AIU Ins. Co. v Nationwide Mut. Ins. Co.

2007 NY Slip Op 33045(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0107366/2003

Judge: Judith J. Gische

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SCANNED ON 9/28/2007

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 107366/2003
AIU INSURANCE
vs
NATIONWIDE MUTUAL
Sequence Number : 005
REARGUMENT/RECONSIDERATION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: SEP 24 2007

JUDITH J. GISCHE, J.S.C. 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 10
---x

AIU Insurance Company,

Plaintiff,

-against-

Nationwide Mutual Insurance Company,

Defendant.
---x

Decision/Order
Index No.: 107366/03
Seq. Nos.: 004, 005

Present:
Hon. Judith J. Gische

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Sequence No. 004	
Pltff AIU n/m (calculate interest) w/ EMS affirm, exhs	1
Def x/m (sign judgment) w/DMK affirm, exhs	2
Pltff opp w/EMS affirm, exh (counter proposed j/m)	3
Motion Sequence No. 005	
Def n/m (reargument) w/DMK affirm, exhs	4
Pltff AIU opp w/EMS affirm, exhs	5
Def reply w/DMK affirm, exh	6
Pltff sur-reply w/EMS affirm, exh	7
Previously considered papers on underlying motions for Summary Judgment:	
Motion Sequence No. 002	
Def's motion [dismiss] w/DMK affirm in support, affirm of good faith (DMK), exh	1
Pltff's affirm in oppos (EMS) w/exhs	2
Def's affirm in further support (DMK) w/exhs	3
Motion Sequence No. 003	
Pltff's motion [sj] w/EMS affirm in support, exhs	4
Pltff's affid in support (PM) w/exhs	5
Pltff's affid in support (JC) w/exhs	6
Def's affirm in opp (DMK) w/exhs	7
Def's affid (RW) w/exh	8
Pltff's affirm in reply to opp (EMS) w/exhs	9
Pltff's affid in support (LW-C)	10
Pltff's affirm in sur-reply (EMS) w/exhs	11

Also considered:

Decision/Order, 10/11/06, Gische J. (Sep back) 12
CD Rom of documents submitted on Motion seq #2, 3 13
Letter 3/26/07 (DMK) 14

GISCHE J.,

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant Nationwide Mutual Insurance Company ("Nationwide") has brought this motion to reargue the court's decision dated October 11, 2006 on the basis that the court misapprehended certain material facts and therefore the court should reverse its decision, granting AIU Insurance Company ("AIU") summary judgment to plaintiff. AIU opposes the motion, and has brought its own motion to have the court award it prejudgment interest. Nationwide opposes AIU's motion in the larger context of its reargument motion, and has cross moved to have the court sign its counter proposed judgment in the event the court decides to deny Nationwide leave to reargue.

Since the court appears to have two mistakes in its decision, the court grants permission to reargue in order to clarify its decision. *See*: CPLR § 2221 [d][2]; Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). To the extent, however, that Nationwide argues the mistake requires the court to grant it summary judgment, or at least reverse its decision to grant AIU summary judgment, the court disagrees. As will be set forth below, the errors identified do not meaningfully detract from the court's original decision, that both AIU and Nationwide provided coverage to CCM's employees under their respective worker's compensation/ employer's liability policies with that company.

This decision also addresses the separate motion by AIU to have the court award it pre-judgment interest.

The first error by the court in the previous decision was that the Note of Issue not had not been filed when in fact it had been. That error was of no moment. The motions were brought timely, and reference to the status of the filing of the Note of Issue was only to reflect that the motions could be considered on their merits. Brill v. City of New York, 2 NY3d 648 (2004). Since they were still timely, even conceding the Note of Issue filing. This correction of fact has no impact on the outcome of the decision.

Since the facts of the underlying dispute and the arguments raised in the underlying motions for summary judgment were extensive, the court only repeats such facts are necessary to address the arguments presently raised.

