

**Westpoint Intl., Inc. v American Intl. S. Ins. Co.**

2009 NY Slip Op 31577(U)

July 13, 2009

Supreme Court, New York County

Docket Number: 116832/07

Judge: Emily Jane Goodman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

*2-17-09*

Index Number : 116832/2007  
**WESTPOINT INTERNATIONAL**  
vs.  
**AMERICAN INTERNATIONAL SOUTH**  
SEQUENCE NUMBER : # 002  
DISMISS COMPLAINT

Justice

INDEX NO. 116832-07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #002  
MOTION CAL. NO. \_\_\_\_\_

ere read on 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

*and with motion decided*

*per attached*

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

**FILED**  
JUL 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/13/09

*[Signature]*

**EMILY JANE GOODMAN**

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: IAS PART 17

-----x  
WESTPOINT INTERNATIONAL, INC. and  
WESTPOINT HOME, INC.,

Plaintiffs,

-against-

AMERICAN INTERNATIONAL SOUTH  
INSURANCE COMPANY,

Defendant.  
-----x

Index No. 16832/07

**FILED**  
JUL 17 2009  
COUNTY CLERKS OFFICE  
NEW YORK

Emily Jane Goodman, J.S.C.:

This is an action by plaintiffs Westpoint International, Inc. and Westpoint Home, Inc., as insureds under a Directors, Officers and Private Company Liability Insurance Policy (Policy) issued by defendant American International South Insurance Company. Plaintiffs seek, among other things, reimbursement of expenses incurred in defending an action brought against them in Delaware state court.

Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), for an order dismissing the Complaint. Plaintiffs cross-move, pursuant to CPLR 3212, for an order granting summary judgment.

**1. Parties**

According to the Complaint, Westpoint International (WI) and Westpoint Home (WH) are Delaware corporations whose principal place of business is located at 28 East 28th Street in New York, New

York. Westpoint Home is a wholly-owned subsidiary of Westpoint International. Defendant American International is a Pennsylvania insurance company with an office in New York City.

## 2. Background

On December 1, 2006, American International issued the Policy to WPI, effective from December 1, 2006, to December 1, 2007. The Policy has an aggregate limit of liability of \$20 million above a \$500,000 self-insured retention, and covers, among others, WPI; WPI's directors, officers and employees; and WPI's subsidiaries, including WPH.

Pursuant to section 1(A), the Policy covered the insureds against any loss incurred as a result of a claim brought against them during the policy period for any actual or alleged wrongful act. Under section 1(B), the Policy also insured WPI against any loss that it incurred arising from a claim made during the policy period against its directors, officers, and employees for any actual or alleged wrongful act arising in their capacities as directors, officers, or employees, for which WPI was required to indemnify them.

The Policy defined "claim" to include, among other things, any civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which was commenced by service of a Complaint or similar pleading. The Policy defined

"wrongful act" in part as:

(1) with respect to individual Insureds, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Insureds in their respective capacities as such, or any matter claimed against such Insured solely by reason of their status as directors, officers or Employees of the Company;

(2) with respect to the Company, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Company.

In the event that a claim was brought, section 8 of the Policy required American International, under certain circumstances, to provide the insureds with a defense against the claim or to advance defense costs prior to the final disposition of the claim, up to the coverage limits of the Policy. Further, American International could be required to reimburse the insureds for any judgment or any settlement consented to by American International. However, American International was entitled to recoup any advanced payments with respect to which the insured was not entitled to be covered for the loss at issue.

Section 4 of the Policy set forth certain exclusions to coverage. Relevant here, section 4(h) provided that American International was not obligated to make any payment for a loss incurred in connection with a claim against one of the insureds "alleging, arising out of, based upon or attributable to any actual

or alleged contractual liability of the Company or any other Insured under any express contract or agreement..."

### 3. The Delaware Action

On December 18, 2006, an action was filed against WPI, among others, in the Court of Chancery of the State of Delaware (Delaware Action). On January 19, 2007, the Delaware plaintiffs filed an Amended Complaint against, among others, WPI and certain of its Directors. The plaintiffs later filed a Second Amended Complaint on August 28, 2007, which, among other things, added WPH as a defendant.

The claims asserted in the Delaware Action against the Directors are for breach of fiduciary duty and for aiding and abetting breach of fiduciary duty.<sup>1</sup> The claims against WPI are for breach of contract, conversion, unjust enrichment, aiding and abetting breach of fiduciary duty and certain claims under Delaware state law and the Uniform Commercial Code. The Delaware plaintiffs also asserted claims against WPH for aiding and abetting the Directors' breach of fiduciary duty, unjust enrichment, as well as claims under Delaware state law and the Uniform Commercial Code.

According to the Delaware Complaint, the Delaware plaintiffs

---

<sup>1</sup> WPI states that because the claims asserted against the Directors in the Delaware Action arose from the performance of their duties as Directors, WPI has indemnified them against their expenses in defending the Delaware Action.

