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VIA USPS OVERNIGHT & COURT-PASS
Court of Appeals of the State of New York
Attn: Margaret N. Wood, Ass't Deputy Clerk
Clerk's Office
20 Eagle Street
Albany, New York 11207-1095

Re: *Garcia v GEICO*
Index No. 4844/13,
AD (2ND Dep't) Doc. No. 2015-05471
Court of Appeals No. APL-2017-00145

Honorable Judges of the Court:

This firm represents respondent/defendant GEICO in the above referenced coverage litigation and appeal. Enclosed for filing pursuant to Court of Appeals' Practice Rule 500.11 is GEICO's response to appellant/plaintiff's filing and GEICO's disclosure pursuant to Rule 500.1(f).

GEICO expressly reserves all the arguments made by it to the Appellate Division in its appellate briefs pursuant to Rule 500.11(f) and respectfully submits that the Court affirm the majority opinion of the Second Department because:

(1) There is no ambiguity within the "four corners' of the umbrella liability insurance contract at issue that its indemnity limit is $2 million. There is no testimony from any witness with actual knowledge, the insured and the insurer, that there was any ambiguity in the policy at issue and that the policy was a $2 million umbrella insurance contract. The appellant, the dissent and the lower court rely improperly on parole evidence, documents outside the umbrella contract, that were an offer and counter-offer prior to the umbrella contact's effective date, takes those documents out of context and conclude that there is an ambiguity in the umbrella contract's indemnity limits which conclusion directly contradicts the testimony of the insured and the insurer. It is black letter contract interpretation law that there must be finding of an ambiguity on the face of the contract before parole evidence can be considered. The dissent and the lower court erred as a matter of law as the majority ruled. Indeed, if this matter were remanded to trial, there is no witness for appellant to call who would testify that the umbrella contract's $2 million indemnity limit is ambiguous. There are no witnesses to support appellant's position so what purpose would a trial serve?

(2) The respondent, dissent and lower court misstates the law by ignoring the controlling Court of Appeals precedent cited to it (*See* R at 413-414), and relied upon by the majority, *First Savings and Loan Ass'n of Jersey City, N.J. v. American Home Ass. Co.*, 29 N.Y.2d 297, 327 N.Y.S.2d 609 (1971), which held that indemnity limits are not severable. Instead, the appellant, the dissent and the lower court relied upon a distinguishable Second Department case involving the severability of an additional vehicle to an auto insurance policy, not the indemnity limits, *In re Nationwide Mut. Ins. Co.*, 37 A.D.2d 15, 322 N.Y.S.2d 164 (2d Dep't 1971). The majority properly held that Court of Appeals precedent is the controlling law on the severability of indemnity limits.

Undisputed Material Facts

On or about August 29, 2005, the insured Jeanne Rakowski, received from GEICO a proposed renewal of her one-year 2004-2005 $1 million umbrella liability insurance contract expiring on October 9, 2005. R at 366-74 (proposed umbrella renewal); R at 84 (Deposition Transcript of Jeanne Rakowski) Pages 15-17; R at 84 (Deposition Transcript of Jeanne Rakowski) Page 20. The insured made a classic counter-proposal by

requesting and receiving a new proposed one-year umbrella policy effective on October 10, 2005 with indemnity limits of $2 million and adding an additional house to the coverage. R at 84 (Deposition Transcript of Jeanne Rakowski) Pages 15-17; R at 84 (Deposition Transcript of Jeanne Rakowski) Page 20; R at 136 (Pitts Deposition Transcript) at pages 97-98; R at 136 (Pitts Deposition Transcript) at page 103 referring to telephone log (R at 298); R at 136 (Pitts Deposition Transcript) at pages 105-06; R at 136 (Pitts Deposition Transcript) at pages 107-08. Accordingly, on or about August 31, 2005, the insured, Jeanne Rakowski, received the new proposed one-year umbrella liability insurance contract numbered P5118238 from GEICO to commence on October 10, 2005, with an unambiguous indemnity limit of $2 million excess of various primary insurance contracts covering a primary residence in Belle Harbor, Queens, a rental residence in Sheepshead Bay, Brooklyn, and two autos, a 2003 Land Rover and a 2001 Mercedes Benz), effective on October 10, 2005, for a premium of $505 total. R at 50-59 (2005-06 $2 million umbrella policy); R at 84 (Deposition Transcript of Jeanne Rakowski) Pages 15-17; R at 84 (Deposition Transcript of Jeanne Rakowski) Page 20.

