

**Handy & Harman v American Intl. Group,  
Inc.**

2008 NY Slip Op 32366(U)

August 25, 2008

Supreme Court, New York County

Docket Number: 0115666/2007

Judge: Herman Cahn

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

PRESENT: Cahn Justice

PART 49

Index Number : 115666/2007

HANDY & HARMAN

INDEX NO. \_\_\_\_\_

vs

AMERICAN INTERNATIONAL GR. INC

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DISMISS ACTION

MOTION CAL. NO. \_\_\_\_\_

C

is motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

AUG 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/25/08

A. Cahn  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X

HANDY & HARMAN,  
Plaintiff,

-against-

Index No. 115666/07

AMERICAN INTERNATIONAL GROUP, INC.,  
AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY and AIG  
DOMESTIC CLAIMS, INC.,

Defendants.

**FILED**  
AUG 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**Herman Cahn, J.:**

Defendants American International Specialty Lines Insurance Company (AISLIC) and AIG Domestic Claims, Inc. (AIG) move to dismiss the complaint's second cause of action for failure to state a claim, and dismissing the request for extra-contractual or consequential damages.

This is an action on an insurance policy purchased by plaintiff to cover environmental pollution liabilities in connection with the remediation of a contaminated site on Kings Highway in Fairfield, Connecticut. Defendant American International Group, Inc. has paid \$2,000,000 in claims under the "cost cap" section of the policy. It has denied coverage, however, under a different portion of the policy regarding third-party claims for clean-up costs resulting from pollution conditions on or under plaintiff's property. Plaintiff seeks recovery under theories of breach of the contract of insurance for the failure to pay a covered risk, and breach of the duty of good faith and fair dealing for defendants' alleged failure to even investigate the claim before denying coverage.

## BACKGROUND

Plaintiff operated a large precious metals manufacturing facility in Fairfield, Connecticut (Compl, ¶ 2). In 2003, it ceased operations, and sought to sell the property (id.). Under the terms of the sale agreement, plaintiff was responsible for demolishing the existing structures and performing an environmental remediation (id.). In April 2004, plaintiff purchased an insurance policy from AISLIC, Pollution Legal Liability Select Clean-Up Cost Cap Insurance Declarations No. PLCC 3778245 (the Policy), to insure certain risks associated with the remediation at the site (id., ¶ 30). Plaintiff alleges that it paid the policy premium and performed all its obligations under the Policy (id.).

Policy Section I, Number I, "Coverages," included "COVERAGE A – ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS," renamed by Endorsement No. 4 as "COVERAGE A– THIRD PARTY CLAIMS ONLY ENDORSEMENT" (Coverage A). The aggregate value of the policy coverage for Coverage A is \$10,000,000. Under Coverage A, AISLIC agreed:

[t]o pay on behalf of the Insured, Loss that the Insured is legally obligated to pay as a result of Claims for Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date, provided such Claims are first made against the Insured and reported to the Company in writing during the Policy Period, or during the Extended Reporting Period if applicable

(id., ¶ 32; Compl, Exh 1, Policy, Sec I [2]). Endorsement No. 6 to the Policy amends Section II, Number 2B to exclude coverage under Coverage A for claims:

arising from Pollution Conditions resulting from Pollutants which are the subject of the Remedial Plan or are otherwise covered under Coverage K or L, or which would be covered under Coverage K or L

but for the erosion of the Self-Insured Retention, exhaustion of the applicable limit of liability, or termination of coverage under Coverage K or L pursuant to the limits of the Policy

(Compl, Exh 1, Endorsement No. 6). This endorsement, however, further provides that the exclusion does not apply to Pollution Conditions resulting from Pollutants identified in the Remedial Plan if the Pollution Condition is “not the same related or continuous Pollution Condition” as that which is covered under Coverages K or L (id.; Compl, ¶ 34).

Under the Policy, under Coverage K for known pollutants, and Coverage L for unknown pollutants, AISLIC agreed, in Coverage K:

[t]o pay on behalf of the Insured, Clean-Up Costs in excess of the Self-Insured Retention that the Insured incurs for the Clean-Up of Pollutants identified in the Remedial Plan

(Compl, Exh 1, Policy, Coverage K). Coverage L provided, in part, that AISLIC agreed:

[t]o pay on behalf of the Insured, Clean-Up Costs in excess of the Self-Insured Retention that the Insured incurs for the Clean-Up of Pollutants different from those identified in the Remedial Plan

(Compl, Exh 1, Policy, Coverage L). The Self-Insured Retention under the Policy was \$4,739,030, and the limit of liability for Coverages K and L combined was \$2 million (Compl, ¶ 37).

