ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.
2007 NY Slip Op 32199(U)
July 12, 2007
Supreme Court, New York County
Docket Number: 0600133/2006
Judge: Herman Cahn
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SCANNED ON 7/20/2007

[* 1]

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

PRESENT: HERMAN CAHN PART 49

Justice

Ace Fire

Plaintiff

- v -

ITT Industries

Defendant.

INDEX NO. 600133/06

MOTION DATE 11/20/06

MOTION SEQ. NO. 044

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

FILED

JUL 20 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):

July 13, 2007

Hon. Cahn

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 49

----------X

ACE FIRE UNDERWRITERS INSURANCE COMPANY, et. al.,

Plaintiffs

-against-

Index No. 600133/06

ITT INDUSTRIES, INC., et al.,

Defendants.

----------X

FILED
JUL 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

CAHN, J.

Plaintiffs ACE Fire Underwriters Insurance Company, et al. (collectively, the ACE Insurers) seek a judicial determination as to the rights and obligations of the parties in this declaratory judgment action with respect to insurance coverage for underlying bodily injury claims arising from exposure to silica, and asserted against defendants ITT Industries, Inc. (ITT) and U.S. Silica Corporation (USS), the successor to ITT's former subsidiary, Pennsylvania Glass Sand Corporation (PGS, and collectively with USS, USS/PGS). The ACE Insurers also assert claims against many of ITT's and USS/PGS's primary, umbrella and excess insurers.

Motion Sequence Nos. 042 and 044 are consolidated for disposition. In Motion Sequence No. 042, plaintiff Pacific Employers Insurance Company (PEIC), one of the ACE Insurers, moves to dismiss defendant ITT's first, fourth, seventh and eighth counterclaims, CPLR 3211 (a) (7).

In Motion Sequence No. 044, PEIC moves to enjoin ITT from further prosecuting an action entitled Cannon Electric Inc., et al. v ACE Property & Casualty Insurance Company, et al., Los Angeles County Superior Court Case No. BC 290354, with respect to the parties' rights and responsibilities under the primary insurance policies issued by PEIC and others to ITT or,

alternatively, from further prosecuting ITT's motion for an injunction in the California action.

For the reasons set forth below, PEIC's motion to dismiss ITT's counterclaims is granted, but its motion for an injunction is denied.

I. Motion to Dismiss Counterclaims – Motion Sequence No. 042

The ACE Insurers filed this action on January 13, 2006 for the purpose of resolving actual controversies regarding the rights and obligations of the parties to this action arising under various contracts of primary or excess insurance issued by the ACE Insurers and the other defendant insurers, to defendants ITT and USS. The coverage issues relate to coverage for thousands of bodily injury claims arising out of claimed exposure to silica products.

Both ITT and USS moved to dismiss the complaint, contending that this court should defer to the first-filed actions filed in three other jurisdictions – Pennsylvania, West Virginia and California. By order dated June 5, 2006, this court denied ITT's motion with respect to the Pennsylvania action. By order dated July 19, 2006, this court denied in its entirety USS's motion with respect to the West Virginia action, and granted ITT's separate motion with respect to the California action, and severed and stayed this action as it related to the excess and umbrella insurers that issued insurance policies to ITT.

On August 8, 2006, ITT answered the complaint in this action, and asserted eight counterclaims solely against PEIC. ITT's counterclaims arise out of primary policies issued by PEIC to ITT that provided coverage from December 1977 to January 1986 (the PEIC Primary Policies) (Counterclaims, ¶¶ 1, 2, 4). Specifically, Policy No. SCG GO 690040-9 for the annual term of January 1, 1985 to January 1, 1986 (the 1985 Policy) obligates PEIC to pay on behalf of ITT:

> all sums which [ITT], by reason of contractual liability assumed by [it] under any written contract of the type designated in the schedule for this insurance, shall become legally obligated to pay as damages because of bodily injury or property damages to which this insurance applies, caused by an occurrence ...

Id., ¶ 8. Under the heading "Designation of Contracts on file or known to the Company," the 1985 Policy's schedule lists "All Contracts" (id.).

On September 12, 1985 (the Closing Date), ITT and Pacific Coast Resources (PCR) entered into an "Agreement of Purchase and Sale of the Capital Stock of Pennsylvania Glass Sand" (the Stock Sale Agreement) (id., ¶ 9). Pursuant to the Stock Sale Agreement, ITT entered into a ten-year contractual obligation to indemnify PGS for certain claims asserted against PGS seeking damages for bodily injury, arising out of claimed exposure to silica prior to the Closing Date of the Stock Sale Agreement (the Silica Suits) (id.).

ITT then secured coverage for its indemnity obligation for the Silica Suits. The day after the Closing Date, PEIC issued Endorsement No. 44 to the 1985 Policy, which provides:

> It is understood and agreed that the contractual liability coverage provided by the policy shall apply to those liabilities assumed by ITT Corporation in the "Contract of Sale" Section 5.1(b) Lung Disease.
>
> It is further agreed that those losses covered by the above-mentioned "Contract of Sale" **shall be considered as occurring during this policy period [1/1/85-1/1/86] regardless of when the claim actually occurs**.
>
> "Contract of Sale" means the sales agreement entered into between ITT Corporation and the Buyers of Pennsylvania Glass Sand.

Endorsement 44 to the 1985 Policy (Shuster Aff., Exh C); Counterclaims, ¶ 10.

Since the Closing Date, ITT has tendered the Silica Suits to PEIC for defense and indemnification (Counterclaims, ¶ 5). After the Closing Date, however, PEIC and ITT had a

dispute as to whether the 1985 Policy and PEIC Primary Policies respond to the Silica Suits (id., ¶ 11). In an effort to avoid litigation, beginning in 1992, PEIC agreed to pay a portion of ITT's defense, investigation and settlement costs arising from the Silica Suits (Silica Suit Losses).

