International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.

2006 NY Slip Op 30214(U)

January 5, 2006

Supreme Court, New York County

Docket Number: 0605910/2001

Judge: Charles E. Ramos

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[* 1]
SCANNED ON 1/20/2006

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

Charles Edward Ramos 53

PRESENT: ______________________ PART ______

0605910/2001

INTERNATIONAL FLAVORS
vs
ROYAL INSURANCE CO

SEQ 13

SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

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

	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

is decided in accordance with accompanying memorandum decision and order.

FILED
JAN 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/5/06

CHARLES E. RAMOS
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
--X
INTERNATIONAL FLAVORS & FRAGRANCES, INC.,
and BUSH BOAKE ALLEN, INC.,

Plaintiffs,

Index No. 605910/01

-against-

ROYAL INSURANCE COMPANY OF AMERICA,
ZURICH AMERICAN INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY,
AMERICAN HOME ASSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,

Defendants
--X

Charles Edward Ramos, J.S.C.:

Motions and cross motion under sequence numbers 13, 14 and 16 are consolidated for disposition and are disposed of in accordance with the following memorandum decision.

In motion sequence 13, defendants American Home Assurance Company (American Home) and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) move, pursuant to CPLR 3212, for an order granting summary judgment declaring that each of the underlying plaintiff's personal injury claims in purported class action product liability lawsuit, captioned Benavides , et al. v International Flavors & Fragrances, et al., in the Circuit Court, Jasper County, Missouri, No. 01CV683025 (the Benavides Action), constitute a separate "occurrence" under the primary insurance policies issued by American Home and National Union.

FILED
JAN 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

In motion sequences 14 and 16, defendants American Home and National Union move, pursuant to CPLR 3025 (b), for leave to

amend their answers to assert counterclaims against plaintiffs, International Flavors & Fragrances, Inc. (IFF) and Bush Boake Allen Inc. (BBA), and to assert cross claims against defendants Royal Insurance Company of America (Royal), Liberty Mutual Insurance Company (Liberty Mutual), and Zurich American Insurance Company (Zurich), alleging that the settlement of two of the underlying personal injury actions in the Benavides Action against the insureds, IFF and BBA, known as the Taffner and Yowell actions, for $10.4 million, exhausted the primary insurance coverage afforded by Royal, Liberty Mutual and Zurich, and collusively and unfairly saddled American Home and National Union with defense costs of the remaining actions and adversely impacted them, in breach of the implied duty of good faith and fair dealing. Said motion has been converted by the court to one for summary judgment dismissing the proposed counterclaims and cross claims.

Defendant Zurich has cross-moved, pursuant to CPLR 3212, for an order granting summary judgment dismissing the cross claims asserted against it by American Home and National Union; and, pursuant to CPLR 3001, for a declaratory judgment declaring that the Zurich policies are properly exhausted and that Zurich owes no further duty to defend or indemnify plaintiffs, IFF and BBA in the underlying Benavides Action.

Background

This is an action for a declaratory judgment as to the obligation, if any, of the insurer defendants to defend and/or

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indemnify IFF and/or BBA in the Benavides Action). The plaintiffs are or were employees of Gilster Mary Lee, a company which owns and operates a microwave popcorn packaging plant in Jasper, Missouri, and their spouses. They allege that they suffered bodily injury, including lung damage (Popcorn Packers Lung), as a result of inhaling butter flavoring products that were produced at the plant since 1986. They allege that the natural and artificial butter flavorings contained diacetyl and other chemical compounds that allegedly caused their bodily injuries, and that the flavorings were designed, manufactured and marketed by IFF and BBA.

All of the insurance policies that the insurance companies sold to IFF and BBA contain explicit promises to defend and pay defense costs in any suit seeking damages because of "bodily injury." The insurance companies sold primary comprehensive general liability insurance policies to IFF and BBA.

All of the insurance policies at issue require the insurance companies to provide a defense. For example, the Zurich policies obligate Zurich to defend any potentially covered claims against the policyholders:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. *We will have the right and duty to defend the insured against any "suit" seeking those damages.* However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III - Limits of Insurance;

and
(2) *Our right and duty to defend* end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages [for bodily injury and property damage] . . . .
(emphasis added).

