

Nomet Mgt. Corp. v Virginia Surety Co., Inc.
2012 NY Slip Op 33697(U)
April 2, 2012
Sup Ct, New York County
Docket Number: 600612/2008
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

NOMET MANAGEMENT CORP.,

Plaintiff,

-against-

VIRGINIA SURETY COMPANY, INC.,

Defendants.

INDEX NO. 600612/2008

MOTION DATE March 6, 2012

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

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 for summary judgment is decided in accordance with the accompanying decision and order.

Dated: April 2, 2012


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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**DECISION AND
ORDER**

Index No. 600612/2008

O. PETER SHERWOOD, J.:

I. OVERVIEW

This declaratory judgment action arises from an underlying personal injury lawsuit in Supreme Court, Kings County (the "Underlying Action"), which was commenced against plaintiff, Nomet Management Company ("Nomet") and Neiss Management Corp., for injuries sustained by an infant due to alleged exposure to lead paint at premises located at 417 Ocean Avenue, Brooklyn, New York (the "Premises"). In or about December 2006, the Underlying Action was settled during trial for \$250,000.00, with defendant, Virginia Surety Company, Inc. ("VSC"), funding \$100,000.00 and Nomet funding the remainder. Plaintiff then commenced this action seeking a declaration that VSC breached a commercial liability insurance policy issued to the owner of the Premises by failing to indemnify Nomet up to the \$250,000.00 limit of the policy and that VSC must reimburse Nomet in the amount of \$150,000.00 which sum it contributed toward settlement of the Underlying Action.

VSC now moves for summary judgment in its favor declaring that it has no obligation to further indemnify Nomet (Motion Sequence Number 003). Nomet has filed a separate motion for summary judgment for reimbursement in the amount of \$150,000.00 and for an order dismissing VSC's counterclaims, and directing VSC to reimburse plaintiff for its attorneys' fees expended in this action (Motion Sequence Number 004).

II. THE UNDERLYING ACTION

On or about April 11, 2002, an action was commenced in Kings County Supreme Court to recover damages for personal injuries allegedly sustained by the then six year-old infant plaintiff, R.T., and derivatively by his mother, A.T., when the infant was exposed to lead paint at the Premises where he resided for an eight-year period from March 1996 through March 2004 (VSC Rule 19-a

Statement ¶2; Gallagher Affirm. ¶¶ 3-4, Exs. "A", "B"). Plaintiff, Nomet asserts that it was the owner of the Premises from November 7, 1980 to December 22, 2004 (Nomet 19-a Stmt ¶ 1).¹ VSC issued a commercial general liability policy to non-party Neiss Management. Nomet was a named insured under the policy and the Premises was an insured location. The policy was in effect for the period October 30, 2001 through October 30, 2002, and had policy limits of \$250,000 per occurrence (the "Subject Policy"). Cambridge Integrated Services Group ("Cambridge"), VSC's third party claims administrator, agreed to assume the defense of Nomet.

On or about November 21, 2006, VSC offered a maximum of \$100,000 in settlement authority to defense counsel, the law firm of Cozen O'Connor ("Cozen"), in the Underlying Action. In or about December of 2006, the Underlying Action was settled during trial for \$250,000. VSC contributed \$100,000 toward satisfaction of the settlement. Nomet paid the balance.

III. PRESENT ACTION

On February 29, 2008, Nomet commenced this one-count declaratory judgment action claiming that VSC's failure to indemnify Nomet to the limits of the Subject Policy constituted a breach of the Policy. Nomet seeks reimbursement of the amount it paid in settlement of the Underlying Action.

Defendant filed an answer with three counterclaims, namely: (1) Nomet breached the terms of the Subject Policy by settling the Underlying Action without consent for an amount it knew VSC would not pay and which amount was outside the scope of coverage and seeks to recover the cost of its defense; (2) VSC overpaid its share of the settlement as its contribution was much greater than the proportion the alleged damages bore to the one-year policy period of the VSC policy and it is entitled to recover the appropriate portion of the \$100,000 payment; and (3) Nomet was not an insured under the Subject Policy, was not entitled to receive a defense from VSC, and was unjustly enriched by receiving such defense and VSC's \$100,000 contribution toward the settlement.

¹Defendant asserts that the Premises were owned by Neiss Management, a non-party here, and managed by Nomet (Gallagher Affirm. ¶ 9).

