

**Mt. McKinley Insurance Company v Corning
Incorporated**

2004 NY Slip Op 30268(U)

July 6, 2004

Supreme Court, New York County

Docket Number: 602454/2002

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. KARLA MOSKOWITZ PART 03

Justice

-----X
MT. MCKINLEY INSURANCE COMPANY, formerly known as GIBRALTAR CASUALTY COMPANY and EVEREST REINSURANCE COMPANY formerly known as PRUDENTIAL REINSURANCE COMPANY,

Plaintiffs,

-against-

INDEX NO. 602454/2002

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

CORNING INCORPORATED, AIU INSURANCE COMPANY, ALLIANZ INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, as successor-in-interest to NOKTHBKOOK EXCESS & SURPLUS INSURANCE COMPANY, f/k/a NORTHBROOK INDEMNITY COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CENTURY INDEMNITY COMPANY, as successor-in-interest to the INSURANCE COMPANY OF NORTH AMERICA and CALIFORNIA UNION INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, EMPLOYERS INSURANCE OF WAUSAU, EXECUTIVE RISK INDEMNITY INC., as successor-in-interest to AMERICAN EXCESS INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, a/k/a GEICO, GRANITE STATE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, HIGHLANDS INSURANCE COMPANY, THE HOME INSURANCE COMPANY, in its own behalf and as successor-in-interest to CITY INSURANCE COMPANY, HUDSON INSURANCE COMPANY, KEMPER INSURANCE COMPANY, as successor-in-interest to LUMBERMEN'S MUTUAL CASUALTY COMPANY, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, NEW ENGLAND REINSURANCE CORPORATION a/k/a NEW ENGLAND INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, OLD REPUBLIC INSURANCE COMPANY, PACIFIC INSURANCE COMPANY, PUKITAN EXCESS AND SURPLUS LINES INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, TRAVELERS CASUALTY & SURETY COMPANY, as successor-in-interest to AETNA CASUALTY & SURETY COMPANY, and WESTCHESTER FIRE INSURANCE COMPANY, as successor-in-interest to INTERNATIONAL COMPANY,

Defendants.

FILED
JUL 12 2004
NEW YORK
COUNTY CLERK'S OFFICE

-----X
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 the motion is decided in accordance with the accompanying Decision and Order.

Dated: July 06, 2004



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MT. MCKINLEY TNSURANCE COMPANY, formerly
known as GIBRALTAR CASUALTY COMPANY and
EVEREST REINSURANCE COMPANY formerly known
as PRUDENTIAL REINSURANCE COMPANY,

Index No.602454/2002

Plaintiffs,

-against-

Motion Sequence NoE
001, 002, 006 & 007

CORNING INCORPORATED, AIU INSURANCE COMPANY,
ALLIANZ INSURANCE COMPANY, ALLSTATE INSURANCE
COMPANY, as successor-in-interest to
NORTHBROOK EXCESS & SURPLUS INSURANCE
COMPANY, f/k/a NORTHBROOK INDEMNITY
COMPANY, AMERICAN CENTENNIAL INSURANCE
COMPANY, AMERICAN HOME ASSURANCE COMPANY,
CENTURY INDEMNITY COMPANY, as successor-in-
interest to the INSURANCE COMPANY OF NORTH
AMERICA and CALIFORNIA UNION INSURANCE
COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S
LONDON and CERTAIN LONDON MARKET INSURANCE
COMPANIES, CONTINENTAL CASUALTY COMPANY,
CONTINENTAL INSURANCE COMPANY, EMPLOYERS
INSURANCE OF WAUSAU, EXECUTIVE RISK INDEMNITY
INC., as successor-in-interest to AMERICAN
EXCESS INSURANCE COMPANY, FIREMAN'S FUND
INSURANCE COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, a/k/a GEICO, GRANITE STATE
INSURANCE COMPANY, GREAT AMERICAN INSURANCE
COMPANY, HARTFORD ACCIDENT & TNDEMNITY COMPANY,
HIGHLANDS INSURANCE COMPANY, THE HOME INSURANCE
COMPANY, in its own behalf and as successor-in-
interest to CITY INSURANCE COMPANY, HUDSON
INSURANCE COMPANY, KEMPER INSURANCE COMPANY,
as successor-in-interest to LUMBERMEN'S MUTUAL
CASUALTY COMPANY, LANDMARK INSURANCE COMPANY,
LEXINGTON INSURANCE COMPANY, NATIONAL UNION
FIRE INSURANCE COMPANY, NEW ENGLAND REINSURANCE
CORPORATION a/k/a NEW ENGLAND INSURANCE COMPANY,
NORTH RIVER INSURANCE COMPANY, OLD REPUBLIC
INSURANCE COMPANY, PACIFIC INSURANCE COMPANY,
PURITAN EXCESS AND SURPLUS LINES INSURANCE
COMPANY, REPUBLIC INSURANCE COMPANY, ROYAL
INDEMNITY COMPANY, TRAVELERS CASUALTY & SURETY
COMPANY, as successor-in-interest to AETNA
CASUALTY & SURETY COMPANY, and WESTCHESTER FIRE
INSURANCE COMPANY, as successor-in-interest to
INTERNATIONAL COMPANY,

