

Chestnut Ridge Air, Ltd. v 12609 Ontario Inc.

2007 NY Slip Op 30943(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0603216/2005

Judge: Rolando T. Acosta

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

PRESENT **HON. ROLANDO T. ACOSTA**

PART 61

Index Number : 603216/2005

CHESTNUT RIDGE AIR

vs
1260269 ONTARIO

Sequence Number : 003

DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED

Dated: 4/16/07

[Signature]
ROLANDO T. ACOSTA J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Chestnut Ridge Air, Ltd.,

Plaintiff,

– against –

12609 Ontario Inc. d/b/a Sky Harbour Aircraft,
United States Underwriters, Inc., Ace American
Insurance Company, General Reinsurance
Corporation, Hartford Fire Insurance Company,
Liberty Mutual Insurance Company, National
Liability & Fire Insurance Company, Zurich
American Insurance Company, American
International Group, Inc., National Union Fire
Company of Pittsburgh, PA, AIG Aviation
(Illinois) Corporation,

Defendants.

DECISION/JUDGMENT

Index No. 603216/05

Seq. No. 3

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing the USAIG¹ defendants' motion for an order granting summary judgment dismissing the first amended complaint against them, National Union's cross-motion² for an order granting summary judgment dismissing the first amended complaint against them, and plaintiff's cross-motion for partial

1. The motion was noticed by defendant United States Aviation Underwrites, Inc., as managers of the United States Aircraft Insurance Group individually and on behalf of Ace American Insurance Company, General Reinsurance Corporation, Hartford Fire Insurance Company, Liberty Mutual Insurance Company, National Liability & Fire Insurance Company, and Zurich American Insurance Company (collectively "USAIG member companies").

2. Defendants American International Group, Inc., National Union Fire Company of Pittsburgh, PA, and AIG Aviation (Illinois) Corporation are collectively referred to as "National Union."

summary judgment ordering all insurance defendants to provide coverage for the physical damage to the airplane:

Papers	Numbered
Amended Notice of Motion, Affidavit and Memorandum of Law	1-2 (Exhibits A-F)
Notice of National Union’s Cross-Motion, Affirmation & Memorandum of Law in Support of its Cross-Motion & in Opposition to USAIG’s Motion	3-4 (Exhibits A-F)
Plaintiff’s Cross-Motion, Affirmation, Affidavits & Memoranda of Law	5-7 (Exhibits 1-5, 1-9, 1-2, 1, 1)
USAIG’s Opposition to Plaintiff’s Cross-Motion	8
USAIG’s Reply Memorandum of Law	9
Affidavit & Memorandum of Law in Reply to National Union’s Cross-Motion & in Opposition to Plaintiff’s Cross-Motion	10-11 (Exhibit A)
Affidavit & Plaintiff’s Reply Memorandum of Law	12-13 (Exhibits 1-4)

Background

Plaintiff Chestnut Ridge Air, Ltd (“Chestnut Ridge”) purchased an aircraft in July 1999. Corporate Air Management, Inc (“CAM”) maintained and handled the day-to-day management of the aircraft on Chestnut Ridge’s behalf, and procured the insurance that covered Chestnut Ridge and the aircraft. The National Union defendants issued a policy to Chestnut Ridge with effective dates of coverage from December 15, 1998 to December 15, 1999. The policy was renewed and stayed in effect until cancelled on or about April 25, 2000. The National Union policies provided the following:

Coverage F - All Risk Basis To pay for any physical damage loss to the aircraft. . . .

* * *

This policy applies only to . . . property damage which occurs, and to physical damage losses to the aircraft which are sustained during the policy period. . . .

Plaintiff's Exhibits 1 & 2. Physical damage is defined as "[d]irect and accidental physical loss of or damage to the aircraft, hereinafter called loss, but does not include loss of use or any residual depreciation in value, if any, after repairs have been made." Id.

The USAIG defendants issued policies to Chestnut Ridge with effective dates from September 1, 2001 through September 1, 2005. The policies provided the following:

Aircraft Physical Damage Coverage:

If you have this coverage, we'll cover you against risk of physical loss or damage to your aircraft as the result of an occurrence both while it's in flight and while it isn't in flight.

When and where you are covered:

You are covered for occurrences that take place during your policy period . . . By an occurrence we mean any accident or continuous or repeated exposure to conditions which you don't expect to happen resulting in . . . property damage or loss of or damage to your aircraft. All injuries or damage from generally the same conditions will be considered one occurrence.

Zarzecki Affidavit, Exhibit D. The policies did not cover damage caused by wear and tear. Id.

In August 1999, CAM contracted with defendant Sky Harbour to strip, repaint and refinish the aircraft. Sky Harbour expressly agreed to provide "metal treatment of steel screws on wings to prevent rusting (as required by manufacturer)." Cem Ozer Affidavit, Exhibit 1. Sky Harbour further agreed, according to plaintiff, that "any corrosion found on the aircraft [would be] appropriately removed. The surface [would then be] washed with a metal preparation solution and the metal [would then be treated with a corrosion inhibiting conversion coating." First Amended Complaint at ¶ 36. In refinishing the aircraft, however, Sky Harbour improperly stripped, cleaned, prepared and sealed the aircraft's wing prior to repainting. Donald E. Sommer Affidavit at ¶ 6; Richard H. McSwain at ¶ 12. The aircraft was returned in September 1999.

In or about March 2005, the initial sign of corrosion was discovered on the aircraft's wing during a routine maintenance. Because the corrosion was covered by paint, the defective workmanship could not be detected until the corrosion caused the paint to bubble up. The aircraft was ultimately rendered unairworthy because of the extensive corrosion.

According to plaintiff's experts, the corrosion occurred because Sky Harbour improperly ground off the protective coating on the steel wing fasteners and apparently was

not reapplied, thus leaving them continuously exposed to among other things, corrosive paint stripping agents that should have been removed. Donald E. Sommer Affidavit at ¶ 5, 7-8; Richard H. McSwain, at ¶ 9, 12, 14. The experts also averred that because Sky Harbour repainted the wing, the steel fasteners were left continuously exposed causing them to corrode. Donald E. Sommer Affidavit at ¶ 5-8; Richard H. McSwain at ¶ 9-14. According to McSwain, corrosion of this nature is progressive and once initiated continues to worsen. Richard H. McSwain at ¶ 12.

Analysis

At issue in these motions is whether the damaged airplane is covered under the various policies. Specifically, the National Union defendants seek an order granting summary judgment dismissing the complaint because the aircraft did not sustain physical damage during the period of their policies. Viewing the facts in the light most favorable to plaintiff, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), the National Union defendants failed to establish their prima facie entitlement to summary judgment.

In construing the language of an insurance policy, courts must give the unambiguous terms of the policy their plain and ordinary meaning. Lavanant v. Gen. Accident Ins. Co., 79 N.Y.2d 623, 629 (1992). Here, the policies in issue provided coverage on an all risk basis for any damage to the airplane that was direct and accidental. According to plaintiff's experts, Sky Harbour damaged the aircraft by, inter alia, grinding off or improperly removing the protective cadmium plating on the steel fasteners on the wing in contravention of the aircraft's maintenance manual, and then failing to replace the protective coating. Sky Harbour also did not, according to the experts, properly clean off the paint stripping agents. The clear language of the policies require only that the aircraft sustained physical damage under the period of the policy to trigger coverage.

Contrary to the National Union defendants, nothing in the policies required that the physical damage manifest itself during the policy period. If they wanted manifestation of damages to trigger coverage, they could have easily written the policies to require manifestation as a condition of coverage. Accordingly, the National Union defendant's cross-motion is denied.

The USAIG defendants also failed to establish their prima facie entitlement to summary judgment. Under their policies, damage or loss caused by an occurrence during the term is covered. By an occurrence the policies "mean [inter alia]. . . continuous or repeated exposure to conditions which you don't expect to happen resulting in . . . property damage or loss of or damage to your aircraft." Here, according to plaintiff's experts, the wing fasteners were subject to continuous exposure to corrosive agents because they were improperly stripped and then were not re-coated with protective sealant. Thus, the

continuous exposure triggered coverage. If the USAIG defendants wanted to limit their policies to first exposure in lieu of continuous or repeated exposure, they could have used language to that effect in the policies. In re Liquidation of Midland Ins. Co., 269 A.D.2d 50 (1st Dept. 2000); see also AllCity Insurance Co. v. Borello, 19 A.D.3d 652 (2nd Dept. 2005)(“the language of the occurrence clause herein ascribes no temporal relevance to the causative event preceding the covered [property damage], but rather premises coverage exclusively upon the sustaining of specific [property damage] during the policy period.”).³

Plaintiff’s cross-motion for partial summary judgment on liability against the National Union and USAIG defendants is denied given that there are triable issues of fact at this juncture as to whether Sky Harbour caused the damage to the aircraft. Compare the Sommer and McSwain Affidavits, where experts aver that Sky Harbour damaged the aircraft, with the Harold R Larson Affidavit, wherein Larson disputes those facts. Plaintiff has also indicated to the Court by letter dated February 14, 2007, that further testing of the airplane was to take place soon. If it is ultimately established that Sky Harbour damaged the airplane, the damage is covered under the National Union and USAIG policies.

Accordingly, it is hereby

ORDERED that the instant motion and cross-motions are DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 16, 2007

SO ORDERED
Rolando T. Acosta
ROLANDO T. ACOSTA, J.S.C.
J.S.C.

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

3. In any event, contrary to the USAIG defendants, injury-in fact may occur at different intervals. See e.g., Stonewall Ins. Co. v. Asbestos Claims Mgm’t Corp., 73 F.3d 1178 (2nd Cir. 1995); McGroarty v. Great American Ins. Co., 36 N.Y.2d 358 (1975). Thus, given the continuous exposure to corrosive agents, injury to the aircraft (apart from the initial exposure) could have occurred during the effective dates of the USAIG policies. Determining whether various injuries occurred to the aircraft at different intervals, however, is not necessary here given the express language of the USAIG policy as noted

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