IV. DISCUSSION

A. Standard of Review

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see*, *Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see* *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

However, once the initial demonstration has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see*, *Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see*, *Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and, further, that summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see*, *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see*, *Zuckerman v City of New York*, *supra*; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine credibility issues, but simply to determine whether such issues of fact requiring a trial exist (*see*, *Powell v HIS Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]; *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

B. VSC Summary Judgment Motion

On its motion, VSC principally relies on *Serio v Public Service Mutual Insurance Company* (304 AD2d 167 [2nd Dept 2003]), where, in an action to recover damages for injuries sustained by

exposure to lead paint, the court held that where several policies of insurance are in effect during the period of lead ingestion, liability among insurers shall be in proportion to the amount of time each was on the risk. Under, this so-called “time-on-the-risk” analysis, insurers’ respective obligations are prorated according to the length of time each covered the risk. In reaching this determination, the Appellate Division relied on *Consolidated Edison Company of New York, Inc. v Allstate Insurance Company* (98 NY2d 208 [2002]) where the Court of Appeals approved a time-on-the-risk allocation involving a pollution claim that allegedly occurred over a period of 60 years.

Applying the time-on-the-risk analysis to the facts of this case, VSC contends that it is responsible only for its pro rata share of the loss, alleged to be one-eighth of any indemnity up to its \$250,000 policy limits or \$31,250 of the settlement amount in the Underlying Action. Thus, VSC maintains that it paid more than its proportionate share of the indemnity by \$68,750. VSC argues that Nomet is not entitled to seek full indemnification from it merely because VSC was the only insurer to assume its defense and indemnity obligations in the Underlying Action.

Nomet does not challenge the “time-on-the-risk” analysis as a means of allocating coverage in toxic exposure cases. However, Nomet contends that this analysis cannot be applied to policy periods during which a particular insured is unable to procure some form of insurance in the marketplace for the risk its seeks to insure (in this case lead exposure) or periods covered by policies issued by insurers in liquidation. Nomet contends that after the expiration of the VSC Policy, Nomet could not procure a primary commercial general liability policy that did not contain a lead liability exclusion. Nomet contends that this fact is confirmed by the deposition testimony of VSC’s claims manager responsible for handling of Nomet’s claim in the Underlying Action, Richard Strohm.

Nomet contends further that in determining the proper allocation fraction, the court must look not merely to the years for which a bodily injury is alleged, but to the years in which the bodily injury in fact occurred. Nomet avers that the infant plaintiff first showed an elevated blood lead level on May 16, 2000 and that his blood lead level remained elevated through March 2004 when the infant moved from the Premises. With respect to this “injury-in-fact” period, Nomet contends that from April 30, 2000 through April 30, 2001, it was insured by Legion Indemnity Company but that Legion was in liquidation at the time of the Underlying Action. Therefore, the Legion policy cannot be taken into account in allocating liability as such policy was not available to Nomet. Nomet observes that

the VSC policy had not expired when the Underlying Action was commenced. Nomet claims that thereafter it could not procure a policy without a lead exclusion, "as logically no insurer would have insured an ongoing loss" (Plaintiff's Memorandum in Opposition, p. 14). Nomet concludes that since the VSC policy was the only available insurance the court can take into account in determining the allocation fraction, VSC is exclusively obligated to indemnify up to the policy limit.

In reply, VSC states that plaintiff's arguments are based upon two erroneous assumptions: (1) that the Subject Policy was extended for an additional five months and (2) that plaintiff could not obtain liability insurance for lead exposure liability after the expiration of the Subject Policy. VSC maintains that it caused a Notice of Non-Renewal to be mailed to the named insured, Neiss Management, on July 26, 2002, which Notice indicates that VSC would not renew the Subject Policy when it expired on October 30, 2002. VSC maintains that whether the court applies an eight-year exposure period as VSC contends is appropriate, or a four-year exposure period as Nomet urges, the result is the same, *i.e.*, VSC is not responsible for the periods when Nomet went without available insurance, whether because it was uninsured, the insurer became insolvent, or it chose to purchase insufficient insurance. VSC disputes Nomet's contention that after the Underlying Action was commenced insurance for lead claims was unavailable.

