SHORT FORM ORDER

Index Number: 14123-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 06-01-2010
Motion Submit Date: 10-05-2010
Motion Sequence .: 001 MG
002 MD
CASEDISP

[X] **FINAL DISP**
[ ] NON - FINAL DISP

_____X

NORTHPORT LAND CORP.,

Plaintiff,

-against-

ZURICH NORTH AMERICA INSURANCE,

Defendant.
_____X

Attorney for Plaintiff
Nicholas J. Demadeo, PC
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Huntington, New York 11743

Attorney for Defendant
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ORDERED, that the motion (motion sequence no. 001) by defendant pursuant to CPLR 3212 for summary judgment dismissing the Complaint is granted; and it is further

ORDERED, that the cross-motion (motion sequence no. 002) by plaintiff pursuant to CPLR 3212 for partial summary judgment on the issue of liability and setting the matter down for trial on damages is denied.

Plaintiff commenced this declaratory judgment action against defendant by the filing of a Summons and Complaint on April 18, 2008 and issue was joined by defendant's service of a Verified Answer dated July 8, 2008. Plaintiff is the owner of real property located at 85 Fort Salonga Road, Northport, New York (the "subject premises"), upon which a gasoline station is located. Defendant is an insurance company

which issued an insurance policy for the subject premises, which covered damages resulting from certain discharges of gasoline on the subject premises. Plaintiff seeks a declaration that defendant is responsible for certain cleanup charges it incurred as a result of contamination discovered on the subject premises. Defendant argues, that for several reasons, it is not responsible for the cleanup costs incurred by plaintiff.

The submissions reflect that on or about November 3, 2006, defendant issued to plaintiff a Storage Tank System Third Party Liability and Cleanup Policy (the "agreement"), which was retroactive to October 20, 2005 (the "retroactive date"). The agreement provided as follows:

> COVERAGE A: FIRST PARTY CLEANUP DISCOVERY
> We will pay on behalf of the "insured" any "cleanup costs" required by "governmental authority" as a result of a "release(s)" that "emanates" from a "scheduled storage tank system(s)" at a "scheduled location", that commences on or after the "retroactive date" and is first discovered by the "insured" during the "policy period", provided the "claim" is reported to us during the "policy period", or any applicable extended reporting period. Coverage for the "claim(s)" due to changes in "governmental authority" during any applicable extended reporting period is set out in EXTENDED REPORTING PERIODS (Section V).
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> COVERAGE B: THIRD PARTY LIABILITY
> We will pay on behalf of the "insured" and "loss" caused by a "release(s)" that "emanates from" a "scheduled storage tank system(s)" at a "scheduled location", that commences on or after the "retroactive", and that the "insured" is legally obligated to pay as a result of "claim(s)" first made against the "insured" during the "policy period" provided that the "claim" is reported to us during the "policy", or any applicable extended reporting period as set out in EXTENDED REPORTING PERIODS (SectionV).

The agreement listed on the "SITE SCHEDULE", those tanks that were covered by the insurance policy.

Plaintiff alleges that on or about October 31, 2006, petroleum product contamination was discovered on property adjoining the subject premises to the west. As a result of an investigation by the New York State Department of Environmental Conservation (the "DEC"), petroleum product contamination was discovered on the subject premises. Plaintiff was required to remediate and remove certain underground storage tanks on the subject premises and alleges that such costs should be paid by defendant pursuant to the insurance agreement.

Defendant now moves for summary judgment dismissing the Complaint on several grounds. In support of the motion, defendant submits a copy of the pleadings, an affirmation of counsel and memorandum of law, Rule 19-A statement, copy of the agreement, affidavit by Craig Werle ("Werle"), hydrogeologist employed by Roux Associates, Inc., affidavit of Thomas Treutlein ("Treutlein"), lab director of Eco Test Laboratories, Inc., and an Order in a related action involving the subject premises. Defendant argues that (1) the vast majority of all the contamination discovered on the subject premises resulted from seepage from a drywell improperly used to store waste oil and this drywell was not covered by the agreement; (2) in other litigation, this Court found that plaintiff had surrendered operation control of the subject premises during the policy coverage period (from the retroactive date to discovery of the contamination) and thus, the tanks are excluded from coverage; and (3) the presence of MTBE in the wells and soil samples establishes that any spill occurred prior to 2004, when New York State banned the use of MTBE. Thus, any contamination from the covered tanks occurred prior to the retroactive date of October 20, 2005.

