

**ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.**

2007 NY Slip Op 32597(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0600133/2006

Judge: Herman Cahn

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

PRESENT: **HERMAN CAHN**

PART 49

Index Number : 600133/2006  
ACE FIRE INDERWRITERS INS. CO.

vs  
ITT INDUSTRIES, INC.

Sequence Number : 048  
STAY PROCEEDINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/11/07  
MOTION SEQ. NO. 048  
MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

AUG 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: 8/15/07 Herman 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: PART 49

-----X  
ACE FIRE UNDERWRITERS INSURANCE  
COMPANY, et. al.,

Plaintiffs

-against-

Index No. 600133/06

ITT INDUSTRIES, INC., et al.,

Defendants.

-----X  
CAHN, J.

FILED  
AUG 21 2007

COUNTY CLERK'S OFFICE  
NEW YORK

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.

In a previous motion, ITT moved to sever and stay the contribution claims of plaintiff Pacific Employers Insurance Company (PEIC), one of the ACE Insurers, against ITT's excess and umbrella insurers, in favor of a more comprehensive coverage action pending in California since 1991 (the California Litigation). The California Litigation was filed by ITT and involves many of the same insurers and policies at issue in this action, including PEIC and its affiliates. By decision and order dated July 19, 2006, this court granted ITT's motion.

***The Outstanding Claim Relating to "Endorsement 44 "***

There is currently only one claim involving ITT's insurance currently pending in

this action: PEIC's contractual obligation to indemnify ITT, under Endorsement 44 to PEIC's policy SCG GO 690040-9, against silica-related loss arising from certain claims brought against PGS on or after September 12, 1995 (the Silica Suits). ITT had initially assumed an obligation to indemnify PGS for the Silica Suits on September 12, 1985 when it sold the stock of PGS. PEIC agreed to provide insurance coverage for that obligation by issuing Endorsement 44 on September 13, 1985. ITT's original indemnity obligation was to last until September 12, 1995. In 1995, ITT's indemnity obligation was extended for an additional ten years, until September 12, 2005.

ITT contends that PEIC's Endorsement 44 obligations were similarly extended until September 12, 2005. Between 1995 and 2005, ITT continued to submit its silica suit losses to PEIC for reimbursement pursuant to Endorsement 44, and PEIC continued to pay for, at least in part, those losses. On August 24, 2005, PEIC repudiated its obligations, and stated that it would no longer cover ITT's silica suit-related losses. PEIC claimed it never "consented" to indemnify ITT for silica-related suits filed after September 12, 1995.

The issue of PEIC's contractual obligation to indemnify ITT under Endorsement 44 after September 12, 1995, is also before the California court in the California Litigation. On April 20, 2007, the California Court issued an order granting partial summary judgment to ITT and against PEIC in that action (the California Court's Order). The California Court's Order addressed and resolved the merits of the central dispute at issue in the one claim involving ITT's insurance that remains currently pending in the instant action – whether PEIC is obligated to provide coverage to ITT for ITT's payment of defense costs for the Silica Suits filed on or after September 12, 1995 against USS, ITT's former subsidiary.

ITT now moves for an order, pursuant to CPLR 327, staying that one remaining claim in this action relating to ITT's insurance – the Endorsement 44 issue – pending the outcome of the California Litigation. For the reasons set forth below, ITT's motion is granted.

### ***PROCEDURAL BACKGROUND***

#### ***The Instant Action***

On January 13, 2006, PEIC, along with its affiliates, excess insurers ACE Fire Underwriters Insurance Company, ACE Property & Casualty Company, and Century Indemnity Company, all defendants in the prior-pending California Litigation (collectively, PEIC), filed the instant action against (1) ITT; (2) insurers that issued over 230 primary, umbrella and/or excess insurances policies to ITT between 1967 and 1986; and (3) PGS, ITT's former subsidiary.

The complaint asserted five causes of action that constituted three separate disputes: (1) the dispute between ITT and PEIC over PEIC's obligations to ITT (causes of action 1, 2, 4 and 5); (2) a dispute between PEIC (a primary carrier) and its affiliates and excess and umbrella insurance carriers that issued coverage to ITT over allocation of loss between primary and excess insurers (fourth cause of action); and (3) a dispute between PEIC and PGS over silica suits other than those covered by Endorsement 44 (causes of action 1, 3 and 4).

