FILED: NEW YORK COUNTY CLERK 06/17/2013 INDEX NO. 158896/2012
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 158896/2012
ONEBEACON AMERICA INSURANCE
vs.
WHITMAN PACKAGING CORPORATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3.15.2013
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendant Whitman Packaging Corporation's motion, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff OneBeacon America Insurance Company's complaint, on the ground that it fails to state a claim upon which relief can be granted, is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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

Dated: 6.10.2013

CAROL EDMEAD J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ONEBEACON AMERICA INSURANCE COMPANY, Index No.: 158896/12

Plaintiff,

-against-

WHITMAN PACKAGING CORPORATION,

Defendant.

_____x

Edmead, J.:

In this action sounding in subrogation, plaintiff OneBeacon America Insurance Company (OneBeacon) seeks to recover from defendant Whitman Packaging Corporation (Whitman) payments it made in 2012 to its insured, Estee Lauder, Inc. (Estee Lauder), for costs that Estee Lauder incurred between July 1999 and March 2009 defending and resolving claims asserted against it by the New York State Department of Environmental Conservation (NYSDEC) (the NYSDEC claims). Defendant Whitman moves, pursuant to CPLR 3211 (a) (7), to dismiss OneBeacon's complaint on the ground that it fails to state a claim upon which relief can be granted.

BACKGROUND

The Underlying Claims

The underlying action in this case was brought by the plaintiff, Estee Lauder, to compel defendant OneBeacon to indemnify it for its costs associated with defending the NYSDEC claims, which arose from the alleged dumping of hazardous wastes at two landfills on Long Island. One of the NYSDEC claims was in regard to the alleged dumping of hazardous wastes at

a landfill located in Blydenburgh (the Blydenburgh landfill). The other NYSDEC claim concerned alleged dumping of hazardous wastes at a landfill located in Huntington (the Huntington landfill). In 2002, a third claim arose in the context of a third-party action against Estee Lauder in a matter entitled *State of New York v Hickey's Carting, Inc.*, Case No. CV 01-3136 ED NY) (Hickey's Carting), in which Estee Lauder, as well as others, were alleged to be liable, in whole or in part, for the costs of remediating the Blydenburgh landfill.

Estee Lauder is a subsidiary of its parent company, The Estee Lauder Companies, Inc. (The Estee Lauder Company). Whitman is a subsidiary of Aramis, Inc., which in turn is a subsidiary of The Estee Lauder Company. Accordingly, Estee Lauder and Whitman are affiliated entities through their common corporate parent, The Estee Lauder Companies.

The NYSDEC claims alleged that Estee Lauder, the entity which arranged for certain waste disposal at the Blydenburgh and Huntington landfills, and other alleged potentially responsible parties, which included various other waste-disposal arrangers and carters, as well as Whitman (collectively, the PRPs), were jointly and severally liable, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA), for the costs incurred by the State of New York (the State) to remediate the Blydenburgh landfill. It should be noted that Estee Lauder informed the NYSDEC that Whitman, named as a PRP in the Blydenburgh matter, disposed of certain wastes at the Blydenburgh landfill at Estee Lauder's direction. In addition, Estee Lauder maintained that Whitman was not responsible for disposing of waste in the ground at the Huntington landfill, although it did incinerate obsolete product there, which product then sat atop the landfill. Whitman was not named as a PRP in the Huntington matter.

The State's approximate cost to remediate the Blydenburgh landfill was $18 million, and its cost to remediate the Huntington landfill was approximately $22 million. Estee Lauder incurred approximately $3,831,838.26 in costs to defend and resolve the Blydenburgh and Huntington claims.

In November of 2004, Estee Lauder resolved the Huntington claim by a consent decree with the NYSDEC in return for mutual releases between and among NYSDEC, Estee Lauder, Whitman and the other alleged PRPs. In March of 2009, Estee Lauder resolved the Blydenburgh claim by a similar consent decree with NYSDEC, in return for mutual releases between and among NYSDEC, Estee Lauder, Whitman and other PRPs.

The Coverage Dispute

In September of 1968, Estee Lauder purchased policy No. E16-40036-27 (the policy) from OneBeacon. The policy provided liability coverage for property damage claims against Estee Lauder during the relevant policy period. Whitman was not insured under the policy.