In 1995, ITT contractually agreed with USS, PGS's successor, to extend its indemnity obligation for an additional ten years, until September 12, 2005 (Answer, ¶ 113). ITT denies PEIC's assertion that PEIC never consented to this extension of ITT's indemnity obligation (id., ¶ 114). Thus, PEIC and ITT disagree as to whether or not PEIC agreed, explicitly or otherwise, to provide liability coverage for that extended period of time.

Since May 2005, ITT has not received any reimbursement from PEIC pursuant to its claims under the insuring obligations (Counterclaims, ¶¶ 12-14). In August 2005, PEIC informed ITT that it was disclaiming coverage for the Silica Suits (id., ¶ 16). ITT contends that while PEIC has paid it over $6,000,000 in connection with the Silica Suits, it still owes ITT over $30,000,000 in defense, investigation and settlement costs for the Silica Suits under the 1985 Policy (id., ¶¶ 12, 16).

ITT has filed the following counterclaims against PEIC: (1) breach of contract, based upon an alleged "claims handling agreement"; (2) breach of insuring agreement; (3) declaratory judgment that PEIC is obligated to indemnify ITT for the Silica Suits under the 1985 Policy; (4) equitable subrogation; (5) contribution; (6) replenishment of limits; (7) declaratory judgment that PEIC is obligated to provide coverage for ITT for silica claims brought directly against ITT; and (8) for statutory remedies pursuant to Pa. Stat. Ann. § 8371.

In this motion, PEIC contends that ITT's first, fourth, seventh and eighth counterclaims are subject to dismissal because they fail to state cognizable causes of action under

New York law.

First Counterclaim – Breach of Contract

In its first counterclaim, ITT asserts that PEIC breached a purported claims handling agreement, which ITT claims is a "contract," pursuant to which PEIC allegedly incurred "contractual obligations" (Counterclaims, ¶¶ 20-29). However, no such "contract" or "agreement" is attached to ITT's pleadings, and the counterclaim does not identify with specificity any details of the alleged agreement. Instead, ITT asserts only that:

> [I]n or about 1992 and continuing until the present, Pacific Employers agreed to pay a portion of ITT's Silica Suit Losses, and in fact had from time-to-time paid a portion of ITT's Silica Suit Losses, under a claims handling agreement.

Counterclaims, ¶ 11. ITT then contends, in its first counterclaim, that PEIC has breached this "agreement":

> On or about August 24, 2005, Pacific Employers refused to meet these contractual demands and refused to acknowledge, accept or undertake, its contractual obligations. In so doing, Pacific Employers' obligations under the claims handling agreement with regard to the Silica Suits have been breached.

First Counterclaim, ¶ 27. However, nowhere in the counterclaims does ITT state the date of the alleged agreement, the duration of the alleged agreement, the parties to the alleged agreement or the signatories to the alleged agreement, or cite any of the alleged agreement's actual provisions.

In order to prevail on a breach of contract claim, a plaintiff must properly identify the alleged contract that forms the basis for its claim. "In an action to recover damages for breach of contract, the complaint must, inter alia, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract"

(Chrysler Capital Corp. v Hilltop Egg Farms, Inc., 129 AD2d 927, 928 [3d Dept 1987] [citations omitted]; accord Caniglia v Chicago Tribune-New York News Syndicate, Inc., 204 AD2d 233 [1st Dept 1994]; Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd., 5 Misc 3d 285 [Sup Ct, NY County 2004]). ITT has failed to do either. Instead, ITT makes vague, conclusory statements with respect to an alleged claims handling agreement which it fails to adequately identify, and then simply concludes that it is a "contract," so that it can assert that PEIC breached it.

For instance, ITT fails to allege when the purported claims handling agreement was actually entered into, the identity of the parties to the alleged agreement, or any of the alleged agreement's actual provisions. It also fails to identify the particular PEIC insurance policy or policies under which any such payments were to be made, or the particular type of coverage allegedly afforded by whatever PEIC policy or policies ITT claims to be applicable.

Moreover, although ITT refers to an alleged allocation ratio and "percentage of indemnity costs" that PEIC agreed to pay pursuant to this "agreement," it does not specify any numbers which correlate to the alleged ratio, or even assert that such a "ratio" was contained within any such "agreement" (see First Counterclaim, ¶¶ 23-25). ITT's reference to such an allocation ratio is meaningless in the absence of specifics regarding all of the participants in the alleged allocation, the actual numbers and percentages involved, and the duration of the alleged agreement.

Where a breach of contract claim is pleaded in a complaint, but is subject to a motion to dismiss for failure to state a claim because the alleged contract is not properly referenced in the complaint, the remedy is dismissal of that claim:

> The IAS court properly dismissed ... the plaintiff's amended

> complaint, purporting to set forth a cause of action for breach of a 1976 contract between the members of a New Delhi, India family ... for plaintiff's **failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract**, including the specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the amount of financial support which defendant ... or other family members were required to provide or the length of time during which that support had to be provided before their contractual obligations concluded.

Sud v Sud, 211 AD2d 423, 424 (1st Dept 1995) (emphasis added; citations omitted).

Likewise, here, the alleged existence of a claims handling agreement alone, without a specific description of its terms, is too vague and indefinite to be enforceable, as a matter of law. Accordingly, ITT's first counterclaim is dismissed (id.; see e.g. Sheridan v Trustees of Columbia University, 296 AD2d 314 [1st Dept 2002], lv denied 99 NY2d 505, cert denied 539 US 904 [2003] [court dismissed breach of contract claim, based on an alleged, post-degree agreement under which plaintiff gave defendant a promissory note in exchange for defendant's promise to release his transcript, because it did not allege the essential terms of the note or the agreement in nonconclusory language, or plaintiff's performance of his obligations thereunder]; Gordon and Breach Science Publishers, Inc. v New York Systems Exchange, Inc., 267 AD2d 52, 52 [1st Dept 1999] [breach of contract cause of action dismissed "since plaintiff failed in its pleading to identify the contractual provisions IBM breached"]; Shield v School of Law, Hofstra University, 77 AD2d 867 [2d Dept 1980] [failure to set forth in the complaint relevant portions of the contract allegedly breached required dismissal of the complaint]).

