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

PRESENT: JUDITH J. GISCHE PART 10
Justice

Continental Insurance Co.,

- v -

Garlock Sealing Technologies,

INDEX NO. 116789/04
MOTION DATE 9/22/05
MOTION SEQ. NO. 005
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/~~for~~ dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

FILED
NOV 22 2005
NEW YORK
COUNTY CLERK'S OFFICE

motion (e) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 11/16/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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CONTINENTAL INSURANCE COMPANY,

Plaintiff,

-against-

GARLOCK SEALING TECHNOLOGIES, LLC and COLTEC INDUSTRIES, INC.,

Defendants.

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DECISION/ORDER
Index No.: 116789/04
Seq. No.: 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219[a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's motion [dismiss] w/affirm in support (RMK), exhs	1
Ptlf's memorandum of law in support	1A
Defs' memorandum of law in opposition	2A
Pltf's reply exhs	3
Pltf's reply memorandum in further support	3A
Defs' affid in support (PLG, Jr.)	4
Defs' supplemental memorandum of law in oppos	4A
Pltf's affirm in support (RSE) w/exhs	5
Pltf's supplemental reply memorandum of law in further support	5A

GISCHE, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, Continental Insurance Company ("CIC"), brought this action for declaratory judgment, seeking a determination that it had no obligation to its insureds, defendants in this case, to defend claims or pay awards to third parties arising out of asbestos related injuries and deaths. After the court denied defendants' initial motion to dismiss, they served an answer containing counterclaims. CIC now moves to

dismiss defendants' third counterclaim for the tort of "bad faith". The allegations supporting the counterclaim are that CIC wrongfully and in bad faith denied coverage under insurance polices it issued and refused to participate in a global settlement agreement defendants had negotiated with its other insurers. Defendants oppose the motion. A more particularized explanation of the insurance coverage at issue is set forth in this court's decision and order dated April 13, 2005.

The gravamen of CIC's argument in favor of dismissal is that under New York Law there is no recognized separate cause of action for "bad faith" based on facts that otherwise constitute a breach of contract claim arising out of the insurance policies. Defendants argue that Pennsylvania law applies to the partles' dispute and that Pennsylvania recognizes the tort of bad faith as it is plead in the third counterclaim. The parties' dispute is crucial because the tort of bad faith carries with it a right to seek punitive damages, while a breach of contract claim carries no such right. Defendants argue that, in any event, any determination of the issue of choice of law is premature. They further argue that even if New York Law applies, then they have properly plead a cause of action for the tort of "bad faith".

CIC does not deny that Pennsylvania recognizes the tort of bad faith. It argues, however, that Pennsylvania law does not apply in this case.

Discussion

It is black letter law that on a motion to dismiss made pursuant to CPLR § 3211 the court is required to accept as true all of the allegations made in the pleading, unless they are flatly contradicted by documentary evidence. Guggenheimer v. Ginzberg, 43

NY2d 268 (1977). The court must draw all favorable inferences in favor of preserving the pleading and only if there is no legally cognizable bases for the claim, should it be dismissed. Rovello v. Orofino Realty Co., 40 NY2d 633 (1976).

1. New York Law of Tort of Bad Faith

The parties concede that the State of Pennsylvania recognizes a tort premised upon a bad faith denial of insurance coverage. See: 42 Pa. C.S.A. § 8371; Terletsky v. Prudential Property & Casualty Insurance Co., 649 A2d 680,688 (Pa. Superior Ct. 1994). They disagree, however, whether New York State also recognizes such a tort. If New York recognizes such a tort of bad faith, then the motion to dismiss should be denied, regardless of which state's law is ultimately applied. If the tort is not recognized in New York, then the parties' choice of law dispute must be addressed. Thus the court's analysis begins, as it must, with resolving the issue of whether there is actually a conflict between the laws of New York and Pennsylvania. Allstate Insurance Company v. Stolarz, 81 NY2d 219 (1993).