An unambiguous premium invoice was issued on or about August 31, 2005 by GEICO to Rakowski indicating that the minimum payment due of the $505 total was $306. R at 60. Upon information and belief based upon the undisputed evidence (R at 64) the minimum payment was received by GEICO from Rakowski unambiguously manifesting that the insured accepted the $2 million contract proposal with all its terms and conditions including the premium to be charged and the right of GEICO to unilaterally cancel the insurance contract if there was a failure to pay the premium.

GEICO issued a second invoice to Rakowski on or about October 18, 2005 for the premium balance due of $199 to be paid no later than October 27, 2005. R at 61. It is not disputed by appellants or the insured that Rakowski never paid the $199 premium balance owed to GEICO.

On or about November 4, 2005, Rakowski was issued an invoice/notice of cancellation stating that if the balance of $199 for the insurance premium was not paid, the $2 million umbrella liability insurance contract would be cancelled at 12:01 AM on May 19, 2006. R at 62. A certificate of mailing (R at 63) and GEICO's computer database

memorialized the mailing (R at 64). There is no evidence that Rakowski ever paid the premium balance due to GEICO.

GEICO sent a follow up email to Rakowski on or about May 15, 2006 (R at 65) but received no response. GEICO further attempted to telephone Rakowski after the cancellation on or about May 20, 2006 (R at 65) but received no response.

Pursuant to the foregoing facts, the one-year $2 million umbrella liability insurance contract was terminated at 12:01 AM on May 19, 2006 for non-payment of premium pursuant to the express clause in the written insurance contract giving GEICO that unilateral right. R at 58, Para. "9".

On May 19, 2006 after 12:01 A.M., Rakowski apparently loaned the Land Rover to an acquaintance and the car was involved in accident resulting in injuries to the appellant. R at 36, Paragraph "Ninth". Subsequently, the appellant prevailed in an underlying personal injury suit against the insured and was awarded damages, (based upon the allegations of the instant complaint), of $819,152.90 after additur by the Appellate Division, of which $310,000 was paid by the available primary insurance. R at 35-40.

Pleadings, Undisputed Testimony and Admissible Evidence

Paragraph "Eighth"

The Complaint alleges (R at 36 at Para. "Eighth") and the lower court misstates as fact (R at 6), that the insured and GEICO entered into a one-year umbrella liability insurance contract with indemnity limits of $1 million commencing October 10, 2005, but that is clearly wrong and not supported by any admissible evidence. The insured testified at her deposition that she requested and received an increase in the indemnity limits of her umbrella liability insurance policy from $1 million to $2 million before the effective date of renewal, October 10, 2005. For the sake of brevity, the testimony is not repeated here and the court is respectfully referred to the testimony excerpted in the Record at 13-15.

Thus, the insured requested and received an increase of the indemnity limit from $1 million to $2 million in negotiations before the umbrella policy became effective on October 10, 2005. There was no amendment or endorsement because the renewal was a proposal in August 2005 and it did not become effective by its terms until October 10, 2005 and until the insured accepted the umbrella renewal. Her request to change the limits (and make other changes) is a classic counter-proposal meaning she did not accept the $1 million renewal proposal. She understood that the invoice for the policy would be increased accordingly. The exhibits are entirely consistent with her testimony. See R at 298 (telephone log of request by insured to increase limits from $1 million to $2 million and make changes to umbrella policy); R at 50-59 ($2 million umbrella policy); R at 60 (invoice for $2 million umbrella policy); R at 61 (invoice for balance of $2 million umbrella policy); R at 62 (notice of cancellation for $2 million umbrella policy). There is no evidence to the contrary that supports the substantive allegation in the complaint (R at 36 at Para. "Eighth") or the lower court decision (R at 6) that there was a $1 million umbrella liability insurance contract commencing October 10, 2005.