The insurance provided in the Zurich Policies applies to "bodily injury" that "is caused by an 'occurrence' that takes place in the 'coverage territory,'" and if the "bodily injury" could have occurred "during the policy period." The Zurich Policies define "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Thus, allegations of injury taking place during the policy period activate all of these policies. These "occurrence" policies apply irrespective of when the actual claim is made against the policyholder.

The other insurance policies, in comparable language, similarly obligate Royal, Liberty Mutual, American Home and National Union to defend any potentially covered claims. Through the defense provisions, the insurance companies explicitly promised to pay defense costs if there is any allegation that IFF or BBA is liable for damages because of bodily injury that could have taken place during the applicable policy periods.

Royal issued policy number PTS 457493 to BBA, a wholly owned subsidiary of IFF (its parent corporation), for three consecutive policy periods: December 15, 1997-1998; December 15, 1998-1999; and December 15, 1999-2000. The Royal policies included coverage for damages for "bodily injury." Liberty Mutual issued five

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comprehensive general liability insurance policies to an entity known as Union Camp Corporation (which is not a party hereto), which policies listed BBA as an additional Named Insured. IFF was not named as an insured or an additional named insured on any of the relevant Liberty Mutual policies.

The original class action complaint in the Benavides Action alleged, in essence, that IFF had sold a butter flavoring made by BBA to the plaintiffs' employer, and that exposure to the product had resulted in serious injuries to plaintiffs. Both National Union and American Home sold to IFF primary insurance policies with a duty to defend.

Procedural Posture of This Action

The first amended complaint in this action alleges four causes of action, as follows: (1) breach of contract by Royal, Zurich and Liberty Mutual, for refusal to defend IFF and BBA in the Benavides Action; (2) a declaratory judgment as to the refusal of Royal, Zurich and Liberty Mutual, to defend IFF and BBA in the Benavides Action; (3) a declaratory judgment that all defendants must defend and indemnify IFF and BBA in the Benavides Action; and (4) compensatory and exemplary damages for the bad-faith refusal by Royal and Zurich to defend plaintiffs based on the pollution exclusion contained in their primary policies. Zurich, National Union and American Home all have served answers to the complaint and to cross claims asserted against them by their co-defendants. Zurich has asserted a cross claim against Royal and Liberty Mutual and National Union to determine Zurich's

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proper allocable share of defense costs for the Benavides Action. Zurich seeks contribution from the cross claim defendants. National Union and American Home have also asserted cross-claims against Royal, Liberty Mutual and Zurich for contribution or indemnity.

Summary Judgment Standard

CPLR 3212 (e) authorizes the court to grant summary judgment "as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." A motion for summary judgment can be granted only where there is no genuine issue to be resolved at trial and the claims can properly be resolved as a matter of law (Andre v Pomeroy, 35 NY2d 361, 364 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607 [3d Dept 1983], appeal dismissed 61 NY2d 758 [1984]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324

[1986]; Zuckerman v City of New York, 49 NY2d, at 562). Only the existence of a bona fide issue raised by evidentiary facts, and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). Moreover, the court should draw all inferences from the evidence favorable to the party opposing the motion (Citibank, N.A. v Dutka, 74 AD2d 520 [1st Dept], appeal dismissed 50 NY2d 928 [1980]).

On a motion for summary judgment, the court does not weigh the credibility of the affiants unless untruths are clearly apparent (Mortimer v Lynch, 119 AD2d 558 [2nd Dept 1986]) or the evidence fails to meet the "threshold of believability" (Friesch-Groningsche Hypotheekbank Realty Corp. v Ward Equities, 188 AD2d 397, 398 [1st Dept 1992]).

Declaratory Judgment

The purpose of an action for a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations (James v Alderton Dock Yards, 256 NY 298, 305, rearg denied 256 NY 681 [1931]). An action for a declaratory judgment is not subject to dismissal merely because the plaintiff is not entitled to the declaration that it seeks (Lanza v Wagner, 11 NY2d 317, 334 [1962], appeal dismissed 371 US 74, cert denied 371 US 901 [1962]). In such a case, rather than dismiss the complaint, the court should make an appropriate declaration of the rights and obligations of the parties with respect to the

subject matter of the litigation (Sweeney v Cannon, 30 NY2d 633 [1972]). However, there must a justiciable controversy between adverse parties, so that a declaration of rights will have some practical effect; where there is no dispute as to the plaintiff's rights, a declaratory judgment action will be dismissed (Downe v Rothman, 215 AD2d 716, 717 [2d Dept 1995]).