Reargument

Plaintiff ("AIU") issued a wrap up policy to the New York City School Construction Authority ("SCA"). The policy consisted of a commercial general liability policy and 4 worker's compensation policies, one of which provided "1b" employer's liability/worker's compensation coverage to CCM, the employer of the deceased ("Leyton") who is the subject of the underlying wrongful death action. The AIU WC policy (effective January 1, 1994 through January 1, 1995), was in effect at the time of the Leyton fatality. It was a new policy.

CCM also had (concurrently) a "1b" employer's liability/worker's compensation policy with Nationwide ("NW WC"). The NW WC policy that in effect at the time of the accident was for the period February 23, 1994 through February 23, 1995. It was the

renewal of an existing policy that CCM had had with Nationwide for a number of years.

The information page, section one (1) of the NW WC policy identifies the name and address of the insured (e.g. CCM at 8516 4th Avenue, Brooklyn) and provides that coverage is as follows:

> "Locations- All usual workplaces of the insured at for from which operations covered by this policy are conducted at the above address unless otherwise stated herein: 001 8516 4th Avenue, Brooklyn New York 11209"

The printed section of the NW WC policy (section E) indicates further that:

> "**Locations**
> This policy covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces."

Section three (3) of the information page indicates that the policy applies to work in New York state. Section 3.D. provides that the policy includes the following endorsements and schedules: CAS 4415, WC 31 03 08 0484, WC 000000 A 0492, WC 31 06 14 0493, and WC 00 04 14 0790.

It is undisputed, and the court has already decided that the AIU WC policy contains the same printed "Locations" language that NW WC does and that both policies provide have the following language in each of their policies as well:

> "E. Other Insurance
> We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid."

The court in its prior decision, however, mistakenly decided that the NW WC

contains explicit language extending coverage to "all construction contracts and projects pertaining to P.S. 327," which is the location where the fatality occurred. This is an incorrect statement because, in fact, the NW WC does not contain such language. The AIU WC policy, however, does however contain a specific location endorsement [Policy No.: WC 841-21-85-RA, Endorsement #00004] ("specific location endorsement"). The specific location endorsement provides as follows:

> "The coverages afforded by this policy are limited to the Borough of Brooklyn construction operations performed on behalf of the insured.
>
> This policy intended to include all construction contracts designated as insured, to all projects as made a part of this policy, at the following schools:
>
> 1. P.S. 327
> 2. P.S. 396

Nationwide argues that the court should vacate its grant of summary judgment to AIU and now grant Nationwide summary judgment because the mistake it made is so fundamental to the court's prior decision, that the reasoning in it is now eviscerated. Nationwide contends (as it did on the underlying motion being reargued) that because the NW WC policy does not specifically *include* the P.S. 327 project, but was explicitly identified in the AIU WC policy in the specific location endorsement, the school was not within the scope of Nationwide's coverage to CCM under the NW WC. Thus, it is Nationwide's contention that the site specific location endorsement (or express inclusion of P.S. 327 as a covered location) in the AIU WC policy tags AIU alone with responsibility for coverage of the P.S. 327 site, and therefore, the NW WC, which does not have a site specific endorsement, does not provide coverage for P.S. 327.

To support this argument, and in support of this motion to reargue, Nationwide contends that it charged lower premiums than it otherwise would have because the work at P.S. 327 (in their opinion) was covered under the AIU WC (e.g the wrap up). They urge the court to consider evidence of their "intent" not to cover that location and their awareness of the AIU WC policy when Nationwide issued its own renewal. Nationwide also urges the court to consider that the policy was audited by the New York State Insurance Ratings Board, and no additional premiums were charged. This, according to Nationwide, is decisive evidence that its policy did not provide coverage for P.S. 327 (or any construction activities) but only for its office operations. Nationwide also argues that duplicate coverage for a site makes no sense and is wasteful.

