

**Brooklyn Union Gas Company v Centruy Indemnity
Company**

2005 NY Slip Op 30325(U)

January 10, 2005

Supreme Court, New York County

Docket Number: 403087/2002

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 7

Justice

0403087/2002

BROOKLYN UNION GAS CO.
vs
AMERICAN HOME ASSURANCE CO.

NO. 403087/02
DN DATE 10-14-04
DN SEQ. NO. 006
DN CAL. NO. _____

SEQ 6
DISMISS ACTION

The following papers, numbered 1 to 6 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits
Replying Affidavits

PAPERS NUMBERED	
1, 2	
3, 4	
5, 6	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision & order

FILED
JAN 19 2005
NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/10/05 Paul G. Feinman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

-----X
BROOKLYN UNION GAS COMPANY,
Plaintiff,

against

CENTURY INDEMNITY COMPANY, CERTAIN
UNDERWRITERS OF LLOYD'S, LONDON AND
LONDON MARKET INSURANCE COMPANIES,
ZURICH INSURANCE COMPANY (as agent to an
alter ego of Home Insurance Company), and HOME
INSURANCE COMPANY,
Defendants.

Index Number 403087/2002
Oral Arg. Date Oct. 14, 2004
Mot. Seq. No. 006

DECISION AND ORDER

-----X

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affidavits, and Memorandum of Law.....	<u>1, 2</u>
Affirmation in Opposition and Memorandum of Law.....	<u>3, 4</u>
Second Affirmation and Reply Memorandum.....	<u>5, 6</u>

PAUL G. FEINMAN, J.:

Defendant Zurich Insurance Company moves to dismiss the complaint as against it. For the reasons set forth below, the motion is granted.

This is a declaratory judgment action brought by Brooklyn Union Gas Company pursuant to CPLR 3001. Brooklyn Union seeks a declaration as to the obligations of the several defendant insurance companies under certain liability policies sold to it, including one issued by the Home

Insurance Company (Home).¹ Brooklyn Union asserts that Home was taken over by defendant Zurich Insurance Company (Zurich) in 1995.²

The Fourth Amended Complaint alleges, *inter alia*, that Zurich is an alter ego and agent of Home and legally responsible for Home's coverage obligations. Plaintiff alleges specific examples of Zurich's domination and control of Home, including that \$1 billion of Home's underwriting business was transferred to Zurich in June 1995 at which time Home ceased underwriting new policies and Zurich assumed the authority to renew or underwrite new policies for Home and to perform obligations; and that Zurich's and Home's assets, in the form of premiums, were commingled, and premiums due to Home went to Zurich (Not. of Mot. Ex. A Fourth Amended Complaint ¶¶ 5-7). It is Brooklyn Union's contention that after Zurich took over Home in 1995, its course of conduct led to the undercapitalization of Home and ultimately to its liquidation and apparent inability to make good on Brooklyn Union's insurance policy. (Not. of Mot. Ex. A Fourth Amended Complaint ¶ 8).

Zurich moves to dismiss the Fourth Amended Complaint based on lack of personal jurisdiction (CPLR 3211 [a][8]). In addition, it moves to dismiss the complaint on various other grounds including agency and standing.³ For the reasons stated below, Zurich's motion is granted

¹According to the complaint, the policy underlying the instant motion is listed as number HEC-9-30-46-96, issued by "Zurich Ins. Co." (Not. of Mot. Ex. A Fourth Amended Complaint, Ex. A). However, Brooklyn Union concedes that the policy was originally issued by Home, and states that it provided \$5 million in insurance coverage excess of \$100,000 for the policy period from July 1, 1969 to July 1, 1972 (Pl. Memo of Law in Opp. at 4).

²Home Insurance Company is an insurance company domiciled in New Hampshire which entered into liquidation in June 2003, pursuant to an order of the New Hampshire Superior Court (Not. of Mot. Ex. D, Liquidation Order).

³Brooklyn Union concedes it fails to state a cause of action as to agency (Pl. Memo in Aff. at 24 n. 7).

based on lack of standing.

Zurich moves to dismiss on the ground the Brooklyn Union lacks standing to pursue claims for coverage under Home's policies based on the existence of the June 13, 2003 Order of Liquidation from Superior Court, State of New Hampshire (Not. of Mot. Ex. D). Under New Hampshire law, the liquidator is vested with title to all of the insurer's property, assets and causes of action (N.H. Rev. Stat. Ann. § 402-C:21[I] [2003]). The liquidator has the power to prosecute "any action" which may exist on behalf of policyholders against "any officer of the insurer, or any other person" (N.H. Rev. Stat. Ann. § 402-C:25[XIII] [2003]). Nonetheless, Brooklyn Union sets forth several arguments as to why it should be allowed to pursue its claim against Zurich.

In *Corcoran v Frank B. Hall & Co., Inc.*, 149 AD2d 165 (1st Dept. 1989), the insurance company, Union Indemnity, was placed in liquidation pursuant to New York Insurance Law, and James Corcoran, Superintendent of Insurance of the State of New York, was appointed as the company's liquidator. He commenced an action on behalf of the insurance company, its policyholders and creditors against defendant Frank B. Hall & Co., and others, accusing them of acquiring Union and then operating it as a "loss leader" for the sole benefit of Hall Group's other businesses. Thereafter, several insurance guaranty funds and insurance companies, all of which had previously filed proofs of claim in the Union liquidation proceeding, commenced two separate actions against the same defendants. The court held that the liquidator had the "paramount and *exclusive* standing to assert claims" on behalf of the policyholders and creditors (149 AD2d at 172, emphasis in original). The court further held that while the defendants' conduct might have constituted independent wrongs against Union and the various guaranty funds and insurance companies, "all of the claims are, nevertheless, inextricably interwoven with the allegations that

Union served as a 'loss leader' to generate money for the Hall Group" and that therefore, the liquidator's claim should go forward "exclusively," with any possibly independent claims of misrepresentation raised by the other plaintiffs to be stayed pending final determination of the liquidator's claim (149 AD2d at 177).