The New York State Court of Appeals has clearly held that New York State does not recognize an independent tort based upon an insurance company's failure to perform its contractual obligations under an insurance policy. New York University v. Continental Ins. Co., 87 NY2d 308 (1995); Rocanova v. Equitable Life Assur. Soc. of U.S., 83 NY2d 603 (1994). In a subsequently decided case, however, and over a strong dissent, the Appellate Division of this department reinstated bad faith claims against an insurance company that were based upon an alleged deliberate failure to pay out a claim. Acquista v. New York Life Insurance Company, 285 AD2d 73 (1st dept. 2001). The court reasoned that while New York State does not recognize an

independent tort based of bad faith denial of insurance claims, expanded contractual damages should be available for foreseeable, consequential damages resulting from the offending conduct. The first department case stands alone and in more recent decisions, the first department has dismissed such torts as a matter of law. Benjamin Shapiro Realty Company v. Agricultural Insurance Company, 287 AD2d 389 (1st dept. 2001).

This court, therefore, holds that under New York Law there is no independent tort for a bad faith denial of insurance coverage. The counterclaim is valid in Pennsylvania but invalid in New York. Consequently, there is a *bona fide* choice of law conflict raised in this motion.

2. Choice of Law

The "bad faith" counterclaim that is at the heart of this motion sounds in tort. In Allstate Insurance Company v. Stolarz (81 NY2d 219), the Court of Appeals expressly articulated its rejection of historically mechanical and rigid approaches to determining choice of law questions in favor of a more modern analysis. The Court of Appeals held that preferential analysis for tort cases is an "interest analysis" approach, where the public policies underlying the competing laws are considered. Allstate Insurance Company v. Stolarz, *supra*; Schultz v. Boy Scouts of America, Inc., 65 NY2d 189 (1985). The preferential choice of law analysis in contract cases is a "center of gravity" or a "grouping of contracts" analysis. Allstate Insurance Company v. Stolarz, *supra*. The Court of Appeals recognized, however, that even these rules are flexible, noting that certain contract disputes import public policy considerations and possibly different choice of law considerations. Allstate Insurance Company v. Stolarz, *supra*.

Whether a bad faith denial of coverage by an insurance company gives way to a tort cause of action with an attendant right to seek punitive damages, is clearly one that imports issues of a particular State's public policy. See: Acquista v. New York Life Insurance Company, 285 AD2d 73, 77-81 (1st dept. 2001); *McMains*, Bad Faith Claims Handling–New Frontiers: A Multi-State Cause of Action in Search of a Home, 53 J Air L. & Comm 901 (summer 1988). Consequently the "interest analysis" is the appropriate choice of law standard.[1]

Under the "interest analysis," controlling effect must be given to the law of the jurisdiction that, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues raised in the litigation. Schultz v. Boy Scouts of America, *supra.* In determining which jurisdiction has the greatest interest in the litigation, the only facts or contacts of significance are those relating to the purpose of the particular law(s) in conflict. In most cases those significant facts or circumstances consist exclusively of the parties' domiciles or the place of the tort. Schultz v. Boy Scouts of America, *supra*; Bodea v. Trans Nat Express, Inc., 286 AD2d 5 (4th dept. 2001). Where the laws in conflict pertain to the regulation of conduct then the

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[1]In Carribean Construction Services v. Zurich Insurance Company, 267 AD2d 81 (1st dept. 1999), however, the Appellate Division, first department applied the choice of law rules applicable to contracts in a dispute involving a bad faith denial of an insurance claim. It appears that no party argued, and the court did not consider, whether a different choice of law analysis was applicable. Consequently the case is not binding authority that would prevent this court from utilizing an "interest analysis" under the circumstances presented at bar.

If this court were to apply contract choice of law rules, then consistent with its determination on the first motion to dismiss, the record would still not be sufficiently developed at this time for the court to conclusively determine which jurisdiction's laws apply. See: People v. Evans, 94 NY2d 499 (2000).

location of the tort is of paramount importance, because the state has an interest in regulating conduct within its own borders. Where the laws in conflict pertain to the allocation of risk, then the domicile of the parties is of paramount importance. Padula v. Lilarn Properties Corp., 84 NY2d 519 (1994).

At bar, the laws in conflict are aimed at regulating the conduct of the insurance companies. Pennsylvania, in recognizing the tort of bad faith, clearly intends a prophylactic effect against insurance companies wrongfully denying valid claims that otherwise should be covered by the insurance companies, because this drives up the costs of the insureds who bear the unnecessary expenses of defending and paying out expenses. While the court finds that the laws in conflict are "conduct" laws, the issues of both domicile and location of the tort should be examined in connection with a choice of law analysis.

CIC is a New Hampshire corporation with headquarters in Illinois. Coltec is a Pennsylvania corporation with its headquarters in Charlotte, North Carolina. Garlock is a Delaware corporation with its headquarters located in Charlotte, North Carolina. Garlock, however, has its principal place of business in Palmyra, New York and other manufacturing sites in South Carolina and Texas. It also maintains a sales office in Newtown, Pennsylvania.

Normally a corporation's domicile is its state of incorporation (Sease v. Central Greyhound Lines, Inc. of New York, 306 NY 284 [1953]). Although not argued by the parties there is some authority holding that for choice of law issues the domicile of a corporation is the State where it maintains its principal place of business. Elson v. Goldfracht, *supra*; Dorsey v. Yantambwe, 276 AD2d 108 (1st dept. 2000). Under such

analysis Coltec's domicile would be in Pennsylvania and Garlock's domicile would be in New York. Otherwise, under conventional legal analysis, neither corporation is domiciled in New York State.

Where, as here, the tort is for the wrongful denial of coverage, determining the locus of a tort can be difficult. US Alliance Federal Credit Union v. Cumis Insurance Society Inc., 346 FSupp2d 468 (SDNY 2004). Robert S. Elrich, CIC's claims manager, who since October 2003 has been responsible for the underlying insurance claims operates out of CIC's Chicago office. The parties appeared to have corresponded about the issue of coverage from their respective locations.

CIC argues that in a case such as this, the locus of the tort is where the economic impact is felt. They argue that because in a recent 10Q filing by Enpro, the publicly traded parent company of Coltec, there is disclosure about the financial impact of the underlying asbestos claims on Garlock, the effect of the wrongful denial of insurance coverage is being borne only by Garlock. They argue because Garlock is mainly located in New York, New York State law should apply.

Defendant dispute that the economic impact of the denial of coverage is felt solely by Garlock or that the effect of the claim denial is felt mainly in New York. They argue the many of the insurance policies which form the basis of the counterclaim were issued to Coltec, which is primarily located in Pennsylvania. They argue that the majority of underlying asbestos claims are not primarily in New York.

Where the location of a tort is difficult to determine, the court may consider as part of its analysis the location of the effect of the allegedly offending conduct occurs. US Alliance Federal Credit Union v. Cumis Insurance Society Inc., *supra*. See also:

Northwestern Mutual Life Ins. Co. v. Wender, 940 FSupp 62 (SDNY 1996). The effect may or may not be economic.

While it is not disputed that Garlock, located in New York is economically effected by the denial of coverage, it also appears that Coltec, located in Pennsylvania, is also economically effected. The extent of that economic impact on each defendant and the relationship of such impact to the other defendant has not been developed on this record. The Enpro 10Q is not conclusive to establish, as a matter of law, that Coltec is not effected either economically or otherwise by CIC's denial of coverage. Nor has either party advanced the possibility that each of the defendants may be subject to different state's laws under choice of law analysis. It is entirely possible that Coltec can proceed with a bad faith tort claim, but Garlock cannot.

While it would certainly be advantageous to determine the choice of law issues at an early date in proceedings, that determination is not always possible. The court does not find it possible to make an early choice of law determination regarding the third counterclaim in this particular case. Here information about the effect (including the financial effect) of the denial of coverage is bareboned, at best.

Under the circumstances, the motion to dismiss must be denied at this time. CIC has not established, as a matter of law, that New York law applies to the third counterclaim. While defendants have not established that Pennsylvania law applies to the third counterclaim, it is not their burden to do so on this motion to dismiss.

Conclusion

The motion to dismiss the third counterclaim is denied without prejudice to renew at trial or, if appropriate, upon the completion of discovery, in a summary judgment motion.

This shall constitutes the decision and order of the court.

Dated: New York, New York
November 16, 2005

So Ordered

HON. JUDITH J. GISCHE, J.S.C.