New York courts apply a time-on-the risk approach to allocating insurance coverage for diseases with long latency periods, as well as for similar matters such as pollution. Under this approach, liability for injury or damages is allocated to all triggered policies, and to the insured for periods of self-insurance, rather than on a "joint and several" basis. Under the latter approach, liability for all injuries sustained from exposure to a toxic substance may be attributed to one triggered policy, the total liability would be collected under that policy up to that policy's limits, and the insurer on that policy could then seek contribution from insurers on other triggered policies (*see Olin Corp. v Insurance Co. of N.A.*, 221 F3d 307, 322 [2d Cir.]). Under the time-on-the-risk method, each insurer's liability (up to its policy limit) is measured by the underlying loss multiplied by the ratio of time covered by the policy to the time exposed to the risk (*see Sybron Transition Corp. v Security Ins. of Hartford*, 258 F3d 595, 597 [7th Cir] [interpreting NY law]). Courts have adopted this method since it is generally impossible to determine whether exposure to a toxic substance in a given year caused or contributed to the injury. Thus, the courts allocate liability to

all periods of exposure because they contain the likely causes and liability is spread among insurers “to reflect the uncertainty in the timing of cause and consequence” (*Sybron*, 258F3d at 601). In this respect, other insurers on the risk are not responsible for the pro rata share attributed to periods covered by insurers that are now insolvent, but rather such periods are attributed to the insured (*see Olin*, 221 F3d at 322-327; *see also Continental Cas. Co. v Employers Ins. Co. of Wasau*, 22 Misc3d 729 [Sup Ct. NY Co 2008], *rev'd on other grounds* 85 AD3d 403 [1st Dept 2011]). In determining allocation, the court must also inquire whether during periods of no insurance, there was appropriate insurance available in the marketplace.

These principles compel application of the time-on-the-risk approach in this case. VSC has submitted documentary proof that even for the period after the Subject Policy expired, liability insurance covering lead exposure liability was available from at least one company, AIG. It appears that the infant plaintiff suffered injury over an eight year period stemming from exposure to lead. This period serves as the denominator in the calculation. VSC covered the risk for one year of its policy, which period serves as the numerator of the calculation ratio. Thus VSC is liable in the amount of one-eighth of Nomet's total liability under the settlement which is \$31,250. Accordingly, VSC has met its burden of demonstrating its entitlement to summary judgment declaring that it has no obligation to further indemnify Nomet with respect to settlement of the Underlying Action.

C. Nomet's Motion for Summary Judgment

The Nomet motion for summary judgment (Motion Sequence No.: 004) is predicated on two principal arguments: (1) that the Subject Policy issued by VSC was the only available policy for the period during which the infant plaintiff in the Underlying Action sustained injuries and, therefore, VSC is liable to Nomet for the full amount of the settlement value in that action; and (2) that at no time was VSC operating under a reservation of rights as it relates to either the defense of the Underlying Action or indemnification of Nomet. For these reasons VSC should be estopped from advancing the position that it is required to participate up to \$100,000 only in the settlement of the Underlying Action. Nomet also maintains that VSC's counterclaims should be summarily dismissed as lacking in merit.

In support of its motion, Nomet submits the declaration pages for each of the insurers that provided coverage of the Premises during the period, 1996 to March 2004, which is the period during

which the infant plaintiff was exposed to lead paint at the Premises (*see* Affirmation in Support of Jonathan Corbett, Ex. “D”). Nomet identifies the following insurance carriers as providing commercial general liability insurance for the Premises but claims they are “non-triggered” policies:

1. General Accident Insurance Co. (4/30/96-4/30/97) (lead paint exclusion)
2. Reliance Insurance Co. (6/01/96-6/01/97) (in liquidation according to VSC)
3. Pacific Insurance Co. (3/20/97-5/16/97)
4. Empire Indemnity Insurance Co. (5/16/97-5/16/98)
5. Landmark Insurance Co. (4/30/98-4/30/99)
6. National Union Fire Insurance Co. (4/30/99-4/30/00)

Nomet contends that no bodily injury occurred during the time the above policies were in effect because the infant plaintiff’s blood lead levels were first found to be elevated on May 16, 2000 (*see* Corbett Affirm. Ex. “C”).² Indeed, Pacific, Landmark and National Union all initially agreed to provide a defense in connection with the Underlying Action, but later denied coverage on the ground that no bodily injury occurred during their respective coverage periods (*id.* Exs. “E” and “F”). General Accident denied coverage based upon the lead exclusion provision in its policy (*id.* Ex. “G”). Reliance, which was in liquidation at the time of the loss, also denied coverage on the ground that no bodily injury occurred during the policy period attributable to it (*id.*).

