

**Consolidated Edison Co. of N.Y., Inc. v American
Home Assur. Co.**

2005 NY Slip Op 30457(U)

March 29, 2005

Supreme Court, New York County

Docket Number: 600527/01

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

Consolidated ED Company

INDEX NO. 600527/d

MOTION DATE 5/3/04

MOTION SEQ. NO. 027

MOTION CAL. NO. _____

- v -

American Home Assurance

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 this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

RECEIVED IN MOTION ...

FILED
MAR 30 2005
NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/29/05 Alan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Plaintiff

-against-

Index No. 600527/01

AMERICAN HOME ASSURANCE COMPANY,
ALLSTATE INSURANCE COMPANY, AMERICAN
REINSURANCE COMPANY, CENTURY INDEMNITY
COMPANY, CERTAIN UNDERWRITERS OF LLOYD'S
LONDON AND LONDON MARKET INSURANCE
COMPANIES, CONTINENTAL CASUALTY COMPANY,
DAIRYLAND INSURANCE COMPANY, EMPLOYERS
INSURANCE OF WAUSAU, FIREMEN'S FUND
INSURANCE COMPANY, HOME INSURANCE
COMPANY, INSURANCE COMPANY OF NORTH
AMERICA, INTERNATIONAL INSURANCE COMPANY,
NATIONAL CASUALTY COMPANY, NEW ENGLAND
INSURANCE COMPANY, PROTECTIVE NATIONAL
INSURANCE COMPANY OF OMAHA, ST. PAUL FIRE
& MARINE INSURANCE COMPANY, TIG INSURANCE,
TWIN CITY FIRE INSURANCE COMPANY, ZURICH
AMERICAN INSURANCE COMPANY, and
ZURICH INSURANCE COMPANY,

Defendants

-----X

HERMAN CAHN, J.:

Motions bearing sequence numbers 022 and 027 are consolidated for purposes of
disposition.

In motion bearing sequence number 022, defendant Zurich Insurance Company (Zurich)
moves, pursuant to CPLR 3211 to dismiss the second amended complaint for lack of personal

jurisdiction, lack of standing and failure to state a cause of action. In motion bearing sequence number 027, defendant Zurich American Insurance Company (ZAIC), also moves to dismiss the third amended complaint for lack of standing and failure to state a cause of action.

In this action, plaintiff Consolidated Edison Company of New York, Inc. (Con Ed) seeks a declaratory judgment against defendant insurance carriers, who allegedly issued it primary and excess comprehensive general liability policies during the period from 1938 to 1986. Plaintiff seeks a declaration that, under their respective policies, the insurers have a duty to defend and indemnify Con Ed with respect to liability for remediation and remediation-related costs and expenses at four former manufactured gas plants (MGP's) that it owned or operated in New York State. Currently Con Edison owns only one of these MGP sites, the Astoria site. This site also has PCB contamination that must be remediated.

The Home Insurance Company (Home) was one of the carriers named in this action. Home issued three successive policies to Con Ed, covering the period from December 28, 1961 to June 2, 1970. The Superior Court of the State of New Hampshire, by order dated June 13, 2003, placed Home in liquidation. The order of liquidation provided that all actions pending against Home be abated. As a consequence of the provisions of the liquidation order, the action against Home was dismissed by abatement on consent of all parties.

Thereafter, plaintiff amended the complaint for the second time to join Zurich as a defendant in place of Home. The second amended complaint alleges that "[a] unity of interest has existed and exists between Zurich and Home Insurance Company..., such that any individuality and separateness of these entities has ceased. Zurich is therefore the agent and alter ego of Home and is legally responsible for Home's coverage obligations to plaintiff." Plaintiff

further asserts that Zurich controlled and dominated Home's insurance business causing a loss of the insurance coverage purchased by Con Edison. In particular, plaintiff cites Home's cessation of underwriting, with renewals going to Zurich, which commingled the assets and future premiums, and controlled Home's investments, claims processing, and management. The third amended complaint asserts the same alter ego and agency allegations as to ZAIC.

Zurich and ZAIC contend that the plaintiff lacks standing to assert these claims, because they are claims common to all Home policyholders, and under New Hampshire law, as reflected in the liquidation order, such claims may only be pursued by the Liquidator. Plaintiff argues that these are individual claims based upon a breach of the insurance agreement by Home's alter ego, Zurich, or its domesticated insurer ZAIC.

This very same issue was raised in another insurance coverage case, involving environmental damage coverage for MGP activities. See, Brooklyn Union Gas Co. v American Home Assurance Co., Sup Ct, New York County, January 10, 2005, Feinman, J., Index No. 403087/02. In that case, Justice Feinman in a well-reasoned opinion held that there was no standing on the part of the utility policyholder to pursue an action against Zurich, because the claim, if any, rested with the liquidator appointed by the New Hampshire Superior Court, and that to permit an individual policyholder to go forward with such a claim would serve to subvert the stay contained in the order of liquidation.

I too conclude 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 consequently afford full faith and credit to the order issued by the liquidation court in New Hampshire. (Ambassador Ins. Co. v Allied Programs Corp., 165 AD2d 806 [1st Dept 1990]).

Consequently, plaintiff lacks standing and cannot pursue the claims against Zurich and ZAIC. In light of the lack of standing, I need not consider the other grounds for dismissal.

Accordingly, it is


ORDERED that the motions to dismiss are granted and the complaint as against Zurich Insurance Company and Zurich American Insurance Company is severed and dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court;

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 29, 2005

ENTER:



J.S.C.

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MAR 30 2005
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