

**Seneca Ins. Co. v J.M.D. All-Star Import
Export, Inc.**

2008 NY Slip Op 32500(U)

September 12, 2008

Supreme Court, New York County

Docket Number: 0602536/2006

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

Seneca Insurance Company,

PLAINTIFF

- v -

J.M.D. All-Star Import Export, Inc. And Ajay Sarin

DEFENDANT

INDEX NO. #602536-2006

MOTION DATE _____

MOTION SEQ. NO. #001

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

FILED

SEP 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/12/08

Bernard J. Fried
J.S.C.

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 60

-----x
SENECA INSURANCE COMPANY,
Plaintiff,

Index No. 602536/06

-against-

J.M.D. ALL-STAR IMPORT EXPORT, INC. and
AJAY SARIN,
Defendants.
-----x

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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Fried, J.:

In this action for insurance coverage, plaintiff Seneca Insurance Company (Seneca) moves for an order, pursuant to CPLR 3212, granting partial summary judgment in its favor, declaring that, under the terms of the insurance policies issued by Seneca to defendant J.M.D. All-Star Import Export, Inc. (JMD All-Star), Seneca has no duty to defend or indemnify JMD All-Star or its principal, defendant Ajay Sarin, in an action pending in the United States District Court for the Southern District of New York, entitled Colgate-Palmolive Company v J.M.D. All Star Import and Export, Inc., et al., No. 06 CV 2857

(Colgate Action).¹

JMD All-Star and Sarin oppose the motion and cross-move for an order granting summary judgment in their favor declaring, inter alia, that Seneca is obligated, under the applicable insurance policies, to defend and indemnify defendants in the Colgate Action.

Reference is made to my memorandum decision issued herewith in the companion action entitled Sarin v CNA Financial Corporation et al., Index No. 601453/07 (the Sarin Action) for a full recitation of the facts and applicable law, which are incorporated by reference.

Briefly, the Sarin Action and this action arise out of the same operative facts - - both actions concern insurance coverage disputes regarding defense and indemnity in the Colgate Action as between the insureds and their insurers. In the decision and order in the Sarin Action handed down herewith, I held that, under the applicable insurance policies therein, the insurers are obligated to provide a defense to their insureds in the Colgate Action.

The primary difference between the Sarin Action and this action is that, whereas in the Sarin Action, the insureds (plaintiffs) are retail stores (and their principals) that sold the Colgate/Colddate toothpaste to the public, in this action, the insureds (defendants) are the wholesale distributor and its principal that sold the Colgate/Colddate toothpaste to various retail stores, including the stores named in the Sarin Action. Additionally, Ajay Sarin, a

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It should be noted that "Seneca informed defendants [JMD All-Star and Sarin] that it was reserving its rights and defenses including the right to disclaim coverage under the Policies in connection with the Colgate Action....[And] that Seneca retained counsel for the defense of Defendants in connection with the Colgate Action." (Defendants' Statement of Undisputed Material Facts, ¶¶ 9 & 10)

principal of JMD All-Star (defendant herein), is also a principal of various of the insured retail stores in the Sarin Action, and is individually named as a plaintiff in that action.

As discussed infra, and for the reasons set forth in the accompanying decision in the Sarin Action, I hold that Seneca owes a duty to defend JMD All-Star and Sarin in the Colgate Action. In so holding, I reject Seneca's contention that the distinctions between the two actions merit a different outcome in this action than that reached in the Sarin Action.

Seneca issued a commercial general liability policy (primary policy) and a commercial umbrella liability policy (umbrella policy) to JMD All-Star, including Sarin as an officer and director of JMD All-Star, for two coverage periods beginning March 30, 2005, and ending March 30, 2007, both of which provide coverage for personal and advertising injury (Seneca Policies). The Seneca Policies provide coverage to defendants for trademark infringement in connection with their advertising. The provisions and exclusions set forth in the Seneca Policies are analogous to those contained in the CNA Policies in the Sarin Action.

The defendants-insureds here, like the plaintiffs-insureds in the Sarin Action, contend that the claims asserted against them in the Colgate Action fall within the realm of "advertising injuries" coverage of the Seneca Policies. The insurer here, like the CNA Insurers in the Sarin Action, takes the opposite position.

In April or May 2006, defendants gave notice to Seneca of the Colgate Action and demanded that Seneca defend and indemnify them in said action pursuant to the provisions of the Seneca Policies.

On or about May 6, 2006, Seneca informed defendants that it was reserving its rights

and defenses with respect to the Colgate Action, including the right to disclaim coverage under the Seneca Policies, stating, among other things, “we offer the following comments based upon the allegations set forth in the [Colgate] Complaint . . .”:

“Regardless of the breadth of the statute allegedly violated, it is clear that the specific factual allegations set forth in the [Colgate] Complaint that [Colgate] does not allege any example of an advertisement produced by the Insured advertising the offending merchandise “to the general public or specific markets segments” but only describes, in the course of its investigation, that the offending merchandise was distributed and/or sold by the insured. Accordingly, Seneca reserves its rights to deny coverage and to withdraw its defense should it be determined that [Colgate] does not, in fact, allege that the Insured committed any “Advertising injury” in accordance with the terms and conditions of the Policy.”

