Columbia Energy Group v Fisher
2007 NY Slip Op 31583(U)
June 11, 2007
Supreme Court, New York County
Docket Number: 0603149/2004
Judge: Carol R Edmead
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 6/12/2007

[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Columbia Energy

- v -

Fisher, Alexander

INDEX NO. 603149/04

MOTION DATE 6/13/07

MOTION SEQ. NO. 003

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 [x] No

FILED
JUN 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

Motions sequence numbers 003, 004, and 005 are decided as follows:

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants Fisher Harris Shapiro Inc. and International Amalgamated Group, Inc. for summary judgment dismissing the complaint against them is granted to the extent that summary judgment is granted to defendant Fisher Harris Shapiro Inc. and the complaint is dismissed as against defendant Fisher Harris Shapiro Inc, and the remainder of the motion is denied (motion 003); and it is further

ORDERED that the motion by defendants HUB International Group Northeast Inc. f/k/a Kaye Insurance Associates, Inc., Kaye Insurance Associates, Inc. New England, Alexander Fisher, A. Fisher Co., Inc., and APCO Corp. for summary judgment dismissing the complaint against them is granted to defendant Alexander Fisher and the Complaint is dismissed as against defendant Alexander Fisher, and the remainder of the motion is denied (motion 004); and it is further

ORDERED that the motion by defendant Crawford & Company for summary judgment dismissing the complaint and all cross claims against it is denied (motion 005); and it is further

ORDERED that the action is severed and the remainder shall continue against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/11/07

J.S.C.

HON. CAROL EDMEAD

Check one: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------x

COLUMBIA ENERGY GROUP and AMERIGAS EAGLE PROPANE, L.P., formerly known as Columbia Propane, L.P., formerly known as National Propane, L.P.,

Plaintiffs,

Index No. 603149/04

-against-

ALEXANDER FISHER, A. FISHER CO., INC., FISHER HARRIS SHAPIRO INC., INTERNATIONAL AMALGAMATED GROUP, INC., APCO CORP., KAYE INSURANCE ASSOCIATES, INC., KAYE INSURANCE ASSOCIATES, INC. - NEW ENGLAND and CRAWFORD & COMPANY,

Defendants.

----------x

FILED
JUN 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

EDMEAD, J.:

Motion sequence numbers 003, 004 and 005 are herewith consolidated for disposition.

In motion 003, defendants Fisher Harris Shapiro Inc. (FHS) and International Amalgamated Group, Inc. (IAG) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them on the ground that no genuine triable issues of fact exist.

In motion 004, defendants HUB International Group Northeast Inc. f/k/a Kaye Insurance Associates, Inc., Kaye Insurance Associates, Inc. New England (together, HUB), Alexander Fisher, A. Fisher Co., Inc. (AFC), and APCO Corp. (APCO) (collectively, the HUB defendants), move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them on the ground that no genuine triable issues of fact exist.

In motion 005, defendant Crawford & Company (Crawford) moves for an order, pursuant to CPLR 3111 and 3212, granting summary judgment dismissing the complaint and all cross claims against it on the ground that no genuine triable issues of fact exist.

BACKGROUND

Plaintiffs Columbia Energy Group and Amerigas Eagle Propane, L.P., formerly known as Columbia Propane, L.P., formerly known as National Propane, L.P. (collectively,

Columbia) are suppliers of propane products. At the time of the relevant events at issue, Columbia was a subsidiary of Triac Companies, Inc. (Triac). Triac sold Columbia in July, 1999.

Due to the nature of its business, Columbia had and has extensive insurance requirements. It maintained an in-house risk manager and general counsel to coordinate and monitor internal and external insurance, risk management and claims-related issues, and, additionally, engaged many outside insurance professionals (such as insurance brokers, risk managers and claims administrators) to manage its insurance, claims and risk management functions. These outside consultants were paid for their services at agreed rates and/or through earned insurance commissions.