In response to the dismissal motion, ITT makes the inaccurate assertion, citing paragraphs 179-183 of the complaint, that in its fifth claim for relief, "[PEIC] has alleged that it

performed under the claims handling agreement and that, pursuant to its terms, [PEIC] is entitled to reimbursement" (ITT Mem., at 6). However, a close reading reveals that PEIC, in fact, makes no such allegations. Its fifth claim for relief speaks only of payments by PEIC made "pursuant to the contractual liability coverage of the relevant PEIC policy," not ITT's alleged claims handling agreement (see Complaint, ¶¶ 179-183).

ITT also argues that the motion to dismiss should be denied, as "ITT need only refer to the provisions of the agreement upon which liability is predicated" (ITT Mem., at 6). However, none of the decisions relied upon by ITT, the most recent of which was issued more than 40 years ago, support this proposition. For example, although the Court in King v Kritscher Mfg. Co., (220 AD 584 [1st Dept 1927]) held that "a complaint need not state every detail of a contract," the Court also stated that a complaint must "show the existence of its essential elements" (id. at 585). The Court further held that because "[t]here is no contract alleged in this case," the complaint had to be dismissed (id.) Similarly, while the Court in Berdych v Bell Aerospace Corp. (19 AD2d 582 [4th Dept 1963]) held that "it is generally unnecessary to set forth the contract in full," the Court also held that "the provisions upon which the plaintiff's claim is based must, nevertheless, be set out" (id. at 582).

Accordingly, ITT's first counterclaim is dismissed.

Fourth Counterclaim – Equitable Subrogation

In its fourth counterclaim, based on a theory of equitable subrogation, ITT contends that PEIC was obligated under the comprehensive general liability provisions of all of the PEIC Primary Policies, including the 1985 Policy, to defend and indemnify PGS from and against the Silica Suits. This is in addition to any obligation that PEIC may have had to

indemnify ITT based on the contractual liability provision in the 1985 Policy and Endorsement 44 thereto (as discussed above) regarding ITT's contractually assumed obligations. ITT further contends that, in fulfilling its own independent contractual obligation, it also fulfilled PEIC's obligations to PGS, so that ITT should be equitably subrogated to the rights of PGS under the PEIC policies.

In support of this contention, ITT alleges that:

> On September 12, 1985 ("Closing Date"), ITT and Pacific Coast Resources entered into an Agreement and Purchase and Sale of the Capital Stock of Pennsylvania Glass Sand ("Stock Sale Agreement"). Pursuant to the Stock Sale Agreement, ITT entered into a *contractual obligation to Pennsylvania Glass Sand Corporation* (Pennsylvania Glass Sand) for certain claims asserted against Pennsylvania Glass Sand seeking damages because of bodily injury arising out of exposure to silica prior to the Closing Date ("Silica Suits").

Counterclaims, ¶ 9 (emphasis added). ITT further alleges that:

> 41. Pursuant to the Stock Sale Agreement, ITT contractually agreed to indemnify Pennsylvania Glass Sand for Silica Suits involving bodily injury (including exposure) prior to the Closing Date. As set forth in the Stock Sale Agreement, this indemnity obligation was intended to be expressly covered by the Policy.
>
> * * *
>
> 43. Pursuant to the Policy and/or Pacific Employers Primary Policies, Pacific Employers is, and was always, primarily obligated to defend and indemnify Pennsylvania Glass Sand from and against the Silica Suits.
>
> * * *
>
> 45. ITT, by fulfilling its indemnity obligations pursuant to the Stock Sale Agreement, has satisfied Pacific Employers' obligation under the Policy and/or the Pacific Employers Primary Policies to defend and indemnify Pennsylvania Glass Sand from and against the Silica Suits, and ITT has become subrogated to the rights and remedies of

> Pennsylvania Glass Sand against Pacific Employers to enforce Pacific Employers' obligation under the Policy and/or the Pacific Employers Primary Policies to defend and indemnify Pennsylvania Glass Sand from and against the Silica Suits.

Fourth Counterclaim, ¶¶ 41, 43, 45.

However, the Stock Sale Agreement was between ITT and PCR, not ITT and PGS. Pursuant to section 5.1(b) of the Stock Sale Agreement, which addresses indemnification for lung disease claims, ITT agreed to indemnify PCR, not PGS:

> Seller [ITT] agrees to indemnify Buyer [PCR] ... against, and reimburse it for, any out-of-pocket damage, loss, cost or expense ... reasonably incurred by Buyer [PCR] ... that arise out of claims, demands, or causes of action ... that have been brought or asserted, or are brought or asserted after the Closing Date, by third parties ... against PGS alleging that the pre-Closing acts or omissions of Seller or PGS resulted in, caused or contributed to any lung disease, including, without limitation, silicosis and any such disease caused by exposure to attapulgite dust.

It seems clear that the indemnitee under this Agreement as written, was PCR, not PGS. It is equally clear from the remainder of the language of the section that there is no textual foundation for ITT's averment at paragraph 41 of the fourth counterclaim that: "As set forth in the Stock Sale Agreement, this indemnity obligation was intended to be expressly covered by the Policy."

ITT did, however, secure from PEIC coverage for its indemnity obligation as set forth in the original Stock Sale Agreement by means of Endorsement No. 44 to the PEIC Policy, which states:

> It is understood and agreed that the contractual Liability coverage provided by this policy shall apply to those liabilities assumed by ITT Corporation in the "Contract of Sale" Section 5.19(b) Lung Disease.

