

**National Fire Ins. Co. of Hartford v Travelers
Cas. & Sur. Co.**

2009 NY Slip Op 30407(U)

February 20, 2009

Supreme Court, New York County

Docket Number: 105522/08

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS
Justice

PART 53

NATIONAL FIRE, ET AL

INDEX NO.

105522/08

- v -

MOTION DATE

MOTION SEQ. NO.

004

TRAVELERS CASUALTY, ET AL

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

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

Dated: 2/20/09

[Signature]
HON. CHARLES E. RAMOS

J.S.C.

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:COMMERCIAL DIVISION

-----X

NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, as successor by merger to
TRANSCONTINENTAL INSURANCE COMPANY;
CONTINENTAL INSURANCE COMPANY, as
successor-in-interest to certain
policies issued by HARBOR INSURANCE
COMPANY;

Plaintiffs,

Index: 105522/08

-against-

TRAVELERS CASUALTY AND SURETY COMPANY,
formerly THE AETNA CASUALTY AND SURETY
COMPANY; FIREMAN'S FUND INSURANCE
COMPANY; ALLIANZ GLOBAL RISKS US
INSURANCE COMPANY; HARTFORD ACCIDENT
AND INDEMNITY COMPANY; CENTURY INDEMNITY
COMPANY, as successor to CCI INSURANCE
COMPANY, as successor to INSURANCE
COMPANY OF NORTH AMERICA and INDEMNITY
INSURANCE COMPANY OF NORTH AMERICA; ACE
PROPERTY AND CASUALTY INSURANCE COMPANY,
formerly CIGNA PROPERTY AND CASUALTY
INSURANCE COMPANY, formerly AETNA INSURANCE
COMPANY; NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA; AMERICAN
HOME ASSURANCE COMPANY; GRANITE STATE
INSURANCE COMPANY; LIBERTY MUTUAL
INSURANCE COMPANY; FEDERAL INSURANCE
COMPANY; TRANSPORT INSURANCE COMPANY;
TIG INSURANCE COMPANY, as successor by
merger to INTERNATIONAL INSURANCE COMPANY;
ROGER A. SEVIGNY, the Commissioner of
Insurance of the State of New Hampshire,
as Liquidator of THE HOME INSURANCE COMPANY;
STEVEN M. GOLDMAN, the Commissioner of
Banking and Insurance of the State of New
Jersey, as Liquidator of INTEGRITY INSURANCE
COMPANY; ERIC R. DINALLO, Superintendent of
Insurance of the State of New York, as
Liquidator of MIDLAND INSURANCE COMPANY;
JOEL ARIO, Acting Insurance Commissioner
of the State of Pennsylvania, as Liquidator
of RELIANCE INSURANCE COMPANY; JOANNE
DOES, THIRD-PARTY LIABILITY INSURERS, being
carriers other than the aforementioned who
issued third-party liability insurance to
KENTILE FLOORS, INC.; JSENTILE FLOORS, INC.;
METEX MFG. CORPORATION; JOHN LESLIE ALLEN;
CARL BEEL; GILBERT CARRIZALES; ESTATE OF
MARIA CAVALLINI; JOHN CAVOUNIS; ROBERT

