

Federal Insurance Company v AT&T Corporation

2005 NY Slip Op 30239(U)

November 30, 2005

Supreme Court, New York County

Docket Number: 0600887/2005

Judge: Walter Tolub

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

FEDERAL INSURANCE COMPANY,

INDEX NO. 600887/2005

Plaintiff,

MOTION DATE 9/06/05

- v -

AT&T CORPORATION,

MOTION SEQ. NO. 001

Defendant.

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 ...

PAPERS NUMBERED

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

FILED
DEC 02 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/20/05

WALTER B. TOLUB, 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: PART 15

-----X
FEDERAL INSURANCE COMPANY,

Plaintiff,

-against-

AT&T CORPORATION,

Defendant.

TOLUB, J.:

Index No. 600887/05

FILED

DEC 02 2005

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This action for a declaratory judgment arises out of a claim by defendant AT&T Corp. (AT&T) for fiduciary liability coverage for an ERISA class action lawsuit pending in federal court in New Jersey. In motion sequence 001, defendant AT&T moves, pursuant to CPLR 3211 (a) (4), to dismiss the action on the ground that there is another action pending in New Jersey Superior Court between the same parties for the same relief. Motion sequence 002 is a motion by three other insurance companies¹ seeking leave to intervene, pursuant to CPLR 1013, as party plaintiffs.

FACTS AND PROCEDURAL HISTORY

Those Certain London Market Insurers Subscribing to Policy Number 509/QB405501 (Lloyd's) issued a fiduciary liability insurance policy to AT&T for the period July 9, 2001 to July 9, 2007 (the primary policy). The primary policy was issued to AT&T at its New York City address, through AT&T's insurance broker, Marsh, Inc., also located in New York City. Lloyd's

¹As discussed more fully, *infra*, this motion has been partially withdrawn and remains pending only as to one insurance company.

are insurers that operate in the London insurance market, with their principal place of business in the United Kingdom. AT&T is a New York corporation, and, at present², its principal place of business is Bedminster, New Jersey.

Subject to its terms and conditions, the primary policy provides coverage for actions or suits for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). Lloyd's's primary policy has a \$25 million limit of liability. Endorsement 7 of the primary policy, entitled "New York Amendatory Endorsement," was added to conform to certain requirements applicable to policies delivered in New York.

Federal Insurance Company (Federal), Gulf Insurance Company (Gulf), and Continental Casualty Company (Continental) each issued excess policies to AT&T for the same policy period. Federal's excess policy (no. 8146-24-07) provides a \$25 million limit of liability that attaches only after the primary policy has been exhausted by payment of any claims. Federal is an Indiana corporation, with its principal place of business in New Jersey. Gulf's excess policy (no. GA2846071) provides a \$10 million limit of liability that attaches after the combined limits of the primary policy and the Federal policy have been exhausted. Continental's excess policy provides a \$10 million limit of liability that attaches after the combined limits of the primary policy, the Federal policy and the Gulf policy have been exhausted by payment of losses.

On November 12, 2002, a class action lawsuit entitled Furstenau v AT&T Corp., et al., Civ. Action No. 02-5409, was filed in New Jersey federal court against AT&T, its officers and directors, alleging violations of ERISA. AT&T requested coverage from Lloyd's for the

²As discussed more fully below, Federal claims that AT&T was headquartered in New York City in July 2001, at the time the policies were issued.

Furstenau litigation under the primary policy by letter dated August 1, 2003. On January 7, 2004, Lloyd's denied coverage on multiple grounds, including the failure to provide timely notice. Federal also denied coverage for the Furstenau litigation, incorporating the coverage positions taken by Lloyd's. Gulf and Continental reserved their rights to decline coverage. On October 15, 2004, AT&T objected to the declination of coverage by Lloyd's. This prompted both Lloyd's and Federal to reiterate their declination of coverage, by letters dated December 27, 2004 and January 20, 2005, respectively.

On March 7, 2005, a conference call was held between lawyers for AT&T and Federal, whereby AT&T requested that Federal contribute to a proposed settlement of the Furstenau litigation. Federal advised that it would consider the proposal and attempt to respond to it promptly. Instead, however, Federal concluded that it should file the instant declaratory judgment action, which was commenced on March 11, 2005, a Friday, seeking a declaration that coverage for the Furstenau litigation is excluded pursuant to the terms and conditions of the primary and Federal policies. AT&T's outside counsel was notified of this lawsuit that same day.