In May of 1999, Estee Lauder provided notice of the Huntington and Blydenburgh claims to OneBeacon. After conducting an investigation, OneBeacon denied that it had ever issued the policy, denying coverage approximately 14 months later. Thereafter, in 2005, Estee Lauder filed suit in the Supreme Court of New York, New York County, under index No. 602379/05 to establish the existence of the policy, to obtain defense and indemnity coverage under the policy for the Huntington and Blydenburgh claims and to recover damages for breach of contract.

On February 19, 2009, in the case of *Estee Lauder Inc. v OneBeacon Ins. Group, LLC* (62 AD3d 33, 40 n 6, 41 [1st Dept 2009]), the Appellate Division, First Department, held that OneBeacon was obligated to defend Estee Lauder with respect to the Blydenburgh landfill claim

and the *Hickey's Carting* action and ordered OneBeacon to "promptly" pay the alleged charges, allowing Estee Lauder the opportunity to adjust said charges to reflect only those that were "reasonable and necessary."

As of mid-year 2011, because OneBeacon had not yet made any payments to Estee Lauder, as ordered by the Appellate Division in February of 2009, Estee Lauder moved for an order in this court permitting it to amend its pleadings to allege a claim that OneBeacon had breached its continuing duty of good faith by (1) failing to make the ordered adjustments to the charges, and (2) by failing to make the aforementioned payment to Estee Lauder. On February 23, 2012, this court granted Estee Lauder's motion to amend its pleadings.

Following this court's ruling on February 23, 2012, OneBeacon finally paid Estee Lauder 100% (percent) of the amount of Estee Lauder's claim for the Huntington and Blydenburgh defense costs. Specifically, between April and July of 2012, OneBeacon paid Estee Lauder $3,831,838.26, plus partial interest in the amount of $1,097,104. Thereafter, on December 14, 2013, OneBeacon filed the instant suit to recover the costs it paid to Estee Lauder from Whitman, asserting three causes of action: unjust enrichment, implied indemnification and equitable subrogation. Whitman now moves to dismiss each of these causes of action on the ground that each fails to state a cause of action on which relief can be granted.

DISCUSSION

CPLR 3211 (a) (7) permits a defendant to seek dismissal of a cause of action for failure to state a claim. In evaluating a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5

NY3d 11, 19 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Harris v IG Greenpoint Corp.*, 72 AD3d 608, 608-609 [1st Dept 2010]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997], citing *Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]; *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). "[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one" (*Amaro v Gani Realty Corp.*, 60 AD3d at 492).

Unclean Hands

Initially, Whitman argues that OneBeacon is barred from seeking equitable relief on the ground that OneBeacon did not come to court with clean hands. Whitman argues that OneBeacon failed to make any payment regarding its obligations to the defense of Estee Lauder until more than 12 years after it first received notice of Estee Lauder's potential liability, and more than three years after the Appellate Division directed it to make prompt payment. "[T]he party seeking equity must do equity, i.e., he must come into court with clean hands" (*Pecorella v Greater Buffalo Press*, 107 AD2d 1064, 1065 [4th Dept 1985]).

However, "[t]he doctrine of unclean hands is only available where plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter, and the party seeking to invoke the doctrine is injured by such conduct" (*Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984]; *Cohn & Berk v Rothman-Goodman Mgt. Corp.*, 125 AD2d 435, 436 [2d Dept 1986]). "In other

words, relief to the plaintiff cannot be denied unless the immoral or unconscionable act alleged by the defendant was done to the defendant himself" (*id.*).

Here, as it has not been sufficiently established that Whitman itself suffered any alleged inequity from OneBeacon's acts with respect to Estee Lauder, Whitman cannot invoke the doctrine of unclean hands.

OneBeacon's Unjust Enrichment Claim

Unjust enrichment, a quasi-contract theory of recovery, "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "'The essence of unjust enrichment is that one party has received money or a benefit at the expense of another'" (*Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [2d Dept 1999], quoting *City of Syracuse v R.A.C. Holding*, 258 AD2d 905, 906 [4th Dept 1999]). "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

Therefore, to successfully plead unjust enrichment, a plaintiff must demonstrate "'that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]; *Clark v Daby*, 300 AD2d 732, 732 [3d Dept 2002]). "The unjust enrichment claim does not require that the party enriched take an active role in obtaining the benefit" (*Aetna Cas. & Sur. Co v LFO Constr. Corp.*, 207 AD2d 274, 277 [1st Dept 1994]).

