million insurance layer that covered property damage sustained by Port Authority in excess of $10 million. (Compl. ¶ 26.) The Lexington Second Layer Coverage provided a per occurrence limit equal to a $9.5 million part of a $50 million insurance layer that covered property damage sustained by Port Authority in excess of $50 million. (Compl. ¶ 32.) Defendant allegedly agreed to reinsure 100% of the risk under the First Layer and Second Layer Coverage. (Answer ¶¶ 27, 33, 41-45.)

As a result of the two September 11, 2001 terrorist attacks on the World Trade Center, Port Authority sustained significant damage. (Answer ¶¶ 47-52, 54.) There was a coverage dispute between the tenants of the World Trade Center and their property insurers regarding the number of occurrences arising from the September 11 attacks. (Compl. ¶¶ 55.) The World Trade Center

tenants argued that the attacks constituted two occurrences, which would entitle the tenants to two times the property insurers' limits, while the property insurers argued that there was only one occurrence, which would entitle the tenants to only one limit. Following a trial, a jury determined that the two September 11 attacks constituted two separate occurrences, entitling the World Trade Center tenants to two times their property insurers' limits. (Compl. ¶ 59.) The Second Circuit affirmed the District Court's judgment. (Compl. ¶¶ 60 61.)

Port Authority also took the position that there were two occurrences, resulting in a doubling of its coverage, and submitted an insurance claim to its insurers seeking to recover over $1 billion for the damage it sustained as a result of the attacks. (Compl. ¶ 62.) Port Authority's insurers, including Plaintiff, only paid one per occurrence limit to Port Authority. (Compl. ¶¶ 63 66.) Plaintiff paid $11.5 million under its First Layer Coverage and $9.5 million under its Second Layer Coverage. (Compl. ¶¶ 63 66.) Plaintiff submitted a reinsurance claim for these amounts to Defendant, who fully reimbursed Plaintiff for its $11.5 million and $9.5 million payments. (Compl. ¶ 67.)

Port Authority's insurers, including Plaintiff, engaged in "coverage litigation" over whether Port Authority could recover a second payment from its insurers in the amount of its full per occurrence limits. (Compl. ¶ 73.) After negotiations, Port

Authority, American Home, and Plaintiff entered into a settlement agreement, under which an $11 million settlement amount was allocated pro rata by limits among the American Home Policy, the Lexington First-Layer Coverage, and the Lexington Second Layer Coverage, (Answer ¶¶ 83, 87) and Port Authority forever released all claims against Plaintiff under its First Layer and Second Layer Coverage. (Compl. ¶ 89.)

Plaintiff ultimately submitted a claim to Defendant for reinsurance for $4,080,645.16 with respect to its First Layer Coverage and for $3,370.967.74 with respect its Second Layer Coverage. (Compl. ¶ 93.) Defendant rejected the claim because Defendant maintained that until the primary $10 million American Home Policy is exhausted, Lexington, and in turn Tokio Marine, has no reinsurance obligation. (Answer ¶ 95.)

II. DISCUSSION

A. Legal Standard for Judgment on the Pleadings

On a motion for judgment on the pleadings under Rule 12(c), a court applies the same standard as it would to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010) (citing Johnson v. Rowley, 569 F.3d 40, 43 (2d Cir. 2009). The Court therefore views the pleadings in the light most favorable to, and draws all reasonable inferences in favor of, the non-

moving party. Id. Judgment is appropriate if, based on the pleadings, the moving party is entitled to judgment as a matter of law. Burns Int'l Sec. Servs. v. Int'l Union, 47 F.3d 14, 15 (2d Cir. 1995).

B. Excess Insurance Coverage Obligations

Plaintiff asserts that the law in the Second Circuit is well-settled: An insured is entitled to coverage from an excess insurer even when the insured has not received payment from the primary insurer sufficient to exhaust the underlying primary limit, so long as the total loss exceeds the primary policy and ventures into the scope of the excess policy. Accordingly, Plaintiff seeks a declaration as a matter of law that its excess coverage obligations to Port Authority were not contingent upon exhaustion of the per-occurrence limit of the underlying American Home policy.[1]

Defendant Tokio Marine argues that Lexington's policies were not required to provide coverage unless the underlying insurer (American Home) itself actually paid the full amount of its policy limits of liability. Specifically, Tokio Marine contends: (i) Lexington's coverage obligation was not triggered

[1] Plaintiff also argues that the settlement between Port Authority, American Home and Lexington did, in fact, exhaust the American Home policy because Port Authority forever released all claims against American Home and Lexington pursuant to the settlement.

until exhaustion of the $10 million per-occurrence limit of the American Home policy; (ii) American Home's payment under the settlement fell $6.4 million short of exhausting that limit; and (iii) after applying $6.4 million of the $7.4 million Lexington payment to exhaust the American Home policy, Lexington's obligation under the excess policies was only $1 million.