Definition of "Occurrence" and "Accident"

National Union and American Home issued eight primary policies to IFF during the relevant period. Each of these policies contains a deductible in the amount of $100,000 per occurrence, except for National Union policies GL 249-89-15 RA (5/1/91 - 5/1/92) and 590-56-91 (5/1/92 - 5/1/93), which each contains a $50,000 per occurrence self-insured retention (SIR). The policies provide coverage only for injuries caused by or arising out of an "occurrence," which is defined in "Section V -- Definitions" of the Commercial General Liability Coverage Form of the policies as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In toxicant exposure cases, such as the case at bar, New York applies an "exposure trigger," i.e., the "trigger event in the policy ... is an occurrence which results in injury, not the injury itself. ... [S]uch policy language requires only an occurrence (inhalation) during the coverage period, and not the injury itself (the actual onset of asbestosis)" (Matter of Liquidation of Midland Ins. Co., 269 AD2d 50, 61 [1st Dept 2000] [emphasis in original]).

Applying the above contractual definition to the "Popcorn Packers Lung" claims at issue in the underlying Missouri action, it is clear that one occurrence did not cause the damage to each of the plaintiffs therein (see Aguirre v City of New York, 214 AD2d 692 [2d Dept 1995]). Rather, for purposes of the deductible and SIR, each plaintiff's claim is a separate "occurrence" because each plaintiff suffered exposure to the natural and artificial butter flavorings containing diacetyl and other chemical compounds that allegedly caused their bodily injuries at different times (In re Prudential Lines Inc. v American Steamship Owners Mut. Protection & Indem. Assn, Inc., 158 F3d 65 [2d Cir 1998] [each asbestos claim held to arise from a separate "occurrence" and, therefore, the deductible applied to each claim]; Olin Corp. v Insurance Co. of N. Am., 972 F Supp 189 [SD NY 1997], affd 221 F3d 307 [2d Cir 2000] [pesticide environmental cleanup deductible applied each year, not just once]).

Accordingly, motion sequence 13, by defendants American Home and National Union is granted to the extent of granting summary judgment declaring that each of the underlying personal injury plaintiff's claims constitutes a separate "occurrence" under the primary insurance policies issued by American Home and National Union, and, therefore, each is subject to a separate deductible or SIR.

Premature" Exhaustion of Policy Limits

The AIG companies (i.e., American Home and National Union) claim that, without their consent or knowledge, and to the

exclusion and detriment of the AIG companies, Royal, Zurich and Liberty, with the complicity of IFF /BBA, settled the Taffner and Yowell claims in the Benavides Action in Missouri for their remaining primary policy limits of $10.4 million, in order for IFF/BBA to avoid paying any uncovered punitive damages, and to enable the primary carriers to avoid future defense costs, including appellate costs in the appeal of the Peoples verdict[1] (another plaintiff in the Benavides Action). The AIG companies, which issued umbrella policies that sit directly over the Royal, Zurich and Liberty policies, assert that the settlements were done in bad faith, and that those policies were prematurely exhausted by reason of the above settlement, the effect of which will be to prevent a proper allocation of indemnity and reasonable settlements, and will impermissibly pass the defense cost obligation to the umbrella policies.

American Home and National Union, in their capacities as primary insurer of IFF and of BBA, seek to assert cross claims against Liberty Mutual, for breach of duty of good faith and fair dealing.

Implied Covenant of Good Faith and Fair Dealing

> [I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

[1] The jury issued a $20 million verdict.

(Kirke La Shelle Co. v Paul Armstrong Co., 263 NY 79, 87 [1933]; Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983]; Van Valkenburgh, Nooger & Neville, Inc. v Hayden Pub. Co., 30 NY2d 34, 45, cert denied, 409 US 875 [1972]). New York law recognizes that, under appropriate circumstances, an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied, enforced (see, Goodstein Constr. Corp. v City of New York, 80 NY2d 366 [1992]; Gelder Med. Group v Webber, 41 NY2d 680, 684 [1977]). This covenant of good faith and fair dealing includes "an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (Grad v Roberts, 14 NY2d 70, 75 [1964]).