CLARK; ROBERT DEGLAU; SUSANNE DELISLE;
 JOHN DURO; ESTATE OF HAROLD ELSNER; EMILY
 FABINIAK; ANGEL FERNANDEZ; ESTATE OF
 RICHARD FINDLAY; WILLIAM GALANIS; ESTATE
 OF CHESTER GIESE; ESTATE OF ORVILLE
 GROOTEMAAT; ROBERT GUNDERSON; ESTATE
 OF EDSSEL HANKA; HARVEY HELFAND; ESTATE
 OF VIRGIL HORNER; GILBERT EM; ESTATE OF
 RICHARD JEFFERS; HUBERT JOHNSTON; ROBERT
 KENNEMORE; ESTATE OF BERNHARDT
 KOEPPEN; ESTATE OF RUDOLPH KOLETIC;
 WALTER KONWAY; GEORGE LACKMAN; ESTATE
 OF EMIL LAUF; F. LEE LAWRENCE; ESTATE OF
 WILLIAM LEITZEL; ESTATE OF FRANK LONGO;
 RONALD MATA; ESTATE OF BRUCE MAYNARD;
 PHILLIP MAZZOCCHI; JOHN MCTAGGART;
 ESTATE OF GEORGE MEANOR; CHARLES
 MILLER; ESTATE OF PETER MISHKO; JACK
 NACHT; ESTATE OF NICHOLAS PALAZZO; JOHN
 PALL; THOMAS PAWLOWSKI; ESTATE OF
 HOWARD PRATT; WILLIAM PURCELL; ESTATE OF
 EDWARD PUTLOCK; JOHN RHEIN; ESTATE OF
 CLAY RICH; ESTATE OF LEON ROBERTS; BENITO
 ROSALES; ESTATE OF RAYMOND ROSWELL;
 ESTATE OF HOWARD SCHOENFELD; ESTATE OF
 MARIE SCHONS; STEPHEN SCHWARTZ; EDWARD
 SEDLACEK; ESTATE OF MORRIS SEGAL; ESTATE
 OF RICHARD SHANK; ESTATE OF GEORGE
 SHEPARD; CHARLES SHULL; CARL SOB CZAK;
 MARILYN STRATTON; ESTATE OF CARL STUDE;
 ESTATE OF FLORENCE THOMPSON; JAMES
 URBACH; ROSE MARY VICARI; ALBERTO
 VULTAGGIO; JACK WADE; JAMES WEESE;
 HOWARD WENZEL; ESTATE OF GEORGE WILENT;
 ESTATE OF VICTOR YANNOTTI; SYDNEY ZIFF;
 and JOHN DOES, ASBESTOS CLAIMANTS, being
 individuals other than the aforementioned
 who settled Asbestos Claims with KENTILE
 FLOORS. INC. but whose settlements have
 not been fully funded,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

Defendant, counter-claimant, and cross-claimant, Metex
 Manufacturing Corporation (Metex) moves, pursuant to CPLR 3212,
 for partial summary judgment to enforce the duty to defend

against defendants Liberty Mutual Insurance Company (Liberty) and Century Indemnity Company (Century).

Background¹

Between 1906 and 1992, Kentile Floors, Inc.² (Kentile) manufactured and distributed vinyl floor tiles. Due to the alleged presence of asbestos in floor tiles manufactured by Kentile, it has been a named defendant in numerous lawsuits. From 1960 to 1985, it is alleged that Kentile was covered by various insurance policies, including primary products liability policies purchased from Liberty, Century, and National Union Fire Insurance Company of Pittsburgh (National Union). From 1992 to 2003, these primary insurers defended and indemnified Kentile in connection with applicable asbestos claims.

In 2003, claiming coverage limits had been exhausted, the primary carriers ceased defending and indemnifying Kentile. From 2003 to 2008, Kentile's umbrella and excess policies with National Union and American Home Assurance Company (American

¹ The alleged facts set forth in the Rule 19A Statements, memorandums of law, and affirmations are based largely on information and belief, and are disputed.

² Metex emerged from Kentile's 1992 bankruptcy filing as a "Reorganized Debtor." Metex makes this motion based on plaintiffs' assertions (among other parties) that it is a successor to Kentile's asbestos liability. Contrary to Liberty's assertion that only the Insurance Claims Administrator (ICA) may bring claims on behalf of Kentile, that right is clearly not exclusive. First Amended Joint Plan of Reorganization at § 5.5.2. Further, Metex was granted authority to assert claims on behalf of Kentile to enforce relevant insurance policies by a stipulation "So Ordered" by the bankruptcy court, and not objected to by Liberty. Stipulation and Agreed Order Remanding Certain Issues to The Supreme Court of the State of New York, County of New York, October 27, 2008.

* 5]

Home) continued the defense and indemnification of asbestos claims against Kentile. In early 2008, National Union and American Home discontinued Kentile's defense and indemnification on the ground that excess policy limits were exhausted.³ Since early 2008, CNA has paid the majority of Kentile's defense and indemnity with certain costs contributed by Century under an umbrella policy. CNA asserted policy exhaustion as of December 31, 2008, and Century has been ordered by this Court to continue Kentile's defense and indemnification pending the disposition of this motion.

The policies at issue in this motion are two Liberty primary insurance policies covering the period from January 1, 1970 - January 1, 1971 (the "1970 Policy"), and January 1, 1971 - January 1, 1972 (the "1971 Policy"), and a three-year, first level excess umbrella policy issued by Century covering the period of June 30, 1965 to June 30, 1968.