ITT previously filed two motions in the instant action pursuant to CPLR 3211 (a) (4), each of which sought a partial dismissal of the complaint. In its first motion, ITT moved to dismiss or, in the alternative, sever and stay those causes of action that related to PEIC's contractual obligations under Endorsement 44, on the ground that those claims were already at issue in an earlier-filed action ITT had brought in Pennsylvania. In its second motion, ITT sought an order dismissing, or severing and staying, the complaint as to the insurers that issued

excess and umbrella policies to ITT. The second motion was premised, in part, on the argument that dismissal was appropriate under CPLR 3211 (a) (4) because almost all of the excess insurers and their policies (and issues raised by PEIC's claims against them) were already at issue in the California Litigation.

This court denied ITT's first motion. That decision is currently on appeal.

In a July 19, 2006 decision, this court granted ITT's second motion, and severed and stayed, pursuant to CPLR 3211 (a) (4), PEIC's contribution claims against ITT's excess and umbrella insurers in favor of the California Litigation. This court determined that this result was compelled because those claims:

arise[] from the very same policies at issue in the California Litigation (ITT's umbrella and excess coverage) and the very same type of claims (silica claims). In light of the importance of conserving judicial resources, it makes no sense to duplicate the effort of the California Court in this court. The wheel has already been invented; it need not be reinvented.

*Ace Fire Underwriters Ins. Co. v ITT Industries, Inc.*, 4 Misc 3d 1211(A), \* 7 (Sup Ct, NY County 2006).

On November 20, 2006, this court further expanded on its decision to grant ITT's second motion, and limited the issues that it will decide in this motion to "the meaning, et cetera, of the primary policy issued by Pacific [Employers] Insurance Company, Endorsement 44." Luttinger Aff, Exh 2. This issue is encompassed in the second cause of action in the complaint. With regard to the other issues raised by the complaint, this court deferred to the California Court. *Id.* Thus, the only issue presently being adjudicated in this action is PEIC's second cause of action for declaratory relief regarding its obligations to provide coverage to ITT under

Endorsement 44.

### ***The California Litigation***

The California Litigation includes several related cases, including an action entitled *Cannon Electric, Inc. v Affiliated FM Ins. Co.*, in the Superior Court, County of Los Angeles, Case No. BC 290354 (the 354 Case). In the 354 Case, ITT seeks coverage for, among other things, bodily injury and personal injury claims caused by exposure to products containing silica sand and other material allegedly manufactured, sold, used or distributed by ITT. On February 1, 2007, ITT filed a motion for summary adjudication against PEIC in the 354 Case, seeking, inter alia, a ruling that PEIC is required to reimburse defense costs for the Silica Suits not only under Endorsement 44, but also under the general liability coverage parts of other primary policies issued by PEIC to ITT between 1977 and 1985. PEIC opposed ITT's motion.

On April 20, 2007, the Superior Court of California, County of Los Angeles (Lichtman, J.), issued a decision granting a summary adjudication in favor of ITT that PEIC is required to reimburse it for defense costs related to the Silica Suits. Specifically, the California Court held, inter alia, that:

1. Under the general liability sections of the policies at issue, PEIC has a current obligation to reimburse ITT for the costs that ITT incurs on or after April 20, 2007, the date of the order, for the defense of silica-related suits filed against ITT;
2. Under the general liability sections of the policies at issue, PEIC has a current obligation to reimburse ITT for the defense of silica-related claims filed on or before September 12, 2005 against PGS, which is an additional insured under the policies; and
3. Under the contractual liability coverage part and Endorsement 44 of the 1985

policy, PEIC is obligated to reimburse ITT for the costs paid by ITT prior to August 24, 2005 (the date that PEIC repudiated its obligations) to reimburse PGS for the defense of silica-related suits. California Decision, at 1-3 (Luttinger Aff., Exh 1).