The insured's testimony, and the aforementioned exhibits are also one hundred percent supported and consistent with GEICO's testimony by the Umbrella Liability Insurance Program Manager, Richard Pitts. For the sake of brevity, the testimony is not repeated here and the court is respectfully referred to the testimony excerpted in the Record at 15-18.

Thus, GEICO's testimony, the insured's testimony and all the evidence in this case are in one hundred per cent agreement that contradict the unsupported allegation in the complaint (Ex. "A" at Para. "Eighth") and the lower court decision (R at 6) of a $1 million umbrella liability insurance contract that was effective October 10, 2005. Consequently, that claim is not supported by any evidence of admissible quality, and summary judgment on the claim is compelled. The undisputed fact is that the insured requested a change of liability limits to $2 million before the October 10, 2005 effective date of the umbrella liability insurance contract, as well as other changes and the initial proposed renewal of $1 million was rejected. The contract negotiations leading up to the October 10, 2005 $2 million umbrella liability contract are irrelevant parole evidence because the contract that was agreed

to by the insured effective on October 5, 2005 had unambiguous liability limits of $2 million and unambiguous policy premium of $505.

Paragraph "Twenty-First"

The complaint alleges that GEICO wrongfully cancelled for non-payment of premium the "$1 Million" liability limit umbrella insurance contract effective on October 10, 2005 (R at 39 at Para. "Twenty-First"). This allegation is meritless because in addition to the undisputed fact that there was no $1 million liability limit umbrella insurance contract effective October 10, 2005 (it was unambiguously $2 million), it is further undisputed by all the evidence including the insured's sworn testimony as well as GEICO's sworn testimony, that the insured did not pay the entire premium owed for $2 million umbrella liability contract that was effective commencing October 10, 2005. Therefore, GEICO was within its contractual (R at 50 at § VI, Paragraph 9(a)(1)) and legal rights to terminate the $2 million umbrella insurance contract for non-payment of premium. See R at 60 (Invoice 8/31/2005); R at 61 (Invoice 10/18/2005); R at 62 (Notice of Cancellation 11/4/2005); R at 63 (Certificate of Mailing); R at 64 (GEICO computer database entry of cancellation); R at 65 (GEICO Log Entry re: Telephone Call, Follow up email).

The insured testified that she has no knowledge if she paid the full amount of the premium for the $2 million umbrella policy, that she never contested GEICO's cancellation for non-payment of premium and that in fact she habitually (and still does) paid her insurance bills at the last minute, mailing the check on the same date as the due date and had received notices of cancellation of insurance policies for non-payment of premium more than once. For the sake of brevity, the testimony is not repeated here and the court is respectfully referred to the testimony excerpted in the Record at 20-25.

The testimony of GEICO's Umbrella Program Director, Richard Pitts, was consistent with the testimony of the insured and all the other evidence that the full amount of the premium for the $2 million umbrella liability insurance contract effective October 10, 2005 was not paid. For the sake of brevity, the testimony is not repeated here and the court is respectfully referred to the testimony excerpted in the Record at 26-28.

Thus, there was only one umbrella contract in effect in 2006 prior to the accident: a one-year $2 million policy which was terminated for non-payment of premium on May 19, 2006 at 12:01 A.M. (R at 50-59). The accident at issue occurred after 12:01 A.M. It is not disputed that the one-year umbrella policy would have paid up to $2 million had the accident occurred before it was terminated for non-payment of premium. There is no evidence that the full amount of the premium for the $2 million umbrella liability insurance policy effective commencing October 10, 2005 was paid and that GEICO's cancellation was "wrongful". GEICO testified that it gave the insured numerous notices and opportunities to pay the full amount of the premium and GEICO never received payment.

It is further undisputed that GEICO has the right in the umbrella insurance contract to unilaterally terminate the policy for failure to pay the premium. The $2 million indemnity limit is unambiguous as is the policy premium. The fact that the previous umbrella policy that expired on October 9, 2005 had a $1 million liability limit for a lessor premium or that there was a proposed and rejected policy renewal for $1 million is totally irrelevant and inadmissible parole evidence in the face of an unambiguous policy term: the indemnity limit and policy premium. It also irrelevant that the insured paid the premium in installments and that the second installment was the same amount of money as the cost of the second million dollars in indemnity coverage.