On February 5, 2009, Metex notified the Court that it is withdrawing its motion against Century without prejudice. Therefore, the central remaining issue before the Court is whether the Liberty policies limits have been exhausted.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law

³ Metex and other defendants are challenging National Union and American Home's assertion of policy exhaustion. This issue is subject to subsequent adjudication in this action, but not an issue before the Court on this motion.

by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991).

Discussion

As a procedural aside, Liberty seeks to defeat this motion on the ground that no discovery has occurred, and factual issues have not been reconciled. First, Liberty seeks discovery on which law this Court should apply because the relevant policies are silent as to choice of law. "[W]here it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk." *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 24 (1st Dept 2006), *aff'd*, 9 NY3d 928 (2007). Here, the Liberty policies identify Kentile as being located at 58 Second Avenue, Brooklyn, New York, and the Liberty sales office in Brooklyn, New York. Additionally, the Court takes judicial notice that as of January 13, 1971, Kentile was a

"New York domiciled corporation." See *Golden v Kentile Floors, Inc.*, 52 FRD 386, 387-388 (NDGA 1971). In light of these facts, and for the purposes of this motion, Kentile is deemed to be a domiciliary of New York at the time the Liberty policies were executed, and New York law will apply.

Second, Liberty asserts that discovery is needed to justify underlying facts asserted by Metex on information and belief, and where no admissible evidence supporting those facts have been submitted. However, Liberty's insurance policies issued to Kentile speak for themselves, are the sole basis for Metex's assertion of the duty to defend, and have been properly submitted on this motion. Collateral and non-material facts submitted on information and belief, in addition to extrinsic evidence, will not be considered on a motion for summary judgement interpreting the unambiguous terms of an insurance policy. See *State v Home Indemnification Co.*, 66 NY2d 669, 671 (1985) (Interpreting unambiguous insurance is for the court); *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 (1st Dept 1995) (When the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment).

Lastly, Liberty asserts a laches defense. However, "where an action at law is timely under the applicable...statute of limitations [as here], the defense of laches is unavailable." *B.N. Realty Assoc. v Lichtenstein*, 21 AD3d 793, 799 (1st Dept 2005).

The merits of this motion involve whether the two Liberty insurance policies at issue contain aggregate limits.⁴ Generally, where a policy has no aggregate limit of liability, the policy must continue to pay up to its "per occurrence" limit for each occurrence that triggers the policy regardless of the number of claims or occurrences, without exhaustion except as to a particular occurrence.

Under both policies⁵, the "Limit of Liability" is expressly replaced⁶ with the "Single Limit of Liability Endorsement," which states in relevant part:

"Regardless of the number of (1) insured under this policy, (2) persons or organizations who sustain Bodily Injury... or (3) claims made or suits brought on account of Bodily Injury..., the company's liability is limited as follows:

Coverages A and B - The total liability of the company for all damages because of Bodily Injury and Property Damage which occur during the policy period and arise out of one occurrence shall not exceed \$500,000.

Subject to the above provision respecting the total liability of the company for all Bodily Injury and all Property Damage during the policy period, if an occurrence gives rise to Bodily Injury of [sic] Property Damage which occurs partly before and partly within the policy for such occurrence shall not exceed \$500,000 minus the total of all payments made with respect to

⁴ The undisputed definition of "aggregate limit" is the total limit of an insurance company's liability under a particular policy.

⁵ The policies at issue are standard form policies except as endorsed therein.

⁶ The "Single Limit of Liability Endorsement" clearly sets forth that "Section IV Limits of Liability is deleted and replaced..." (Emphasis added).

such occurrence under a previous policy or policies of which this policy is a replacement."

Endorsement Serial No. 1. (Emphasis added).

Endorsement No. 2 replaces the last paragraph of "Section IV Limits of Liability" (intentionally omitted above) with the following language:

"Coverages A and B - For the purpose of determining the limit of the company's liability (1) all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions and (2) all personal injury arising out of a series of publications or utterance of the same or similar defamatory material shall be considered as arising out of one occurrence."

Endorsement No. 2 additionally adds the following paragraph to "Section IV":

"If the same occurrence gives rise to personal injury or property damage which occurs partly before and partly within the policy period the [sic] each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement."

Endorsement No. 1 clearly sets forth the basis for liability per occurrence, it does not contain any language referring to aggregate limits of liability. In fact, the "Limit of Liability" section that was expressly replaced contained aggregate language, evidencing the parties' clear intent to exclude it.