* * *

> "Contract of Sale" means the sales agreement entered into between ITT Corporation and the Buyers of Pennsylvania Glass Sand.

Endorsement 44 to the 1985 Policy.

Reading the relevant provisions of the Stock Sale Agreement and the PEIC Policy together, it appears that the obligation that was insured by Endorsement No. 44 was ITT's contractual obligation to indemnify PCR, the buyer of PGS, for stated costs and expenses associated with the defense and payment of certain Silica Claims. Contrary to ITT's arguments, Endorsement No. 44 does not promise coverage to PGS directly for any such costs and expenses. Consequently, to the extent that ITT may have carried out its indemnity obligations by paying any of the Silica Claims against PGS/USS and has not been reimbursed by PEIC, ITT arguably has a cause of action in its own name based on its own alleged rights. However, it cannot be equitably subrogated to any asserted right of PGS/USS, since PGS/USS had none under Endorsement No. 44.

Thus, contrary to ITT's allegations in paragraph 43 of the fourth counterclaim, PEIC was not "primarily obligated to defend and indemnify Pennsylvania Glass Sand from and against the Silica Suits." Instead, ITT itself had contractually assumed that "primary obligation." Whatever obligation that PEIC had, if any, was owed to ITT in connection with insuring ITT's own contractual indemnification obligation to PCR, and later to PGS/USS. That obligation was limited to indemnifying PCR against damage, etc. reasonably incurred by PCR, which arise out of claims brought or asserted against PGS alleging that acts or omissions of PCR or PGS resulted in lung disease, etc.

Likewise, contrary to ITT's allegations in paragraph 45, to the extent that ITT

fulfilled its indemnity obligations pursuant to the Stock Sale Agreement, it satisfied its own obligation under that Agreement to defend and indemnify PGS from and against the Silica Suits. ITT therefore could not "become subrogated to the rights and remedies of Pennsylvania Glass Sand" against PEIC for defense and indemnification because PGS had no such rights and remedies; rather, arguably only ITT had any rights to coverage, given the provisions of Endorsement No. 44 of the PEIC Policy and the Stock Sale Agreement.

Under New York law, "equitable subrogation" refers to an insurer's rights as an equitable subrogee against a third party, which rights will "accrue upon payment of the loss and are based upon the principle that in equity an insurer, which has been compelled under its policy to pay a loss, ought in fairness to be reimbursed by the party which caused the loss" (Federal Ins. Co. v Arthur Andersen & Co., 75 NY2d 366, 372 [1990]; accord Trans-Resources, Inc. v Nausch Hogan and Murray, 298 AD2d 27 [1st Dept 2002]). The rights of an insurer as equitable subrogee against a third party are derivative and limited to such rights as the insured "would have had against such third party for its default or wrongdoing" (Ocean Acc. & Guar. Corp. v Hooker Electro-Chemical Co., 240 NY 37, 47 [1925]; accord USAA Cas. Ins. Co. v Brown, 206 AD2d 470 [2d Dept 1994]). Consequently, an insurer can only recover if the insured could have recovered, and its claim as subrogee is subject to whatever defenses the third party might have asserted against the insured (American Sur. Co. of New York v Town of Islip, 268 AD 92 [2d Dept 1944]; accord Federal Ins. Co. v Arthur Andersen & Co., 75 NY2d at 372).

More specifically, equitable subrogation:

> is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter, so

> long as the payment was made either under compulsion or for the protection of some interest of the party making the payment, and in discharge of an existing liability.

Gerseta Corp. v Equitable Trust Co. of New York, 241 NY 418, 425-26 [1926]; accord Korea Commercial Bank v Ianos, 236 AD2d 249 [1st Dept 1997]; Med. Malpractice Ins. Assn. v Medical Liability Mut. Ins. Co., 86 AD2d 476 [1st Dept], appeal denied 57 NY2d 604 [1982]). Thus, to be entitled to equitable subrogation, a party must: (1) have made a payment; (2) to discharge another's obligation; and (3) such payment must not have been purely voluntary (23 NY Jur2d, *Contribution* § 117 [2006]).

Applying these general principles, it is clear that ITT's equitable subrogation claim fails as a matter of law. First, ITT has not made any payment to discharge another's obligation. ITT did not make any defense or indemnity payments on behalf of PGS/USS for the Silica Claims in order to discharge any PEIC obligation to PGS/USS. Rather, ITT did so: (1) in order to discharge its own obligations to PGS/USS; and (2) to discharge PGS/USS's obligations to third-party claimants who brought suits and claims arising from silica exposure. Thus, PGS has no rights against PEIC under the 1985 Policy with respect to payments that ITT made on PGS's behalf pursuant to ITT's obligations arising from the Stock Purchase Agreement, since ITT would have been paying its own obligations pursuant to the ITT Indemnity. Since PGS had no rights against PEIC, ITT has no rights as PGS's alleged "equitable subrogee" (see Korea Commercial Bank v Ianos, 236 AD2d at 250 [theory of equitable subrogation does not apply where the party seeking to benefit from the claim is paying its own debt]; Pathe Exchange v Bray Pictures Corp., 231 AD 465, 469 [1st Dept 1931] ["Subrogation is an equitable remedy not given to one who merely pays his own debt"]).

Second, ITT has not made an involuntary payment. Rather, in agreeing to indemnify PCR for certain of PGS's silica liabilities, ITT did so voluntarily. ITT was not obligated to indemnify PCR for PGS's liabilities in connection with certain Silica Claims until ITT assumed that obligation under the 1985 Stock Purchase Agreement. A volunteer is not entitled to the right of subrogation (Kiendl v Cochrane, 153 AD 802 [1st Dept 1912]; accord Bermuda Trust Co. Limited v Ameropan Oil Corp., 266 AD2d 251 [2d Dept 1999]). The fact that ITT became subject to enforcement of its contractual obligation by PCR and its successors in interest does not change the initial voluntary assumption of that payment, which ITT presumably took in furtherance of its own business interests.