Consequently, summary judgment is compelled against the appellant on his allegation that is wholly unsupported by any evidence of admissible quality that the umbrella liability insurance contract was wrongfully cancelled for non-payment of premium. The completely unworkable and non-sensical lower court decision ignored the Court of Appeals controlling precedent cited to it (R at 413-414), changed the indemnity limits after the fact of an accident, relied upon misstated facts, irrelevant, inadmissible hearsay and parole evidence, and therefore it was properly reversed by the Second Department.

Procedural History

GEICO moved for summary judgment (R at 7-298) on or about October 14, 2014 after the Note of Issue and Certificate of Readiness (R at

296-97) were filed. Plaintiff filed his opposition (after several extensions agreed to by GEICO) on or about March 19, 2015 (R at 299-402). GEICO filed its reply on or about March 25, 2015 (R at 403-418). The lower court issued its decision on or about June 15, 2015 (R at 3-6) and GEICO filed its Notice of Appeal on or about June 22, 2015 (R at 2). Oral argument was heard by the Second Department on January 17, 2017 and issued its decision reversing the lower court on June 28, 2017.

Where Is the Witness or Other Admissible Evidence That Plaintiff Relies Upon to State There Is an Ambiguity in the $2 Million Indemnity Limit Within the Four Corners of the Umbrella Contract?

A. Without A Finding of An Ambiguity in The Contract, Extrinsic Evidence Is Inadmissible and Irrelevant

Neither witness testified that there was anything ambiguous about the two material terms at issue: (a) the $2 million indemnity limit (R at 50) or (b) the $505 total premium charged for the one-year $2 million umbrella policy (R at 52). Indeed, there is no other reasonable meaning of these two written contract terms. The insured is not confused, GEICO's not confused. The lower court did not find any ambiguity in these two material terms and it is black-letter law that a contract shall be enforced according to its plain meaning unless there is an ambiguity on its face. Without any evidence of an ambiguity and consequent finding of an ambiguity, GEICO respectfully submits that this Court is compelled as a matter of law to interpret these two material contractual terms at issue according to their plain meaning within the "four corners" of the contract and the Court may not resort to extrinsic evidence such as pre-contract proposals and negotiations. *Appleby v. Chicago Title Ins. Co.*, 80 A.D.3d 546, 914 N.Y.S.2d 257 (2d Dep't 2011); *Superior Ice Rink, Inc. v. Nescon Contracting Corp.*, 52 A.D.3d 688, 861 N.Y.S.2d 362 (2d Dep't 2008); *In re Ideal Ins. Co.* 231 A.D.2d 596, 59 N.Y.S.2d 273 (1st Dep't 1997). *See also Mid-State Industries, Ltd. v. State Supreme Court*, 117 A.D.3d 1255, 986 N.Y.S.2d 637 (3d Dep't 2014).

Accordingly, as a matter of law, it is improper for the lower court, appellant or the dissent to rely upon parole evidence, documents that preceded the effective dates of the $2 million umbrella contract at issue that were part of the renewal process. The appellant asks this court to use

extrinsic documents to find an ambiguity in the $2 million indemnity limit of the contract even though that indemnity could not be written any clearer. Moreover, the insured testified that she purchased a $2 million umbrella policy. Thus, the contract language is clear, and the witnesses are clear. The evidence that is admissible is clear.

The Second Department dissent argues there is ambiguity in the $2 million indemnity limit, a material term of the contract, when juxtaposed with an installment payment plan, which is not a material term of the contract. That would be shocking news to the entire insurance industry which routinely allows installment payment plans as a convenience to insureds. The contract language regarding the indemnity limit says "$2 million". There are no "ifs, ands or buts" to this limit, nothing referring to the payment plan. How is the language "$2 million" ambiguous when it says nothing else?

The dissent further suggests that the insured could have been confused but this comment ignores the evidence, the testimony of the insured who said in no uncertain terms that she had a $2 million umbrella policy and expressed no confusion about a payment plan. A lawyer's argument that he is confused and even, respectfully, a judge's comment that he could see how someone is confused, is not evidence. The evidence, by way of testimony is that neither party to the contract was confused. There was a $2 million umbrella policy with a payment plan.