Endorsement No. 2 does not add aggregate limits. As set forth above, the added language merely refers to an "applicable aggregate limit" that was previously replaced and deleted by Endorsement No. 1.

Liberty argues at length that their own policies contain ambiguities that raise questions of fact as to their true meaning. This Court is not persuaded. The policy's language is clear and unambiguous, foregoing the need to analyze extrinsic evidence. See *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990) (A contract that is a clear and complete should be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing); *State v Home Indemnity Co.*, 66 NY2d 669, 671 (1985).

Nevertheless, in insurance matters, "if a policy of insurance is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the policy holder and against the company." *Hartol Products Corp. v Prudential Insurance Company of America*, 290 NY 44, 49 (1943).

An insurer's duty to defend is broader than its duty to indemnify, and is triggered, irrespective of the insurer's ultimate duty to indemnify. *Zurich-American Insurance Companies v Atlantic Mutual Insurance Companies*, 139 AD2d 379, 384 (1st Dept 1988). The duty to defend "exists whenever a complaint against the insured alleges claims that may be covered under the insurer's policy."⁷ *In re WorldCom, Inc. Securities Litigation*,

⁷ "The allegations of the underlying complaints must be taken at face value. Even though false or groundless, the allegations trigger the insurer's duty to defend as long as they

354 F. Supp 2d 455, 464 (SDNY 2005). An insurance company seeking to avoid its defense obligations bears a heavy burden and, therefore, must demonstrate that the allegations in the underlying action fall wholly outside coverage, that there is no reasonable interpretation that might otherwise bring the underlying action within coverage, "and that there is no possible factual or legal basis upon which the insurer may eventually be obligated to indemnify the insured under any policy provision." *Frontier Insulation Contractors v Merchants Mutual Insurance Co.*, 91 NY2d 169, 175 (1997) (emphasis added). Liberty has failed to meet this high burden.

Thus, as a matter of law, Liberty has a duty to defend Kentile because there is clearly a possibility (if not a certainty) that the 1970 Policy and the 1971 Policy cover the claims asserted against Kentile.

Metex further seeks to have Liberty reimburse Kentile's umbrella and excess insurance companies that prematurely exhausted coverage for defending Kentile due to Liberty's erroneous exhaustion of its primary policies. The relief is granted. Primary insurance limits must be exhausted before excess coverage can apply. *National Union Fire Insurance Company*

raise a theory of liability within the scope of the policy's coverage. [The] question is not whether the complaint can withstand a motion to dismiss for failure to state a cause of action. Nor is the insured's ultimate liability a consideration. If, liberally construed, the claim is within [as it is here] the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be." *Zurich-American Insurance Companies v Atlantic Mutual Insurance Companies*, 139 AD2d 379, 384 (1st Dept 1988).

of *Pittsburgh, PA v The Connecticut Indemnity Company*, 52 AD3d 274, 276 (1st Dept 2008). A primary insurer has the obligation to defend without any entitlement to contribution from an excess insurer. *Firemen's Ins. Co. v Federal Ins. Co.*, 233 AD2d 193 (1st Dept 1996), lv denied, 90 NY2d 803 (1997). Where an excess insurance company pays defense costs when primary insurance coverage is available, the primary insurance company is obligated to reimburse the excess insurance company for the amounts expended. See e.g. *Fidelity General Ins. Co. v Aetna Ins. Co.*, 27 AD2d 932 (2nd Dept 1967); *Progressive Casualty Insurance Co. v Empire Insurance Co.*, 162 Misc 2d 91 (Sup NY County 1994); See generally, *Niagara County v Utica Mutual Insurance Co.*, 80 AD2d 415 (4th Dept 1981), lv denied, 54 NY2d 608 (1981). Clearly, to the extent that the excess carriers have paid defense costs prematurely, they must be made whole.

This Court hereby adjudicates the issue of aggregate limits only. Because this Court has not had the opportunity to review each and every claim, if Liberty asserts a defense to coverage regarding a particular claim or claims which does not invoke aggregate limits, that dispute may be brought before this Court as the parties may be so advised.

All other arguments have been considered and deemed without merit.

Accordingly, it is ORDERED that Metex's motion for partial summary judgment is hereby granted. Settle order on notice.

Dated:



HON. CHARLES E. RAMOS

J.S.C.