DECISION & ORDER

FILED
JUL 12 2004
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----x
KARLA MOSKOWITZ, J.:

Motion sequence numbers 001, 002, 006 and 007 are
consolidated for disposition.

This is a declaratory judgment action. Plaintiffs, who are various insurance companies, seek an order clarifying their coverage obligations under the policies of insurance they issued to defendant Corning Incorporated (Corning) for those asbestos-related claims that arise from Corning's ownership interest in Pittsburgh Corning Corporation (Pittsburgh Corning) and Corning's ownership of Cohart Refractories, Inc. (Cohart). Plaintiffs also seek an order clarifying the coverage obligations of those defendant insurers that insured Corning.

In motion sequence 001, defendants Century Indemnity Company (Century) and Westchester Fire Insurance Company (Westcheater Fire) seek to consolidate this action with the action under New York County Index No. 600821/03.¹

In motion sequence number 002, Corning moves to dismiss plaintiffs' complaint for lack of jurisdiction (CPLR 3211[a][2]), prior pending action (CPLR 3211[a][4]) and failure to state a cause of action (CPLR 3211[a][7]).

Alternatively, Corning seeks a stay pending the approval of the chapter 11 plan in the Pittsburgh Corning Bankruptcy proceedings now pending in the Western District of Pennsylvania Bankruptcy Court. Defendants Continental Insurance Company, Employers Insurance of Wausau, Executive Risk Indemnity, Inc.,

¹The title of the action designated as New York County Index No. 600821/03 is Century Indemnity Company and Westchester Fire Insurance Company v. Corning Incorporated, et al.

* 4]
Federal Insurance Company, First State Insurance Company, Hartford Accident & Indemnity Company, Highlands Insurance Company, Pacific Insurance Company, New England Reinsurance Corporation, Royal Indemnity Company and Travelers Casualty & Surety Company cross-move for a case management order to control the course of discovery in this action.

In motion sequence 006, Corning moves to dismiss defendants' cross-claims for lack of jurisdiction, prior pending action and failure to state a cause of action.

In motion sequence 007, plaintiffs seek dismissal, without prejudice, of their complaint as against defendant The Home Insurance Company (The Home) because Home is currently in receivership.

Background

In April 2000, non-party Pittsburgh Corning filed a voluntary petition for bankruptcy relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the Western District of Pennsylvania (the Bankruptcy Court). A large number of asbestos-related legal actions against Pittsburgh Corning allegedly necessitated that filing. Because Corning, a defendant in this action, is a 50% owner of Pittsburgh Corning's capital stock, the Bankruptcy Court allowed Corning to intervene in Pittsburgh Corning's bankruptcy action and to avail itself of the protections of 11 U.S.C. § 524(g). That Code section,

specifically dealing with asbestos-related claims,² provides for the creation of a trust out of which to pay the claims.

In the context of Pittsburgh Corning's bankruptcy case and the proposed establishment of a Section 524(g) trust, Corning began negotiating with the Asbestos Claimants Committee to reach a global resolution of all its asbestos liabilities, including those related to Corning's 100% ownership interest in Cohart.

On July 26, 2002, after the initiation of these negotiations, Corning commenced an adversary proceeding in the Bankruptcy Court, designated as AP 02-2445-JKF (the adversary proceeding), seeking coverage determinations under certain insurance policies various insurers issued to Corning. All of the insurers in this action are defendants in the adversary proceeding.

On July 3, 2002, prior to the commencement of the adversary proceeding, plaintiff insurers here commenced this declaratory judgment action seeking clarification of their coverage obligations for Corning's asbestos-related claims. Almost immediately, Corning removed this action to the U.S. District Court for the Southern District of New **York**, contending that there was federal jurisdiction because of the relationship of this action to the bankruptcy case.