Plaintiff’s environmental consultants, Roux Associates, Inc., developed a Remedial Action Work Plan, which identified certain pollutants on the site, including petroleum-related compounds and metals (id., ¶¶ 4, 38-39). Plaintiff commenced remediation at the site under the Remedial Action Work Plan, with defendants’ knowledge (id., ¶¶ 4, 40). It incurred costs in excess of the \$4,739,030 Self-Insured Retention and AIG accepted coverage under the Policy

under Coverage K, and paid the cost overruns up to the Coverage K policy limit of \$2,000,000 (id., ¶¶ 5, 45).

In December 2004, contractors from Roux discovered underground conditions, including a previously unknown layer of materials beneath clean fill, and a previously unknown underground storage tank filled with debris (id., ¶ 41). Roux also discovered a previously unknown foundation, beneath which were pollutants unknown at the time of the creation of the Remedial Action Work Plan, and which were later identified as containing petroleum-related compounds and metals (id., ¶¶ 43-44). The discoveries were brought to the attention of the Connecticut Department of Environmental Protection (CTDEP), which, by letter dated December 22, 2005, directed that the newly discovered areas of contamination be remediated (id., ¶¶ 44, 46; Compl, Exh 2). Plaintiff sent the CTDEP letter to AIG as notice of its Claim (Compl, ¶ 48).

On June 13, 2006, Cherilyn Zavatsky, an AIG claims adjuster, sent a letter to plaintiff, entitled "Disclaimer of Coverage," which stated that it served as a denial of coverage under Coverages K and L, on the ground that their coverage limits had been exhausted (id., ¶ 49). It did not address Coverage A (id., ¶ 50). On June 20, 2006, plaintiff's counsel wrote a letter stating that the June 13 letter from AIG failed to mention Coverage A, and requested that AIG confirm that the Policy will respond to the claim under Coverage A (id., ¶ 51).

By letter dated July 14, 2006, Ms. Zavatsky stated that there was no coverage for plaintiff's claim under Coverage A, citing Endorsement No. 6, and stating that coverage for this claim would have been provided under Coverages K or L but for the erosion of the limits of liability of the Policy (id., ¶ 52). By letter dated August 4, 2006, plaintiff's counsel pointed out the very next sentence of Endorsement No. 6, which stated that the exclusion relied upon by the

claims adjuster “shall not apply to Pollution Conditions resulting from Pollutants identified in the Remedial Plan if the Pollution Condition is not the same related or continuous Pollution Condition as that which would be covered under Coverage K or L” but for the exhaustion of the applicable limit of liability (id., ¶ 53).

On October 6, 2006, another AIG claims adjuster wrote to plaintiff asserting that the CTDEP letter did not constitute a “Claim” under the Policy, because it did not constitute a demand (id., ¶ 54). The adjuster further stated that a review of the materials submitted indicates that Coverage A does not apply because the pollutants did not result from pollution conditions unrelated to those that were or would otherwise be covered under Coverages K or L (id., ¶ 55). Plaintiff’s counsel again wrote on February 9, 2007, indicating that the adjuster was wrong, that it was a Claim, and that AIG should have interviewed the persons with knowledge or investigated the claim (id., ¶ 56).

On June 1, 2007, a third claims adjuster from AIG was assigned to this matter, and reaffirmed that the CTDEP letter was not a Claim, and that Coverage A did not apply (id., ¶ 58). On July 26, 2007, plaintiff’s counsel again indicated that the claims adjuster was wrong, and pointed out that AIG has refused to properly investigate the claim (id., ¶ 60). On November 7, 2007, the claims adjuster sent another letter accusing plaintiff of refusing to cooperate and provide the requested documents and information regarding its claim (id., ¶ 61).

On November 21, 2007, plaintiff commenced this action seeking recovery for breach of the contract of insurance, and breach of the covenant of good faith and fair dealing. In the first cause of action, plaintiff seeks recovery for the substantial sums it expended in the clean-up and remediation of its property and for consequential damages stemming from of defendants’ delay,

failure to investigate and bad faith denial of its claim (id., ¶¶ 64-70). In the second cause of action, plaintiff alleges that defendants breached the covenant of good faith by failing to fully investigate its claims for coverage under Coverage A, and seeks damages including amounts incurred in the prosecution of the claim (id., ¶¶ 71-75).