American Home and National Union, in their capacities as primary insurer of IFF seek to assert cross claims against Liberty Mutual, in its capacity as primary insurer of BBA, and National Union, its capacity as excess insurer of BBA, for breach of duty of good faith and fair dealing.

American Home and National Union, IFF's primary insurers, refused to participate in the $10.4 million combined settlement of the Taffner and Yowell claims. No contribution from National Union, BBA's excess insurer, was necessary because those claims were settled within the primary policy limits.

It is axiomatic that the duty of good faith and fair dealing arises from a contractual relationship (Pavia v State Farm Mut. Auto. Ins. Co., 82 NY2d 445, 452 [1993]). Absent privity of

contract between the parties, the law imposes no such duty (Four Winds v Blue Cross & Blue Shield, 241 AD2d 906, 906-907 [3d Dept 1997]). "[A]n insurer owes no duty to a third party, because an implied covenant of good faith and fair dealing does not exist where there is no contractual relationship between the claimant and the insurer" (14 Lee R. Russ & Thomas F. Segall, Couch on Insurance § 198:18 [3d ed 2004]). Here, there is no contractual relationship between Liberty Mutual, BBA's primary insurer, and American Home and National Union, in their capacity as IFF's primary insurer. Therefore, there is no duty of good faith and fair dealing owed by the former to the latter.

An insurer may be held liable to its insured for bad faith refusal to settle a claim within the policy limits where there exists a probability of a judgment in excess of the policy limits (Pavia, 82 NY2d at 453-454). As for National Union's capacity as BBA's excess insurer pursuant to their policies, case law extends the duty of good faith and fair dealing to require that a primary insurer accept a reasonable settlement within policy limits so as to avoid exposing the excess layer of coverage (see e.g. St. Paul Fire & Marine Ins. Co. v United States Fidelity & Guar. Co., 43 NY2d 977 [1978]). "Under New York law, a primary insurer's duty of good faith is owed to excess insurance carriers as well as to the insured" (New England Ins. Co. v Healthcare Underwriters Mut. Ins. Co., 352 F3d 599, 607 [2d Cir 2003]). The court notes that National Union and American Home have not challenged the reasonableness of the $10.4 million settlement of the Taffner and

Yowell claims, which was within the limits of the primary policy.

Therefore, National Union's first and second proposed cross claims fail to state a cause of action and are dismissed, and, the motion for leave to amend is denied.

In view of this holding, the cross motion by Zurich is granted to the extent of declaring that the Zurich policies are properly exhausted and that they owe no further duty to defend or indemnify IFF and BBA in the underlying Benavides Action.

To recapitulate, it is hereby

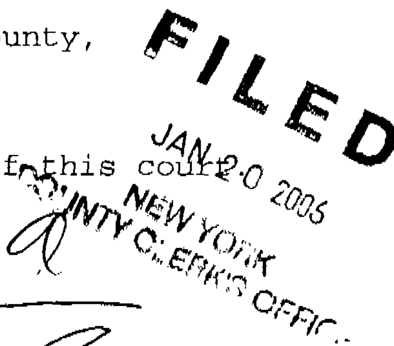
ADJUDGED AND DECLARED that each of the underlying personal injury plaintiff's claims constitutes a separate "occurrence" under the primary insurance policies issued by American Home and National Union, and, that, therefore, each is subject to a separate deductible or self-insured retention; and it is further

ORDERED that motion sequence 16, for leave to serve an amended answer with cross claims, is denied for failure to state a cause of action, and the cross motion by Zurich is granted and the proposed counterclaims are dismissed; and it is further

ADJUDGED AND DECLARED that the Zurich policies are properly exhausted and that they owe no further duty to defend and/or indemnify International Flavors & Fragrances, Inc. and/or Bush Boake Allen, Inc. in Benavides , et al. v International Flavors & Fragrances, et al., in the Circuit Court, Jasper County, Missouri, No. 01CV683025.

This shall constitute the decision and order of this court.

Dated: January 5, 2006



J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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