On **March** 21, 2003, Judge Denise Cote remanded that portion of this action that concerned non-affiliate insurance policies

² See Legislative History to Public Law No. 103-394 (1994).

back to this court. Judge Cote stayed any decision on the propriety of removal of that part of the action concerning the Affiliate policies' pending a determination in the adversary proceeding.

On May 9, 2003, the District Court of the Western District of Pennsylvania (District Court) withdrew its reference to the Bankruptcy Court of the adversary proceeding. (See May 9, 2003 Order of the District Court of the Western District of Pennsylvania). Corning moved to vacate that District Court order of withdrawal and, on July 28, 2003, the District Court issued an Order: (1) abstaining from adjudicating and dismissing Corning's claims against those insurers listed in the complaint with Non-Affiliate, Non-Assigned Excess Insurance policies; and (2) requesting further briefing on three issues, including the preclusive effect of Judge Cote's ruling in the related New York County declaratory judgment actions.⁴ The Court then stayed the adversary proceeding pending the submission of the additional briefing (and until further order). (See July 28, 2003 Order).

³ The District Court included the list of such insurers as Exhibit A to its decision. "Assigned policies" are those policies that Corning has agreed to assign the right to pursue the proceeds of to the Trust associated with the bankruptcy reorganization. Many of the policies Corning assigned to the Trust are policies under which Pittsburgh Corning is also seeking coverage (the "Affiliate Policies").

⁴ The three related New York County actions include this action, as well as Lumbermens Mutual Casualty Insurance Co. v Corning, Index No. 104829/03 and Century Indemnity Co. v Corning, Index No. 600821/03.

As of March 17, 2004, the parties were still filing briefs. As of June 14, 2004, there was yet no decision.

In the interim, counsel notified the court on May 13, 2004 that the District Court of Travis County, 53rd Judicial District placed defendant Highlands Insurance Company into Receivership. (The State of Texas v. Highlands Insurance Company GV 304537).

The court *sua sponte* stays that part of the action asserted against Highlands Insurance Company and severs and continues the action as to all other parties.

Discussion

Given the present status of the adversary proceeding, it would be inappropriate for this court to address those motions (and cross motion) that involve insurance coverage for the policies listed on Exhibit B (**as** attached to the District Court's July 28, 2003 Order).

It is only those policies listed on Exhibit A that the District Court is no longer addressing in the adversary proceeding. Included among those policies listed on Exhibit A are those plaintiffs here issued. However, policies that several of the defendants to this action issued are on the list of insurance policies in Exhibit B. Additionally, the policies at issue in New York County Index No. 600821/03, entitled Century Indemnity Company and Westchester Fire Insurance Company v. Corning Incorporated, et al., are included on Exhibit B and are, therefore, still under consideration in the District Court.

Thus, it would be premature for this court to consolidate this action with Century Indemnity Company and Westchester Fire Insurance Company v. Corning Incorporated, et al. Therefore, the court stays the motion seeking consolidation until after the District Court has ruled about jurisdiction over all the insurance policies that are the subject of both this action and those at issue in Century Indemnity Company and Westchester Fire Insurance Company v. Corning Incorporated, et al.

In motion sequence number 002, Corning seeks to dismiss for lack of jurisdiction, prior pending action and failure to state a cause of action.

First, this court notes that plaintiffs commenced this action prior to the initiation of the adversary proceeding in the bankruptcy court. Therefore, Corning's assertion that this court should dismiss the complaint because of a prior pending action is denied.

Next, Corning contends that there is no subject matter jurisdiction because there is no justiciable controversy between the parties.

Corning maintains that the injunction in the bankruptcy action stays any asbestos-related claims, and, if the proposed plan of reorganization is approved, none of Corning's insurance carriers will face any exposure for asbestos-related claims. Plaintiffs, however, maintain that, under the proposed plan of reorganization, Corning will have the right to seek recovery of

its financial contribution to the trust created in the bankruptcy plan from the plaintiffs here. They maintain, therefore, that this action is ripe for adjudication.

Courts will not entertain a declaratory judgment action when any decree that might issue will become effective only upon the occurrence of a future event that may or may not occur. See New York Public Interest Research Group, Inc. v Carey, 42 NY2d 527; see also Employers' Fire Ins. Co. v Klemons, 229 AD2d 513. "If a decision rendered by the Court might ultimately prove to have no effect on the substantial rights of either party, the complaint should be dismissed." Employers' Fire Ins. v Klemons, 229 AD2d at 514.