(referred to here as Lenders) became creditors of a company called WestPoint Stevens, Inc. in 1998 pursuant to a \$480 million credit agreement. (Delaware Complaint at ¶ 55). The transaction included a Collateral Trust Agreement pursuant to which the Lenders were given a First Lien on substantially all of the real and personal property of WestPoint Stevens. (Id. at ¶¶ 56-58). This property included shares of stock owned by WestPoint Stevens in "Domestic Subsidiaries", which the Collateral Trust Agreement defined as including subsidiaries acquired at a later time by WestPoint Stevens. (Id. At ¶ 57). Beal Bank, S.S.B. was named as the Trustee under the agreement. (Id. At ¶ 56).

The Collateral Trust Agreement also required the execution of a Stock Pledge Agreement, pursuant to which WestPoint Stevens agreed to pledge after-acquired securities to Beal Bank. (Id. at ¶¶ 58-59). The Delaware plaintiffs alleged that, in addition to their rights as lienholders with respect to the pledged shares, because WPI allegedly became a Domestic Subsidiary of WestPoint Stevens, plaintiffs also had the right, in the event of a default by WestPoint Stevens, to have WPI's shares registered in Beal Bank's name so that it could vote those shares and exercise corporate governance rights based on those shares. (Id. at ¶ 60).

WestPoint Stevens filed for bankruptcy in 2003 and was in default on the Lenders' loan by November of 2004. (Id. at ¶¶ 62,

69). In July of 2005, the United States Bankruptcy Court for the Southern District of New York approved the sale of WestPoint Stevens' assets to WPI, through WPH, pursuant to an Asset Purchase Agreement. In exchange for Westpoint Stevens' assets, WPI issued to WestPoint Stevens two-thirds of WPI's common stock. The Bankruptcy Court approved the transaction and granted liens to the Lenders on the WPI common stock to replace their prior liens on WestPoint Stevens' assets. (Id. At ¶ 62).

The Delaware plaintiffs alleged that the various defendants, including WPI and the Directors, took certain actions in 2005 that caused a reduction in the value of the Lenders' collateral, i.e., the shares of WPI. Specifically, the Directors, abetted by WPI and WPH, allegedly breached their fiduciary duties by, among other things, making changes to the corporate governance of WPI in order entrench the current Board of Directors and prevent the Lenders from exercising their voting rights or other shareholder rights.

The corporate governance changes allegedly included amendments to WPI's charter that: 1) reappointed WPI's existing Board of Directors to three classes with staggered terms; 2) added two new directors; 3) eliminated shareholders' ability to act upon written consent in lieu of shareholder meetings absent the unanimous consent of all shareholders; 4) eliminated the shareholders' right to call special meetings; 5) increased the number of shareholder

votes needed to change the company's bylaws, from a majority to a two-thirds super-majority; and 6) increased the number of common stock shareholder votes needed to remove a director for cause to an 85% majority. (Delaware Complaint at ¶¶ 9, 73). The Delaware Complaint also alleged that the defendants failed to register the shares of stock as required by the Asset Purchase Agreement. (Delaware Complaint at ¶ 75).

#### 4. The New York Action

Plaintiffs commenced the instant action in December of 2007, asserting claims for breach of contract and a declaratory judgment. Plaintiffs allege that the claims asserted in the Delaware Action against WPI, WPH and the Directors are covered by the Policy. As such, they contend that American International is required to reimburse WPI and WPH for attorneys' fees and costs incurred in connection with the defense of WPI, WPH, and the Directors in the Delaware Action, as well as for the full amount of any judgment or settlement therein up to the \$20 million coverage limit of the Policy.

American International now moves, pursuant to CPLR 3211(a)(1) and (7), for an order dismissing the Complaint. American International argues that it is not required to provide a defense because section 4(h) of the Policy excludes coverage for the allegations set forth in the Delaware Action.

[\*9]

As set forth above, section 4(h) of the Policy provides that American International was not obligated to make any payment for a loss incurred in connection with a claim against one of the insureds "alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Company or any other Insured under any express contract or agreement..." American International argues that the allegations in the Delaware action arise from the various contracts at issue in that action, including the Asset Purchase Agreement and the Stock Pledge Agreement.

"It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage.'" *Automobile Ins Co of Hartford v Cook*, 7 NY3d 131, 137 [2006], quoting *Continental Cas Co v Rapid-American Corp*, 80 NY2d 640, 648 [1993]; see, *Fieldston Property Owners Ass'n, Inc v Hermitage Ins Co, Inc*, 61 AD3d 185 [1st Dept 2009]; *Henderson v New York Cent Mut Fire Ins Co*, 56 AD3d 1141 [4th Dept 2008]. Thus, "[i]f, liberally construed, the claim is within 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." *Automobile Ins Co of Hartford v Cook*, 7 NY3d 131, 137 [2006], quoting *Ruder & Finn Inc v Seaboard Sur Co*,

52 NY2d 663, 670 [1981]. Furthermore, "[w]here there is ambiguity as to the existence of coverage, doubt is to be resolved in favor of the insured and against the insurer." *Id.*, quoting *Handelsman v Sea Ins Co*, 85 NY2d 96, 101 [1994].