Defendants are a group of insurance and/or claims professionals that provided insurance brokerage, claims, risk management and insurance consulting services and/or administered Columbia's insurance and claims programs. Defendant Alexander Fisher is an individual alleged to have owned and/or controlled the various defendant entities.

At its core, this action concerns three separate propane explosions, occurring between March 30, 1996 and July 28, 1997, each of which resulted in personal injuries, fatalities and property damage, to wit, "the Lloyd incident,"[1] "the Keltie's incident"[2] and "the Gonzalez incident."[3]

Columbia's insurance coverage, at the time each of these incidents occurred,[4]

---

[1] The Lloyd incident occurred at the home of the Lloyd family, in Greenlawn, New York, on March 30, 1996, resulting in the deaths of Sandra Lloyd and her two young children.

[2] The Keltie's incident occurred at Keltie's Bum Steer, a restaurant located in Brewster, New York, on July 28, 1997, resulting in serious injuries, two fatalities and property damage to the restaurant and adjacent motel, and believed to have been caused by propane leaking from an underground line into the restaurant's kitchen.

[3] The Gonzalez incident occurred at a lake house located in Wisconsin, on February 10, 1997, resulting in serious injuries and one fatality, and believed to have been caused by an open propane line.

[4] The Lloyd incident occurred during the term of the October 1995 to 1996 general liability policy period, and the Keltie's and Gonzalez incidents occurred during the term of the October 1997 to 1998 general liability policy period.

consisted of a general liability policy, with limits of $1 million primary coverage (over a $500,000 retention), and $100 million in excess coverage policies. Transamerica Insurance Group (TIG) provided the first tier of excess insurance, with a layer of $15 million each year.

According to Columbia, defendants had extensive knowledge of Columbia's insurance and claims programs, and provided advice to Columbia on all matters relating thereto, and Columbia relied upon defendants for this advice. Columbia contends that defendants' responsibilities included giving notice of claims to Columbia's insurers. In this instance, Columbia maintains that defendants were obligated, but failed, to place Columbia's excess insurer, TIG, on timely notice of the three occurrences, or, alternatively, to timely advise Columbia of its obligation to give such notice to its excess insurer. Here, Columbia (or a defendant entity acting on behalf of Columbia) gave notice to TIG on various dates in 1999 of these incidents and related lawsuits, and, on each occasion, demanded that TIG indemnify Columbia in the event that the underlying primary insurance was exhausted. TIG, rejected each such demand for insurance coverage in writing based on late notice of claim and suit.[5]

In the complaint, dated October 26, 2004 (Complaint), Columbia asserts causes of action sounding in negligence, breach of contract and breach of fiduciary duty against defendants. Columbia claims that it is entitled to reimbursement from defendants of the settlement and defense costs which Columbia paid, but would have been covered by its excess insurance had defendants given timely notice of the claims/suits. In each matter, the settlement paid by Columbia exceeded the self-insured retention ($ 500,000) and primary policy limits ($1 million). Columbia also seeks reimbursement of other expenditures including the costs incurred in engaging coverage counsel to evaluate its position, and to file a separate coverage action in Illinois against its excess carrier relating to the Gonzalez matter.

Defendants maintain that Columbia's in-house risk manager, Marcia Fisher, was

---

[5] Columbia commenced a coverage action against TIG in Illinois pertaining to the Gonzalez incident, which TIG and Columbia eventually settled.

the first point of contact for any claims against Columbia, and that she managed the claims and was aware at all times of the status, valuation and liability analysis of each claim. It was Ms. Fisher, and none other, defendants submit, who investigated claims and maintained 'hands on' control over all insurance-related decisions. Defendants contend that, at some time in 1999 - and not before - Columbia first requested that defendants report these claims to TIG. Defendants contend that it was Columbia's duty, and not defendants' duty, to place carriers on notice of the underlying claims, and that, in any event, defendants did not have prior notice of the claims or suits, such that they could have been expected to provide notice of same to TIG.

FHS submits that it did not commence operations until 1999, and, as such, even if giving notice of claims to carriers was within the realm of its obligations, it would not have been in a position to give notice to TIG at a time when it was timely to do so.