Initially, the theory of unjust enrichment is based on a quasi-contract theory and only applies in the absence of a contract or agreement on the same subject (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005] ["no unjust enrichment because the matter [was] controlled by contract"]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Whitman argues that, because the policy was "an express contract governing the subject matter of [OneBeacon's] claims," i.e., the defense of Estee Lauder in the event of property damage, and as case law dictates that it is of no moment whether or not Whitman was a signatory to the policy, there can be no unjust enrichment cause of action against it (*see Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313, 313 [1st Dept 1995] [Court held that the existence of an express, valid and enforceable contract between defendant and the plaintiff, which governed the subject matter of the plaintiff's claim, barred any quasi-contractual claims against another defendant, a third-party nonsignatory to said contract]).

However, as put forth by OneBeacon, the subject matter of OneBeacon's claims concern whether OneBeacon has a right to reimbursement from Whitman for the defense Whitman allegedly received from OneBeacon, not whether OneBeacon was required to defend Estee Lauder. On that note, the policy did not address whether OneBeacon was responsible for defending Whitman, nor did it address whether or not OneBeacon had the right to seek recoupment from other entities which might also be liable for the subject property damage. Thus, Whitman is not entitled to dismissal of OneBeacon's unjust enrichment claim on this ground.

However, in pleading unjust enrichment, the facts alleged must "indicate a relationship

between the parties that could have caused reliance or inducement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*id.*, citing *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]).

Here, as Whitman argues, OneBeacon has failed to plead the existence of a relationship between it and Whitman that could have caused some type of reliance or inducement or the bestowal of a benefit (*see id.*). OneBeacon's obligation to pay Estee Lauder's defense costs was established when it issued the policy to Estee Lauder. Whitman was not a party to the policy, nor was it an insured under the policy. Importantly, OneBeacon has not alleged any relationship with Whitman whereby Whitman unfairly induced OneBeacon to issue the policy to Estee Lauder or to perform its obligations under the policy

In addition, "'[g]enerally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent'" (*Clark v Daby*, 300 AD2d at 732-733, citing *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d at 421).

Here, while OneBeacon's defense of Estee Lauder may have worked also to Whitman's benefit, it has not been asserted that Whitman's conduct was tortious or fraudulent, or that OneBeacon operated under a mistake of fact or law. Rather, OneBeacon paid Estee Lauder's defense costs because they were obligated to under the terms of the policy. In fact, OneBeacon only performed its obligations under the policy after the Appellate Division ruled that it must do so.

Moreover, OneBeacon's claim of unjust enrichment fails, because it does not contain sufficient factual details to establish that Whitman "unjustly received something of value at the expense of [OneBeacon]" (*North Salem Psychiatric Servs., P.C. v Medco Health Solutions, Inc.*, 50 AD3d 986, 986 [2d Dept 2008]). As argued by Whitman, although OneBeacon argues that Estee Lauder's defense costs were vastly disproportionate to the defense that would have been required to defend Estee Lauder alone, OneBeacon does not put forth any evidence in support of this argument, despite having access to Estee Lauder's defense bills. In addition, OneBeacon does not allege that any benefits were paid directly to Whitman. It should be noted that, pursuant to the Appellate Division's ruling in February of 2009, although OneBeacon had the opportunity to make an adjustment to its defense costs owed to Estee Lauder, OneBeacon never made any downward modifications on the theory that such charges actually went to the defense of Whitman.

OneBeacon's defense of Estee Lauder, standing alone, is insufficient to support an inference of unjust enrichment on the part of Whitman (*Mandarin v Wildenstein*, 16 NY3d at 183 ["without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal"]; *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2005] ["plaintiff's allegation that the appellants received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment"]; *Clark v Daby*, 300 AD2d at 732 ["the mere fact that [a] plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment"]).

Thus, as OneBeacon has failed to state a claim for unjust enrichment on which relief can be granted, Whitman is entitled to dismissal of OneBeacon's unjust enrichment claim against it.

OneBeacon's Implied Indemnification Claim

"A cause of action for implied indemnification requires a showing that plaintiff and defendants owed a duty to third parties, and that plaintiff discharged the duty which, as between plaintiff and defendants, should have been discharged by defendants" (*Germantown Cent. School Dist. v Clark*, 294 AD2d 93, 99 n 2 [3d Dept 2002], *citing McDermott v City of New York*, 50 NY2d 211, 216-217 [1980]).