The following Tuesday, March 15, 2005, AT&T filed an action against Lloyd's and all three excess insurers in New Jersey Superior Court, County of Middlesex, entitled AT&T Corp v Certain Underwriters at Lloyd's, London, et al., Docket No. MID-L-1976-05 (the New Jersey action). In the New Jersey action, AT&T seeks breach of contract damages against Lloyd's, and declaratory relief against the three excess insurers, in connection with the Furstenau litigation. The defendants jointly moved to dismiss the New Jersey action on the basis of comity. On May 13, 2005, Judge Frank M. Ciuffani denied the motion to dismiss. Judge Ciuffani supplemented

the order with a decision read into the record on June 3, 2005. Judge Ciuffani found that this coverage dispute had more connections to New Jersey than New York. He found that both parties to this declaratory judgment action were headquartered in New Jersey, and specifically, that AT&T had been headquartered in New Jersey for more than 20 years. He further ruled that, under New Jersey choice of law principles, New Jersey law "may" very well apply, which would be more favorable to the insured in that New York and New Jersey differ on whether an insurer must demonstrate prejudice in order to disclaim on the basis of late notice. He further noted his "concern" that Federal, looking to increase the likelihood that New York law would apply, rushed to the courthouse here in New York in the midst of settlement negotiations.

Meanwhile, back here in New York, Lloyd's and the other two excess carriers, Continental and Gulf, moved to intervene as plaintiffs in this declaratory judgment action on or about April 22, 2005. However, in mid-October, Continental and Gulf reached an agreement with AT&T to discontinue all litigation among them. Letter dated November 2, 2005 from Edward Hayum, Esq. By stipulations dated October 7th and 11th, AT&T agreed with Continental and Gulf, respectively, that the motion to intervene would be withdrawn as to the excess insurers. The motion to intervene remains pending, therefore, only on behalf of Lloyd's.

DISCUSSION

CPLR 3211 (a) (4) authorizes a court to dismiss or stay an action on the ground that there is another action pending between the same parties for the same cause of action in another court. The rule gives courts discretion, which should be exercised "to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues." White Light Prods., Inc. v On The Scene Prods., Inc., 231 AD2d 90, 96 (1st Dept 1997).

“While technical priority in the commencement of actions is a factor to be considered in determining whether dismissal pursuant to CPLR 3211 (a) is appropriate, it is not necessarily dispositive.” Certain Underwriters at Lloyd’s, London v Hartford Acc. and Indem. Co., 16 AD3d 167, 168 (1st Dept 2005), citing San Ysidro Corp. v Robinow, 1 AD3d 185, 186 (1st Dept 2003). Exceptions to the first-filed rule are recognized “where competing actions [are] commenced ‘reasonably close in time’ to one another.” National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters., Inc., 205 AD2d 341, 343 (1st Dept 1994), quoting Flintkote Co. v American Mut. Liab. Ins. Co., 103 AD2d 501, 505 (2d Dept 1984), affd 67 NY2d 857 (1986); see also Seaboard Sur. Co. v Gillette Co., 75 AD2d 525 (1st Dept 1980) (consideration given to an action filed first in time is “relatively insignificant” when the actions were filed within a few hours of each other). Other factors the court must consider are: (1) whether priority in filing was achieved by duplicity or the desire to seek a tactical advantage by forum shopping, particularly during settlement negotiations; (2) how far each litigation has progressed; and (3) which forum has a more significant and substantive nexus to the controversy, and thus is the most appropriate forum for its resolution. Certain Underwriters at Lloyd’s, London, 16 AD3d at 168; San Ysidro, 1 AD3d at 186; Seneca Ins. Co. v Lincolnshire Mgt., Inc., 269 AD2d 274 (1st Dept 2000).

There is no dispute that the New Jersey action involves the same issues of insurance coverage as between Federal, AT&T and Lloyd’s, if the latter is permitted to intervene herein. Nevertheless, the New Jersey action was, at the time of its commencement, and still is broader in scope than the instant declaratory judgment action. Lloyd’s is already a party defendant in New Jersey. In addition, AT&T is seeking both a declaration as to the obligation of Lloyd’s and Federal to pay for any liability that may be incurred in Furstenau, as well as damages from

Lloyd's, which is alleged to have breached its contractual obligations by refusing to pay for defenses fees and costs incurred in Furstenau. In Continental Ins. Co. v Polaris Indus. Partners, L.P. (199 AD2d 222 [1st Dept 1993]), the Appellate Division endorsed the dismissal of an action on the ground that another action was pending in Minnesota, even though the Minnesota action was subsequently commenced, where commencement was reasonably close in time and it was found that the other action "offers more" than the New York action. Id. at 223. The fact that Lloyd's and the other two excess insurers subsequently sought intervention in this action, and AT&T could file counterclaims against Lloyd's for money damages, does not change the fact that AT&T's lawsuit in New Jersey was the more comprehensive litigation at the time of its commencement.