In their motion, defendants AISLIC and AIG seek dismissal of the claim for breach of the covenant of good faith, on the ground that it duplicates the breach of contract claim and that the allegations cannot support an independent cause of action entitling plaintiff to separate or additional damages. They also contend that plaintiff's demand for amounts incurred in prosecuting this claim must be dismissed as a matter of law. Further, they argue that plaintiff's claim for extra-contractual and consequential damages requires pleading that defendants' actions constituted an independent tort; the tort is of an egregious nature; it is directed to the plaintiff; and it is part of a pattern directed at the public generally. They urge that plaintiff's pleadings fail to meet these requirements, and, therefore, the request for such damages must be dismissed.

#### **DISCUSSION**

The motion to dismiss is granted only to the extent that the second cause of action cannot state a separate tort claim for breach of the duty of good faith, and the request for damages in the form of plaintiff's attorneys' fees incurred in bringing this action is dismissed. The remainder of the motion is denied.

Implicit in an insurance contract, as in all contracts, is a duty of good faith and fair dealing, under which the insurer promises to investigate and pay covered claims (New York Univ. v. Continental Ins. Co., 87 NY2d 308, 318 [1995]; see also Bi-Economy Mkt., Inc. v. Harleystown Ins. Co. of N.Y., 10 NY3d 187, 194 [2008]). Plaintiff's allegations here, that

defendants delayed, failed to investigate and denied plaintiff's claim in bad faith, simply allege a breach of the insurance contract and any covenants implied in that contract. These allegations do not allege conduct giving rise to an independent tort duty of care flowing to plaintiff insured separate and apart from the insurance contract (New York Univ. v Continental Ins. Co., 87 NY2d at 319-20). Therefore, to the extent that the second cause of action seeks to allege a tort claim for breach of the duty of good faith, that claim is dismissed.

Nevertheless, while this cause of action is not a tort claim, the breach of the duty of good faith allegations may be incorporated into plaintiff's breach of contract claim. Plaintiff has sufficiently alleged a basis for seeking consequential damages beyond the policy limits for such breach (see Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d 200, 203-04 [2008] [consequential damages available for failure to properly investigate insured's loss]; Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of N.Y., 10 NY3d at 192-95 [consequential damages resulting from breach of covenant of good faith may be asserted in insurance contract context]; Hoffman v Unionmutual Stock Life Ins. Co. of N.Y., 51 AD3d 633, 633 [2d Dept 2008] [allegations of insurer's bad faith may be incorporated into breach of contract claim]; Acquista v New York Life Ins. Co., 285 AD2d 73, 79-82 [1st Dept 2001] [bad faith allegations may be incorporated into contract claim, and insured may seek consequential damages]). While ordinarily damages arising from a breach of contract will be limited to the contract damages necessary to redress the wrong (see New York Univ. v Continental Ins. Co., 87 NY2d at 315), in the insurance contract context, an insured may pursue a claim for consequential damages, as plaintiff does here, based on defendants' claimed breach of the covenant of good faith.

Earlier this year, the Court of Appeals, in two cases decided the same day, determined

precisely this issue. In Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y. (10 NY3d at 187), the Court permitted an insured to seek consequential damages based on allegations of the insurer's failure to fulfill its obligations under the insurance contract by delaying payment and denying coverage thereunder (id. at 192-95). The insured had obtained a commercial property insurance policy that included business interruption coverage and was seeking consequential damages for the collapse of its business resulting from the insurer's failure to meet its obligations under the insurance contract. The Court began its discussion with the principle that a nonbreaching party to a contract may recover general damages for the natural and probable consequences of a breach, and that special or consequential damages also may be available for foreseeable and probable risks (id. at 192-93). It then stated that in determining if consequential damages were reasonably contemplated by the parties, it must examine the nature, purpose and particular known circumstances of the contract, and the "liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made" (id. at 193 [internal quotation omitted]). The Court found that a reasonable insured would understand that the insurer was promising to investigate in good faith and pay covered claims and that an insured may also bargain for comfort, peace of mind and risk aversion (id. at 194). It further reasoned that, in many circumstances, business policy holders may lack the resources to continue business operations without insurance proceeds (id. at 194-95). Thus, "limiting an insured's damages to the amount of the policy, i.e., money which should have been paid by the insurer in the first place, plus interest, does not place the insured in the position it would have been in had the contract been performed" (id. at 195 [internal citations omitted]). In addition, the Court determined that the

policy exclusion for consequential loss did not bar recovery for consequential damages (*id.* at 196). Accordingly, it denied the insurer's motion for summary judgment dismissing the consequential damages claim.

