

**Indemnity Insurance Company of North America v
Transcontinental Insurance Company**

2003 NY Slip Op 30139(U)

March 27, 2003

Supreme Court, New York County

Docket Number: 0603492/2002

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB

PART 15
(SUB)

Justice

Indemnity Ins

INDEX NO.

603492/02

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -
Transcontinental Ins.

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

SCANNED

APR 04 2003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/27/03

4
WALTER B. TOLUB /S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Plaintiff,

-against-

Index No. 603492/02

TRANSCONTINENTAL INSURANCE COMPANY
AND CONTINENTAL CASUALTY COMPANY,

Defendants.

-----x

WALTER B. TOLUB, J.:

SCANNED

APR 04 2003

Defendants Transcontinental Insurance Company (TIC) and Continental Casualty Company a/k/a CNA (CNA) move for an order disqualifying the law firm of Lustig & Brown from representing plaintiff Indemnity Insurance Company of North America (Indemnity) in this action.

This is an action to recover for defendants' breach of their duty of good faith by failing to settle the underlying action captioned McGann v Three Star Mason Supplies, Inc., Sup Ct, Queens County, Index No. 14183/99, within the primary policy limits of their insurance policy. The underlying action by Kiplin McGann was an action to recover for personal injuries arising from an automobile accident on April 29, 1999. The complaint alleged negligence against Three Star Mason Supplies, Inc. (Three Star), the owner of an automobile, and against Three Star's employee, who operated the automobile involved in the accident within the scope of his employment. At the time of the

accident, Three Star maintained a primary coverage general liability policy, with TIC and CNA with a coverage limit of \$1 million, and an excess coverage with Indemnity, with a coverage limit of \$25 million.

TIC and CNA assumed the defense of the underlying action. Ultimately, a verdict of total liability was rendered against defendants in the underlying action, with no comparative negligence against Mr. McGann. Subsequently, the underlying action **was** settled, with TIC and CNA contributing \$1 million, and Indemnity contributing \$500,850 towards settlement. Indemnity commenced this action against TIC and CNA, alleging that they acted in bad faith, because they failed to settle prior to the liability verdict, at which time Mr. McGann demanded \$1 million. Lustig & Brown did not represent any party or interest in the underlying action.

Defendants move to disqualify Lustig & Brown as counsel for plaintiff. Defendants submit an affidavit of Danette J. Buckley, director of the world wide claims department of CNA. Ms. Buckley states that Lustig & Brown **represented** and provided legal advice to various underwriting companies authorized to use the "CNA" service mark (the CNA Companies), and continues to do so. Affidavit of Danette J. Buckley, ¶ 3. Ms. Buckley states that lawsuits in which Lustig & Brown represents such companies include actions similar to the one at bar. Id. Ms. Buckley

further states that Lustig & Brown is currently representing Valley Forge Insurance Co. (Valley Forge) in an unrelated pending action captioned AIU Ins. Co. v Valley Forge Ins. Co., Sup Ct, NY County, Index Nos. 603446/99 and 590436/00 (the Valley Forge Action). Id. at ¶ 7. Ms. Buckley also states that "CNA Insurance Companies" is a trade name used by an affiliated group of commonly owned and managed insurance underwriting companies, including defendants and Valley Forge. Id. at ¶ 6. Ms. Buckley states that all of the CNA Companies share the same claims handling staff operating from a single office and following the same procedures. Id. at ¶ 8.

Defendants argue that Lustig & Brown must be disqualified as counsel for plaintiff, because Lustig & Brown is currently acting as counsel in an unrelated pending action, and because Lustig & Brown previously became privy to confidential information related to CNA's claims handling procedures, while acting as counsel for various CNA Companies.

Plaintiff argues that, because the issues in the present case and in the pending unrelated action are different, and because defendants fail to specify the alleged secret information that Lustig & Brown obtained in the course of its representation of the CNA Companies, defendants failed to satisfy their burden to show that their motion does not represent mere litigation tactics, and that disqualification is warranted. Plaintiff urges

that defendants must show a substantial relationship between the issues presented in this litigation and in the unrelated action. Defendants urge that the federal law "prima facie" test applies.