As noted by the Court in *McDermott v City of New York* (50 NY2d at 217):

> "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity' (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs [citations omitted]."

Accordingly, in order to establish an implied indemnity claim, OneBeacon is required to show that both OneBeacon and Whitman, the party to owe indemnification, breached a duty owed to Estee Lauder, the underlying plaintiff (*Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 [1990]). In addition, OneBeacon must show that OneBeacon discharged that duty, which, as between Whitman and Beacon, should have been discharged by Whitman (*McDermott v City of New York*, 50 NY2d at 217).

OneBeacon argues that, when it paid defense expenses to Estee Lauder in connection with Estee Lauder's liability exposure created by Whitman's own waste and product disposal at the Blydenburgh and Huntington landfills, OneBeacon obtained an implied right of indemnification

against Whitman. However, OneBeacon's cause of action for implied indemnity fails, because OneBeacon did not establish any duty owed by Whitman to Estee Lauder (*see Germantown Central School Distr. v Clark*, 294 AD2d at 94, 98-99 [cause of action for implied indemnity failed where school district could not show that the contractor, who failed to discover and remove asbestos, owed any duty to the third parties, school district's employees and school children]). In fact, a review of the record indicates that Whitman, as the processor of the materials at issue, worked according to destruction and disposal procedures authored by Estee Lauder.

As OneBeacon has failed to state a claim for implied indemnity on which relief can be granted, Whitman is entitled to dismissal of OneBeacon's implied indemnity claim.

OneBeacon's Equitable Subrogation Claim

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 307 AD2d 939, 941 [2d Dept 2003]). "[T]he insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured" (*Federal Ins. Co. v Arthur Anderson & Co.*, 75 NY2d 366, 372 [1990]).

"An insurer's subrogation rights accrue upon payment of the loss" (*Winkelmann*, 85 NY2d at 582). "At that point, an insurer who has paid the policy limits possesses the derivative and limited rights of the insured and may proceed directly against the negligent third party to

recoup the amount paid" (*id.*). However, it is not necessary that the insured is made whole before the insurer's rights as subrogee arises (*id.*). "The general rule is that an insurer which has paid part of a loss may proceed pro tanto against a third person whose negligence or wrongful act caused the loss" (*Federal Ins. Co. v Arthur Anderson & Co.*, 75 NY2d at 374).

When OneBeacon initially received notice in regard to the Blydenburgh and Huntington claims, it denied the existence of the policy and denied coverage. In turn, Estee Lauder filed suit to establish OneBeacon's obligations under the policy. Thereafter, Estee Lauder defended itself, along with Whitman. Estee Lauder resolved the Huntington claim in November of 2004, and the Blydenburgh claim in March of 2009. Importantly, in resolving these claims, NYSDEC, Estee Lauder, Whitman and the other PRPs gave mutual releases.

Although the Appellate Division ordered OneBeacon to "promptly" pay Estee Lauder's unpaid defense costs in February of 2009, OneBeacon did not pay anything at all to Estee Lauder until 2012, more than three years after Whitman was released with respect to the Blydenburgh claim, and seven years after Whitman was released with respect to the Huntington claim. Therefore, OneBeacon had no right of subrogation until April of 2012. By this time, whatever rights that Estee Lauder might have had against Whitman had been released. Accordingly, OneBeacon cannot now succeed to any right of Estee Lauder against Whitman.

As OneBeacon cannot establish a claim sounding in equitable subrogation, Whitman is entitled to dismissal of OneBeacon's equitable subrogation claim against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Whitman Packaging Corporation's motion, pursuant to CPLR

3211 (a) (7), to dismiss plaintiff OneBeacon America Insurance Company's complaint, on the ground that it fails to state a claim upon which relief can be granted, is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: June 10, 2013

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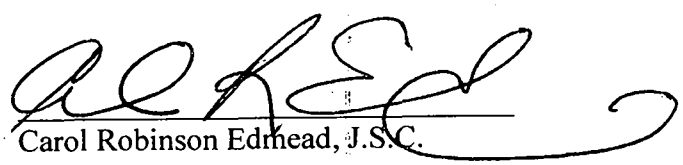

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD