

**Ace Fire Underwriters Ins. Co. v ITT
Indus., Inc.**

2007 NY Slip Op 32135(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0600133/2006

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN

PART 49

Index Number: 600133/2006

ACE FIRE INDERWRITERS INS. CO.

vs

ITT INDUSTRIES, INC.

Sequence Number : 031

DISMISS

C

INDEX NO. _____

MOTION DATE 7/31/06

MOTION SEQ. NO. 031

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 17 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

original in 54 05

Dated: 7/5/07 Herman Cahn J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
ACE FIRE UNDERWRITERS INSURANCE
COMPANY, et. al.,

Plaintiffs

-against-

ITT INDUSTRIES, INC., et al.,

Defendants.
-----X

FILED

Index No: 600133/06

JUL 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

CAHN, J.

Motion Sequence Nos. 005, 006, 014, 031, and 032 are consolidated for disposition.

Plaintiffs ACE Fire Underwriters Insurance Company, et al. (collectively, the ACE Insurers) seek a judicial determination as to the rights and obligations of the parties in this declaratory judgment action with respect to insurance coverage for underlying bodily injury claims arising from exposure to silica, and asserted against defendants ITT Industries, Inc. (ITT) and U.S. Silica Corporation (USS), the successor to ITT's former subsidiary, Pennsylvania Glass Sand Corporation (PGS, and collectively with USS, USS/PGS). The ACE Insurers also assert claims against many of ITT's and USS/PGS's primary, umbrella and excess insurers.

In Motion Sequence No. 005, USS moves to dismiss or, in the alternative, sever and stay the ACE Insurers' claims against USS in this action, in favor of an action previously filed in West Virginia by USS (the West Virginia Action), CPLR 3211 (a) (4), 3001 and 327.

In Motion Sequence No. 006, USS moves to dismiss or, in the alternative, sever and stay the cross claims filed against it by defendants/excess insurers Allstate Insurance Company and Royal Insurance Company, CPLR 3211 (a) (4), 3001 and 327.

In Motion Sequence No. 014, USS moves to dismiss or, in the alternative, sever

and stay the cross claims filed against it by defendants/excess insurers United States Fire Insurance Company, TIG Insurance Company, Everest Reinsurance Company, Mt. McKinley Insurance Company and OneBeacon America Insurance Company, CPLR 3211 (a) (4), 3001 and 327.

In Motion Sequence No. 031, USS moves to dismiss or, in the alternative, sever and stay the cross claims filed against it by defendants/excess insurers American Home Assurance Company, American International Underwriters Company, Birmingham Fire Insurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Landmark Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, CPLR 3211 (a) (4), 3001 and 327.

In Motion Sequence No. 032, defendant Liberty Mutual Insurance Company (Liberty Mutual) moves to dismiss the claims asserted against it in the complaint, CPLR 3211 (a) (7).

USS's Motions to Dismiss or Stay with Respect to the Cross Claims Filed by the Excess Insurers (Motion Sequence Nos. 5, 6, 14, 31)

In a prior motion, Motion Sequence No. 011, USS moved to dismiss or, in the alternative, sever and stay the ACE Insurers' claims against USS in this action, in favor of the West Virginia Action. USS also moved to dismiss or stay the cross claims filed by excess insurers Certain Underwriters at Lloyd's, London, Certain London Market Companies, and North River Insurance Company (collectively, Lloyd's) and Affiliated FM Insurance Company (Affiliated) against USS, arguing that the cross claims should be dismissed or stayed for the same reasons that the ACE Insurers' claims against USS should be dismissed or stayed.

By decision and order dated July 19, 2006, the Court denied USS's motion "to dismiss or stay the claims asserted against it in favor of the West Virginia Action" (Decision at 17), including both the claims asserted by the ACE Insurers, as well as the cross claims asserted by Lloyd's and Affiliated. In rejecting USS's argument that this action should be stayed in favor of the West Virginia Action, the Court held that "it is clear that this action is more comprehensive than the West Virginia Action with respect to the claims asserted against USS, as it seeks to globally resolve all coverage claims under all provisions of the policies at issue" (id. at 19). Thus, the Court concluded, "as between New York and West Virginia, New York is the more appropriate forum" (id. at 18).

On the basis of the July 19th Decision and Order, Motion Sequence No. 005 is denied. With the exception of the motion to dismiss the cross claims of Lloyd's and Affiliated, Motion Sequence No. 005 seeks exactly the same relief as Motion Sequence No. 011. Accordingly, Motion Sequence No. 005 is denied as moot, as the issues raised in the motion have already been completely resolved in Motion Sequence No. 011.

Motion Sequence Nos. 006, 014 and 031, USS's motions to dismiss or stay the cross claims asserted by certain of the excess insurers in favor of the West Virginia Action, are also denied. In the July 19th Decision and Order, the Court determined that this action is more comprehensive with respect to all of the claims asserted against USS (see Decision at 17 and 19), including the cross claims asserted by excess insurers Lloyd's and Affiliated, and thus, specifically denied USS's motion to dismiss or stay those cross claims (see id. at 3). As such, Motion Sequence Nos. 006, 014 and 031, in which USS seeks to dismiss or stay the cross claims asserted by certain other excess insurers, are denied, as the issues raised by USS in those motions

have already been disposed of.

Motion Sequence No. 32 – Liberty’s Mutual’s Motion to Dismiss the Complaint

Liberty Mutual moves to dismiss the ACE Insurers’ fourth claim for relief against it, which seeks contribution. For the reasons set forth below, Liberty Mutual’s motion to dismiss is granted.

Liberty Mutual issued two primary insurance policies to ITT during the policy years 1973 through 1977. PGS, a former subsidiary of ITT, has been sued by thousands of claimants alleging that they have suffered bodily injury as a result of exposure to silica products manufactured or sold by PGS (the Silica Suits). ITT has not been named in any of the Silica Suits. Neither ITT nor PGS is seeking coverage from Liberty Mutual for any of the Silica Suits.

ITT sold PGS to Pacific Coast Resources (PCR) in 1985. ITT contractually agreed to assume certain of PGS’s silica-related liability pursuant to the terms of the “Agreement of Purchase and Sale of the Capital Stock of Pennsylvania Glass Sand Corporation” (the PGS PSA). At the same time that ITT assumed this obligation, on September 13, 1985, plaintiff Pacific Employers Insurance Company (ACE/Pacific) agreed to indemnify ITT for this contractual liability under its 1985 primary policy, No. SCG GO 690040-9 (the ACE/Pacific Policy) (Complaint, ¶¶ 104, 105, 112).

ACE/Pacific’s agreement to indemnify ITT for silica-related losses is embodied in the ACE/Pacific Policy, which has a policy period of January 1, 1985 to January 1, 1986 (Twomey Aff., Exh 3). The ACE/Pacific Policy contains a contractual bodily injury coverage part that obligated ACE/Pacific to pay on behalf of ITT:

all sums which [ITT], by reason of contractual liability assumed by [it] under any written contract of the type designated in the schedule for this insurance, shall become legally obligated to pay as damages because of bodily injury or property damages to which this insurance applies, caused by an occurrence . . .

Contractual Liability Insurance Coverage Party (Blanket Coverage) Form GL 215 (id.). Under the heading “Designation of Contracts on file or known to the Company,” the ACE/Pacific Policy schedule lists “All Contracts” (id.).

ACE/Pacific also agreed that all such indemnity claims would be “funneled” to the ACE/Pacific Policy. Thus, ACE/Pacific’s agreement to pay for ITT’s Silica Suit liability was also expressly set forth in Endorsement 44 of the ACE/Pacific Policy, which ACE/Pacific specially prepared and issued in connection with ITT’s sale of PGS. This endorsement – issued the day after the closing of the ITT/PGS transaction – provides that all losses subject to the indemnity would be considered as “occurring during” 1985:

It is understood and agreed that the contractual liability coverage provided by the policy shall apply to those liabilities assumed by ITT Corporation in the “Contract of Sale” Section 5.1(b) Lung Disease.

It is further agreed that those losses covered by the above-mentioned “Contract of Sale” shall be considered as occurring during this policy period [1/1/85-1/1/86] regardless of when the claim actually occurs.

“Contract of Sale” means the sales agreed entered into between ITT Corporation and the Buyers of Pennsylvania Glass Sand.

Endorsement 44 to the ACE/Pacific Policy; see also Complaint, ¶ 112 [“[ACE/Pacific agreed to provide an endorsement to one of its primary policies acknowledging that contractual liability coverage, under that policy alone, may apply to the PGS Silica Claims pursuant to the 1985 ITT/PCR Purchase Agreement”]].

Liberty Mutual issued the following primary comprehensive general liability insurance policies to ITT (collectively, the Liberty Mutual Policy):

<u>Policy Number</u>	<u>Policy Period</u>
LG1-621-004092-033	12/31/73-12/31-76
LG1-621-004092-036	12/31/76-12/31-77

Complaint, ¶ 146.

The Liberty Mutual Policy contains an exclusion which expressly provides that the Policy “does not apply: to liability assumed by the insured under any contract or agreement except an incidental contract” (Comprehensive General Liability Policy Form at 1 [Twomey Aff., Exhs 5, 6]). An “incidental contract” means:

any written (1) lease of premises, (2) easement agreement . . . (3) undertaking to indemnify a municipality required by municipal ordinance . . . (4) sidetrack agreement, or (5) elevator maintenance agreement.

Id. at 3. The ACE Insurers do not dispute that the contractual liability assumed by ITT to PGS and by ACE/Pacific by and through endorsement 44 to the ACE/Pacific Policy does not constitute an “incidental contract,” and cannot be part of the coverage afforded by the Liberty Mutual policy.

In this action, in their fourth claim for relief, the ACE Insurers seek a declaration that the umbrella and excess insurers, including Liberty Mutual, who issued liability policies to ITT are contractually required to contribute to any past or future payments made by the ACE Insurers to ITT for silica claims.

Although on a motion to dismiss pursuant to CPLR 3211 (a) (7), the facts pleaded

are presumed to be true, “factual claims . . . flatly contradicted by documentary evidence are not entitled to such consideration” (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991], appeal denied 80 NY2d 788 [1992] [citations omitted]; see also CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais, 270 AD2d 138 [1st Dept 2000]).

Here, the plain and unambiguous terms of the policies at issue clearly demonstrate that the ACE Insurers cannot, as a matter of law, maintain a claim for contribution against Liberty Mutual and, thus, their fourth claim for relief must be dismissed as to Liberty Mutual.

The ACE Insurers cannot seek contribution from Liberty Mutual for silica related losses for which ACE/Pacific contractually agreed to indemnify ITT because Liberty Mutual did not “coinsure” ACE/Pacific’s indemnity for the PGS Silica Suits. Under New York law, an insurer may only seek contribution from another insurer on the grounds that the insurers were “co-insurers,” i.e., “the insurance provided by each must cover the same interest and against the same risk” (Medical Malpractice Ins. Assoc. v Medical Liability Mut. Ins. Co., 86 AD2d 476, 478-79 [1st Dept], appeal denied 57 NY2d 604 [1982] [internal citation omitted]; see also Southgate Owners Corp. v Public Serv. Mut. Ins. Co., 241 AD2d 397 [1st Dept 1997]; Couch on Insurance 3d § 218.3 [2005]). Where two insurers provide coverage to the same insured, but for separate and distinct risks, there can be no contribution between them (HRH Constr. Corp. v Commercial Underwriters Ins. Co., 11 AD3d 321 [1st Dept 2004], lv denied 5 NY3d 705 [2005]; Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co., 100 AD2d 318 [3d Dept 1984], affd 64 NY2d 840 [1985]).

HRH Constr. Corp. is instructive. In that case, a general contractor was named as

an additional insured under individual general liability policies obtained by two of its subcontractors. The general contractor was sued by an employee of one of the subcontractors for injuries allegedly sustained on the job site, and one of the subcontractor's insurers undertook the defense. That subcontractor's insurer settled on behalf of the general contractor, and then sought contribution from the other subcontractor's insurer. In finding that the settling insurer had no claim for contribution against the insurer of the other subcontractor, the First Department held that:

While both [subcontractors' insurers] provided primary insurance to [the general contractor], they did not insure the same risk. The carriers insured [the general contractor] as to the risks associated with two separate subcontractor's individual work at the job site. Each insurer afforded coverage to [the general contractor] only for claims arising out of work performed by that carrier's primary named insured. Thus, the claims herein do not involve a coinsurance situation.

11 AD3d at 323 (citations omitted).

Here, ACE/Pacific does not allege that Liberty Mutual insured the ITT-assumed liability to PGS. Hence, the ACE/Pacific Policy insured ITT for a risk separate and distinct from any risk embraced by the coverage provided by Liberty Mutual to ITT. Therefore, ACE/Pacific has no right of contribution from Liberty Mutual for ITT's contractually-assumed liability for Silica Suits brought against PGS. As ACE/Pacific candidly admits, Endorsement 44 was drafted to acknowledge that "contractual liability coverage under that policy alone may apply to the PGS Silica Claims pursuant to the [PGS PSA]" (Complaint ¶ 112). Thus, it provides coverage to ITT for claims brought against PGS (*id.*). Furthermore, according to the plain language of Endorsement 44, all ITT-assumed Silica Suit loss is funneled to the ACE/Pacific Policy.

Accordingly, ACE/Pacific and Liberty Mutual cannot be deemed to be co-insurers for the PGS-assumed Silica Suit liability, and no right of contribution exists as to Liberty Mutual.

Moreover, it is fundamental that, in order to invoke or “trigger” a contribution right against an insurer “on the risk” during a different policy period, it is necessary for damage or injury to have “occurred” during the period of the allegedly contributing policy. Here, however, ACE/Pacific specifically agreed that no injury for which it is responsible arising out of the assumed liability for Silica Suits took place in any policy or policy year other than 1985. Thus, ACE/Pacific agreed that all ITT-assumed Silica Suit losses “shall be considered as occurring during [1985] regardless of when the claim actually occurs” (ACE/Pacific Policy at Endorsement 44). This “funnel” clause essentially eliminates the possibility of a contribution claim arising in favor of ACE/Pacific for any ITT-assumed Silica Suit loss. Indeed, Liberty Mutual did not insure ITT in 1985, and did not agree to share or coinsure ACE/Pacific’s contractual liability assumption as expressed in ACE/Pacific’s Policy Endorsement 44.

In addition, the Liberty Mutual Policy expressly excludes from coverage the silica risk assumed by contract by ITT. Endorsement No. 2 to the Liberty Mutual Policy, which modifies the contractual liability coverage afforded by the Policy, provides contractual liability coverage only pursuant to a “written contract made prior to the ‘occurrence’ giving rise to the ‘personal injury’ or ‘property damage’ with respect to which indemnification is claimed” (Liberty Mutual Policy, Endorsement No. 2 [Twomey Aff., Exhs 5, 6]). However, the written contract pursuant to which ITT assumed the PGS liability was entered into on September 13, 1985 – almost eight years after the expiration of the last Liberty Mutual policy on December 13, 1977 (see Complaint, ¶¶ 11, 112, 146).

The ACE Insurers' primary argument in opposition to the dismissal motion is that their contribution claim against Liberty Mutual is based not only on the extent and duration of contractual liability coverage for the ITT indemnity, but also on potential products liability coverage, which "may be available to ITT and/or PGS-USS under products liability coverage provided in other primary and excess or umbrella liability insurance policies issued to ITT and/or PGA-USS" (PI Mem at 5-6). The Court rejects this argument. In their fourth claim for relief, the ACE Insurers specifically allege that the defendant insurers have "*contractual obligations* to contribute proportionately to any defense or indemnity owed to ITT and/or PGS-USS, if any, as a result of the Silica Claims" (Complaint, ¶ 177 [emphasis added]). The ACE Insurers do not, however, mention potential products liability coverage (see Complaint, ¶¶ 174-78).

Accordingly, ACE/Pacific has no contribution claim against Liberty Mutual. Consequently, the ACE Insurers cannot, as a matter of law, maintain a claim for contribution against Liberty Mutual, and their fourth claim for relief is dismissed as to Liberty Mutual.

The Court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that Motion Sequence Nos. 005, 006, 014 and 031 are denied; and it is further

ORDERED that the motion of Liberty Mutual Insurance Company (Motion Sequence No. 032) to dismiss the claims asserted against it in the complaint is granted, and the fourth claim for relief is severed and dismissed against Liberty Mutual; and it is further

ORDERED that the clerk shall enter judgment in favor of Liberty Mutual

Insurance Company, against plaintiffs as herein directed, with costs and disbursements to Liberty Mutual as taxed by the Clerk of the Court; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 5, 2007

ENTER:



J.S.C.

FILED
JUL 17 2007
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