B. The Appellant as Well As the Lower Court and Dissenting Opinion Rely on Inadmissible Evidence

There is no admissible testimony, no admissible evidence to support appellant's argument of a one-year $1 million umbrella policy or the lower court's recitation of that allegation stating it as fact in its decision denying summary judgment to GEICO. Appellant's "dispute of fact", accepted by the dissent, is nothing more than classic conclusory "wishful thinking" put forward by counsel based upon "fluff". That is, inadmissible documents and testimony:

(a) inadmissible parole and extrinsic evidence - contract negotiations in the annual renewal process in which a one-year $1 million policy was proposed at one point and rejected by the insured who counter-proposed a one-year $2 million policy as the insured and GEICO testified;

(b) irrelevant, extrinsic and therefore inadmissible documents about one-year umbrella policies that were in effect in 2003 and 2004 that expired long before the accident in 2006 by their terms.

(c) irrelevant, extrinsic and therefore inadmissible documents from GEICO's internal computer system arising out of the one-year $2 million umbrella contract (which one-year $2 million policy was not pled by plaintiff), particularly the annual renewal process (parole evidence) leading up to the eventual one-year $2 million umbrella policy and the payment of premium for the one-year $2 million umbrella policy.

In other words, the appellant obfuscates undisputed and unambiguous material facts of a one-year $2 million umbrella policy with a total premium of $505 by submitting inadmissible negotiation documents and using misleading jargon in a classic strategy of "muddying the waters". The opposition apparently succeeded with this strategy in confusing the lower court to state as a matter of fact that there was a one-year $1 million umbrella policy in May 2006, a conclusion that both witnesses, the only witnesses in the case, denied.

Appellant relies upon lay witness testimony that imprecisely uses legal and industry jargon with such words as "amendments" and "policy documents" when talking about a *proposed* umbrella insurance contract which jargon suggests that the *proposed* contract is already effective. The opposition repeatedly refers to "amended policy documents" when in fact the "policy documents" are renewal ***proposals*** in August 2005, three months before the actual policy became effective and the "amendments" are counter-proposals. Indeed, the appellant is so obfuscatory, that it actually admits the insured and GEICO agreed to a one-year $2 million umbrella liability insurance contract in the process of arguing that there is a question of fact of whether there is a $2 million or $1 million umbrella contract. *See* R at 302-03. Nevertheless, neither the insured, Ms. Rakowski, nor GEICO, by Mr. Pitts, expressed any confusion that the umbrella contract that became effective October 10, 2005 had a $2 million indemnity limit and that the

premium charged was $505 payable with a minimum of $306 for the first payment.

Appellant further argues that somehow the premium charged by GEICO and the explanation of the premium provided in deposition testimony by GEICO's witness, Mr. Pitts, *ipso facto* created a question of fact over the $2 million indemnity limit, but again neither witness expressed any confusion about the $2 million indemnity limit nor the total premium charged for it. Mr. Pitts explained that $199 of the total premium was for the second million dollars in indemnity. With all due respect to appellant, so what? It does not matter how the premium was calculated. It is irrelevant extrinsic evidence. Mr. Pitts answered a question at a deposition but that testimony is irrelevant to the issue of whether there was a one year $2 million umbrella policy or a one-year $1 million umbrella policy and therefore not admissible.

The only allegation pled is that there was a one-year $1 million umbrella policy. The fact that appellant's counsel, or the dissent or the lower court claim to be confused does not create a question of fact nor change material terms of the contract. Both factual witnesses testified that they understood that there was a one-year $2 million policy and the premium for it was $505. Where is appellant's factual witness that the two terms are ambiguous? Where is appellant's (non-parole) admissible evidence that that the contractual indemnity limit is ambiguous? Again, it seems we have nothing to base plaintiff's argument upon that is admissible evidence – only wishful thinking based upon obfuscation.