Here, Zurich argues that the liquidator's authority to pursue policyholder claims encompasses alter ego claims against third parties which are common to policyholders, creditors and the insurer, citing decisions from Hawaii, Illinois, New Jersey, and Oklahoma which hold that policyholders' claims against third parties in the context of an insurer's insolvency are common claims for which the liquidator has exclusive standing (Memo in Supp. of Def. at 19 and n. 8). However, Brooklyn Union contends that its claim against Zurich is a "personal right to insurance coverage" which was thwarted by Zurich's actions (Pl. Memo of Law in Opp. at 25). It relies on *Matter of Integrity Ins. Co.*, 573 A.2d 928, 936 (N.J. Super. 1990), in which the court noted that while a liquidator of an insolvent insurance company may prosecute claims on behalf of the creditors and policyholders, it may not maintain a suit if the cause of action is "personal in nature" to an individual creditor or policyholder who has the right to maintain a separate cause of action against the defendants in the appropriate jurisdiction. An example of a personal right was described by the *Integrity* court in its discussion of *Cotten v Republic Natl Bank of Dallas*, 395 S.W.2d 930 (Tex. Civ. App. 1965), where the court distinguished the right of the receiver of an insolvent insurance company to sue a bank for fraud to the extent that it sought to preserve or recover the assets of the insurance company, from the right of any individual policyholder who had a claim against the bank for misrepresentation and false inducement. In *Corcoran*, described above, the court noted that the non-liquidator plaintiffs "possibly might" have independent claims of

misrepresentation, but that the claims of “massive, ongoing fraud” asserted by the liquidator on behalf of the insurance company, its policyholders and creditors were “inextricably interwoven” with those of the non-liquidator plaintiffs such that the liquidator’s claims should proceed first (*Corcoran*, 149 AD2d at 177). Here, although Brooklyn Union argues that it has “personal contractual rights” which it seeks to enforce by suing Zurich (Pl. Memo of Law in Opp. at 27), it is simply unclear that its rights differ from those of the other Home policyholders, all of whom were presumably injured by Zurich’s alleged actions such that they cannot recover on their insurance policies. Brooklyn Union has not asserted a claim of personal injury and unique harm caused by Zurich.

Additionally, there is little merit to Brooklyn Union’s argument that the liquidation order only enjoins actions against Home’s officers, agents, representatives and so on which arise “from their actions on behalf of The Home, the Rehabilitator or the Liquidator,” but not an action against Zurich for its course of conduct carried out, not on behalf of Home, but on its own behalf (Pl. Memo of Law in Opp. at 29, citing the Liquidation Order at [n][2]).

Brooklyn Union asserts that it should be allowed to pursue its claim against Zurich because the New Hampshire liquidator apparently is not pursuing a claim against Zurich on behalf of Home, its policyholders or creditors. Brooklyn Union points to its March 5, 2004 letter to the liquidator asking whether he planned to seek recovery from Zurich for the depletion of Home’s assets (Aff. in Opp. Ex E), which has not been answered (Pl. Memo of Law in Opp. at 28 n. 8). It offers no authority for the proposition that when a company is in liquidation, an individual entity may bring a cause of action if the liquidator does not. Such a rule would undermine the very stay that was instituted by the court ordering the liquidation. Here, Brooklyn Union does not contest that New

Hampshire is a "reciprocal state" pursuant to the uniform insurers liquidation act (Ins. Law § 7408[b][6]), and that the courts of New York must therefore accord full faith and credit to the stay issued (see, *Kelly v Overseas Investors, Inc.*, 24 AD2d 157 [1st Dept. 1965], *rev'd on other grounds*, 18 NY2d 622 [1966]).⁴ For these reasons, defendant's motion to dismiss the complaint as against it must be granted and the Court need not reach the other grounds for dismissal asserted by defendant Zurich. It is

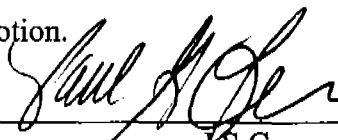
ORDERED that the motion to dismiss is granted and the complaint is dismissed as against Zurich Insurance Company only and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the action is severed and continued as to the remaining defendants; and it is further

ORDERED that movant shall promptly serve a copy of this decision and order with notice of entry upon all parties to this litigation, regardless of whether they appeared on this motion.

This constitutes the decision and order of the court. Courtesy copies of this decision have been mailed only to counsel who appeared on the motion.

Dated: January 10, 2005
New York, New York



J.S.C.
FILED
JAN 19 2005
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⁴It is unclear whether there has been an attempt to have an ancillary receiver appointed in New York to prosecute claims on behalf of New York creditors and policyholders pursuant to Ins. Law § 7412. Where no ancillary receiver is appointed, the claims can only be pursued in the state where the insurance company was domiciled (*G.C. Murphy Co. v Reserve Ins. Co.*, 54 NY2d 69 [1981]).