Accordingly, any payment for the Silica Claims made by ITT to indemnify PGS/USS was made pursuant to ITT's independent contractual obligations to PGS pursuant to other policy provisions. Thus, ITT has no equitable subrogation rights, and the fourth counterclaim must be dismissed.

Seventh Counterclaim – Declaratory Judgment

In its seventh counterclaim, ITT seeks a declaration that:

> To the extent that any of the Silica Suits is asserted directly against ITT as a responsible party and not against Pennsylvania Glass Sand, ITT seeks a declaration that Pacific Employers is obligated to provide coverage to ITT pursuant to the terms of the Pacific Employers Primary Policies.

Seventh Counterclaim, ¶ 58. ITT defines the Silica Suits as "certain claims asserted against Pennsylvania Glass seeking damages because of bodily injury arising out of alleged exposure to silica prior to the Closing Date ("Silica Suits")" (Counterclaims, ¶ 9). ITT does not aver that claims have actually been asserted directly against it. To the contrary, in its answer, ITT

discloses that "[o]n information and belief, ITT denies that it has been identified as a defendant in the Underlying Silica Claims" (Answer, ¶ 116). Accordingly, the seventh counterclaim does not present a justiciable controversy, and is dismissed.

> CPLR 3001 provides that:
>
> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.

A necessary predicate for entertaining a declaratory judgment action is that the claim involve a justiciable controversy. "[A] declaratory judgment action requires an actual controversy between parties having a stake in the outcome ... and is routinely used to resolve coverage issues with respect to claims against insureds" (Mt. McKinely Ins. Co. v Corning Inc., 33 AD3d 51, 56 [1st Dept 2006] [citations omitted]).

Conversely, it is well settled that "courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass" (New York Public Interest Research Group, Inc. v Carey, 42 NY2d 527, 531 [1977] [citation omitted]). If an action has not yet been commenced, any declaration of rights will be purely advisory, so that no justiciable controversy justifying commencement of a declaratory judgment action will be deemed to exist and any claim for declaratory relief must be dismissed (Employers' Fire Ins. Co. v Klemons, 229 AD2d 513 [2d Dept 1996]).

Accordingly, a necessary precondition to ITT's seventh counterclaim is some factual allegation or admission that ITT itself faces liability for the Silica Suits. However, ITT

admits in its answer that there are no Silica Suits asserted directly against it. Thus, the seventh counterclaim does not present a justiciable controversy. Rather, ITT's attempt to seek a declaratory judgment with respect to claims that do not now exist but may come into being at some unidentified point in the future represents nothing more than an attempt to obtain an advisory opinion. Where a future event that could give rise to indemnification is beyond the control of the parties and might never occur, a declaratory judgment claim is premature (Kings Park Industries, Inc. v Affiliated Agency, Inc., 22 AD3d 466 [2d Dept 2005]; Sokoloff v Town Sports Intl. Inc., 6 AD3d 185 [1st Dept 2004]). Without a justiciable controversy, a declaratory judgment action is purely advisory, and must be dismissed (Employers' Fire Ins. Co. v Klemons, 229 AD2d at 514).

Indeed, Judge Robreno reached the same conclusion with respect to the identical ITT claim asserted against PEIC as Count V of the Pennsylvania action. After reviewing applicable case law construing the Federal Declaratory Judgment Act, Justice Robreno held that:

> The dispute in Count V meets neither the "actual controversy" standard of the Declaratory Judgment Act, nor is it ripe for judicial determination. As far as the Court can tell, Count V involves a hypothetical state of facts, stating a "nebulous and contingent" controversy.

ITT Industries, Inc. v Pacific Employers Insurance Company, 427 F Supp 2d 552, 560 (ED Pa 2006).

Accordingly, ITT's seventh counterclaim fails to present a justiciable controversy, and must be dismissed.

Eighth Counterclaim – Pennsylvania Bad Faith Statute

ITT alleges that, under the 1985 Policy, PEIC is obligated to defend and

indemnify ITT against the Silica Suits, and that PEIC breached that obligation, which breach "is unreasonable, frivolous, unfounded or otherwise in violation of 42 Pa. Stat. Ann. § 8371" (Eighth Counterclaim, ¶¶ 60-61).

ITT fails, however, as a matter of Pennsylvania law, to plead a cognizable bad faith cause of action under Pa. Stat. Ann. § 8371 (the PA Bad Faith Statute). In order to adequately plead a cause of action for bad faith under section 8371, ITT must allege that: (1) PEIC lacked a reasonable basis for denying coverage under the PEIC policy; and (2) PEIC knew or recklessly disregarded its lack of reasonable basis (Klinger v State Farm Mut. Ins. Co., 115 F3d 230 [3d Cir 1997]; Terletsky v Prudential Property & Cas. Ins. Co., 437 Pa Super 108 [1994], appeal denied 540 Pa 641 [1995]).

Even viewed in its most favorable light, the eighth counterclaim fails to allege either element. At most, ITT alleges that PEIC breached its purported coverage obligation by not making further reimbursement of Silica Suit Losses since May 2005 (Eighth Counterclaim, ¶ 61). ITT makes no allegation that PEIC's behavior lacked any reasonable basis, or that PEIC knew or recklessly disregarded its lack of reasonableness in denying such claims. Instead, ITT simply contends:

> 61. On or about August 24, 2005, Pacific Employers breached its obligation to defend and indemnify ITT from and against the Silica Suits. Furthermore, for a period extending from approximately May 2005, continuing until the present, Pacific Employers has failed or refused to make any payment or reimbursement of the costs and legal expenses of the Silica Suits. Pacific Employers' breach and failure or refusal to pay insurance proceeds is unreasonable, frivolous, unfounded or otherwise in violation of 42 Pa. Stat. Ann. § 8371.