The appellant further relied extensively upon discussions of GEICO's internal computer system which is again based upon deposition testimony that is otherwise inadmissible because it is extrinsic evidence and utterly irrelevant. Neither witness disputes that there was a premium of $505 and that it was not paid. What difference does it make what GEICO's computer system did? It is all obfuscation.

GEICO moved for summary judgment because there is no material factual dispute based upon admissible evidence requiring a trial of the substantive allegations of the complaint and the matter must be resolved as a matter of law:

a. The underlying auto accident injuring the plaintiff occurred after 12:01 AM on May 19, 2006. Appellant does not dispute this.

b. Appellant admits that the one-year umbrella insurance contract between GEICO and the insured Jeanne Rakowski effective October 10, 2005 (R at 50-59) was terminated pursuant to the terms of the contract at 12:01 A.M. on May 19, 2006 because of the insured's failure to pay the unambiguous policy premium. R at 304; R at 314, Para. 40.

c. Appellant admits that the umbrella liability insurance contract between GEICO and the insured Jeanne Rakowski had unambiguous indemnity limits of $2 million, not $1 million. See R at 302-303.

d. GEICO testified that the umbrella policy (R at 50-59) would have required it to pay up to $2 million had the policy not been terminated.

Appellant argues there are disputed material facts because counsel says so, but in fact submits no witness testimony and no admissible evidence whatsoever that there is an ambiguity in the indemnity limit of the $2 million umbrella policy. There is no testimony to support the only allegation in the pleading of a $1 million policy (there is no pleading asserting a $2 million policy). All the evidence, all of it, shows that the umbrella policy that was cancelled before the accident had $2 million indemnity limits. Indeed, appellant has repeatedly admitted that the umbrella policy effective October 10, 2005 was a $2 million policy because the insured rejected a proposed $1 million umbrella policy and counter proposed a $2 million policy which counter proposal was accepted by GEICO. See R at 302-03.

The Appellant Relies Upon the Overruled Dissenting Opinion of the Lower Court in *First Savings* Rather Than Addressing the Controlling Court of Appeals Decision and The Dissent Creates Questions of Fact Where There Are None Supported by Evidence

In this case, the lower court misstated the law by ignoring the controlling Court of Appeals precedent cited to it (*See* R at 413-414), *First Savings and Loan Ass'n of Jersey City, N.J. v. American Home Ass. Co.*, 29 N.Y.2d 297, 327 N.Y.S.2d 609 (1971), which held that indemnity limits are not severable with facts that are very similar to this case. Appellant cannot distinguish that holding so instead it cites the dissent of the First Department

ruling in *First Savings* which dissent was not only overruled by the First Department but also by the Court of Appeals which affirmed the First Department majority ruling that the indemnity limits are not severable.

The lower court ruled (R at 3-6) that the unambiguous $2 million indemnity limit is severable from the rest of the umbrella liability insurance contract after the fact of the accident, citing *In re Nationwide Mut. Ins. Co.*, 37 A.D.2d 15, 322 N.Y.S.2d 164 (2d Dep't 1971), in which the Second Department held that the insurer could not cancel an otherwise fully paid automobile insurance policy where the insured subsequently requested and received an endorsement to the policy to add an additional vehicle for an additional premium, which additional premium was not paid. *Nationwide* had nothing whatsoever to do with an indemnity limit. In *Nationwide*, the insurer sent notice of cancellation of the entire policy for the failure to pay the premium for the endorsement for the additional vehicle. Subsequently, there was accident involving the other vehicle that was not the subject of the endorsement. The Appellate Division in *Nationwide* held that the insurer could only terminate coverage for the additional vehicle because the endorsement was severable.

In *First Savings*, the insured increased the limits of a property policy by endorsement but then failed to pay the premium for the increased limits causing the insurer to terminate the policy. The Court of Appeals explained:

> Williston, referring to divisible contracts, states that: "'A contract is divisible where by its terms, 1, performance of each party is divided into two or more parts, and, 2, the number of parts due from each party is the same, and, 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party.'" (6 Williston, *Contracts* [3d ed.], § 860, at pp. 253-254.)
>
> Applying these principles, we conclude that the October 21, 1968 endorsement became, as it specifically provided, part of the original insurance contract. (17 Couch, *Insurance* [2d ed.], § 65.1 et. seq.; *Metzger v. Aetna Ins. Co.*, 229 App. Div. 2, 6; *Rhine v. New York Life Ins. Co.*, 273 N.Y. 1, at 15-16.) The endorsement increased the amount of coverage for the same property and the same risk, namely: damages sustained to the