Nomet characterizes the following policies as triggered policies:

1. Legion Indemnity Company (4/30/00-4/30/01)
2. Virginia Surety Company (10/30/01-10/30/02)
3. Virginia Surety Company (3/1/03-4/27/03)
4. Arch Insurance Group (4/29/03-4/29/04)

Nomet acknowledges that during the periods the “triggered” policies were in effect, the infant plaintiff’s blood lead levels were continually measured at or above 10 micrograms per deciliter (Corbett Affir. Ex. “C”). Legion did not provide Nomet with a defense because it was in

²Nomet contends that the New York City Department of Health and Mental Hygiene deems blood lead levels elevated when recorded at 10 micrograms per deciliter or greater (Plaintiff’s Memorandum of Law in Support, p. 4). NYC Health Code (24 RCNY) §173.13 (d) (2) defines lead poisoning as blood lead levels of 20 micrograms per deciliter or higher (*see Pelaez v Seide*, 2 NY3d 186, 196, fn. 3 (2004)).

conservation at the time the Underlying Action was filed (*id.* Ex. "I"). Arch denied coverage based on a lead contamination exclusion clause in its policy (*id.* Ex. "M"). Nomet acknowledges that a separate VSC policy, issued to Prestige Properties and including the Premises, which covered the period March 1, 2003 - April 27, 2003, contained a lead exclusion provision (Plaintiff's Memorandum of Law in Support p. 7).

Nomet argues that the court should consider only the injury-in-fact period, *i.e.*, May 16, 2000, when the infant's blood lead level was first recorded as elevated, through March 2004, when the infant moved from the Premises. Nomet then argues that the court should exclude the period when the Legion policy was in effect (April 30, 2000-April 30, 2001), because even though the policy was triggered, Legion was in liquidation at the time the Underlying Action was filed and therefore the policy was not available to indemnify Nomet. Lastly, Nomet contends that subsequent to expiration of the Subject Policy, it could not procure a policy in the marketplace that covered lead paint liability because the Underlying Action had already been commenced and "logically no insurer would have insured an ongoing loss" (Plaintiff's Memorandum of Law in Support, p. 14). By extension of this reasoning, Nomet maintains that the allocation fraction is a one-to-one ratio and therefore, VSC is exclusively obligated to satisfy Nomet's liability up to its policy limits.

As to dismissal of the counterclaims, Nomet contends that the documentary evidence demonstrates that (1) VSC was aware of and consented to settlement of the Underlying Action as Strohm expressly proffered \$100,000 to settle the action (first counterclaim); (2) VSC is not entitled to any reimbursement from Nomet as its pro rata share of the settlement was underpaid, rather than overpaid (second counterclaim), and (3) VSC's claim that Nomet was not an insured under the Subject Policy is belied by the Subject Policy itself in which Nomet is explicitly named as an insured (third counterclaim).

VSC in opposition relies on the same arguments as on its motion for summary judgment. It also challenges Nomet's position that only the periods when the infant plaintiff was recorded as having an elevated blood lead level should be considered in the allocation of liability. Rather, VSC contends that the entire eight-year exposure period should be considered in relation to the settlement (*see Pelaez v Seide*, 2 NY3d 186, 197 [2004])("[e]ven at low levels, lead paint poisoning can harm the central nervous system and cause health problems such as impaired growth, hearing loss and limited attention span").

VSC also argues that the majority of the period that the settlement covered must be allocated to Nomet as it either chose to self-insure by not purchasing insurance or purchased an inadequate amount of insurance when it opted to purchase policies with exclusion of coverage for lead liability claims.

Lastly, VSC contends that Nomet's estoppel argument must be rejected because it is based on an incorrect understanding of the law, namely Insurance Law §3420 (d) cited by Nomet. VSC contends that the fact it agreed to defend and indemnify Nomet in the Underlying Action does not require it to tender the full amount of its policy in order to settle the action.

Nomet's arguments based on its view of the law regarding the time-on-the-risk formula lacks merit for the reasons discussed in section IV(B) of this Decision and Order. Regarding Nomet's estoppel argument, Nomet indicates in its reply brief that while VSC adheres to its position that it operated under a reservation of rights in the Underlying Action, VSC admits in its Response to Nomet's Rule 19-a Statement of Facts that no such reservation of rights letter was ever issued in connection with the Underlying Action (*see* ¶ 25 of VSA's Rule 19-a Response). The court need not address the estoppel issue because VSC has already paid more than its prorated share of the loss in the Underlying Action and it is not seeking to recoup the excess amount it paid.

Accordingly, it is hereby

ORDERED that the motion of defendant, Virginia Surety Company, Inc., for summary judgment (Motion Sequence Number 003) is GRANTED to the extent that it seeks a declaration that it has no obligation to indemnify plaintiff, Nomet Management Corporation, any amount in excess of the amounts already paid in the Underlying Action; and it is further


ORDERED that the motion of plaintiff, Nomet, for summary judgment (Motion Sequence Number 004) is DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against plaintiff, Nomet, and in favor of defendant, VSC, dismissing the complaint in its entirety with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: April 2, 2012

ENTER,



O. PETER SHERWOOD

J.S.C.