Generally, the substantial relationship test applies to the situation where an attorney, who previously represented movant, is now acting as counsel for the adverse party. Solow v W.R. Grace & Co., 83 NY2d 303, 308-9 (1994). In such a case, the conflict arises between the former client's interest in confidentiality and the current client's interest in vigorous representation. Id. Accordingly, where the moving party shows that, "the former and current representations are both adverse and substantially related," disqualification will be appropriate in order to ensure that matters that the movant may have disclosed to its former attorney will not be subsequently used against it by that attorney in a related litigation. Id.

Where a counsel for the opposing party simultaneously acts as a counsel for the movant, the doctrine of concurrent representation shifts the burden of proof regarding the propriety of such representation to the opposing party. MSKCT Trust v Paraneck Enterprises Inc., 296 AD2d 769, 770 (3d Dept 2002); Aerojet Properties, Inc. v State, 138 AD2d 39, 41 (3d Dept 1988). In such a case, the inquiry focuses on whether counsel is able to fulfill its fundamental duty of undivided loyalty, considering the conflict inherent in simultaneous representation. Aerojet.

Accordingly, the moving party is not required to show the existence of a substantial relationship, but the challenged counsel must show, "at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." Id., quoting Cinema 5, Ltd. v Cinerama, Inc., 528 F2d 1384, 1387 (2d Cir 1976).

However, where the movant is not actually the client of a counsel, but is merely a related entity of the client, the traditional attorney-client relationship between the movant and the client does not exist, and the appropriate standard is the less stringent substantial relationship test. AMBAC Indemn. Corp. v Bankers Trust Co., 145 Misc 2d 52, 60 (Sup Ct, NY County 1989), citing Glueck v Jonathan Logan, Inc., 653 F2d 746 (2d Cir 1981).

Defendants in this action are CNA, which is merely a trade name used by a number of affiliated companies, and TCI, an underwriter of insurance at **issue** in this case. Valley Forge, represented by Lustig & Brown in the unrelated pending action, is a sister company of TCI, one of a number of affiliated companies using the CNA trade name. Plaintiff argues that TCI and Valley Forge are merely sister companies and that the substantial relationship test applies. However, the affiliation of the CNA companies for purposes of determining Lustig & Brown's duties in this context is more than a mere sister company relationship.

See JP Morgan Chase Bank ex rel. Mahonia Ltd. and Mahonia Natural Gas v Liberty Mut. Ins. Co., 189 F Supp 2d 20, 22 (SD NY 2002).

All of the CNA Companies share the same claims handling staff and procedures, and the same office handles claims under all of the policies issued by the CNA Companies. Plaintiff submits an affidavit of Russell N. Brown in which he states that, Lustig & Brown, never had any contacts with Danette J. Buckley. Affidavit of Russel N. Brown, ¶ 2. Nevertheless, Mr. Brown concedes that, throughout the years, Lustig & Brown represented various CNA Companies. Id. at 2. Accordingly, Lustig & Brown has been communicating in its role as counsel for Valley Forge, and other CNA Companies, with the same office that handled the settlement at issue in the present case. Therefore, the prima facie test applies.

Plaintiff argues that the subject matter of this case differs from the subject matter of the Valley Forge Action. In the Valley Forge Action, acts by plaintiff in the Valley Forge Action with respect to settlement are at issue, and in the preset case, CNA's settlement practices are at issue. In order for Lustig & Brown to continue the effective representation in the Valley Forge Action, Lustig & Brown must continue to communicate with the CNA office which handles claims and settlements. However, because the settlement practices of the same office that has been communicating with Lustig & Brown, as its own counsel,

are at issue in the present case, Lustig & Brown may potentially obtain confidential information related to CNA's claims handling procedures and use it against defendants in the present case. Therefore, considering the surrounding circumstances of the case, plaintiff has failed to meet its burden of showing the absence of any conflict in loyalties or impediments to a vigorous representation of both clients.


Defendants' motion to disqualify Lustig & Brown from representing plaintiff in this action is granted.

Accordingly, it is hereby

ORDERED that the motion by defendants Transcontinental Insurance Company and Continental Casualty Company a/k/a CNA for an order disqualifying the law firm of Lustig & Brown from representing plaintiff Indemnity Insurance Company of North America in this action is granted and the law firm of Lustig & Brown is disqualified from representing plaintiff Indemnity Insurance Company of North **America** in this action.

Counsel for the parties shall appear for a preliminary conference at I.A. Part 15, Room 335, 60 Centre St., New York, New York on May 2, 2003 at 11:00 a.m.

Dated: 3/27/03



HON. WALTER B. TOLUB, J.S.C.