> insured premises by fire. Upon the effective date of the endorsement, the insurance company became liable, in the event of a fire, for the full amount of $15,000, even though the additional premium of $119 was not remitted. This added coverage and liability thereunder continued to be in full force and effect for more than four months, ceasing only upon notice of termination for nonpayment of premium. In addition, the cancellation notice specifically referred to policy D7539681 in its entirety. Certainly, under such circumstances, it cannot be said the contract was divisible. (*Ming v. Corbin*, 142 N.Y. 334, at p. 340-341.)

29 N.Y.2d at 300, 327 N.Y.S.2d at 611.

The facts of the instant case are even more compelling to deny severability than *First Savings*, because here the liability limits of the contract were not changed by an endorsement. The one-year umbrella contract itself commenced on October 10, 2005 and its indemnity limit was always unambiguously $2 million. It was not changed at any time. The fact that the expiring umbrella contract from the previous year had indemnity limits of $1 million is irrelevant parole evidence as well as hearsay. The fact that GEICO originally proposed a $1 million umbrella contract for the new year is also irrelevant and inadmissible. The negotiations leading up to a written contract are not relevant where there is no ambiguity of the meaning of the contract term at issue, the $2 million indemnity limit. Here, the written umbrella insurance contract commencing on October 10, 2005 had an indemnity limit of $2 million at all times and there is nothing ambiguous about that material term.

The fact that the insured was permitted to pay the premium in two installments is also irrelevant. The unambiguous contractual term of a $2 million indemnity limit is not made ambiguous by premium payment in installments. The suggestion by the lower court, the dissent and the plaintiff that the Court can order that GEICO should have unilaterally amended the policy and changed the liability limits from $2 million to $1 million based upon the partial premium payment is a classic example of "20-20" hindsight reasoning and is completely unlawful and unworkable:

a. The umbrella liability insurance contract does not give GEICO the right to unilaterally change a material term such as the amount of indemnity coverage, and certainly does not state when this should occur. The contract, however, does give GEICO the right to unilaterally terminate the contract if the premium is not paid.

b. When should GEICO have made this unilateral change proposed by the appellant? Should GEICO have acted on October 27, 2005 when the payment was due, November 4, 2005 when the notice was sent or May 19, 2006 when the policy terminated? No doubt the appellant would say May 19th but if that was the case what if the insured had a $1.5 million-dollar loss on May 18th? The insured gets the benefit of $2 million liability limits up to May 19th and then $1 million after May 19th without any compensation to GEICO? Why would anyone bother paying the entire premium if that was the case? Just ask for $2 million and pay for $1 million and you will get the increased limits for more than fifty percent of the year without paying a dime.

The dissent opines that the fact that GEICO was obligated to pay $2 million the day before the accident "begs the question" because that means the contract is not severable. The dissent fails to explain to the insurance industry how and when such a decision to sever should be made. Based upon the two preceding paragraphs, one could understand why the dissent avoiding any discussion of how this severability plan is workable. Indeed, the complete mess that would be caused by a ruling that a payment plan makes an indemnity limit ambiguous suggests that the dissent was motivated in its analysis by the desired result and hindsight reasoning rather than the plain meaning of the terms of the contract.

The dissent suggests that the case should be remanded for trial on the question of whether the insured and insurer thought the indemnity was "severable". This of course ignores the fact that we already have the sworn testimony of the insured and the insurer stating that the indemnity is $2 million 'period' and they were not confused at all by the payment plan. It is inexplicable that this testimony was ignored by the dissent in reaching its conclusion that a trial is required, except to again suggest that the dissent wanted to reach that result regardless of the evidence.