Seneca commenced this action seeking a declaration that it is not obligated to defend or indemnify defendants under the Seneca Policies in connection with the Colgate Action. Defendants answered, denying Seneca’s assertion of non-coverage under the Seneca Policies, and claiming instead that they are entitled to a declaration that, among other things, Seneca is obligated to defend and indemnify defendants in the Colgate Action.

The issue is whether JMD All-Star “advertised” in its business, and, if so, whether one or more of the exclusions contained in the Seneca Policies applies to bar coverage. Seneca’s arguments in this action parallel the arguments asserted by the CNA Insurers in the Sarin Action. Additionally, Seneca argues that the particular circumstances in this case warrant a different outcome than that reached in the Sarin Action on the grounds that: (a) JMD All-Star did not engage in “advertising” because the nature of JMD All-Star’s business was wholesale rather than retail; and (b) Sarin, at a deposition conducted in May 2006, testified that JMD All-Star did not do any advertising.

JMD All-Star and Sarin, like the plaintiffs in the Sarin Action, contend that the Colgate Complaint alleges an advertising injury within the scope of both the primary and umbrella policies. Defendants assert that, although JMD All-Star does not sell directly to the general public, and therefore does not engage in typical mass-market advertising, such as radio or television advertisement, or print advertising such as flyers or magazine ads, JMD All-Star nevertheless does engage in “advertising” within the scope and meaning of the Seneca Policies by means of direct marketing and advertising to customers, including phone calls and visits to customers by JMD All-Star’s salespersons, and by JMD All-Star’s maintenance of a showroom where goods for sale (including the Colgate/Colddate toothpaste) are displayed.

Thus, although when deposed, Sarin testified that JMD All-Star did not engage in advertising, in paragraph 11 of his affidavit, sworn to November 27, 2006, he explained that “[d]uring those depositions, I answered questions that JMD [All-Star] does not do any advertising. I understood the questions, based on contexts posed, to relate to print and media advertising that is often done to promote to the general public. In fact, I was specifically asked if there were any advertisements in any newspapers or magazines.” T h e evidence submitted by defendants demonstrates that JMD All-Star’s salespeople typically promote and sell JMD All-Star’s products through direct marketing to customers, including visits to customers and business prospects, and, additionally, that JMD All-Star maintains a showroom where product samples were displayed for customers to see and order. Defendants submit that this activity constitutes “advertising” within the meaning of the Seneca Policies.

Seneca asserts that defendants' claim of "advertising" by JMD All-Star is disingenuous because the retail stores that JMD All-Star allegedly advertised to, were stores owned or controlled directly or indirectly by Sarin. However, the evidence shows that JMD All-Star's customers are not limited to merely the 16 related stores. Rather, JMD All-Star's customers include many other stores located throughout the Northeast region of the country that are unrelated to the subject 16 stores and have no affiliation with Sarin or the other individuals with ownership interests in the 16 stores. JMD All-Star's sales invoices confirm the sale of Colgate/Colddate toothpaste products by JMD All-Star to such unaffiliated entities. This evidence supports defendants' contention that JMD All-Star in fact engaged in advertising activity.

It is clear that the Colgate Complaint sufficiently alleges that JMD All-Star advertised, offered for sale, sold and distributed toothpaste, and contains numerous other allegations of its purported advertising activity in connection with Colgate's claims in the Colgate Action. As such, defendants' cross motion is granted to the extent that Seneca has an obligation to defend defendants in the Colgate Action, and Seneca's motion is denied.

Accordingly, it is:

ORDERED that the motion by plaintiff Seneca Insurance Company for summary judgment is denied; and it is further

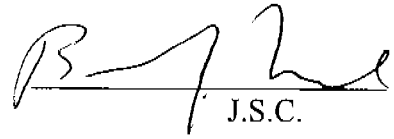
ORDERED that the cross motion by defendants J.M.D. All-Star Import Export, Inc. and Ajay Sarin for summary judgment is granted to the extent that it is ADJUDGED and DECLARED that plaintiff Seneca Insurance Company is obligated under the applicable commercial insurance policies to defend defendants in the underlying action

pending in the United States District Court for the Southern District of New York, entitled Colgate-Palmolive Company v J.M.D. All Star Import & Export, Inc., et al., No. 06 CV 2857 and is ordered to reimburse defendants for all costs to date, including attorneys' fees, incurred in connection with defendants' defense of the Colgate Action; and it is further

ORDERED that a conference will be held on October 21, 2008 at 3:30 p.m., in Part 60.

Dated: September 12, 2008

ENTER:



J.S.C.

HON. BERNARD J. FRIED

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