SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

AMERICAN CASUALTY COMPANY OF READING, PA., TWIN CITY FIRE INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY	:	
Plaintiffs,	:	Index No. 653280/2011
-against-	:	DECISION AND ORDER
MORRIS GELB, T. KEVIN DENICOLA, EDWARD J. DINEEN, KERRY A. GALVIN, JOHN A. HOLLINSHEAD, JAMES W. BAYER, W. NORMAN PHILLIPS, C. BART DE JONG, DAN F. SMITH, CAROL A. ANDERSON, SUSAN K. CARTER, STEPHEN I. CHAZEN, TRAVIS ENGEN, DANNY W. HUFF, PAUL S. HALATA, DAVID J. LESAR, DAVID. J.P. MEACHIN, DANIEL J. MURPHY, WILLIAM R. SPIVEY, CHARLES L. HALL, KEVIN R. CADENHEAD, and RICK FONTENOT,	:	Motion Sequence No. 004
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiffs move for summary judgment on Counts I-III of the Amended Complaint pursuant to CPLR 3212, seeking a declaratory judgment that the insurance policies issued to Lyondell Chemical Company (Lyondell) and its Directors & Officers (D&O) do not provide coverage for defense costs from a claim prosecuted by a Litigation Trust against the Lyondell D&O in the United States Bankruptcy Court in the Southern District of New York (Adversary Proceeding). Defendants move for partial summary judgment seeking a declaratory judgment

that the insurance policies in question cover defense costs for the Adversary Proceeding. Edward S. Weisfelner, as Litigation Trustee of the LB Litigation Trust, moves to intervene pursuant to CPLR 1012(a) or 1013, in opposition to Insurers' motion for summary judgment, and in support of Insureds' motion for summary judgment.

Background

The plaintiffs in this case are American Casualty Company of Reading, Pa. (American Casualty), Twin City Fire Insurance Company (Twin City), U.S. Specialty Insurance Company (USSIC) and Navigators Insurance Company (Navigators) (Excess Insurers). The Excess Insurers provided layers of excess directors and officers insurance coverage (in excess of a primary policy from the Zurich American Insurance Company (Zurich)) to Lyondell during two policy periods, running from 2006 to 2007, and then 2007 to 2013 (Excess Policies). With respect to the plaintiffs (with the exception of Navigators), the 2006-07 and 2007-13 Excess Policies have the same limits of liability and underlying coverage thresholds. American Casualty provides up to $15 million of coverage after $25 million of underlying coverage is provided by Zurich. Twin City provides up to $15 million of coverage after $40 million of underlying coverage is provided by Zurich and American Casualty. USSIC provides up to $15 million of coverage after $55 million of underlying coverage is provided by Zurich, American Casualty, and Twin City. In both the 2006-07 and 2007-13 policies, Navigators provides up to $10 million in coverage. For the 2006-07 policy, Navigators' coverage is triggered by $120 million in underlying coverage by Zurich, American Casualty, Twin City, USSIC, and other insurers. For the 2007-13 policy, Navigators' coverage is triggered by $115 million in underlying coverage by Zurich, American Casualty, Twin City, USSIC, and

other insurers. Most terms of the Excess Policies mimic those of the Zurich primary policy; those that do not are specifically labeled as distinct in the Excess Policies.

Each of the defendants (Insureds) is an individual who was a director and/or officer of Lyondell and/or certain of its subsidiaries. The Insureds believe the Excess Polices entitle them to defense costs incurred from defending the Adversary Proceeding. Zurich has paid $25 million to the Insureds for defense costs of the Adversary Proceeding.

Background of the Adversary Proceeding

On July 17, 2007, the Lyondell board announced it had approved an acquisition offer by Basell AF S.C.A. (Basell). On August 20, 2007, before Lyondell's shareholders had approved the transaction, certain Lyondell shareholders filed a class action in Delaware Chancery Court. *See Walter E. Ryan Jr. v Lyondell Chemical Co., et al.*, Case No. 3176 (the Ryan Litigation). The Ryan Action involved a breach of fiduciary duty claim pursuant to *Revlon v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del. 1986), where the shareholders alleged that the "merger price [of $48 per share] was grossly insufficient." *Lyondell Chem. Co. v Ryan*, 970 A2d 235, 239 (Del. 2009). According to the *Ryan* court, "[t]here is only one *Revlon* duty – to get the best price for the stockholders at a sale of the company." *Ryan*, 970 A2d at 242. Zurich and the Excess Insurers were informed of the *Ryan* litigation under the 2006-2007 policies. Here, Lyondell's creditors, by contrast, do not assert that Lyondell's directors "failed to obtain the best available price in selling the company," *cf. id.*, but that Lyondell's directors allowed a leveraged transaction for a price that rendered Lyondell insolvent.

The Lyondell-Basell merger closed on December 20, 2007. Lyondell became a subsidiary of Basell, and Basell was renamed Lyondell-Basell Industries AF S.C.A. On

January 6, 2009, Lyondell filed for bankruptcy in the United States Bankruptcy Court in the Southern District of New York (Bankruptcy Court). On January 19, 2009, the United States Trustee for the Southern District of New York appointed an Official Committee of Unsecured Creditors (Creditors Committee) in the Lyondell bankruptcy. The Creditors Committee received permission to pursue a course of action exclusive to Lyondell, and commenced such an action (Adversary Proceeding) in the Bankruptcy Court. *See Official Committee of Unsecured Creditors, on behalf of the Debtors' Estates v Citibank, N.A., London Branch, et al.*, Adv. Proc. No. 09-01375.