In finding that PGS was also an insured under the general liability provisions of the policies, Judge Lichtman rejected PEIC's argument that it was not obligated to cover PGS because ITT sold PGS in September 1985. *Id.* at 2. Judge Lichtman held that "an insured does not lose its vested insurance status as a result of a stock sale" and that PEIC must be held to its legal commitment to cover PGS regardless of the fact that it was sold. *Id.*

In finding that the contractual liability coverage part and Endorsement 44 of the 1985 policy also provide coverage for PGS's defense costs reimbursed by ITT, Judge Lichtman rejected PEIC's argument that the contractual liability provision required it to cover only suits brought against ITT resulting from a breach of the indemnity agreement itself. *Id.* at 4. Judge Lichtman noted that PEIC's argument was supported neither by the language of the provision nor by the fact that PEIC had treated the contract as though the contract obligated it to reimburse defense costs of silica-related suits against PGS. *Id.* at 4-5. Judge Lichtman also held that PEIC was estopped from asserting that its obligations under Endorsement 44 ended in 1995 because it waived its right to do so by continuing to pay the costs for ten years beyond 1995. *Id.* at 5-6. Lastly, Judge Lichtman directed ITT "to notice a further hearing on the issue of the dollar amount(s) owed." *Id.* at 7.

PEIC filed a petition seeking immediate appellate review of the California Court's Order. On July 3, 2006, the California Appellate Court ratified Judge Lichtman's determination that PEIC is obligated under Endorsement 44 "to fund defense and other costs through and

including September 11, 2005.” The Appellate Court, however, also issued an alternative writ, finding that limited aspects of the order turned on disputed facts:

As to the defense and other costs incurred in the future, there is a triable issue of material fact as to whether defendant has waived or is estopped to assert the right to withhold payment for those matters. There is further a triable controversy as to whether there are any unpaid defense and other costs incurred prior to September 12, 2005.

7/3/07 Appellate Decision, at 1-2 (citation omitted). The writ ordered Judge Lichtman to either (a) vacate the April 20, 2007 order, and enter a new and different order denying the motion based on the existence of these limited factual disputes, or (b) show cause why a peremptory writ ordering such action should not issue.

On July 6, 2007, Judge Lichtman chose to vacate the April 20, 2007 order and enter a new order denying ITT’s motion for partial summary judgment. At the July 20, 2007 status conference in the California Litigation, Judge Lichtman agreed with ITT and PEIC that the limited factual disputes identified by the Appellate Court should immediately be set for trial. He ordered the parties to submit a proposed order severing these issues for trial, and also ordered ITT and PEIC to meet and confer over the next 14 days to produce a pre-trial discovery plan.

Accordingly, it is clear that the only remaining issue between the parties in the instant action – the Endorsement 44 issue – is on a fast track to trial in the California Court.

### ***DISCUSSION***

In light of the California Court’s Order, the subsequent affirmation by the California Appellate Court that PEIC is obligated under Endorsement 44 to fund defense and other costs through and including September 11, 2005, and the imminent trial of the disputed factual issues relating to Endorsement 44, the instant action should be stayed pursuant to CPLR

327, pending the outcome of the California Litigation.

The doctrine of forum non conveniens “permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere.” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 (1984), *cert denied* 469 US 1108 (1985). The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice. *See Piper Aircraft Co. v Reyno*, 454 US 235, 255 (1981); *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972); *Capitol Currency Exch., N.V. v National Westminster Bank PLC*, 155 F3d 603, 609 (2d Cir 1998), *cert denied* 526 US 1067 (1999). If the balance of conveniences indicates that trial in the plaintiff’s chosen forum would be unnecessarily burdensome for the defendant or the court, a dismissal or a stay is proper. *See id.*

In determining whether a stay may be “in the interest of substantial justice,” courts consider and balance various factors including: the availability of an adequate alternative forum; residency of the parties; the potential hardship to the defendant; and the burden on New York courts. *See Islamic Republic of Iran*, 62 NY2d at 479; *World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153, 157 (1<sup>st</sup> Dept 1996); *Continental Ins. Co. v Polaris Indus. Partners, L.P.*, 199 AD2d 222, 222 (1<sup>st</sup> Dept 1993). No single factor is determinative. *Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618, 619 (2d Dept 1995). Indeed, the “great advantage” of CPLR 327 is “its flexibility based upon the facts and circumstances of each case.” *Islamic Republic of Iran*, 62 NY2d at 479. Whether to grant a motion to stay on the ground of forum non conveniens is subject to the discretion of the trial court. *Gonzalez v Lebensversicherung AG*, 304 AD2d 427, 427 (1<sup>st</sup> Dept 2003), *lv denied* 1 NY3d 506 (2004). In brief, the issue revolves around numerous

facts in each specific case.

A balancing of the factors indicates that, in the interests of substantial justice, this action should be stayed, pending determination of the California Litigation. The California Court's Order is a substantive decision on the merits, which addressed and resolves the central issue that remains pending in the instant action. In addition, the California Appellate Court specifically ratified Judge Lichtman's findings as to that central issue. Pursuant to the doctrines of res judicata and collateral estoppel, the California Court's Order, as well as the outcome of the trial on the disputed factual issues, is likely to have a preclusive effect in this case.

The only claim that is not stayed in the instant action is the second cause of action, which concerns the interpretation of the contractual liability coverage part and Endorsement 44. Several of the issues resolved by the California Court's Order directly concern the interpretation of the contractual liability coverage part and Endorsement 44. Specifically, the California Court held, contrary to PEIC's argument, that the contractual liability coverage part and Endorsement 44 were not intended to provide coverage for suits brought only against ITT resulting from a breach of the indemnity agreement itself, but were in fact intended to cover ITT's indemnity obligation for claims brought against PGS. In addition, the California Court also held that PEIC is estopped from asserting, as it does in Count 2, that its obligations under Endorsement 44 ended in 1985. Finally, the California Court also held that PEIC is obligated under the contractual liability coverage part and Endorsement 44 to reimburse ITT for the costs paid by ITT prior to August 24, 2005 to reimburse PGS for the defense of silica-related suits – under both the general liability coverage parts exclusively within the California Court's jurisdiction and under the contractual liability coverage at issue in California and here.

In its July 3, 2007 decision, the California Appellate Court specifically ratified Judge Lichtman's decision insofar as it determined that PEIC was obligated by Endorsement 44 "to fund defense and other costs through September 11, 2005" (7/3/07 Appellate Decision, at 1). Although the Appellate Court found that there were disputed issues of fact with respect to whether PEIC waived its right to withhold payment for future costs, and whether there were any unpaid costs incurred prior to September 12, 2005, Judge Lichtman determined that these limited factual disputes should be immediately set for trial.

The potential future preclusive effect of the California Court's Order, as well as the trial of the disputed factual issues, mandates staying the single claim that remains pending in this action in favor of the California Litigation. *See Stroock & Stroock & Lavan, LLP v KSW, Inc.*, 2001 WL 1682878 (Sup Ct, NY County 2001); *see also Minton v Minton*, 277 AD2d 103, 103 (1<sup>st</sup> Dept 2000).

Other relevant factors under CPLR 327 also weigh in favor of not permitting this action to go forward in New York. The California Court has grappled with the issues currently pending here since 1991. Given the duplicative nature of the actions, and the fact that trial is imminent in California, it would be unduly burdensome and a waste of scarce judicial resources to require ITT to litigate in both California and New York against the same adversaries. *See Sarfaty*, 221 AD2d at 620. Thus, a stay of this action pending resolution of the California Litigation will best serve the convenience of the parties and preserve judicial resources.

In its opposition, PEIC offers no reason why this court should duplicate the California Court's effort by re-litigating the same issue here – the scope of PEIC's coverage obligations under Endorsement 44 for post-September 1995 Silica Suits. In addition, PEIC's

argument that ITT's motion should be denied because it previously moved to stay pursuant to CPLR 3211 (a) (4) is without merit. A party that unsuccessfully moves to dismiss pursuant to CPLR 3211 is not precluded from making a later motion to dismiss or stay the action pursuant to CPLR 327. *Harp v Malyn*, 166 AD2d 848, 849 (3d Dept 1990). Moreover, the grounds upon which ITT makes the instant motion (the California Court's Order and the Appellate Court's ratification of the Endorsement 44 issue) did not exist when ITT brought its prior motion under CPLR 3211 (a) (4). The court has taken into account the great length of time that the parties have litigated these very issues in California, before the issues were raised here. Such a lengthy history of litigation outweighs the normal hesitation of denying a plaintiff its choice of courts in which to litigate.

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

Accordingly, it is

ORDERED that the motion of defendant ITT Industries, Inc. is granted, and this action is severed and stayed, pending resolution of the California Litigation, with respect to the issue of plaintiff Pacific Employers Insurance Company's contractual obligation to indemnify ITT, under Endorsement 44 to PEIC's policy SCG GO 690040-9, against silica-related loss arising from the Silica Suits, as set forth in Count 2 of the complaint.

Dated: August 15, 2007

ENTER:

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