Without any factual obligations to support it, ITT's conclusory characterization of PEIC's conduct as "unreasonable, frivolous, unfounded, or otherwise in violation of" the PA Bad

Faith Statute cannot sustain ITT's bad faith claim. Accordingly, because ITT has failed to adequately plead a cause of action under the PA Bad Faith Statute, the eighth counterclaim must be dismissed.

The court also notes that it is doubtful that the PA Bad Faith Statute would be applicable to this case. Paragraph 6.9 of the Stock Sale Agreement explicitly provides that "This Agreement shall be construed and enforced in accordance with, and governed by, the laws of the State of New York, without application of any choice of law provisions if the same would require any law other than the laws of New York" (Shuster Aff., Exh A, § 6.9). In addition, the PEIC policies were issued to ITT in the state of New York. Thus, it is likely that New York law will govern the rights and duties under those policies (see Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 AD2d 44, 50 [1st Dept 2001] ["Given the nationwide scope of Sentinel's operations, the principal location of the insured risk should be deemed to be the State where Sentinel is incorporated and has its principal place of business, from which it negotiated the Special Terms of the Policy, and where the Policy presumably was delivered to it (thus constituting the state where the contract was made)"]).

II. PEIC's Motion for an Anti-suit Injunction (Motion Sequence No. 044)

For the past 15 years, the Los Angeles Superior Court (the California Court) has exercised jurisdiction over and been actively managing a consolidated and comprehensive insurance coverage dispute between ITT, the ACE Insurers, and the rest of ITT's insurers with respect to coverage under ITT's liability policies, including the primary general liability policies issued by PEIC to ITT. During that time, ITT has sought to litigate all coverage disputes related to its pre-1986 general liability coverage, in California, whether the disputes concerned ITT's

primary or excess coverage, whether the underlying claims were for environmental property damage or bodily injury, or whether the underlying claims allegedly arose out of ITT's products.

In February 2003, after ITT filed an action entitled Cannon Electric, Inc. et al. v ACE Property & Casualty Insurance Company, et al, in the Los Angeles County Superior Court, Case No. BC 290354 (the California 354 Action), the California Court ruled that the California 354 Action was related to two other comprehensive coverage actions involving ITT's historic insurance program pending before the California Court, ITT Corporation d/b/a General Controls v Pacific Indemnity Co., Los Angeles Superior Court Case No. 037585 (filed September 16, 1991) and ITT Industries, Inc. v Pacific Employers Ins. Co., Los Angeles County Superior Court Case No. 0185311 (filed February 3, 1998). On August 27, 2001, these two cases were consolidated for all purposes as ITT Industries, Inc. v Pacific Employers Ins. Co., Los Angeles County Superior Court Case No. 037585 (ITT's three comprehensive coverage actions are collectively referred to herein as the California Litigation).

From the inception of the California 354 Action, ITT sought to adjudicate its rights to insurance coverage under primary, excess and umbrella policies for liabilities stemming from product liability suits alleging injury from silica, as well as asbestos. It is beyond dispute that the California Court has jurisdiction over the silica-related coverage disputes. On July 19, 2006, this court severed and stayed the ACE Insurers' claims against ITT's excess and umbrella insurers, pending resolution of the California Litigation.

On August 8, 2006, ITT filed its fourth amended complaint in the California 354 Action, in which it added specific claims for coverage for the underlying Silica Claims against the ACE Insurers, and naming USS as a defendant.

On October 5, 2006, the California Court held a conference to discuss the status of the California 354 Action (David Luttinger Aff., ¶ 8). At the conference, the ACE Insurers informed the California Court that they would be challenging the California Court's jurisdiction and filing a forum non conveniens motion (Transcript of Status Conference, at 8-12 [Luttinger Aff., Exh 5]). During that status conference, ITT informed the ACE Insurers and the California Court that it intended to file a motion for summary adjudication concerning the ACE Insurer's defense obligation as to the Silica Suits (id. at 44-45).

On October 27, 2006, the ACE Insurers filed a motion to dismiss ITT's fourth amended complaint on the ground of forum non conveniens. On the same day, ITT filed a motion seeking an injunction to prevent the ACE Insurers from interfering with the California Court's jurisdiction. ITT's motion for injunctive relief seeks to prohibit the ACE Insurers from taking any further action: (1) that threatens the jurisdiction of the California Court; (2) that raises the specter of reaching results in the New York action inconsistent with results reached by the California Court; (3) against any other parties to the instant case which creates the potential for inconsistent results; (4) against any umbrella or excess insurer of ITT that is also subject to the California Court's jurisdiction; (5) against any primary, umbrella, or excess insurer of ITT that did not provide coverage for PGS; (6) against any primary, umbrella or excess insurer of ITT that has exhausted its product liability/completed operations limits of liability or has been dismissed from the California 354 Action; or (7) that otherwise challenges the proper jurisdiction of the California Court or creates the potential for impeaching, undermining or reversing prior rulings of the California Court.

On November 6, 2006, ITT also made a motion in the California Court seeking an

order that PEIC is required to reimburse the ongoing defense costs by ITT in connection with 12,684 pending silica suits (see Shuster Aff., Exh J). On November 15, 2006, the ACE Insurers made an ex parte application seeking to change the hearing date of ITT's summary adjudication motion. In the ACE Insurers' ex parte application, it stated that it had decided that "further discovery was unnecessary to oppose [ITT's defense] motion" (see Luttinger Aff., Exh 7, at 2:17-18).

The ACE Insurers now seek a preliminary injunction: (1) enjoining ITT from prosecuting the California 354 Action regarding the PEIC primary policies issued to ITT, including ITT's pending motion for summary adjudication on the defense obligation; and (2) prohibiting the California Court from ruling on ITT's motion for an anti-suit injunction against the ACE Insurers. The ACE Insurers contend that an injunction barring ITT from further prosecuting the California 354 Action is necessary, as it will prevent ITT from effectively divesting this court of jurisdiction over issues relating to primary coverage for the underlying Silica Claims.

The doctrine of comity militates against staying proceedings previously commenced in a foreign court of competent jurisdiction (see Indosuez Internatl. Finance B.V. v National Reserve Bank, 263 AD2d 384 [1st Dept 1999]). Thus, "[t]he use of the injunctive power to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed, for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal" (Arpels v Arpels, 8 NY2d 339, 341 [1960]). Accordingly, it is only in extraordinary cases that New York courts will refuse to apply the rule of comity, which forbids the granting of an injunction to stay proceedings, which have been commenced in a foreign court of competent

jurisdiction (Roman v Sunshine Ranchettes, Inc., 98 AD2d 744 [2d Dept 1983]; accord Miller v Wincott, 8 Misc 3d 1002(A) [Sup Ct, Nassau County 2005]). Unless the ACE Insurers clearly show that the California Litigation was brought by ITT to evade some state's law, or was brought by ITT in bad faith, or with an intent to vex, annoy or harass the ACE Insurers, an injunction should not be granted (Paramount Pictures, Inc. v Blumenthal, 256 AD 756 [1st Dept], appeal dismissed 281 NY 682 [1939]; Sarcpa, S.A. v Pepsico, Inc., 225 AD2d 604 [2d Dept 1996]).

Where, as here, there is no clear evidence of exceptional circumstances that would justify injunctive relief enjoining prosecution of a foreign action, the injunction will not be granted (see e.g. Roman v Sunshine Ranchettes, Inc., 98 AD2d at 744; Paramount Pictures, Inc. v Blumenthal, 256 AD at 756; see also E.B. Latham & Co. v Mayflower Indus., 278 AD 90 [1st Dept 1951]).

The ACE Insurers argue that a preliminary injunction is necessary for three reasons: (1) to end ITT's attempts to avoid litigating under New York law; (2) to thwart ITT's "campaign of vexing, annoying and harassing litigation," and to spare additional time and resources associated with simultaneously litigating in both New York and California; and (3) to prevent ITT from divesting this court of jurisdiction to consider issues relating to primary coverage for the underlying silica claims (The ACE Insurers Mem., at 9-10). None of these reasons compels the grant of a preliminary injunction in this case. Contrary to the ACE Insurers' assertions, ITT has taken no action in California to divest this court of jurisdiction to consider whether Endorsement 44 contractually obligates the ACE Insurers to indemnify ITT for underlying silica claims, or to avoid having the question answered pursuant to New York law. Similarly, no showing of vexing, annoying or harassing litigation that could justify a grant of

injunctive relief, has been made here.

No facts have been adduced to support the assertion that the California Litigation was brought to evade New York law. In Paramount Pictures, 256 App Div at 759, the First Department discussed what it means to "evade the law of the domicile of the parties" in the context of an anti-suit injunction. As discussed, the classic example of such conduct takes place when a party files an action in a foreign jurisdiction to take advantage of a law that is more favorable to it than the law in force in the state of the parties' domicile (id.).

The main premise of the ACE Insurers' argument appears to be that ITT automatically avoids the application of New York law simply by being before a California court. This is incorrect. California choice of law is governed by Hurtado v Superior Court, 11 Cal 3d 574 [1974]). Pursuant to Hurtado, if there is a "false conflict" – meaning no difference between California law and New York law, then California law is applied. But if there is a "true conflict," then the California court applies the law of the forum with the most substantial interest in the outcome of the matter, as does New York (id.).

In the first significant issue between the parties – i.e., whether the ACE Insurers must reimburse ITT's defense costs for its 12,684 currently-pending silica suits – there is simply no "conflict" between California and New York law. ITT's California defense motion is based upon principles of law that are well settled in both California and New York. In both jurisdictions, the defense obligation arises whenever allegations against the insured state a claim to which the policy potentially applies, even if the allegations are groundless, false, or fraudulent (see e.g. Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 310 [1984] [duty to defend arises whenever allegations in complaint fall within scope of risks undertaken by insurers, regardless of

how "false or groundless those allegations might be"]; Horace Mann Ins. Co. v Barbara B., 4 Cal 4th 1076, 1081 [1993] ["carrier must defend a suit which *potentially* seeks damages within the coverage of the policy" [citations omitted] [emphasis in original]). Similarly, in both jurisdictions, an insurer must defend the entirety of each potentially covered suit, even if some of the allegations in the complaint fall within the terms of coverage, and some do not (Seaboard Sur. Co. v Gillette Co., 64 NY2d at 310 [it is not material that the complaint asserts additional claims which fall outside policy's general coverage]; Horace Mann Ins. Co. v Barbara B., 4 Cal 4th at 1081 [insurer is obligated to defend against both covered and uncovered claims]). Finally, to determine whether an insurer has a duty to defend, courts in both jurisdictions look to the factual allegations of the complaint (Seaboard Sur. Co. v Gillette Co., 64 NY2d at 310 [duty to defend "rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased"]; Horace Mann Ins. Co. v Barbara B., 4 Cal 4th at 1081 [determination is made by comparing "allegations of the complaint with the terms of the policy"]).

Since the ACE Insurers have identified no difference between California and New York law that would motivate ITT to want to avoid a New York forum, the ACE Insurers' claim that ITT is attempting to avoid New York law or has engaged in forum shopping makes no sense.

Second, the ACE Insurers fail to demonstrate that ITT has acted vexatiously, or with the intent to harass the ACE Insurers. For litigation to be vexatious, "it must be shown that it [was] instituted maliciously and without probable cause" (Paramount Pictures, Inc. v Blumenthal, 256 AD at 760).

Here, the ACE Insurers present no evidence that the California Litigation or ITT's

fourth amended complaint in the California 354 Action were brought maliciously and without probable case. Rather, the ACE Insurers merely make conclusory assertions that "an injunction would thwart ITT's campaign of vexing, annoying and harassing litigation against the ACE Plaintiffs" (the ACE Insurers Mem., at 9). To the contrary, the California Litigation is apparently designed to comprehensively resolve ITT's coverage disputes with its historic liability insurers.

Indeed, the main argument appears to be that an injunction should issue because movant may have to incur "additional legal expenses" related to the California Litigation (the Ace Insurers Mem., at 10). However, mere inconvenience or hardship, or the claim that the movant will be required to incur the expense of litigating in a foreign court, are not sufficient grounds for interference with the foreign action and a party's choice of forum (id.; Indosuez Intl. Finance B.V. v National Reserve Bank, 263 AD2d at 384; Leif B. Pederson, Inc. v Weber, 128 AD2d 453, 455 [1st Dept 1987]).

Although the ACE Insurers cite to Jay Franco and Sons Inc. v G Studios LLC, No. 602236/05, 2006 NY Misc LEXIS 2883 [Sup Ct, NY County June 14, 2006] for the proposition that an injunction must be granted in this case to avoid duplicative litigation and a waste of judicial resources, their reliance on this case is misplaced. Franco involved an action for return of a deposit made pursuant to a proposed licensing agreement. Over two years after the New York action was commenced, and shortly after the Supreme Court denied a motion to stay the New York action pending arbitration, the defendant filed an action arising out of the same set of facts in California state court. Significantly, even though the California action arose out of the same set of facts as the New York action, when the California action was filed, the defendant advised the California court that the newly filed action "was not related to any other action or

proceeding pending in any state" (id. at * 3). Thereafter, the plaintiff brought a motion for an anti-suit injunction in the New York court to prevent the defendant from further prosecuting the California case. The Supreme Court held that injunctive relief was warranted because the defendant had made a "clearly false" representation to the California court when it alleged that there was no related action. Thus, contrary to the ACE Insurers' arguments, the court's finding was not based on mere inconvenience and hardship presented by the foreign litigation.

Here, in contrast, the California Litigation has been pending for 15 years, and involves many of the same policies and issues involved in this litigation. Unlike in Franco, at no time did ITT misrepresent the related nature of the actions either to this court or the California Court. Indeed, on August 7, 2006, prior to filing the Fourth Amended Complaint, ITT notified this court of its intention to do so (see Luttinger Aff., ¶ 7; Exh 4).

The ACE Insurers' third assertion – that ITT is attempting to divest this court of jurisdiction to consider issues relating to primary coverage for the underlying silica claims – is similarly without merit. The ACE Insurers' request for an injunction is premised on the following misstatement: that ITT has sought an order "prohibiting [the ACE Insurers] ... **from prosecuting or otherwise taking any further action** in ... a lawsuit filed in New York County, New York" (the ACE Insurers Mem., at 6 [emphasis in original]). However, ITT's anti-suit injunction motion filed in California does not seek to enjoin the ACE Insurers from prosecuting its discrete dispute concerning Endorsement No. 44 in this action. Indeed, ITT's anti-suit injunction motion was tailored to carve out of its reach any injunction that would prevent the ACE Insurers from litigating in this court the issue of whether Endorsement 44 obligates the ACE Insurers to indemnify ITT for the Silica Suits. In its memorandum in support of its motion

for an anti-suit injunction, ITT argued that:

> [I]f ACE is prohibited from litigating disputes over policies and claims already before this Court, then the New York Action may proceed on the merits of Endorsement 44 without affecting the rights of any party issuing only general liability coverage.

Shuster Aff., Exh A, at 4:20-23. As such, the ACE Insurers' assertion that ITT is seeking to divest this court of jurisdiction is completely without merit.

Accordingly, the ACE Insurers are not entitled to a preliminary injunction because no exceptional circumstances exist upon which such injunctive relief could be based.

The ACE Insurers' alternative motion for an order enjoining ITT from further prosecuting the California anti-suit injunction motion is also denied. As grounds for its request, the ACE Insurers rely upon a previous decision issued by this court in Columbus Hockey Ltd. v National Hockey League, 1998 NY Misc LEXIS 697 [Sup Ct, NY County 1998], in which this court enjoined the parties to an action in this court from seeking an order in a parallel Ohio action restricting, enjoining or limiting (1) the prosecution or defense of any claims or cross claims in the New York action; and (2) any party in the Ohio action from defending or prosecuting any claims by or against the NHL and Nationwide in the New York action.

Columbus Hockey League does not, however, support the ACE Insurers' alternative request for relief. That case involved competing anti-suit motions – with both parties seeking to enjoin the other from proceeding in the foreign action. The situation here is materially different. ITT's anti-suit motion does not seek to prevent this court from adjudicating the dispute under Endorsement 44. Indeed, when ITT drafted its anti-suit motion in the California 354 Action, it was careful to carve out the prosecution of the ACE Insurers' contractual obligation pursuant to Endorsement 44 – the subject matter of the parties' dispute here. As such, there is no

need to enjoin ITT from prosecuting its anti-suit injunction motion.

Accordingly, the ACE Insurers' motion for an injunction is denied.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of plaintiff Pacific Employers Insurance Company for an order dismissing defendant ITT Industries, Inc.'s first, fourth, seventh and eighth counterclaims (Motion Sequence No. 042) is granted, and the first, fourth seventh and eighth counterclaims are severed and dismissed; and it is further

ORDERED that the motion of Pacific Employers Insurance Company for an injunction (Motion Sequence No. 044) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 12, 2007

ENTER:

J.S.C.

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