Initially, defendant argues that the primary source of contamination was a drywell improperly used to store waste oil as discovered by Werle, the retained consultant for defendant. According to Werle, when DEC inspected the subject premises it discovered that a pipe connected a floor drain in one of the garage service bays to this drywell. DEC concluded that this drywell was the source of the contamination on the adjoining property. Further tests were conducted on the underground storage tanks on the subject premises and only the super unleaded pipeline between the tank and dispenser failed the

tank tightness test. DEC ordered removal of all the underground storage tanks, despite the fact that it never determined the magnitude of the problem with the super unleaded pipeline. Werle concluded in his report that the "primary source of hydrocarbon contamination at the site was the dry well filled with waste oil". Further analysis of the ground water samples indicated that the majority of the contamination was in the vicinity of this drywell. Based on the foregoing, defendant argues that the contamination caused by this drywell, is not covered by the agreement as an enumerated storage tank, and the Complaint must be dismissed.

Next, defendants point to the presence of MTBE in the soil samples collected as establishing that any spill occurred prior to the retroactive period. Specifically, Werle explains that New York State banned the use of MTBE, a gasoline constituent, effective January 1, 2004. Thus, the detection of the presence of MTBE in the soil samples proves that any spill or contamination occurred prior to the retroactive date of October 20, 2005. Thus, this is a separate basis requiring dismissal of the Complaint.

Finally, defendant argues that prior litigation establishes that plaintiff is not entitled to recover under the agreement. Specifically, in a breach of contract action arising out of the sale of the subject premises and captioned, *Dhir Ankit Corp. v. PRVS Corp., index no. 2053-2007* ("Dhir Ankit" litigation), this Court, by Order (PINES, J.), dated May 2, 2008, granted plaintiff purchaser summary judgment. In that case, the issue was whether plaintiff was entitled to a return of its down payment pursuant to the terms of the contract of sale between the parties, because the DEC declared the subject premises a contaminated site and shut down the operation of the gas station in or about November of 2006. In granting plaintiff summary judgment ordering the return of its down payment as well as cancellation of the promissory note, the Court found that the parties' July, 2004, agreement was clear and unambiguous and provided for the refund of the purchase price in the event the premises was closed by any governmental authority. The Court rejected defendants' argument that the contamination occurred more than a year after the closing of title in August of 2005, and thus it was not responsible.

Now, defendant argues that the Dhir Ankit litigation establishes that plaintiff herein had surrendered operational control of the subject premises and the underground storage tanks for the entire time period between the retroactive policy date of October 20, 2005 and discovery of the contamination. Rather, plaintiff (or a related entity) had sold the subject premises to the plaintiff in the Dhir Ankit litigation and thus, coverage is excluded by the Exclusions provision of the Agreement which states that:

> This insurance does not apply to "claim(s)", "cleanup costs" or "loss(es)" based upon or arising out of:
>
> E. any "release" from a "scheduled storage tank system" which commences after the "scheduled storage tank system" or the "scheduled location" is sold, leased, given away, "abandoned", or operational control has been relinquished by the "insured".

The Order in the Dhir Ankit litigation proves that plaintiff sold the subject premises and relinquished operational control of the gas station, such that based on the foregoing, defendant asserts there are no questions of fact as to whether coverage is excluded.

Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability and seeks to set the matter down for trial on the issue of damages. Plaintiff submits an affirmation of counsel, a copy of the pleadings, and an affidavit by Jeffrey Bohlen, Certified Environmental Inspector and Principal Geologist with EnrivoTrac Ltd., an entity hired by plaintiff to conduct a subsurface investigation and forensic evaluation of the gasoline spill. Plaintiff argues that there are questions of fact which preclude granting summary judgment dismissing the Complaint. Specifically, according to Bohlen's report, leaking tanks and piping covered by the policy were also a source of contamination which occurred after the ban on the use of MTBE in January of 2004. A question of fact exists as to whether the release occurred after October 20, 2005 and thus, summary judgment must be denied. Additionally, Bohlen notes that the presence of ethanol in the samples indicates the release occurred after the MTBE ban in January of 2004. Bohlen also explains in his affidavit that DEC reported a crack in one of the tanks and suspected contamination between two of the tanks. Plaintiff argues that there are

multiple possible sources of contamination, some of which would be covered by the insurance policy, and thus, defendant's motion summary judgment must be denied. Instead, since there is evidence of a leaking gasoline tank which contributed to the contamination, such would be covered, and summary judgment should be granted to plaintiff on the issue of liability.

Turning to the issue of the surrender of operational control, plaintiff notes that it is the insured listed on the Agreement and was the landlord of the subject premises. Plaintiff paid and defendant accepted premium payment. Plaintiff purchased the insurance because the tenant failed to do so. Plaintiff, as landlord, was in control of the subject premises and is entitled to coverage under the Agreement. Plaintiff thus urges the Court to deny defendant's motion for summary judgment and grant its cross-motion for partial summary judgment on the issue of liability and set down for trial the issue of damages.