According to IAG, it is not an insurance broker or consultant, but rather engages in the wholly unrelated industry of developing products which enhance asset based transactions with an emphasis on real estate transactions. IAG contends that it did no work whatsoever for, or have any responsibilities to, Columbia, but rather worked solely for Columbia's former parent company, Triac. However, IAG billed Columbia in seven invoices spanning nearly two years in excess of $ 45,000 for insurance consulting and management services. IAG submits that these bills reflected a decision by Triac to apportion IAG's bills among its subsidiaries, including Columbia. Columbia, on the other hand, submits that the nature and extent of the exact services that IAG provided, and whether those services were provided to Columbia, is not clear, except that Columbia paid IAG substantial sums for these services.

Crawford submits that it did not have a contract or any other relationship with Columbia. Crawford claims that it was merely a third-party claims administrator, contracted by Columbia's primary insurer, AIG Risk Management (AIG), to render claims adjusting services pursuant to a claims service agreement between Crawford and AIG.

Note of Issue was filed March 8, 2007, and these summary judgment motions

were made within 60 days thereafter.

DISCUSSION

Columbia maintains that the various defendants acted as broker, agent, consultant, and third-party administrator on behalf of Columbia, and that each breached duties owed to Columbia and/or breached contract obligations by failing to provide notice to the excess insurer, TIG, of the three underlying claims, resulting in denial of excess coverage.

The HUB defendants submit that they are entitled to summary judgment dismissing the Complaint on the grounds that: (a) they did not have a "special relationship" with Columbia sufficient to impose such a duty on them to place the excess insurer, TIG, on notice of the three underlying claims and lawsuits arising therefrom, or, alternatively, if such a duty was owed by the HUB defendants to notify Columbia's insurers of the underlying claims and lawsuits, the evidence establishes that the HUB defendants were never provided with notice of any of the underlying claims for reporting purposes and thus could not have placed TIG on notice; (b) the negligence and breach of fiduciary duty causes of action are barred by the three-year statute of limitations; (c) the negligence and breach of fiduciary duty causes of action are duplicative of the breach of contract claim; and (d) the claims asserted against the individual defendant Alexander Fisher concern activities performed in the capacity as an officer or employee of one or more of the corporate defendant herein.

FHS, IAG and Crawford join in the above, and further submit that they are entitled to summary judgment because: (a) FHS did not commence operations until 1999, at which time, any notice to TIG would have already been untimely; (b) IAG performed unrelated services for Columbia's parent corporation, and did not perform any business or services for Columbia; and (c) there was no privity between Columbia and Crawford.

Defendants' arguments in support of summary judgment are based on legal doctrines and case law applicable to the liability of insurance brokers and other insurance professionals for failure to procure insurance (see e.g., Hoffend & Sons, Inc. v Rose & Kieran,

Inc., 7 NY3d 152 [2006]) rather than law applicable to insurance professionals' obligation to give notice to the insurer on behalf of the insured of claims or actions filed against the insured. Consequently, the conclusions urged by defendants are misguided.

New York routinely recognizes an obligation by insurance brokers and consultants to their client, the insured, to notify the insurer of claims and/or actions arguably falling within the scope of coverage. Thus, in Martini v Lafayette Studio Corp. (273 AD2d 112 [1st Dept 2000]), the First Department held that the insured was entitled to summary judgment against its insurance broker, declaring the broker liable to bear the costs of defending and indemnifying the insured in the underlying action to the extent of the coverage the insurer would have provided had it been timely notified of the covered claims against the insured in the main action. The court stated that the insured "is entitled to recover against (the broker) all damages caused by (the broker's) negligent referral of the claim to the wrong insurer, i.e., the costs of defense and indemnity equivalent to what [the insurer] would have provided had it been timely notified . . . ." (id.; see also Mega Contracting, Inc. v Insurance Corp. of New York, 37 AD3d 669 [2d Dept 2007] [defendant broker was not entitled to summary judgment dismissing cause of action based on broker's alleged failure to forward a timely notice of claim to plaintiff's insurance carrier based on the existence of triable issues of fact]; Lavandier v Landmark Ins. Co., 26 AD3d 264 [1st Dept 2006] [plaintiff-insured permitted to amend complaint to assert causes of action for both breach of contract and negligence against insurance broker for its failure to timely forward notice of claims to the insured's carrier]; Baseball Office of the Commissioner v Marsh & McLennan, Inc., 295 AD2d 73, 82 [1st Dept 2002] [defendant-broker was not entitled to summary judgment - if the insured notified the broker of its receipt of the pleadings in the underlying action, then broker had an obligation to alert plaintiff of its need to notify insurance carrier of the lawsuit]). The First Department, in the Baseball case, stated:

> In any event, White's misinterpretation of the scope of Twin City's coverage is not dispositive of Baseball's claim that Marsh failed to advise it properly as to its notice obligations. If White, as he claims, did, in fact notify Quinn on receipt of the Piazza summons and complaint, Marsh, at a minimum, had an obligation to

> alert Baseball of its need to notify Twin City of the lawsuit. An insured has a right to look to the expertise of its broker with respect to insurance matters. (See, e.g., Bell v O'Leary, 744 F2d 1370, 1373.) And, it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. (See, e.g., Rotanelli v Madden, 172 AD2d 815, 817, lv denied 79 NY2d 754.) It is precisely to perform this service as well as others that the insured pays a commission to the broker.

(id.).

Thus, contrary to the position taken by defendants, insurance brokers and insurance professions generally do owe a duty to the insured with respect to notifying insurers of claims and suits. Thus, here, if Columbia alerted defendants to the occurrence(s) in question, or alerted defendants to its receipt of the pleadings in the respective actions, then said notified defendants may have had an obligation to notify TIG or, at a minimum, to alert Columbia of its need to notify the excess insurer of the lawsuits (see Martini v Lafayette Studio Corp., supra).

Even if they might otherwise owe a duty to notify insurance carriers of an insured's claims/suites, defendants contend that, based on the facts of this case, there can be no breach of that duty or obligation because: (a) Columbia allocated the function of analysis of potential claims, including the making of determinations pertaining to notification of insurance carriers, to its in-house risk management team rather than to outside insurance professionals; and (b) Columbia never gave timely notice to defendant(s) of any of the three underlying claims or related lawsuits.

The court finds that questions of fact exist with respect to whether Columbia allocated such decision making and notification functions to itself (see e.g., National Union Fire Ins. Co. of Pittsburgh v Fidelity National Title Ins. Co. of New York, 243 AD2d 275 [1st Dept 1997]). Triable issues of fact also exist with respect to the question of whether defendants had or should have had notice of the claims, and what if anything they did, or could have been expected to do, regarding notification, under the circumstances of this case, taking into consideration the relationship of the parties. The facts pertaining to these issues are not clear, and, as such, defendants have not established their entitlement to summary judgment on this ground (see

generally, Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

FHS has demonstrated that it did not commence active operations until 1999, when giving notice to TIG would have been untimely. Columbia has failed to refute this showing. Accordingly, FHS is entitled to summary judgment in its favor.

IAG has not demonstrated that it is entitled to summary judgment. Despite its claim that it performed unrelated services for Triac only, and that Columbia's payment of nearly $50,000 to IAG was arranged solely as an accounting convenience for Triac, IAG has failed to submit sufficient evidence to support this contention as a matter of law, and/or Columbia has demonstrated the existence of factual issues pertaining to the relationship between IAG and Columbia, sufficient to defeat IAG's entitlement to summary judgment.

Although Columbia acknowledges that Columbia never had a contractual relationship with Crawford, it claims that Crawford's lack of privity argument is unavailing because Columbia is a third-party beneficiary of the contract between AIG and Crawford, and, additionally because Crawford, as a third-party administrator, owed a duty as an insurance professional to Columbia. Material triable questions of fact preclude the court from determining, at this juncture, these arguments. Accordingly, Crawford's request for summary judgment is denied.

The court rejects defendants' claim that the negligence and breach of fiduciary duty causes of action are duplicative of the breach of contract claim (see Lavandier v Landmark Ins. Co., supra).

The court likewise rejects defendants' argument that the negligence and fiduciary duty causes of action are time-barred by the three-year statute of limitations. Defendants submit that the limitations period started running at the time TIG should have been notified of the claims, rather than when TIG declined coverage. They maintain that the statute of limitations accrues from when the wrondoing occurs and not when the wrongdoing is discovered (National Life Ins. Co. v Frank B. Hall & Co. of New York, Inc., 111 AD2d 681 [1st Dept 1985], affd, 67

NY2d 1021 [1986]). These causes of action are not barred by the statute of limitations (see Lavandier v Landmark Ins. Co., supra [the proposed negligence claim accrued not at the time of the alleged breach of duty, but subsequently, at the time of injury, i.e., when the insurance company disclaimed coverage to the insured]; see also Cunningham v Insurance Co. of North America, 2006 WL 2568464,*4 [ED NY Aug 31, 2006, Dearie, J, No. 04 CV 2997 RJD VVP]).

Alexander Fisher, individually, is entitled to summary judgment dismissing the claims asserted against him. He contends that any and all actions performed by him were done in his capacity as an agent or officer of the various corporate defendants.

Being an officer of a corporate defendant, without more, does not provide a basis to establish individual or personal liability. "[I]t is well settled that "[t]hose seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (Sheridan Broadcasting Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005], citing TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998]; see also CDR Créances S.A. v Euro-American Lodging Corp., __ AD3d __, 2007 WL 1470494 [1st Dept 2007]). To pierce the corporate veil, one must show "'that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (Sheridan Broadcasting Corp. v Small, supra at 332, quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]).

As explained by the Third Department in Heim v Tri-Lakes Ford Mercury, Inc. (25 AD3d 901, 902 [3rd Dept 2006]):

> "Piercing the corporate veil is an equitable doctrine which allows courts to disregard the corporate form whenever necessary to prevent fraud and hold corporate owners liable for the corporations' obligations (see Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140-141 [1993]; State of New York v Robin Operating Corp., 3 AD3d 769, 771 [2004]). . . . "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will

intervene" (Matter of Morris v New York State Dept. of Taxation & Fin., supra at 142)."

Columbia has failed to raise any factual issues sufficient to defeat Fisher's entitlement to summary judgment. There is no evidence showing that Mr. Fisher acted in an individual capacity or as anything other than as a representative of disclosed corporate entities. Nor, contrary to Columbia's contention, is there any basis here for the court to disregard the corporate form and pierce the corporaate veil in order to prevent fraud or achieve equality.

Lastly, the court denies the parties' informal requests for the imposition of sanctions against Columbia.

CONCLUSION

It is ORDERED that the motion by defendants Fisher Harris Shapiro Inc. and International Amalgamated Group, Inc. for summary judgment dismissing the complaint against them is granted to the extent that summary judgment is granted to defendant Fisher Harris Shapiro Inc. and the complaint is dismissed as against defendant Fisher Harris Shapiro Inc, and the remainder of the motion is denied (motion 003); and it is further

ORDERED that the motion by defendants HUB International Group Northeast Inc. f/k/a Kaye Insurance Associates, Inc., Kaye Insurance Associates, Inc. New England, Alexander Fisher, A. Fisher Co., Inc., and APCO Corp. for summary judgment dismissing the complaint against them is granted to defendant Alexander Fisher and the Complaint is dismissed as against defendant Alexander Fisher, and the remainder of the motion is denied (motion 004); and it is further

ORDERED that the motion by defendant Crawford & Company for summary judgment dismissing the complaint and all cross claims against it is denied (motion 005); and it is further

ORDERED that the action is severed and the remainder shall continue against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED
JUN 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 11, 2007

Hon. Carol Robinson Edmead