In addition, the two actions were filed within two business days of each other, and thus the priority accorded the New York action is not a significant factor in this analysis. Neither action has progressed beyond the filing of the complaints and motions to dismiss. Nor should deference be given to Federal's choice of New York as the preferred forum when it raced to file this action in response to AT&T's proposal that Federal contribute to a settlement of the Furstenau litigation. New York does not condone the filing of anticipatory declaratory judgment actions in the midst of settlement talks such as occurred here, as doing so "'would create disincentives to responsible litigation' by discouraging settlement negotiations out of apprehension that an adversary might take advantage of the opportunity to file a preemptive suit in an advantageous forum [citations omitted]." White Light Productions, 231 AD2d at 98-99; accord Certain Underwriters, 16 AD3d at 168; Ontel Prods., Inc. v Project Strategies Corp., 899 F Supp 1144, 1150-51 (SD NY 1995).

As for which forum has the more significant and substantive nexus to this controversy, this court agrees with Judge Ciuffani's ruling that New Jersey has more connections to this coverage dispute than New York. The underlying class action lawsuit is venued in New Jersey, and there is no dispute that Federal and AT&T are both headquartered in New Jersey at the present time, distinguishing this case from Seneca Ins. Co. v Lincolnshire Mgt., Inc. (269 AD2d 274, supra). Federal makes the claim that AT&T was headquartered in New York City when the policies were issued in July 2001. It bases this claim solely on the fact that page 20 of AT&T's 2001 Annual Report lists its "Corporate Headquarters" as "32 Avenue of the Americas, New York, NY 10013-2412." Affidavit of David Newmann, Esq., sworn to on May 5, 2005, Exh. 6 thereto. However, page one of this Annual Report identifies the company as being located at "One ATTWay in Bedminster, New Jersey." AT&T submits affidavits from two employees who aver that AT&T was headquartered in New Jersey in 2001. According to the affidavit of Paula Phillips, a litigation manager in AT&T's Law Department, as of year end 2002, AT&T had 17,204 employees in New Jersey, compared to 4,911 employees in New York. As of year end 2001, AT&T had 16,428 employees in New Jersey and 4,566 employees in New York. Although this court is not privy to the evidence presented to Judge Ciuffani on the insurers' motions to dismiss the New Jersey action, he specifically ruled that AT&T had been headquartered in New Jersey for more than 20 years. Allowing Lloyd's to intervene in this action does not change the equation, since Lloyd's is an insurance syndicate operating out of the United Kingdom, is doing business in both jurisdictions, and makes no claim that New York is a more convenient forum for this dispute.

Federal argues that both the primary policy and the Federal excess policy were issued to

AT&T at its New York address through Marsh, Inc., also located in New York. While this appears to be true with respect to the Lloyd's policy, the certified copy of the Declarations page of the Federal policy merely lists the insured as "AT&T Corp." without specifying a corporate address, and does not identify Marsh as the broker. See Newmann 5/5/05 Aff., Exh. 3 thereto.³ AT&T contends that the treasury group responsible for risk management decisions is located in Bedminster, New Jersey. It submits an affidavit from Paul Riley, the head of its risk management group since 1998, who claims that he was personally involved in the negotiation, purchase and payment of premiums related to Federal's policy, and that all documentation related to this policy is maintained in New Jersey. Mr. Riley further maintains that his group was responsible for negotiating and purchasing the Lloyd's policy, through or with the assistance of brokers, and also directed the payment of insurance premiums to carriers. Thus, while the Lloyd's policy may have been issued in New York through the services of a New York broker, it is not at all clear that the policy was negotiated, paid for and/or breached here.

The court finds, therefore, that this action should be dismissed, pursuant to CPLR 3211 (a) (4), in favor of the action commenced by AT&T in Superior Court in New Jersey. The motion by Lloyd's to intervene is, therefore, denied as moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is

ORDERED that the motion of defendant AT&T Corp. to dismiss the action on the

³Mr. Neumann, outside counsel for Federal, fails to state the basis upon which he has any personal knowledge of the negotiation and issuance of the policies in question, and thus the court can only conclude that his personal knowledge stems solely from the documentary evidence attached to his affidavit.

ground that there is another action pending in New Jersey Superior Court between the same parties for the same relief is granted, and the Clerk is directed to enter judgment dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk; and it is further

ORDERED that the motion of Those Certain London Market Insurers Subscribing to Policy Number 509/QB405501 seeking leave to intervene in this lawsuit is denied as moot.

This constitutes the decision and order of the court.

Dated: November 10, 2005

ENTER:



Hon. Walter B. Tolub J.S.C.

FILED
DEC 02 2005
NEW YORK
COUNTY CLERK'S OFFICE