

**Keyspan Gas E. Corp. v Munich Reinsurance Am.,  
Inc.**

2016 NY Slip Op 31185(U)

March 30, 2016

Supreme Court, New York County

Docket Number: 604715/1997

Judge: Saliann Scarpulla

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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: PART 39

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KEYSPAN GAS EAST CORPORATION,

Plaintiff,

**DECISION/ORDER**

-against-

Index No. 604715/1997  
Motion Seq. No. 067, 069

MUNICH REINSURANCE AMERICA, INC., CENTURY  
INDEMNITY COMPANY, NORTHERN ASSURANCE  
COMPANY OF AMERICA

Defendants.

-----X  
**HON. SALIANN SCARPULLA, J.:**

In this insurance coverage action, plaintiff Keyspan Gas East Insurance Corporation (“Keyspan”) moves for an order: (1) to preclude defendant Century Indemnity Company’s (“Century”) expert Dr. Andy Davis from testifying at trial (motion seq. no. 069); and (2) to preclude Century from introducing any evidence or argument at trial concerning the issue of insurance availability in the marketplace (motion seq. no. 067). These two motions are consolidated for disposition.

In 1997, Keyspan’s predecessor-in-interest, Long Island Lighting Company, commenced this action seeking excess insurance coverage for the cost of environmental cleanup of seven manufactured gas plants (“MGPs”) located in Queens and Long Island. At the urging of Century, I held a trial concerning excess insurance coverage at two of the seven MGPs, Patchogue and Rockaway Park in October 2014. A second trial is scheduled to begin on April 4, 2016 for the Glen Cove, Halesite, and Sag Harbor sites.

On October 17, 2014, prior to the first trial, I issued a decision on Century's partial summary judgment motion related to the issue of insurance allocation. In making this motion, Century argued that it was not responsible for any property damage that occurred outside the policy periods with respect to the Hempstead and Rockaway Park sites, and that any covered costs should be allocated pro rata over the entire period during which property damage at each site occurred. Specifically, Century contended that a pro rata allocation should apply because neither party could produce evidence as to how much property damage occurred within a given policy period.

Based on the parties' submissions, I determined that costs should be allocated pro rata over the entire period during which property damage occurred, with exclusions for the time period when insurance was unavailable prior to the policy periods 1953 to 1969, and for the time period when insurance was unavailable after 1986. I held that, under the circumstances where "the parties cannot parse out the exact amount of property damage which occurred within each policy period . . . pro rata allocation is the rational, equitable method to determine how to allocate damages among multiple triggered insurance policies." At the first trial, neither Keyspan nor Century contended that it could determine the exact amount of property damage that occurred in each policy period, nor did Keyspan's or Century's experts testify that they could determine property damage per year.

On January 11, 2016, Century disclosed that it planned to present the testimony of a new expert, Dr. Andy Davis, at the second trial. Dr. Davis opines that he can estimate

the amount of property damage that took place at the Glen Cove, Halesite, and Sag Harbor sites within Century's policy periods.

Keyspan argues that Dr. Davis' expert testimony should be excluded at the second trial because it was untimely disclosed. In opposition, Century argues that Dr. Davis' testimony should not be precluded because Century did not intentionally delay its disclosure, and Keyspan will not be prejudiced because it can provide a rebuttal expert report if the Court grants an adjournment of the trial.

Keyspan further moves to preclude Century from introducing evidence or argument on the question of insurance availability. At the first trial, the jury determined that insurance coverage was unavailable prior to 1933, and from 1986 to 1995.<sup>1</sup> Keyspan argues that no evidence concerning insurance availability should be admitted at trial because this was a general issue that was already litigated and determined by the jury at the first trial. Century contends that evidence of insurance availability is admissible because the doctrine of collateral estoppel does not apply to a jury verdict absent a final judgment, and the law of the case doctrine is inapplicable because the post-trial motion has not yet been decided by the Court.