The Parties both base their arguments about exhaustion of primary insurance and triggering of excess coverage on Zeig v. Mass. Bonding & Insurance Co., 23 F.2d 665 (2d Cir. 1928). Zeig involved an excess coverage policy that required the primary insurance to be "exhausted in the payment of claims to the full amount of the expressed limits." Id. at 666. The Zeig court considered whether it was "necessary for the plaintiff actually to collect the full amount of the policies . . . in order to 'exhaust' that insurance" and found that the policy at issue did not require primary insurers to make full payment on the underlying policies. Instead, the court held that "claims are paid to the full amount of the policies, if they are settled and discharged, and the primary insurance is thereby exhausted." Id. The Zeig court recognized that parties could include in their excess policy a condition requiring a primary insurer to pay the full limit of its policy before the excess coverage would be triggered. However, such a condition would have to be unambiguously stated in the policy. Id. The court also observed

that the excess insurer "had no rational interest in whether the insured collected the full amount of the primary policies, so long as it was only called upon to pay such portion of the loss as was in excess of the limits of those policies." Id.

Zeig continues to be the seminal decision interpreting New York insurance law in this Circuit. See, e.g., Christiania General Ins. Corp. of N.Y. v. Great Am. Ins. Co., 979 F.2d 268, 278 (2d Cir. 1992) (citing Zeig for the proposition that "excess carrier must pay claims to extent its layer is pierced even though underlying carrier settled with insured for less than the full amount of underlying carrier's liability"); Pereira v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 2006 WL 1982789, at *7 (S.D.N.Y. July 12, 2006) (citing Zeig in rejecting excess insurer's argument that it owed no obligation "to provide any coverage unless and until the underlying insurance policies have been exhausted by actual payment"). See also Maximus, Inc. v. Twin City Fire Ins. Co., et al., 2012 WL 848039, at *3-6 (E.D.Va. March 12, 2012) (discussing at length and following Zeig "in light of well-established principles of insurance contract interpretation and the substantial policy considerations articulated by Zeig").

Defendant contends that their position is perfectly consistent with Zeig's holding, which permitted recovery from the excess insurer "if th[e] loss was greater than the amount of

the expressed limits of the primary insurance." 23 F.2d at 666. Defendant claims that the loss here was the $11 million settlement, not the total value of the damage sustained by Port Authority in the September 11 attacks. Defendants, however, mistakenly conflate "loss" and "settlement amount." See Zeig, 23 F.2d at 666 (referring distinctly to "loss" and "cash settlement"). So long as the total loss exceeds the attachment point of the excess policy, the law in this Circuit does not require exhaustion of the primary insurance policy to trigger the excess insurer's obligations, regardless of what settlement the primary insurer may have reached. Defendant's argument that exhaustion of the American Home policy here required a pay out of the full $10 million is unavailing; the "Second Circuit has rejected a similar argument that an insurance policy provision required actual exhaustion of previous layers of insurance coverage as a condition precedent for payment of the excess coverage." Pereira, 2006 WL 1982789 at *7 (S.D.N.Y. 2006) (citing Zeig, 23 F.2d at 666).

Here, neither the First-Layer Binder nor the Second-Layer Binder concerning Lexington's excess coverage contain any express or implied requirement that the American Home Policy had to be exhausted before Lexington had an obligation to pay its share of covered damages in excess of $10 million per occurrence. In the absence of unambiguous language requiring

exhaustion via full payment of the underlying policy, no such exhaustion is required. Zeig, 23 F.2d at 666.

Even when viewing the pleadings in the light most favorable to Defendant as the non-moving party, it is clear that Plaintiff's obligation to provide excess insurance coverage to Port Authority was not contingent upon exhaustion of the limits of the underlying primary insurance policy. Plaintiff's Motion for Judgment on the Pleadings seeking such a declaration is HEREBY GRANTED.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Judgment on the Pleadings as to the First Cause of Action is hereby GRANTED.

SO ORDERED.

DATED: March 28, 2012
New York, New York

Deborah A. Batts
Deborah A. Batts
United States District Judge