However, "it is long settled that a declaratory judgment action against insurers, including excess carriers, is permitted prior to judgment where the 'judgments likely to be recovered' in the underlying claims would amount to more than the excess floor * * * or the 'potential liability' might well reach into the excess coverage." State Farm Fire and Cas. Co. v LiMauro, 103 AD2d 514, 518, affd 65 NY2d 369; see also Cabrini Medical Center v KM Ins. Brokers, 142 AD2d 529.

Here the excess carriers have initiated a declaratory judgment action prior to the confirmation of the plan. This is distinguishable from a situation in which an insured seeks to determine the extent of coverage prior to judgment, in that here it is unclear whether or not the Bankruptcy Court will confirm

Pittsburgh Corning's reorganization plan or amend it prior to confirmation. Although plaintiffs assert that their policies could be called upon to provide coverage outside of the proposed plan, they point to no ongoing litigation in which coverage is at issue.

Despite this court's misgivings in continuing this action, in the interests of judicial economy, this court will stay any decision on the justiciability of this action (as respects the non-assigned, non-affiliated policies) until a chapter 11 plan is confirmed in the Pittsburgh Corning bankruptcy case.

Finally, Corning seeks to dismiss this action based upon plaintiffs' failure to state a cause of action. In a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the court must accept each and every allegation as true, without expressing an opinion as to whether the plaintiff ultimately will be able to establish the truth of the averments. (219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509; see also Barr v Wackman, 36 NY2d 371). If it is at all possible for the plaintiff to recover under an allegation, the court must deny the motion (see, Guqgenheimer v Ginzburg, 43 NY2d 268; Wiener v Lazard Freres & Co., 241 AD2d 114), even if the plaintiff has not stated a cause of action (see, Leon v Martinez, 84 NY2d 83).

Although Corning has asserted that the complaint should be dismissed under CPLR 3211(a)(7), it has made no arguments regarding its entitlement to dismissal on those grounds.

Therefore, that portion of Corning's motion is denied.

Several of the defendants have cross-moved for a case management order to control discovery of this action. However, because this court has stayed these motions to dismiss pending both the District Court's determination of the preclusive effect of Judge Cote's decision and the confirmation of Pittsburgh Corning's chapter 11 plan, defendants' cross motion is also stayed.

In motion sequence 006, Corning seeks to dismiss or alternatively, stay, defendants' cross-claims against Corning. Those cross-claims have been asserted by insurance carriers listed under both Exhibits A and B, i.e., non-assigned, non-affiliated insurers and those policies that the District Court is still considering. For the reasons this court already explained, a stay that holds this motion in abeyance until the District Court's determination of the preclusive effect of Judge Cote's decision and the confirmation of Pittsburgh Corning's chapter 11 plan is appropriate at this time.

In motion sequence 007, plaintiffs seek to dismiss this action without prejudice as against defendant The Home. According to the proffered documentation, The Home is in liquidation, and all actions against that company have been abated. (See New Hampshire Superior Court Order, June 13, 2003). The motion is unopposed and is granted.

Accordingly, it is hereby

ORDERED that Century Indemnity Co. and Westchester Fire Insurance Co.'s motion to consolidate this action with Century Indemnity Co. v Corning, Index No. 600821/2003 is denied without prejudice; and it is further

ORDERED that Corning Incorporated's motion to dismiss plaintiffs' complaint is stayed until the District Court of the Western District of Pennsylvania decides whether the federal courts have jurisdiction to determine coverage concerning all the insurance policies at issue here, as well as until a reorganization plan has been confirmed in the bankruptcy action In re Pittsbursh Corning; and it is further

ORDERED that defendants' cross motion for a case management order is stayed until the District Court of the Western District of Pennsylvania decides whether the federal courts have jurisdiction to determine coverage concerning all the insurance policies at issue here, as well as until a reorganization plan has been confirmed in the bankruptcy action In re Pittsburgh Corning; and it is further

ORDERED that Corning Incorporated's motion to dismiss all cross-claims asserted against it is stayed until the District Court of the Western District of Pennsylvania decides whether the federal courts have jurisdiction to determine coverage concerning all the insurance policies at issue here, as well as until a reorganization plan has been confirmed in the bankruptcy action In re Pittsbursh Corning; and it is further

ORDERED that plaintiffs' motion to dismiss the complaint without prejudice as against defendant The Home Insurance Company is granted; and it is further

ORDERED that the action as to defendant Highlands Insurance Company is severed and stayed; and it is further

ORDERED that this action is severed and continued as to all remaining defendants.

Dated: July 06, 2004

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FILED

JUL 12 2004

[Handwritten Signature]

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.