## **Discussion**

### **1. Dr. Davis' Expert Testimony**

CPLR § 3101(d)(1) provides that a party "shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the

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<sup>1</sup> The parties stipulated that insurance coverage was available from 1933 to 1985. I entered a directed verdict in favor of Keyspan with respect to the period after 1995.

subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.”

As to the timing of expert disclosure, CPLR § 3101(d)(1) states that “[w]here a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance.” However, a party may be precluded from offering expert testimony when there is evidence of an intentional or willful failure to disclose the expert in a timely manner, and a showing of prejudice to the opposing party due to the delay.

*Arcamone-Makinano v. Britton Prop., Inc.*, 117 A.D.3d 889, 891 (2d Dep't 2014); *Rojas v. Palese*, 94 A.D.3d 557, 558 (1st Dep't 2012).

Commercial Division Rule 13 – which operates in conjunction with CPLR § 3101(d)(1) – states that the “note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.”

Here, Century's disclosure of its new expert comes more than two years after the close of expert discovery and the filing of the note of issue in this action. Pursuant to the case management order entered on November 13, 2013, expert discovery closed on November 15, 2013, and the note of issue was filed on December 13, 2013.

Century now seeks to present Dr. Davis at the second trial in this action which is scheduled to begin next week, without an explanation for its delay in disclosing this

expert to Keyspan. Century contends that Dr. Davis' testimony should not be precluded because it does not present a new theory, and Keyspan is capable of developing a rebuttal report if the Court grants an adjournment of the trial.

After reviewing the parties' submissions, I find that Century failed to demonstrate good cause for its significant delay in disclosing Dr. Davis as an expert. While Century maintains that Dr. Davis' testimony does not present a new theory, his proffered expert testimony is entirely new. In his expert report, Dr. Davis opines that he can discern the amount of property damage that occurred within each policy period, which is directly contrary to the position that Century has taken throughout this action, even on its motion for summary judgment, and at the trial of the first two MGP sites. Because Century failed to timely disclose this new expert opinion without an adequate explanation, and Keyspan would be prejudiced if it was required to rebut Dr. Davis' testimony at this late stage, I grant Keyspan's motion to preclude Dr. Davis from testifying at trial. *LaFurge v. Cohen*, 61 A.D.3d 426, 426 (1st Dep't 2009); *1861 Capital Master Fund, LP v. Wachovia Capital Markets, LLC*, 95 A.D.3d 620, 620 (1st Dep't 2012) (finding that preclusion of expert report is appropriate where party "failed to timely disclose the new theory and failed to provide an adequate explanation for the delay").

I note that this action has been bifurcated into three separate trials for purposes of efficiency and consistency, not to provide the parties with the opportunity to conduct new discovery and present new experts whose testimony is inconsistent with the testimony of experts submitted previously. Although it may be possible for Keyspan to develop a

rebuttal expert if the Court grants an adjournment, a trial adjournment is unwarranted in light of the lengthy, eighteen year history of this action.

## 2. Insurance Availability

Keyspan also moves to preclude Century from presenting any evidence or argument at trial concerning the issue of insurance availability. At the first trial, the parties presented to the jury the issue of whether insurance coverage was unavailable prior to 1933, and from 1986 to 1995. The jury rendered a verdict finding that insurance coverage was unavailable during those periods. Now that I have ruled on Century's post-trial motion for judgment notwithstanding the verdict, the jury's determination on this issue is now law of the case. Therefore, Keyspan's motion to preclude Century from presenting evidence on the issue of insurance availability is granted.

In accordance with the foregoing, it is

ORDERED plaintiff Keyspan Gas East Insurance Corporation's motion to preclude defendant Century Indemnity Company's expert Dr. Andy Davis from testifying at trial (motion seq. no. 069) is granted; and it is further

ORDERED plaintiff Keyspan Gas East Insurance Corporation's motion to preclude Century from introducing any evidence or argument at trial regarding the availability of insurance (motion seq. no. 067) is granted.

This constitutes the decision and order of the Court.

DATE :

3/30/16

  
SCARPULLA, SALIANN, JSC