

**Trans-Packers Servs. Corp. v National Union Fire
Ins. Co. of Pittsburgh, PA**

2014 NY Slip Op 32154(U)

August 11, 2014

Supreme Court, New York County

Docket Number: 651711/2010

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

----- X
TRANS-PACKERS SERVICES CORP.,

Plaintiff,

- against -

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA and STERLING &
STERLING, INC.,

Defendants.
----- X

Index No. 651711/2010

Motion Seqs. 005, 006

DECISION AND ORDER

This is an action brought by plaintiff-insured Trans-Packers Services Corp. (Trans-Packers), under an insurance policy for product contamination, against defendant-insurer National Union Fire Insurance Company of Pittsburgh, PA (National Union) and defendant-broker Sterling & Sterling, Inc. (Sterling). Defendants each move for summary judgment dismissing the amended complaint.

Background

Plaintiff Trans-Packers is in the business of "blending and packaging of dry food and non-food products for retail, institutional, industrial and military customers." (Amended Complaint [AC], ¶ 2.) This action involves losses which allegedly occurred on December 7, 2007, March 7, 2008, and April 18, 2008, as a result of salmonella contamination in powdered dairy shakes assembled by Trans-Packers (the 2007 and 2008 losses or salmonella contaminations). (Joint Statement of Material Facts [Joint Statement], ¶ 5.) National Union

issued insurance policies covering the periods of the losses. (Id., ¶¶ 1, 6.) Sterling was Trans-Packers' insurance broker at the time of and prior to the losses. (AC, ¶ 4.) It is undisputed that Sterling processed the claim for the 2007 and 2008 salmonella contaminations (Joint Statement, ¶ 6), and that the claim itemized Trans-Packers' losses for three lots of dairy shake powder and the cost of destruction of the lots. (Id., ¶¶ 20-23.) National Union disallowed the 2007 loss on the ground that the amount was below the \$50,000 deductible, and approved payment for the 2008 losses in the amount of \$19,105.26, after applying such deductible. (Id., ¶ 24.) In connection with payment of this amount, National Union prepared, and Trans-Packers executed, a Final Release and Settlement Agreement (Release). (Id., ¶¶ 26, 31.) In March 2010, Trans-Packers filed a claim for business interruption in the amount of approximately \$1.66 million in connection with the 2008 losses. (Id., ¶ 35.) National Union denied coverage for this claim primarily on the ground that it was barred by the Release. (Id., ¶ 36; Mar. 22, 2010 Declination Letter [Joint Statement, Ex. Z].)

The parties sharply dispute whether the Release covers Trans-Packers' business interruption claim, and whether Sterling was negligent in failing to submit this claim along with the original claim for the losses to the products. The Amended Complaint alleges a first cause of action against National Union for breach of contract based on its denial of coverage for the business interruption claim, and a second cause of action against National Union for a declaratory judgment that Trans-Packers is entitled to such coverage. The Amended Complaint alleges a third and a fourth cause of action against Sterling for breach of contract and negligence, respectively, for failure to procure umbrella coverage up to \$10 million for product recalls and/or contamination. It also alleges a fifth and a sixth cause of action against Sterling for breach of

contract and negligence, respectively, for failure to exercise reasonable care in processing the claims based on the losses and, in particular, failure to submit the business interruption claim to National Union.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b].)” (Zuckerman, 49 NY2d at 562.)

National Union

National Union seeks dismissal of both causes of action against it, on the ground that the Release bars Trans-Packers’ subsequent claim for business interruption arising from the 2008 salmonella contaminations. (National Union Memo. In Supp. at 6-7.) Trans-Packers argues that the Release governed only claims made up to and including the date of the Release. (Trans-Packers Memo. In Opp. at 5-6.) In the alternative, Trans-Packers contends the Release should be rescinded based on mutual mistake (id. at 9-10), and that National Union is barred from relying on the Release based on its failure to perform a duty to investigate Trans-Packers’ business interruption claim. (Id. at 11-13.)

“Claim” is defined in the Wherefore Clause of the Release as follows: “WHEREAS,

Trans Packers Services Corp. made a claim under the Policy arising out of a recall on or around March and April 2008 when some of its product tested positive for salmonella (the ‘Claim’).”

In consideration for the payment of \$19,105.26, the Release provided that Trans-Packers “releases and discharges National Union”

“from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever in law, admiralty, or equity, which [Trans-Packers] or its subsidiaries, successors, and assigns, ever had, now have, or hereafter can, shall, or may have against National Union, for, upon, or by reason of, arising out of or relating in any way to the Claim and all circumstances relating thereto.”