AIU argues that both policies cover CCM locations in New York State, unless a particular location or operation is excluded and that, for all intents and purposes, the two policies are the same, except that the AIU WC contains a specific endorsement expressly covering P.S. 327 (and another school) only, but excluding other projects SCA may have had, for example, in Brooklyn. AIU contends further that the fact that its policy has a specific location endorsement does not, by extension, relieve NW WC from any independent obligation it has to provide coverage for that site as well. As it already argued in the underlying motion, by law, all New York locations and operations of an employer are automatically covered by a worker's compensation/employer's liability policy, unless coverage of a particular location is excluded by endorsement. The court agreed with this analysis in the underlying decision, finding that if a policy is issued to limit coverage only to operations conducted at or from specified locations(s), then the Designated Workplaces Exclusion Endorsement (WC 00 03 02) must be attached to

the policy.

AIU also rejects Nationwide's contention on reargument that it "intended" to limit coverage to CCM's non-construction activities, arguing that Nationwide could have, but failed to, attach the necessary endorsements (e.g. the New York Designated Workplace Cancellation Endorsement and Notice of Partial Cancellation [WC 31 03 02]) that would have eliminated the present controversy by reducing or limiting its coverage to CCM. The court has already decided that the NW WC policy did not contain either of these endorsements, but Nationwide contends that the presence or absence of these endorsements does not decide the scope of coverage.

Discussion

Where two or more insurers bind themselves to the same risk, and one pays the whole loss, the paying insurer has the right to recover from its co-insurers a ratable share of the amount paid. National Union Fire Insurance Company of Pittsburgh, PA v. Hartford Insurance Company of the Midwest, 248 AD2d 78 (3rd Dept 1998). Exclusions from coverage are subject to strict construction and must be read narrowly. Automobile Insurance Company of Hartford v. Cook, 7 NY3d 131 (2006). Therefore, whenever an insurer wishes to exclude certain coverage, such exception or exclusion must be specific and clear in order to be enforceable. Seaboard Surety Company v. Gillette Company, 64 NY2d 304 (1984).

By failing to file the necessary endorsements that would have expressly and unequivocally excluded the P.S. 327 project from coverage under its policy, the policy includes the P.S. 327 site because this is a general policy affording general protection to CCM workers wherever situated in New York state. See: Rutan v. Rutan Associates,

[* 9]

Inc., 10 AD2d 657 (3rd Dept 1960). Therefore, the court adheres to its prior decision, that Nationwide failed to prove exclusion or exemption from covering the loss in question. It is not entitled to a decision reversing its previous grant of summary judgment to AIU.

Nationwide's claim, that it "intended" for its policy to only provide insurance coverage for the base operations of the company (CCM) at its Brooklyn office on 86th Street, is based on consideration of extrinsic evidence. This policy however is not ambiguous at all. Extrinsic evidence of what the parties really intended is generally inadmissible and will be considered only if the policy agreement is found to be ambiguous. WWW Assoc. V. Giancontieri, 77 NY2d 162 (1990). It may then be offered to clarify the ambiguities. Cole v. Macklowe, 40 AD3d 396 (1st dept. 2007). It may not be used to create an ambiguity that otherwise does not exist. Before looking to evidence of what was in the parties' minds, a court must give due weight to what is in the contract itself. WWW Assoc. v. Giancontieri, *supra*; Van Kipnis v. Van Kipnis, *supra*. Since Nationwide's renewal policy was issued after the AIU WC policy, Nationwide could (and should) have added an endorsement to its policy specifically excluding the work at P.S. 327, if that is what the parties actually intended. The NW WC policy, as it is written, is not at all inconsistent with the AIU WC policy. The location specific endorsement in the AIU WC policy limits AIU's own coverage to its insured, but it does not, as Nationwide argues, relieve Nationwide from its own coverage obligations under the NW WC policy.

Nationwide's related argument, that it makes no sense for two policies to insure the same risk of loss, e.g. the P.S. 327 site, is not a legal argument but rather an

opinion about economics. There is no legal impediment to having a general policy and a policy with a specific location endorsement, each covering the same risk. *See*: Rutan v. Rutan Associates, Inc., *supra*; *Also*: I/M/O Senay v. B.H. Motto & Co., Inc., 269 AD2d 647 (3rd Dept 2000) (Workers' Compensation Board found two insurers liable for same site, despite exclusion language; one policy general, the other specific).

Although in opposition to Nationwide's motion for reargument AIU raises estoppel claims, including whether Nationwide timely disclaimed coverage to CCM, this is not the basis for Nationwide's reargument motion, and therefore not an issue that the court has to revisit in this decision, particularly since the court already decided that as between the insurers, this is not an available defense.

Although the court has decided to grant reargument of its October 11, 2006 decision because of the mistakes of fact the court made, the errors do not otherwise impact on the court's reasoning and decision made in favor of AIU. Upon reargument, the court adheres to its original decision to grant AIU summary judgment. The court now turns to AIU's motion for prejudgment interest.

In the underlying motion, AIU asked for prejudgment interest from October 29, 1999 on the payment it made to settle the underlying personal injury action. On that date, Justice Bernstein signed the compromise order settling the wrongful death claims and directly how payments would be made to the plaintiff and the Leyton infants.[1]

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[1]This court's October 11, 2006 decision contains language denying any relief asked for in connection with those motions, but not expressly addressed. Although interest was argued before the court on the prior motion, it was denied. Therefore, AIU's present motion is really for reargument, rather than for new relief, as styled. Regardless of how the motion is identified or labeled, the issue is appropriate for consideration by the court.

In a typical breach of contract action involving insurance, interest is computed from the date of accrual of the claim. Brushton-Moira Cent. School Dist. v. Thomas Assoc., 91 N.Y.2d 256 (1998); Seward Park Housing Corp. v. Greater New York Mut. Ins. Co., 43 A.D.3d 23 (1st Dept 2007). Here, there is no contractual relationship between AIU and Nationwide, but both insurers insured the same risk. In this case, the payment that AIU made was made pursuant to the terms of an agreement to which Nationwide was not a party, but is nonetheless bound, for reasons the court addressed at great length in its prior decision, and now, in a more abbreviated manner, in this decision. Mann v. Gulf Ins. Co., 300 A.D.2d 452 (2nd Dept 2002).

Under the unique facts of this case, the court did not previously find, and now adheres to its decision, that AIU is not entitled to prejudgment interest. Mann v. Gulf Ins. Co., supra. The Leyton settlement was reached after the jury rendered its verdict, and motivated to some extent by AIU's business decision to limit its own financial exposure, and put an end to further litigation. The settlement consisted of outright payments and an annuity. The court's decision in this action for declaratory judgment is based upon interpretations of law, as well as equitable principles, such as subrogation. Therefore, while the court has considered AIU's (re)arguments, it nonetheless adheres to its prior order denying AIU interest on the settlement monies it paid.

Although the parties at one point assured the court they would endeavor to jointly present one judgment for the court to sign, they have failed. Instead, the court has before it redlined versions of proposed judgments which differ on the most basic details,

including a recitation of the papers considered. The revised proposed judgments only reflect what each side expected (e.g. hoped) the court would decide in connection with its respective motion now before the court. The parties are directed to in good faith try to reach an agreement on at least the listing of the papers they put before the court, taking into consideration this motion, and the prior motion, and then settle the judgment on notice within the time provided under the court rules to do so. 22 NYCRR § 202.48.

Conclusion

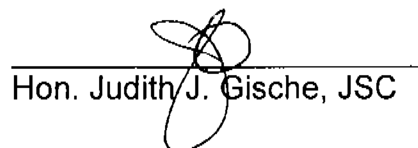
The motion by Nationwide for reargument is granted and the court's decision of October 11, 2006 is hereby modified, only to the extent addressed in this decision, otherwise it remains unmodified. The separate motion by AIU for prejudgment interest is denied. The cross motion by Nationwide for the court to sign its proposed judgment is also denied, without prejudice to resettlement.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

Settle judgment on notice.

Dated: New York, New York
September 24, 2007

So Ordered:



Hon. Judith J. Gische, JSC