

**McCallister Towing of N.Y. LLC v Certain
Underwriters at LLoyd's of London England**

2007 NY Slip Op 33373(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0602916/2003

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

McCALLISTER TOWING OF NEW YORK, L.L.C.,
Plaintiff,

Index No.: 602916/03

Motion Date: 05/15/07

- v -

Motion Seq. No.: 01

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON,
ENGLAND, WHO SUBSCRIBE TO POLICY NOS.
HF0728A00 AND HF9604A00, FEDERAL INSURANCE
COMPANY, and NAVIGATORS INS. CO.,
Defendants.

Motion Cal. No.: 75

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall deny plaintiff's motion for summary judgment.

Plaintiff's complaint seeks a declaration that under certain policies of insurance defendants are liable to provide defense and indemnification to plaintiff with respect to Green v. McAllister Towing of New York, LLC 02 CV 7588 (SDNY) (hereinafter "Green lawsuit"), wherein an employee crew member of a vessel owned by plaintiff claims he suffered personal injury. Plaintiff

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

moves for summary judgment based on its complaint that cites § 2 of the insurance policies, also referred to as the "Protection and Indemnity" coverage.

Defendants oppose the motion arguing that § 2 excludes from coverage any claims made by crew members of covered vessels. In that regard, the insurance policy Schedule appended to plaintiff's supporting papers states, in pertinent part, "2) Protection & Indemnity (excluding Crew)" (emphasis supplied).

In light of this exclusionary language, the court disagrees with plaintiff's argument that City of New York v Certain Underwriters at Lloyd's, 790 NYS2d 82 (1st Dept 2005) is dispositive. In that case the City of New York sought a declaration with respect to defendants' obligation to defend and indemnify it against a third party claim against the City brought by the defendant (plaintiff here), as third party plaintiff in the Green lawsuit, and not with respect to a claim made by a member of any crew. Therefore, the exclusion would not apply to the City's claim against defendants for coverage in the defense and indemnification of plaintiff at bar's third party claim, as the City's claim is not a crew member's.

On the instant motion, plaintiff fails to offer any interpretation of §2 of the policy that gives effect to the phrase "excluding crew". See Throgs Neck Bagels, Inc. V GA Insurance Company of New York, 241 AD2d 66 (1st Dept 1998). Its

proposed construction "offends the rule of construction that a contract shall be read so as to give effect to each and every term and is not supportable as a matter of law." Ruttenberg v Davidge Data Systems Corporation, 215 AD2d 191 (1st Dept 1995).

Though neither the complaint nor plaintiff's initial moving papers cites §1 of the policy, entitled "Jones Act Crew liability with respect to 55 named crew" as a basis for defendant's duty to defend and/or indemnify plaintiff, plaintiff's reply itself asserts issues of contested fact with respect to such section. That is, in response to defendants' opposition raising § 1 as the applicable exclusionary provision, the plaintiff asserts it never consented to the policy provisions that defendants contend exclude members of plaintiff's crew from coverage. Plaintiff also concedes that § 1 coverage is "ambiguous at best".

Plaintiff argues that the ambiguous provisions of § 1 "must be liberally construed in favor of the insured" (Miller v Continental Insurance Co, 40 NY2d 675, 678 [1976]) and that defendants insurers must show both that the insured's construction is unreasonable and that the insurer's is "the only one that fairly could be placed upon the policy" (Sincoff v Liberty Mutual Fire Insurance Co, 11 NY2d 386, 390 [1962].) The difficulty with plaintiff's position is that in its own supporting papers on the initial motion, plaintiff includes an endorsement that states "Further noted and agreed, '55 named

crew' stipulation deleted and replaced with 'all regular Weeks employees'". So even construing § 1 most favorably to the plaintiff and strictly against the defendant insurers, this court cannot determine as a matter of law that plaintiff's crew members were covered under the policies. Given such ambiguity, parol evidence is required to establish the intent of the parties, (Sound Distributing Corporation v Richmond, 213 AD2d 178 [1st Dept 1995]), and therefore, summary disposition is inappropriate.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on October 30, 2007, at 9:30 A.M. in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: October 15, 2007

ENTER:

~~Debra A. James~~
DEBRA A. JAMES S.C.
J.S.C.

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