The Release further provided that “[t]he parties also agree that this settlement is to have no precedential value or effect on future claims under the Policies or any renewals thereof.”

It is a fundamental principle that “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” (Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004] [quoting W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162 [1990] [ellipses in original].) The determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc., 77 NY2d at 162.) The court should determine from the contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) “[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.” (Id. at 572–573 [internal quotation marks and citation

omitted].) A contract is ambiguous “if language was written so imperfectly that it is susceptible to more than one reasonable interpretation.” (Brad H. v City of New York, 17 NY3d 180, 186 [2011].) Moreover, “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.” (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, “where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.” (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001] [internal quotation marks and citations omitted].)

The Release is unambiguous on its face. In exchange for the \$19,000 payment, Trans-Packers released National Union from “all actions, causes of action, suits, . . . damages, judgments, . . . and demands whatsoever” “arising out of” the 2008 salmonella contaminations. The reading urged by Trans-Packers -- that the Release applies only to claims made as of the date of the Release and not to subsequent claims that arise out of the same occurrence -- finds no support in the language of the Release. The Release is denominated a “Final Release and Settlement Agreement,” does not restrict its application to claims filed as of the date of the Release and, by its terms, applies to all claims relating to or arising out of the March and April 2008 contaminations. Although the Release stated that it would have no effect on “future claims” under the policy, that provision must be read to apply only to future claims that do not relate to the released claims arising out of the 2008 salmonella contaminations. To interpret the Release so as to allow additional claims arising from the same contaminations to be subsequently made would render the language of the Release virtually meaningless, and would violate the precept that all provisions must be reconciled, where possible, in order to give all effect.

Trans-Packers' alternative contention that the Release was the result of mutual mistake is equally unpersuasive. In support of this argument, Trans-Packers cites the deposition testimony of National Union's Claims Director, Jo Ann Kerwin, that her understanding of the claim she adjusted was that it was for lost inventory and the cost of destruction (Kerwin Dep. at 122 [Joint Statement, Ex. S]), and that she would not have prepared a final release if she had known that there was going to be an additional claim for business interruption. (Id. at 109-110 [Joint Statement, Ex. T].) Trans-Packers also relies on the deposition testimony of its Chief Operating Officer, Lester Weiss, that he was not aware until June 2009, three months after he signed the Release, that the policy had coverage for business interruption. (L. Weiss Sept. 7, 2012 Dep. at 399, 402, 420-421 [Sussman Aff. In Opp. to National Union Motion, Ex. 2].)

In order to support a rescission claim, a mutual mistake "must be so material that it goes to the foundation of the agreement The premise underlying the doctrine of mutual mistake is that the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties." (Simkin v Blank, 19 NY3d 46, 52-53 [2012] [internal quotation marks, citations, and ellipses omitted].) A mutual mistake is established where it is shown "that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement." (Chimart Assocs., 66 NY2d at 573; Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 443 [1st Dept 2007].)

Trans-Packers fails to raise an issue of fact on its mutual mistake claim, as it does not allege, let alone make any showing, that the parties had an agreement that a business interruption claim would be raised at a later time on the basis of the 2008 salmonella contaminations that were the subject of the Release. On the contrary, neither party contemplated such a claim at the

time the Release was signed. Moreover, National Union was not under any misapprehension as to the claim that was being adjusted. Rather, as Kerwin testified, she adjusted the claim for lost inventory that was presented to her. (Kerwin Dep. at 111 [Joint Statement, Ex. L].)

Finally, Trans-Packers asserts that National Union is estopped from relying on the Release based on its failure to conduct a good faith investigation of Trans-Packers' claim. (Trans-Packers Memo. In Opp. at 12.) More particularly, Trans-Packers argues that a February 15, 2009 package of information from Trans-Packers to National Union contained a letter from Mr. Weiss to a customer (Steve Hoenes of the Defense Supply Center Philadelphia), stating that Trans-Packers lost approximately 132 days of production due to U.S. Department of Agriculture and Food and Drug Administration investigations. (Weiss Letter [Joint Statement, Ex. J].) Based on this letter, Trans-Packers claims that National Union should have investigated its business interruption claim, assisted Trans-Packers in the presentation of the claim, and questioned Sterling regarding the Weiss letter. (Trans-Packers Memo. In Opp. at 13.) Trans-Packers' reliance on the letter ignores that it was merely included in a package of approximately 95 pages of back-up documentation. The letter was not red-flagged and the claim that Sterling submitted to National Union on Trans-Packers' behalf was solely for loss of three lots of contaminated product and costs of destruction. (Sterling Feb. 23, 2009 and Mar. 4, 2009 E-Mails to Kerwin [Joint Statement, Exs. O, Q].)

More importantly, Trans-Packers provides no legal support whatsoever for its claim that National Union had an affirmative duty to independently investigate the circumstances surrounding the claim that the insured submitted in order to determine whether the insured had any other claims that it did not submit, based on the same circumstances. All of the cases cited

by Trans-Packers hold that the insurer may be liable for damages as a result of its failure to perform a good faith investigation of a claim that has in fact been made by the insured. (See Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y., 10 NY3d 187, 194-195 [2008], rearg denied 10 NY3d 890 [2008] [holding insurer liable to insured for damages for loss of business, where insurer failed to investigate in good faith and pay covered claims made under a policy that provided for business interruption coverage]; Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d 200, 202-203 [2008] [holding that insurer may be liable for consequential damages for breach of implied covenant of good faith and fair dealing based on failure to properly investigate claim filed by insured, where consequential damages were within the contemplation of the parties]; Acquista v New York Life Ins. Co., 285 AD2d 73, 81-82 [1st Dept 2001] [holding that insurer's alleged bad faith in denying a claim did not state an independent tort but could "be employed to interpose a claim for consequential damages beyond the limits of the policy for the claimed breach of contract"].)

Further, as the undisputed facts demonstrate, National Union did contact Trans-Packers several times to request an itemization of the losses sustained. (See Joint Statement, ¶¶ 9, 13, 19-25.) National Union did not delay in either requesting information or processing the claim. National Union did not dispute the amounts claimed by Trans-Packers and paid the claim in full less the deductible.

Accordingly, National Union should be granted summary judgment on the claims against it, and the first and second causes of action should be dismissed.

Sterling

Sterling moves for summary judgment dismissing the third and fourth causes of action

which allege that Sterling failed to procure excess insurance for product recalls or contamination. Sterling argues that Trans-Packers has failed to present evidence that a \$10 million umbrella policy would have been available in the marketplace, and that there was no contract between Sterling and Trans-Packers for the procurement of insurance.

Sterling does not present any evidence that an umbrella policy was not available. It cannot satisfy its burden on this motion merely “by pointing out gaps in the plaintiffs’ case.” (See generally Sabalza v Salgado, 85 AD3d 436, 438 [1st Dept 2011]; Valdez v Aramark Servs., Inc., 23 AD3d 639 [2d Dept 2005].)

Sterling fails to eliminate triable issues of fact as to its further claim that it had no obligation to procure umbrella coverage for Trans-Packers. As a general matter, an insurance broker “has a common-law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so.” (Hoffend & Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152, 157 [2006], citing Murphy v Kuhn, 90 NY2d 266 [1997].) Thus, ordinarily, “[a] general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage.” (Hoffend, 7 NY3d at 158.) However, “[w]here a special relationship develops between the broker and client, . . . the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage.” (Voss v The Netherlands Ins. Co., 22 NY3d 728, 735 [2014].)

Here, there is a dispute of fact as to whether Trans-Packers made a specific request for umbrella coverage and as to whether a special relationship developed between Trans-Packers and Sterling. Sterling cites the deposition testimony of Lester Weiss, current Chief Operating Officer of Trans-Packers, that any conversation about the terms of any agreement with Sterling

would have been with Daniel and Selma Weiss before 2006, and with Monica Weiss after 2006. (L. Weiss Dep. at 30 [Krebs Aff. In Support, Ex. 32].) Sterling then cites the testimony of Monica Weiss, Trans-Packers' office manager, that she was not aware that Trans-Packers ever entered into any contracts with Sterling. (M. Weiss Dep. at 341 [Krebs Aff. In Support, Ex. 33].) In opposition, Trans-Packers produces substantial evidence about a course of conduct, dating back to 1989, between Sterling and Daniel Weiss, a founder of Trans-Packers and Lester's father, in which Sterling assumed responsibility for procuring insurance to cover Trans-Packers' needs. As attested by Daniel Weiss, David Epstein, Sterling's representative, contacted him in 1988 about handling Trans-Packers' insurance needs and stated that Sterling could "analyze all of our needs and, if a claim were made, Sterling would become Trans-Packers' 'advocate' in the processing of any claim." (D. Weiss Aff., ¶ 4 [Krebs Aff. In Support, Ex. 8].) Daniel Weiss also details conversations in which he discussed with Epstein the need for umbrella insurance to deal with product recalls or product contamination (referred to by the parties as a "Carteret occurrence," based on a 1997 product recall affecting the Carteret company, which was under common ownership with Trans-Packers and also placed its insurance business with Sterling). Weiss attests that Epstein "explained that any claim, including claims by customers, over \$1,000,000 would be covered by our umbrella policy." (Id., ¶ 7.) He also attests that he met annually with Epstein to discuss his insurance needs until around 2003. (Id., ¶ 8.) Weiss gave consistent deposition testimony that Epstein assured him that any claims over \$1,000,000 would be covered by Trans-Packers' umbrella policy. (D. Weiss Dep. at 130-131 [Sussman Aff. In Opp., Ex. 5].)