Here, the court finds that the Complaint adequately alleges that American International has a duty to provide a defense to Westpoint International and Westpoint Home in connection with the Delaware action, or to reimburse them for all reasonable and necessary costs, including attorneys' fees in excess of the \$500,000 retention, incurred in that action, up to the limits of the Policy.

The Complaint in the Delaware Action asserts eight causes of action against the various defendants. Only one cause of action, the third, is specifically titled as a breach of contract claim and, as such, likely would not be covered by the Policy, based upon the exclusion set forth in section 4(h). However, the remaining causes of action are based in tort or are for statutory violations and thus, are not clearly excluded by section 4(h) of the Policy.

Despite this, American International argues that, although these claims are not labeled as contract claims, they nevertheless arise out of the various contracts at issue in the Delaware action, including the Asset Purchase Agreement and the Stock Pledge Agreement. This is unpersuasive.

"When an insurer seeks to disclaim coverage on the... basis of an exclusion...the insurer will be required to 'provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation.'" *Automobile Ins Co of Hartford v Cook*, 7 NY3d 131, 137 [2006], quoting *Allstate Ins Co v Mugavero*, 79 NY2d 153, 159 [1992] [citation omitted]). "In addition, exclusions are subject to strict construction and must be read narrowly." *Id.*

Here, American International has not demonstrated that the allegations in the Delaware Complaint can only be interpreted as excluded from coverage by section 4(h). There are significant allegations in the Delaware Complaint which can be construed as not arising from the various contracts at issue in that action. For example, as set forth above, the Delaware plaintiffs allege that the defendants took numerous actions to changes to the corporate governance of WPI in order entrench the current Board of Directors and prevent the Lenders from exercising their voting rights or other shareholder rights. These included: 1) reappointing WPI's existing Board of Directors to three classes with staggered terms; 2) adding two new directors; 3) eliminating shareholders' ability to act upon written consent in lieu of shareholder meetings absent

the unanimous consent of all shareholders; 4) eliminating the shareholders' right to call special meetings; 5) increasing the number of shareholder votes needed to change the company's bylaws, from a majority to a two-thirds super-majority; and 6) increasing the number of common stock shareholder votes needed to remove a director for cause to an 85% majority. (Delaware Complaint at ¶¶ 9, 73).<sup>2</sup>

As set forth above, "insurers have a broad duty to defend an insured whenever a complaint alleges any facts or grounds which bring the action within the scope of the risks undertaken by the insurer." *Allou Health & Beauty Care, Inc v Aetna Cas and Sur Co*, 269 AD2d 478 [2d Dept 2000]; *See, Federal Ins Co v Kozlowski*, 18 AD3d 33 [1<sup>st</sup> Dept 2005]. Here, plaintiffs have adequately demonstrated that there are sufficient allegations in the Delaware Complaint to trigger American International's broad duty to provide a defense. The fact that some of the causes of action in the Delaware Complaint might not be covered by the Policy does not extinguish American International's obligation to provide a defense. Therefore, American International's motion to dismiss the

---

<sup>2</sup>American International's citation to *XL Speciality v Agoglia* (2009 US Dist Lexis 36601 [SDNY March 2, 2009]) does not dictate a different result. There, the court interpreted a different policy exclusion "alleging, arising out of, based upon, in consequences of, or attributable to facts of which the insured had knowledge." In any event, the duty to defend was not at issue there, as the insurer had moved for summary judgment for a declaration that it had no duty to provide coverage.

Complaint is denied.

Plaintiffs cross-move, pursuant to CPLR 3212, for an order granting summary judgment and declaring that American International is liable to advance defense expenses in connection with the claims brought in the Delaware action. However, as American International correctly notes and plaintiffs concede, CPLR 3212(a) states that a motion for summary judgment may be made after issue has been joined. *Enriquez v Home Lawn Care and Landscaping, Inc*, 49 AD3d 496 [2d Dept 2008]. Here, issue has not been joined because American International has not yet filed an Answer. Therefore, plaintiffs' motion for summary judgment is denied, with leave to renew. Accordingly, it is

ORDERED that defendant's motion to dismiss the Complaint is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment is denied with leave to renew.

This Constitutes the Decision and Order of the Co

DATED: July 13, 2009

ENTER:

**FILED**  
JUL 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

J.S.C.  
**EMILY JANE GOODMAN**