

**American Home Assur. Co. v Babcock &
Wilcox Co.**

2008 NY Slip Op 32461(U)

September 8, 2008

Supreme Court, New York County

Docket Number: 0600335/2008

Judge: Walter B. Tolub

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

WALTER B. TOLUB

PRESENT: _____

PART 5

Index Number : 600335/2008

AMERICAN HOME ASSURANCE CO.

INDEX NO. _____

vs

BABCOCK & WILCOX CO.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/08

W

WALTER B. TOLUB S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----x
 AMERICAN HOME ASSURANCE COMPANY,
 NAVIGATORS INSURANCE COMPANY and
 NAVIGATORS MANAGEMENT COMPANY, INC.,
 (f/k/a Navigator Insurance Services of Texas)

Plaintiff,

-against-

THE BABCOCK & WILCOX COMPANY, ET. AL.,

Defendants.

Index No.600335/08
 Mtn Seq.001

FILED

SEP 09 2008

COUNTY CLERK'S OFFICE
 NEW YORK

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WALTER B. TOLUB, J.:

This is a motion by The Babcock & Wilcox Company (B&W), Citgo Petroleum Corporation (Citgo) and PDV Midwest Refining LLC (PDV), to dismiss the Complaint seeking a declaratory judgment filed by American Home Assurance Company (AHAC) and Navigators Insurance Company (NY Navigators) and Navigators Management Company, Inc. The application is brought pursuant to CPLR §3211(a)(4) on the grounds that there is another action pending between the same parties for the same relief.

Facts

In August 2001, a fire destroyed the Lemont, Illinois oil refinery owned by PDV and operated by Citgo. The cause of the fire was traced to an allegedly defective pipe fitting, which was manufactured by B&W.

On August 13, 2003, PDV and Citgo, commenced an action in

Illinois state court against B&W for the damages resulting from the fire, claiming over \$545 million in damages (Citgo Petroleum Corp. v. McDermott Int'l Inc., Index No. L009812/03 [Citgo Litigation]). Certain Underwriters at Lloyd's (Lloyd's), who sold property insurance to Citgo and PDV, intervened in the Citgo Litigation based on its position as subrogee. B&W was in bankruptcy when the Citgo Litigation was filed, and the damages sought by Citgo, PDV and Lloyd's were well in excess of the limits of the insurance policy sold by the Plaintiffs to B&W.

On December 21, 2005, B&W, PDV and Citgo entered into a Stipulation capping B&W's out of pocket liability to \$50 million while allowing PDV to pursue the Citgo Litigation to the fullest extent outside the bankruptcy proceedings.

During the relevant coverage period, Plaintiffs claim that B&W, through its parent company McDermott International Inc. (McDermott), had a total of \$375 million in insurance and that Lloyd's issued a fourth layer policy which provided \$50 million in excess coverage.

The fourth layer policy is the insurance policy at issue in the underlying action. Plaintiff claims that this fourth layer policy was negotiated and contracted for in Houston Texas by Texas Navigators, Managing General Agent for New York Navigators, acting on behalf of AHAC and New York Navigators and McGriff, Seibels & Williams of Texas Inc. (McGriff). This is an excess

general liability policy that provides \$50 million in insurance coverage in excess of \$325 million provided by other insurance carriers. This policy was issued for delivery in Louisiana to B&W's parent company, McDermott International Inc (McDermott), and it's wholly owned subsidiary B&W.

On November 8, 2006, Citgo, PDV and Lloyd's obtained a \$387,421,694.65 verdict against B&W in the Circuit Court of Cook County Illinois in the Citgo Litigation. Soon after the verdict was entered against B&W, Plaintiffs' went to multiple New York courthouses, without notice to B&W, and repudiated its obligations under the Policy at issue and filed two declaratory judgments against B&W.

The first declaratory judgment action was filed in Federal Court in the Eastern District of New York and the second action was filed in New York State Supreme Court, New York County. Specifically, on December 6, 2006, AHAC, filed a complaint in the Eastern District of New York for a declaratory judgment against B&W, but not Citgo, PDV or Lloyd's (EDNY action). The EDNY action and was later amended to add Navigators Insurance Company. Then on December 7, 2006, AHAC filed a nearly identical claim in the Supreme Court of the State of New York, but failed to serve the complaint within the time provided under CPLR 306-b (New York State action). The parties in the New York State action were limited to AHAC and B&W.

On or about January 13, 2007, Defendants filed a comprehensive action in Louisiana State Court.

On March 14, 2007, B&W filed a motion to dismiss the EDNY action based on AHAC's failure to join necessary parties and for forum non conveniens, based on the more comprehensive action in Louisiana. AHAC filed an opposition and the matter was argued on April 30, 2007. On December 6, 2007, the District Court granted Defendants' motion and dismissed the EDNY action in favor of the Louisiana action. The District Court held that Citgo, PDV and Texas Navigators were necessary parties and as such, no diversity jurisdiction existed. (American Home Assurance Co v. Babcock & Wilcox Co., Index No 06-CV-6506, 2007 WL 4299847 [EDNY Dec. 6, 2007]). The District Court specifically stated that "the state court case currently pending in Louisiana, where AHAC and Texas Navigators have already been named as defendants, is a better and more efficient means to resolve the underlying dispute." (Id.)

Following the District court's decision, on February 4, 2008, Plaintiffs' filed this action in New York State Supreme Court (present action).

Discussion

The issue before this court is whether the insurance coverage dispute should be resolved in New York or in the action already proceeding in the Civil District Court of Orleans Parish

in New Orleans, Louisiana.

This is the fourth time that Plaintiffs have asked a court to consider this question. The first court to address the issue was the United States District Court for the Eastern District of New York. That court held that this dispute should be resolved in state court and that the Louisiana action is a better and more effective means to resolve the underlying dispute. The second court to address the issue was the Civil District Court in the Louisiana action. That court held that the Louisiana action is considered the first-filed action as compared to the New York State action and that the proper venue is Louisiana. Finally, the Fourth Circuit Court of Appeals, State of Louisiana, agreed that this dispute should be resolved in Louisiana and not in New York.

Plaintiff seeks to have the present action proceed in New York arguing that the New York action was first-filed, that PDV is subject to New York jurisdiction and that New York is the appropriate and most convenient forum to for resolving the dispute. This motion by Defendants to dismiss pursuant to CPLR §3211(a)(4) followed.

First-Filed

CPLR 3211(a)(4) states that a party may move for a judgment dismissing one or more causes of action asserted against it on the grounds that "there is another action pending between the

same parties for the same cause of action in any court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." (CPLR §3211[a][4]). The general rule is that for the instant action to qualify for dismissal on the ground of the other's pendency, the other must have been commenced first. (Izquierdo v. Cities Service Oil Co., 47 Misc.2d 1087 [Sup. Ct. Kings County 1965]). The courts do not approach this with inflexibility, because if the two actions have been commenced reasonably close together in point of time, and if the other action for one reason or another offers more than the instant one does, the court can dismiss the action, notwithstanding that it may have been commenced before the other one. (McKinney's Consolidated Laws of New York Annotated, Siegel, Thompson West Publishing, C:3211:4).

Under New York law, a trial judge has the ability to exercise discretion and dismiss an action where an action involving the same issues between the same parties is already pending in another forum. (Whitney v. Whitney, 57 NY2d 731 [1982]). To dismiss the present suit because of another one, the two must be shown to be for the same "cause of action". Given the fluidity of the concept of a "cause of action", the courts refrain from insisting that the two actions be identical. (McKinney's Consolidated Laws of New York Annotated, Siegel, Thompson West Publishing, C3211:15). The two prong inquiry is

whether both suits arise out of the same actionable wrong and whether as a practical matter, there is any good reason for two actions rather than one. (Id.) If the answer to the first question is yes and to the second question no, then the court should apply CPLR 3211(a)(4) and dismiss the action. (Id.)

Here the Louisiana action includes all of the named parties as in the present action and also includes other named parties. Furthermore, the causes of action arise out of the exact same events and insurance policies in the Louisiana action as in the present action.

In the present action, Plaintiffs seek a judicial determination that there is no coverage for B&W under the policy for the claims arising out of the Underlying Lawsuit. Therefore, the present action is limited to a determination of whether there is insurance coverage. The Louisiana action covers issues regarding insurance coverage between the same parties along with, inter alia, claims for breach of contract and handling practices. Moreover, the litigation in Louisiana is well underway with a trial date set for February 2, 2009. In fact, the Judge in the Louisiana action has stated that it is going to keep the case and that the Louisiana court now stands ready to hear this case. (Hearing Transcript p.43). The Louisiana action is clearly more comprehensive than the present action since the court in New Orleans has jurisdiction over all

the parties and because the Louisiana action includes all of the issues raised by Plaintiffs in this action but also encompasses additional issues.

It follows, that after considering all the circumstances in the present action and the Louisiana action, the action is dismissed pursuant to CPLR 3211(a)(4). For all these reasons, this court need not consider Plaintiffs' remaining arguments.


Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/26/08



HON. WALTER B. TOLUB, J.S.C.

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