

**National Union Fire Ins. Co. of Pittsburgh, PA v
Compaction Sys. Corp. of N.J.**

2013 NY Slip Op 31461(U)

June 28, 2013

Supreme Court, New York County

Docket Number: 107838/2009

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

**NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA,**

INDEX NO.: 107838 / 2009

Plaintiff,

MOTION SEQ. NO.: 004

- against -

**COMPACTION SYSTEMS CORPORATION OF
NEW JERSEY and COMPACTION SYSTEMS
CORPORATION OF CONNECTICUT,**

DECISION and ORDER

Defendants.

Motion by Plaintiff National Union Fire Insurance Co. Of Pittsburgh, PA for Partial Summary Judgment and Declaratory Judgment

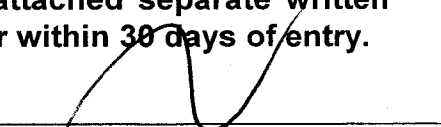
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Cross-Motion: No Yes **Number of Cross-Motions: 1**

Cross-Motion by defendants Compaction Systems Corp. of New Jersey and Compaction Systems Corp. of Connecticut for partial summary judgment.

Upon the foregoing papers, it is hereby ordered that the Motion by the plaintiff is denied in all respects and the cross-motion of defendants is granted only to the extent set forth in the attached separate written Decision and Order. Defendant to settle order within 30 days of entry.

Dated: June 28, 2013
New York, New York


Hon. Shlomo S. Hagler, J.S.C.

Check one: **Final Disposition** ~~**Non-Final Disposition**~~

Motion is: Granted Denied Granted in Part Other

Cross -Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Index No.: 107838/2009

Plaintiff,

-against-

Motion Sequence: 004

COMPACTION SYSTEMS CORPORATION OF
NEW JERSEY and COMPACTION SYSTEMS
CORPORATION OF CONNECTICUT,

DECISION AND ORDER

Defendants.

-----X

SHLOMO S. HAGLER, J.:

Plaintiff National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) commenced this action seeking a declaration of its rights under a 1998 settlement agreement and release (“the Settlement Agreement”) that it entered into with defendants Compaction Systems Corporation of New Jersey and Compaction Systems Corporation of Connecticut (collectively “Compaction” unless otherwise indicated). National Union also seeks damages, plus interest, from Compaction’s alleged breach of the Settlement Agreement. National Union moves and Compaction cross-moves for orders granting each of them partial summary judgment in their favor with regard to the Settlement Agreement. National Union also moves for a dismissal of Compaction’s counterclaims.

STATEMENT OF FACTS

The underlying basis of National Union’s action is federal litigation stemming from the disposal of materials that were, or contained, hazardous substances between the years 1948 and 1981, at the Combe Fill South Landfill in Washington and Chester Townships, Morris County, New

Jersey (“the Site”). Non-party Combe Fill Corp. (“CFC”), a wholly owned subsidiary of non-party Combustion Equipment Associates (“CEA”), purchased the landfill on or about September 15, 1978, and operated it until the Site was closed in 1981. Intense investigations, from 1973 through 1983, by both the United States and the New Jersey environmental protection agencies and departments, resulted in the classification of the subject landfill as a Superfund Site on the National Priorities List. It is undisputed that the estimated cost for the cleanup of the Site is approximately \$200 million.

Many parties were investigated with respect to their alleged ownership and operation of the Site, and/or for their alleged participation in the transportation to, and disposal of, hazardous substances at the Site. CFC and CEA, which became known as Carter Day Industries, Inc.¹ (collectively, “the Carter Day Parties”) following bankruptcy proceedings, as well as Compaction, were among the entities scrutinized for their purported involvement in the environmental contamination of the Site, and identified as potentially responsible parties, or “PRPs.”

As part of its effort to obtain insurance coverage for its involvement with the Site, Compaction filed a declaratory judgment action in 1996 against various insurers in the Superior Court of New Jersey, Bergen County, under Docket No. BER-L-673-96 (“the Bergen County DJ Action”). In or about November 1996, Compaction amended its complaint to include National Union among the insurers from whom it was seeking defense, indemnification, and costs relating to the investigation, cleanup, and remediation of the Site. According to Compaction’s “Amended Complaint II,” National Union provided continuous, primary, excess and/or umbrella comprehensive

1. CEA filed for Chapter 11 bankruptcy in 1980. The entity that emerged from bankruptcy in 1984 is known as Carter Day Industries, Inc.” (Settlement Agreement at p. 1).

general liability insurance to its insured, CEA, between November 1, 1980 and November 15, 1982, and Compaction was seeking coverage as an additional insured under the relevant policies.

On or about July 29, 1998, Compaction and National Union entered into the Settlement Agreement under which the parties settled their coverage dispute in the Bergen County DJ Action. Since National Union had issued certain liability insurance policies (“the Subject Policies”) to its insureds (CEA and the Carter Day Parties), with Compaction as additional insured parties, National Union might have been obligated to provide a defense, indemnify, or pay on behalf of Compaction claims arising under the Subject Policies. In their Settlement Agreement, Compaction and National Union forever released and discharged each other and each other’s predecessors, successors, et al, as follows:

“from any and all claims, duties, causes of action, demands, duties to defend, obligations, liabilities, rights, damages . . . of any kind, whether known or unknown, asserted or unasserted, whether at law or in equity, which [either party] now has, or ever had, or may have in the future with respect to the Subject Insurance Policies on account of the Subject Claims”

(Settlement Agreement at § 5).

The term “Subject Claims” is defined in section four of the Settlement Agreement as:

“any claims, proceedings and actions made, or which may in the future be made, asserted or filed against Compaction by the United States Environmental Protection Agency, the New Jersey Department of Environmental Protection, or any other federal, state, local or other environmental agencies and/or private parties for environmental liabilities . . . arising out of Compaction’s alleged acts or omissions as a generator, disposer, owner/operator, or transporter of alleged hazardous or toxic substances or contaminants. The phrase ‘Subject Claims’ as used herein also incorporates the definition of Environmental Claims contained in the Release. . . .”

The release provides, in relevant part:

“Environmental Claims” shall mean any demand, claim, suit, request for relief, action or forbearance of any kind, proceeding and/or notices of partial or total responsibility (including Potential Responsible Party of “PRP” notices) made, asserted, threatened or filed against Compaction by the [NJDEP, USEPA], other federal, state, local or other governmental or quasi-governmental agencies or private persons, organizations or entities including but not limited to bodily injury, personal injury, property damage, harm to natural resources, plant life or animal life, or any other harm, cleanup . . . or need for remedy of any kind, and/or any other past, present or future claim, demand, or cause of action, arising out of Compaction’s alleged actual, threatened, potential or vicarious acts, omissions, liability, or responsibility . . . related to, arising out of or involving:

(a) alleged, threatened or potential pollution, contamination or other alleged injurious environmental or toxic condition . . . ”

(Release at pages 2-3).

Approximately two months later, on September 20, 1998, the United States Environmental Protection Agency (“USEPA”) filed a complaint, identified as Civil Action No. 98-cv-4812, in the United States District Court for the District of New Jersey against Compaction and other defendants. Claiming that the defendants were involved in arranging for the disposal of hazardous substances at the Site, and/or transporting hazardous substances to the Site, or owning and/or operating the Site at times during which such substances were accepted for disposal, the USEPA was looking to recover from the various defendants in that action the costs incurred in connection with the release and clean-up of hazardous substances at the Site.

The New Jersey Department of Environmental Protection (“NJDEP”) filed a similar complaint against Compaction and other defendants on October 19, 1998, identified as Civil Action No. 98-cv-4781, in the same U.S. district court, and filed an amended complaint on August 30, 1999. NJDEP was seeking to recover past and future damages and costs under the Comprehensive

Environmental Response, Compensation and Liability Act, commonly known as CERCLA; the New Jersey Spill Compensation and Control Action, commonly referred to as the Spill Act; the New Jersey Sanitary Landfill Facility Closure and Contingency Fund Act; and the New Jersey Water Pollution Control Act. In both federal actions, Compaction of New Jersey was identified as the operator of the Site from 1978 to 1981, and Compaction of Connecticut was identified as a transporter of hazardous substances to the Site.

The two federal actions were consolidated and referred to an alternative dispute resolution process, which took approximately 10 years to complete. Meanwhile, on or about February 14, 2000, certain defendants, including Compaction, filed an amended third-party complaint, under the New Jersey action (98-cv-4781), naming a multitude of entities, including CFC, CEA, and Carter Day Industries, Inc., as third-party defendants based on their respective involvement in the contamination of the Site. Eventually, the consolidated federal actions settled as to most, but not all of the parties.

Compaction entered into a "Partial Consent Decree" (also referred to by the parties as the "Consent Decree") settling claims brought against it in the consolidated federal actions for a total of \$37,000,000. Pursuant to the terms of the Partial Consent Decree, Compaction was, and is, responsible for \$11,000,000 of the \$37,000,000 total, and the balance of said sum based upon its ability to successfully pursue contribution and/or indemnification actions against the non-settling PRPs, including the Carter Day Parties (Partial Consent Decree, §§ 23 and 4[b]; Compaction's counterstatement of undisputed material facts and National Union's response to Compaction's counterstatement of undisputed material facts at §§ 15-17).

A notice and public comment period preceded entry of the Partial Consent Decree and Judgment. During the interim, Judge William Walls of the United States District Court for the District of New Jersey granted a motion of Compaction on December 2, 2008, and entered a default against CFC, CEA, and the Carter Day Parties, based on their failure to answer or otherwise appear despite having been properly served. At the request of the court, counsel for Compaction sent the Carter Day Parties and their insurers a letter, dated December 4, 2008, advising them that an in-person hearing was scheduled for December 12, 2008 which would pertain to the default, the contribution litigation against the Carter Day Parties, and the enforcement of a judgment against the Carter Day Parties and their insurance carriers. Following an appearance by counsel for National Union at the December 12, 2008 in-person hearing, the Carter Day Parties retained counsel, entered an appearance in the litigation, and filed a motion to vacate the entry of default. That motion was granted and the Carter Day Parties began litigating, and are still actively litigating, Compaction's claims against it for contribution.

DISCUSSION

Effect of the Settlement Agreement and Release

Turning to the motions before this Court, it is National Union's position that the breadth of the Settlement Agreement is such that it encompasses any means or any avenue by which Compaction might recover damages or insurance proceeds from it, directly or indirectly, either now or in the future, stemming from the environmental contamination at the Site. National Union argues, therefore, Compaction cannot obtain contribution from the Carter Day Parties for their purported, proportionate involvement in the Site's contamination, since a judgment against the Carter Day Parties would result in National Union, as an insurer for the Carter Day Parties, being required to

cover such a claim. National Union argues that Compaction's recovery, once again, of insurance proceeds from National Union, is barred by the Settlement Agreement. National Union seeks summary judgment and a judicial declaration to this effect, dismissal of Compaction's counter-claims for a reverse declaration, and a denial of Compaction's cross-motion.

Compaction argues that although the Carter Day Parties were among the biggest polluters at the Site, they have never paid for their wrongdoing. Compaction alleges that National Union is seeking a judicial redrafting of the Settlement Agreement to reach parties and claims not agreed to at the time of settlement in order to avoid paying insurance proceeds stemming from its own insured's acts and/or omissions at the Site. Compaction asserts that the only claims released under the Settlement Agreement are those brought against it, either past, present or future, relating to Compaction's own acts or omissions relating to the environmental contamination at the Site. It does not affect Compaction's ability to seek contribution from other responsible parties, including the Carter Day Parties.

More specifically, Compaction asserts that the parties to the Settlement Agreement did not include language releasing the Carter Day Parties for their proportionate share of liability for the environmental contamination at the Site, nor did it include language by which Compaction, as a potential judgment creditor of the Carter Day Parties, waived its right to seek enforcement of the Subject Policies. Compaction also points out that the Carter Day Parties were neither a party in Compaction's coverage litigation against National Union, nor were they a party to the Settlement Agreement. Therefore, Compaction asserts that its claim for contribution from the Carter Day Parties is not barred by the Settlement Agreement's broad restrictions and releases. (*Cf. Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 309 AD2d 173 [1st Dept 2003])

[settlement agreement in underlying action regarding one tortfeasor does not affect claim for contribution].)

Ripeness

The parties also dispute whether National Union's claims are ripe, an issue raised by Compaction which needs addressing prior to resolution of the motions for partial summary judgment. Compaction contends that National Union's motion should be dismissed because the judgment which Compaction had obtained against the Carter Day Parties has been vacated and its counsel is actively litigating liability. Therefore, a resolution of National Union's motion would have no immediate effect. Conversely, National Union argues that its motion for summary judgment is ripe because the material facts are largely undisputed, and because this Court is only called upon to resolve a question of law, namely, the scope of the Settlement Agreement.

Both parties rely on *New York Pub. Interest Research Group v Carey* (42 NY2d 527 [1977]) to support their respective positions. In deciding that case, the Court of Appeals noted, in relevant part:

“There are however certain basic principles. The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct (Borchard, *Declaratory Judgments*, pp. 25-28, 75-76).

But a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur (*Prashker v United States Guar. Co.*, 1 NY2d 584, 592 [1956]).”

(42 NY2d at 530-531.)

As applied to the matter before the court, both parties acknowledge that the Carter Day Parties are actively litigating in federal court their liability for the contamination at the Site. The fact that National Union, as the insurer of the Carter Day Parties, will be required to pay on behalf of its insured, to the extent of their proportionate share of liability, is neither abstract nor remote. Therefore, pursuant to CPLR 3001, this Court shall resolve National Union's motion and Compaction's cross-motion.

National Union's Obligation to Indemnify the Carter Day Parties

To the extent that National Union asks this Court to adjudicate its obligation to indemnify the Carter Day Parties, that is outside the scope of this declaratory judgment/breach of contract action, as only National Union's relationship with Compaction is implicated by the Settlement Agreement. An examination of the relevant language reveals that the Settlement Agreement only pertains to the Subject Claims, which, as set forth above, are defined as claims "asserted or filed against Compaction . . . arising out of Compaction's alleged acts or omissions" with respect to the environmental contamination at the Site (Settlement Agreement § 5; Release at 2-3). Compaction is only barred under the Settlement Agreement from seeking further compensation from National Union stemming from claims lodged against it (Compaction) relating to its own acts or omissions with respect to the contamination of the Site. Compaction's claims against the Carter Day Parties sound in contribution to have them pay their proportionate share of liability. The claims for contribution are not, as National Union argues, an attempt to collect twice for the same liability. If Compaction successfully obtains a judgment against the Carter Day Parties, which cannot be

satisfied directly by the Carter Day Parties, Compaction would be entitled, under New York law, to stand in their shoes as against their insurer.²

“The rule is well settled that a judgment creditor, seeking to enforce a policy insuring the judgment debtor against liability, stands in the shoes of the assured and can recover against the insurer only if the assured could recover under the terms of the policy” (*Wenig v Glens Falls Indem. Co.*, 294 NY 195, 198-199 [1945]; see also *D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990]; *Westport Ins. Co. v Alartec Energy Conservation, LLC*, 82 AD3d 1207, 1209 [2nd Dept 2011]). As a judgment creditor, Compaction’s rights would be no greater or less than those of the insured whose shoes it steps into. In this connection, if National Union is ever called upon to indemnify the Carter Day Parties under the Subject Policies, that liability will arise out of its obligations to the Carter Day Parties under those policies, and not out of National Union’s policy obligations with Compaction.

CONCLUSION

Accordingly, based on the foregoing, it is hereby

ORDERED, that the motion by plaintiff National Union Fire Insurance Company of Pittsburgh, PA for partial summary judgment and declaratory judgment is denied in all respects; and it is further

2. Similar arguments were presented by the insurer in *Fairmont Specialty Insurance Company f/k/a Ranger Insurance Company v Compaction Systems Corporation and Compaction Systems Corporation of Connecticut*, under Docket No. L-2156-09, in the Superior Court of New Jersey Law Division, Bergen County, and rejected by that court for reasons consistent with this Court’s conclusions (see Aff. in Support of Cross-Motion, Exhibit “T”).

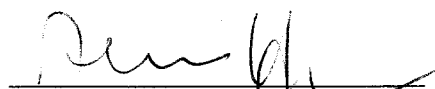
ORDERED, that the cross-motion of defendants Compaction Systems Corporation of New Jersey and Compaction Systems Corporation of Connecticut for partial summary judgment is granted only to the extent that it is entitled to a declaration that a claim by it for contribution from National Union's insured, the Carter Day Parties, based upon the Carter Day Parties' proportionate share of liability for the environmental contamination at the Site, falls outside the scope of the Settlement Agreement, and is otherwise denied.

Defendant is directed to settle an order within thirty (30) days consistent with the above decision.

The foregoing constitutes the decision and order of the court.

ENTER :

Dated: June 28, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.