On March 12, 2010, the Third Amended Joint Reorganization Plan created a Litigation Trust to prosecute causes of action on behalf of Lyondell against its D&O. The Litigation Trust was assigned rights and standing for these causes of action. Upon approval of the Third Amended Joint Reorganization Plan, the Litigation Trust took control of the Adversary Proceeding from the Creditors Committee. Lyondell agreed to finance the Litigation Trust's prosecution of claims. Lyondell transferred $20 million to the Litigation Trust (and to a separate related trust) to defray the attorney's fees and litigation expenses necessary to pursue Lyondell's causes of action against its D&O. On July 23, 2010, the Litigation Trust filed an amended complaint in the Adversary Proceeding.

Discussion

Under New York law, a party may seek intervention as of right under CPLR 1012 (a) or permissive intervention under CPLR 1013 (McKinney). Whether a party seeks to intervene as of right or as a matter of discretion "is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial

interest in the outcome of the proceedings." *Wells Fargo Bank, Nat. Ass'n v McLean*, 70 AD3d 676 (2d Dept 2010).

A third party is not entitled to intervene in a pending action in which "the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." *Osman v Sternberg*, 168 AD2d 490, 490 (2d Dept 1990). A non-direct or speculative interest is insufficient to satisfy this burden. *See Am. Home Assur. Co. v Port Auth. Of N.Y. & N.J.*, 40 Misc 3d 1236(A), 2013 WL 4734501 (Table) Sup Ct NY Cnty 2013) (denying intervention where excess insurer had only a speculative interest in coverage dispute because none of its insurance policies were directly at issue in the underlying litigation). Courts also deny intervention where parties in the case adequately represent the proposed intervenor's interests. *See Quality Aggregates Inc. v Century Concrete Corp.*, 213 AD2d 919, 921 (3d Dept 1995) (reversing trial court's grant of leave to intervene where proposed intervenor was not a party to the lease agreement at issue even though his interests in an escrow would be affected by the litigation and noting there was no reason to believe "that plaintiff's defense of the counterclaim will be inadequate"); *Spota v Cnty. Of Suffolk*, 110 AD3d 785, 787 (2d Dept 2013) (holding an indirect interest in the outcome of a litigation is insufficient for intervention and observing that proposed intervenor "failed to show that any interest he did have would not be adequately represented by the defendant").

Mr. Weisfelner, the Litigation Trustee, cannot properly intervene in the coverage litigation because he does not have a "real and substantial interest in the outcome of the proceedings." *Wells Fargo Bank*, 70 AD3d at 676 (2d Dept 2010). The Litigation Trustee's

claims for insurance coverage under the Policies are speculative and indirect. The Litigation Trustee argues he has a real and substantial interest in the outcome of the coverage litigation because the resolution of the matter against the directors and officers may effectively eliminate its ability to recover on its claims against the directors and officers in the Adversary Proceeding. However, the Litigation Trustee's interest is first conditioned upon succeeding in the Adversary Proceeding, then obtaining a recovery from the Insureds and, finally, establishing that funding for such a recovery will not exist absent insurance coverage. Mr. Weisfelner has no legally recognized claim to assert against the Insureds: he has not obtained a judgment against the Insureds, and is not a party or third party beneficiary of the policies. Unlike the intervenor in *Virginia Surety*, cited by the Litigation Trustee, Mr. Weisfelner here has a speculative interest that is not subject to a potential res judicata effect. *Certain Underwriters at Lloyd's of London v Virginia Sur. Co.*, 33 Misc 3d 1224(A), 2011 N.Y. Slip Op. 52091(U) (Sup Ct Bronx Cnty Nov. 18, 2011) ("*Virginia Surety*"). In *Virginia Surety*, the proposed intervenors' claims would "*assuredly* result in amounts excess of Virginia Surety's policy" because Virginia Surety had already agreed to settle the claims of three injured plaintiffs. *Id.* at *2 (emphasis added). Mr. Weisfelner will not assuredly succeed in the Adversary Proceeding. Also in *Virginia Surety*, the proposed intervenors claimed that they might be bound by the judgment in the action. *Id.* at *2. The Litigation Trustee here does not claim that there is a similar res judicata effect.

Even if the Litigation Trustee had a real and substantial interest in the outcome of the coverage litigation, he "failed to show that any interest he did have would not be adequately represented by the defendant." *Spota*, 110 AD3d at 787. Courts have granted intervention where the insured party failed to adequately protect the availability of coverage. *Liberty*

Insurance Underwriters, Inc. v Goberdhan, No. 600024/10, 2013 WL 2329537 (Sup Ct NY Cnty May 23, 2013) ("*Goberdhan*"). But in the instant case, the Insureds' representation is adequate, unlike in *Goberdhan*. *Id.* at *3. There, Goberdhan had "submitted a meritless opposition to this [rescission] motion that conflates the distinct concepts of cancellation and rescission."). *Id.* at *3. Here, the prospective intervenor did not add any new substantive arguments. The Litigation Trustee merely alleges that he has "presented new factual evidence, and is best-positioned to correct any further omissions or misdescriptions of the relevant facts and such issues that may arise." Although the Litigation Trustee offers additional evidence not previously addressed by the Insureds and Insurers in their respective summary judgment papers, the Insureds are adequately pursuing their rights to coverage and protecting the Litigation Trustee's interests.

It is unnecessary for this court to consider whether there would be prejudice or delay to the parties if granted intervention, because the proposed intervenor does not have a real and substantial interest in the outcome of the litigation, and even if he did, he failed to allege that the defendants did not adequately represent his interest.

Conclusion

Accordingly, it is hereby

ORDERED that the motion to intervene by Edward S. Weisfelner, as Litigation Trustee of the LB Litigation Trust, is denied.

Dated: June 18, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER