

**Gulf Underwriters Ins. Co. v Verizon  
Communications, Inc.**

2007 NY Slip Op 31739(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0600553/2005

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN  
*Justice*

PART 49

Index Number : 600553/2005  
GULF UNDERWRITERS INSURANCE  
vs  
VERIZON COMMUNICATIONS INC.  
Sequence Number : 003  
DISMISS

INDEX NO. 600553/05  
MOTION DATE 4/16/07  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

JUN 21 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

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

Dated: 6/19/07

Her Cahn

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: IAS PART 49

-----X

GULF UNDERWRITERS INSURANCE COMPANY,

Plaintiff,

Index No. 600553/05

-against-

VERIZON COMMUNICATIONS, INC.,

Defendant.

-----X

**Cahn, J.:**

Plaintiff Gulf Underwriters Insurance Company (Gulf) seeks an order declaring that it has no obligation to provide insurance coverage under excess liability insurance policies issued to defendant Verizon Communications Inc. (Verizon). Verizon's answer contains two counterclaims. The first is for breach of contract based on Gulf's alleged refusal to pay Verizon's claim. The second alleges bad faith and seeks punitive damages in connection with Gulf's alleged wrongful denial of coverage.

Gulf now moves to dismiss the second counterclaim. The first counterclaim for breach of the insurance policy is not at issue on this motion.

Facts

Non-party American International Specialty Lines Insurance Company (AISLIC) issued Technology Liability Insurance Policies to Verizon for the periods June 30, 2000 to June 30, 2001 and June 30, 2001 to October 1, 2002 (AISLIC Policies). Gulf issued

Excess Technology Liability Insurance Policies to Verizon for periods corresponding with the AISLIC Policies (Gulf Policies). Each of the Gulf Policies provides up to \$25 million of liability insurance in excess of Verizon's primary policies with AISLIC.

This action arises from the settlement of four lawsuits between Verizon and non-party Ronald A. Katz Technology Licensing, L.P., involving Verizon's alleged infringement upon patents held by Katz Technology (Katz Litigation). The Katz Litigation was allegedly settled by July 7, 2004. Verizon claims that it incurred over \$80 million in attorneys' fees and indemnity costs in connection with its defense and settlement of the Katz Litigation.

On December 31, 2003, AISLIC paid Verizon \$25 million, the full policy limit of its policy, in connection with the Katz Litigation. Verizon claims that it has more than \$55 million in unreimbursed expenses from the Katz Litigation, of which it claims that Gulf is responsible for \$25 million pursuant to the policy it wrote. Verizon avers that it demanded payment of \$25 million from Gulf, but that Gulf refused to pay or provide coverage.

#### Discussion

Gulf's motion to dismiss is based upon its argument that, under New York law, "there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations

under an insurance policy." *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 355 (1<sup>st</sup> Dept 2005). Verizon concedes that New York law does not recognize such a cause of action, but argues in opposition that New York's choice of law rules require application of Pennsylvania law, which does recognize Verizon's claim for bad faith in connection with Gulf's denial of coverage.

Under title 42, section 8371 of the Pennsylvania Code, "[i]n an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may" award interest on the claim, "punitive damages against the insurer," and attorneys' fees. The parties agree that a conflict exists between New York and Pennsylvania law on this issue, and that their agreements do not contain choice-of-law provisions determining which state's law to apply. Thus, "we are required to make that determination in accordance with our state's established choice-of-law principles." *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 20 (1<sup>st</sup> Dept 2006).

The parties agree that the "grouping of contacts" rule applies "the law of the State which the parties understood would be the principal location of the insured risk and the one most intimately concerned with the outcome of the litigation." *Steinbach v Aetna Cas. and Sur. Co.*, 81 AD2d 382, 385 (1<sup>st</sup> Dept 1981); Restatement (Second) of Conflict of Laws § 193. In

determining which state has the most significant relationship with the transaction and parties at issue, the Court of Appeals recognizes the following five contacts outlined in section 188 (2) of the Restatement (Second) of Conflict of Laws: the place of contracting; the place of negotiating the contract; the place of performing the contract; the location of the subject matter of the contract; and the domicile or place of business of the contracting parties. *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 317 (1994) (internal quotation marks and citations omitted).

However,

in cases involving liability insurance covering multistate risks, ... the state of the insured's domicile [is regarded as] a proxy for the principal location of the insured risk, which, under New York law and Restatement § 193, is the controlling factor in determining the law applicable to a liability insurance policy, thereby obviating the need to consider all five Restatement factors.

*Certain Underwriters at Lloyd's, London*, 36 AD3d at 26-27.

Here, the parties do not dispute that the subject matter of the policies at issue is not located in any single state. Moreover, the verified pleadings state that Verizon, the named insured on the Gulf Policies and the named defendant in this action, is a Delaware corporation with its principal place of business in New York. Amended Complaint, ¶ 5; Answer & Counterclaims, ¶ 5. "[T]he state of the principal place of

business takes precedence over the state of incorporation" when the insured's principal place of business and its state of incorporation differ. *Certain Underwriters at Lloyd's, London*, 36 AD3d at 25. Thus, under a choice of law analysis, the location of the insured's risk is New York, Verizon's principal place of business. *Id.* Accordingly, the court need not consider the five Restatement factors. *Id.* at 27.

In any event, even if the court were to consider the five Restatement factors, Verizon's principal place of business is "considered the 'primary factor' in the choice-of-law analysis." *Id.* at 28 (internal citation omitted). This is because "[i]n the case of a liability insurance policy covering risks in multiple states," as is the case here, "the state of the insured's principal place of business has a greater concern with issues of policy construction and application bearing on the amount of available coverage than do the states where contracting, negotiation, or payment of the premium happened to occur." *Id.* at 27.

For the foregoing reasons, New York law applies. As discussed above, the parties do not dispute that, under New York law, "there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance policy." *Continental Cas. Co.*, 16 AD3d at 355.

Accordingly, it is

ORDERED that the motion is granted and the second counterclaim of defendant Verizon Communications Inc. is severed and dismissed; and it is further

ORDERED that the action shall in all other respects continue.

Dated: June 19, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUN 21 2007  
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