In a companion case, the Court in Panasia Estates, Inc. v Hudson Ins. Co. (10 NY3d at 200), again held that consequential damages may be available in a claim for breach of the duty of good faith against an insurer. In that case, the plaintiff insured was the owner of commercial rental property and had obtained commercial property insurance from the defendant insurer. The policy included "Builder's Risk Coverage," covering damage to the property while it was undergoing renovation. During the policy period, the roof was opened for construction and rain caused extensive damage to the property. The plaintiff claimed that it promptly notified the defendant, which delayed in investigating and adjusting the claim, and then improperly denied it. The plaintiff insured brought its action alleging breach of the covenant of good faith, seeking direct and consequential damages for the insurer's breach (*id.* at 202). The Court denied summary judgment to the insurer, holding that consequential damages resulting from a breach of the covenant of good faith may be asserted in an insurance contract context where the damages were foreseeable.

Here, as in both Panasia Estates, Inc. v Hudson Ins. Co. and Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of N.Y., plaintiff's claim is based on allegations that defendants breached their duty to investigate, bargain for, and settle its claims in good faith. Contrary to defendants' contention, plaintiff has sufficiently pled, at this early stage in the litigation, that consequential damages were within the contemplation of the parties as a probable result of the breach at the time of, or prior to, contracting. The purpose of this environmental pollution liability policy was

to ensure that the business paying for and conducting the pollution remediation, the insured, had the financial support to conduct and finish the remediation when the costs went beyond the self-insured retention amount for pollution conditions identified in the remedial plan, and to pay third-party claims for clean-up costs of the pollution conditions. Plaintiff purchased the insurance so that it could avoid financial pressure on its business upon funding the costs of a pollution remediation. An insurer in these circumstances fairly may be supposed to have assumed, when the insurance contract was made, that if it breached its obligations under the contract to timely investigate in good faith and pay covered claims it would have to respond in damages for damages to plaintiff's business (see Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of N.Y., 10 NY3d at 193).

As the Court of Appeals found in Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of N.Y., plaintiff here asserts that this was not a pure agreement to pay or a contract for money only (10 NY3d at 193). Rather, it is claimed that the purpose of this insurance policy – what plaintiff planned to do with the payment -- was at the very core of the contract. Plaintiff bargained for this policy not only so that it could be paid the policy amount, but so that it also could have “the peace of mind, or comfort, of knowing that it will be protected in the event of a catastrophe” (id. at 194 [internal citations omitted]). It was purchased by plaintiff to protect it from the calamity of unforeseen and monumental environmental clean-up costs, and avert risk with regard to such costs and liabilities. Moreover, the particular circumstances of this insurance contract known by the parties at or prior to contracting, point to the foreseeability of consequential damages. For example, the site was being dug up and pollution conditions being remediated, with the purpose

that the site was to be redeveloped. By delaying and failing to investigate, plaintiff contends that the site is further on the road to redevelopment and no longer open or easily inspected, resulting in further foreseeable harm in the form of increased costs and difficulty of proof. It is therefore claimed that, in light of the nature and purpose of this pollution liability policy and the circumstances of the policy, the claim for consequential damages was within the contemplation of the parties as a probable result of a breach at the time of or prior to contracting. Thus, plaintiff has sufficiently alleged a claim for consequential damages for breach of the covenant of good faith, all of which are incorporated into the first cause of action for breach of contract.

Plaintiff's claim for attorneys' fees in pursuing this action, however, is dismissed. It is well-settled that an insured "may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (New York Univ. v Continental Ins. Co., 87 NY2d at 324 [internal citations omitted]; see Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d at 200).

Accordingly, it is

ORDERED that the motion to dismiss is granted only to the extent that the second cause of action as a tort claim for breach of the duty of good faith is dismissed, and that the request for attorneys' fees in the prosecution of this action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the defendants are directed to serve an answer within 10 days after service of a copy of this order with notice of entry.

Dated: August 25, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
AUG 26 2008  
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