In reply, defendant first argues that plaintiff's cross-motion is untimely and must be rejected by the Court because it was submitted after the Court imposed deadline to make such motion. On the merits, defendant notes that the parties' experts agree that MTBE was banned effective January 1, 2004 and argues that such proves that any contaminated soil and groundwater containing MTBE was the result of a release prior to such date. Additionally, defendant argues that plaintiff's claim regarding the use of ethanol prior to the ban on MTBE is without substantiation and cannot be relied on by the Court. Moreover, plaintiff never claimed that the contamination was caused by a leaking underground storage tank, but only the failure of the super unleaded pipe to pass the tightness test and there is no proof to demonstrate any release from this line. Instead, defendant reiterates that Werle's report has demonstrated that any gasoline contamination, not the result of the drywell containing waste oil, occurred outside the coverage period, as evidenced by the presence of MTBE in the soil and groundwater samples. Defendant thus seeks summary judgment dismissing the Complaint and denying plaintiff's cross-motion in its entirety.

The law is well settled that to obtain summary judgment, the moving party must

make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein*, Inc.,** 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.***, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Bald conclusory assertions are insufficient to defeat a motion for summary judgment. ***Orange County-Poughkeepsie Ltd Partnership v. Bonte*,** 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007). "It is not up to the court to determine issues of . . . the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." ***Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.*,** 172 A.D.2d 658, 570 N.Y.S.2d 960 (2d Dept. 1991). Issue finding and not issue determination is the key on a motion for summary judgment. ***Francis v. Basic Metal Inc.*,** 144 A.D.2d 634, 534 N.Y.S.2d 697 (2d Dept. 1988).

The unambiguous provisions of insurance policies must be enforced according to the plain and ordinary meaning of their terms. ***Catucci v. Greenwich Insurance Co.*,** 37 A.D.3d 513, 830 N.Y.S.2d 281 (2d Dept. 2007). It is the province of the Court to determine the rights and/or obligations of the parties under insurance contracts based upon the specific language of the policies. ***Cali v. Merrimack Mutual Fire Insurance Co.*,** 43 A.D.3d 415, 841 N.Y.S.2d 128 (2d Dept. 2007)(internal citations omitted); ***Jahier v. Liberty Mutual Group,*** 64 A.D.3d 683, 883 N.Y.S.2d 283 (2d Dept. 2009). Any exclusions from coverage "must be specific and clear in order to be enforced". ***Essex Insurance Co., v. Pingley,*** 41 A.D.3d 774, 839 N.Y.S.2d 208 (2d Dept. 2007); ***quoting, Seaboard Sur. Co. v. Gillette Co.,*** 64 N.Y.2d 304, 486 N.Y.S.2d 873, 476 N.E.2d 272. ***See also, Nick's Brick Oven Pizza v. Excelsior Insurance Co.,*** 61 A.D.3d 655, 877 N.Y.S.2d 359 (2d Dept. 2009); ***Gaetan v. Firemen's Insurance Co.,*** 264 A.D.2d 806, 695 N.Y.S.2d 608 (2d Dept. 1999).

In the case at bar, defendant has demonstrated prima facie entitlement to summary judgment by the submission of the Werle affidavit evidencing that the primary source of

contamination of the subject premises and adjoining property was the drywell improperly used to store waste oil, which was not listed as a covered underground storage tank on the insurance policy. Moreover, the plain language of the parties' agreement provided that it only covered releases from the retroactive date of October 20, 2005. The inspection of the subject premises revealed MTBE in the soil, and it is undisputed that New York State banned the use of MTBE in gasoline effective January 1, 2004, thus, any contamination occurred prior to the coverage period. Finally, the Dhir Ankit litigation revealed that plaintiff herein had sold and relinquished operational control of the subject premises during the applicable coverage period, and thus, Exclusion "E" bars plaintiff's recovery.

In opposition, plaintiff failed to raise a triable issue of fact that the release occurred during the coverage period from a designated underground storage tank. ***See, e.g., Rangoli, Inc. v. Tower Insurance Co.,*** 71 A.D.3d 753, 894 N.Y.S.2d 919 (2d Dept. 2010). The speculations of plaintiff's experts regarding the use of ethanol in gasoline products during the coverage period are insufficient to raise a triable issue of fact. ***Reddy v. 369 Lexington Ave.,*** 31 A.D.3d 732, 819 N.Y.S.2d 776 (2d Dept. 2006), especially in view of the fact that Bohlen concedes the ban on MTBE occurred January 1, 2004, prior to the retroactive date.

Based on the foregoing, and a review of the entire record before the Court, defendant's motion for summary judgment dismissing the Complaint is granted in its entirety. Plaintiff's cross-motion for partial summary judgment is denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 4, 2011
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[x] FINAL DISP
[ ] NON - FINAL DISP