The dissent also criticizes the termination notice which is, again, irrelevant. The insured never challenged the termination notice and did not testify in any way that she was confused by it. The dissent's suggestion that the termination is somehow ambiguous because the policy number is continued again would be shocking news to the insurance industry which routinely use the same policy number on year to year contracts that are changed and have done so as standard industry practice for decades if not centuries. The policy number is effectively a customer identification number. The contract itself is defined by its material terms, effective dates and indemnity limits of which there is no ambiguity. The suggestion that it is ambiguous for insurers to use the same policy number when the policy changes by term, date or otherwise, would cause chaos in the industry and is a drastic solution where there is no problem identified by any admissible evidence. Again, the witnesses in this case, the insured and insurer, the parties to the contract, testified that they were not confused. Only the appellant's attorney and the dissent have argued there is confusion, neither of which is evidence.

As the Court of Appeals explained in *First Savings*, this is not a divisible contract. The lower court ruling would turn New York contract and insurance law on its head and create chaos as insurers would have to unilaterally change policy limits depending on payments made by the insured rather than the material terms of the contract. In all likelihood, the insurance industry would react by requiring all premium payments up front.

This case is just not that complicated. The admissible evidence is clear: the insured failed to pay the full amount of an insurance premium and thus, after a properly pro-rated period there was a termination of coverage. The insured never contested the termination and testified that she was not confused by the indemnity limit nor the payment. The rest is the hyper creative mind of counsel seeking a desired result.

GEICO Met the Standard for Summary Judgment

A motion for summary judgment must be granted if, upon all the papers and proof submitted, a cause of action is not sufficiently established to warrant the case to proceed to trial. CPLR 3212(b). In order to defeat a motion for summary judgment, appellant must present proof and submit

factual matter of an evidentiary nature sufficient to raise a substantial issue of fact requiring a trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979); *Fried v. Bower & Gardner*, 46 N.Y.2d 765, 413 N.Y.S.2d 650 (1978). "Evidentiary nature" means meeting the standards of admissible evidence. *Zuckerman*, 427 N.Y.S.2d at 598. "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions" cannot defeat summary judgment. *Zuckerman*, 427 N.Y.S.2d at 598. *See also Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). The instant case is a classic example of "unsubstantiated allegations" because the substantive allegations are meritless and not supported by any facts of "evidentiary nature".

The Complaint (R at 35-40, Para. "Eighth") alleges that the insured and GEICO entered into a one-year umbrella liability insurance contract with indemnity limits of $1 million commencing October 10, 2005, but that is clearly wrong and not supported by any admissible evidence.

The complaint further alleges that GEICO wrongfully cancelled for non-payment of premium the "$1 Million" liability limit umbrella insurance contract effective on October 10, 2005 (R at 35-40, Para. "Twenty-First"). This allegation is meritless because in addition to the undisputed fact that there was no $1 million liability limit umbrella insurance contract effective October 10, 2005 (it was $2 million), it is further undisputed by appellant (R at 304; R at 314, Para. "40") and by all the evidence including the insured's sworn testimony as well as GEICO's sworn testimony, that the insured did not pay the entire premium owed for the $2 million umbrella liability contract that was effective commencing October 10, 2005. Therefore, GEICO was within its contractual (R at 50-59, § VI, Paragraph 9(a)(1)) and legal rights to terminate the $2 million umbrella insurance contract for non-payment of premium. *See* R at 60 (Invoice 8/31/2005); R at 61 (Invoice 10/18/2005); R at 62 (Notice of Cancellation 11/4/2005); R at 63 (Certificate of Mailing); R at 64 (GEICO computer database entry of cancellation); R at 65 (GEICO Log Entry re: Telephone Call, Follow up email); R at 84-135 (Deposition of Jeanne Rakowski) Pages 17-18, 19-22, 24-25, 29-31, 35-36, 38-41; R at 136-294, (Deposition of Richard Pitts) Pages 108-09, 119, 120-21, 133-135, 143.

There is no material dispute of fact as to the one cause of action pled in the complaint and therefore movant respectfully submits summary judgment was and still is compelled.

Thank you for your time and attention to this matter.

Very truly yours,

Richard A. Fogel

Cc: Jonathan A. Dachs, Esq. via email and first-class mail

COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Court of Appeals Rule of Practice 500.11(m) that the foregoing letter brief was prepared on a computer using Microsoft Word

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