Epstein submits an affidavit stating that Sterling has obtained an umbrella policy for

Trans-Packers every year since 2002, and that the policy has been renewed every year without significant change. He further attests that the umbrella policy has never provided coverage in excess of the National Union contaminated products policy, and that Trans-Packers has never complained about the coverage. (Epstein Aff., ¶¶ 7-9.) Notably, Epstein does not specifically deny the allegations of the Amended Complaint that Sterling undertook to procure adequate insurance on Trans-Packers' behalf. (AC, Third and Fourth Causes of Action.)

On this record, a triable issue of fact exists as to whether Sterling undertook to provide umbrella coverage that would cover claims based on product recalls or contamination.

Sterling also seeks to dismiss Trans-Packers' fifth and sixth causes of action for breach of contract and negligence, respectively, based on Sterling's failure to process Trans-Packers' business interruption claim. In support of its motion, Sterling disputes that it had any obligation to determine Trans-Packers' available coverage under the policy or to make additional inquiries about Trans-Packers' business interruption claim. Sterling cites Lester Weiss' deposition testimony that, in response to Sterling's February 2009 email requesting more information about Trans-Packers' claim, Weiss stated that "we were looking for damages up to 3 lots. . . ." (Sterling Reply Memo. at 8, quoting L. Weiss Dep. at 125 [Krebs Reply Aff., Ex. A].)

In opposition, Trans-Packers cites Lester Weiss' further deposition testimony that Trans-Packers did not know that it had business interruption coverage, and was relying on David Epstein for guidance. (*Id.* at 124-125.) Lester Weiss also submits an affidavit attesting that Epstein told him during a May 2008 meeting that Sterling "would process the claim [from the 2008 contaminations] as Trans-Packers' advocate." (Lester Weiss Aff., ¶ 12.) According to Lester Weiss, Epstein subsequently told him that the Sterling claims processor had "mishandled

the claim” and was “no longer with Sterling.” (Id., ¶ 16.) As discussed above, Daniel Weiss also attests to the long-standing relationship between Sterling and Trans-Packers and the representations made by Sterling as to the advocacy that it would take in processing claims on Trans-Packers’ behalf. Significantly, also, Lester Weiss attests, without contradiction, that Epstein advised him to sign the Release, without inquiring whether there was a business interruption, notwithstanding that the policy provided for business interruption coverage. (See L. Weiss Aff., ¶ 18.)

A broker may develop a special relationship with its client that imposes a duty upon the broker to exercise a reasonable degree of care in processing the client’s insurance claim. (See Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines Ins. Co., 76 AD3d 412, 413 [broker’s failure to exercise proper care in notifying proper carrier of claim reported to it].) A “high level” of proof is required to establish a special relationship between an insurance broker and its client (see Murphy, 90 NY2d at 271.) On this record, however, the court cannot determine whether a special relationship exists, as a factual issue exists as to the extent to which Sterling undertook to exercise a duty to act as Trans-Packers’ advocate in submitting its claims to National Union.¹

Sterling also claims that Trans-Packers cannot establish that the 2008 lots were in fact contaminated and therefore that Sterling’s failure to properly process its claim was a proximate cause of loss. Sterling fails to eliminate triable issues of fact as to proximate cause, under these circumstances in which it does not dispute that the U.S. Department of Agriculture found

¹It is noted that in determining a motion to dismiss in this action, this Court (Fried, J.) previously rejected Sterling’s arguments that Trans-Packers’ failure to read or understand the terms of the policies is a bar to its claims in this action. (2012 Slip Op 50290[U] [Feb. 17, 2012].)

contaminations. (See Krebs Aff. In Support, ¶ 31.) The branch of Sterling's motion to dismiss Trans-Packers' claim for attorney's fees is premature.

The court has considered Sterling's remaining contentions and finds them to be without merit.

Accordingly, it is ORDERED that defendant National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment (seq. 005) is granted to the extent of dismissing the first and second causes of action in the amended complaint; and the Clerk shall enter judgment accordingly; and it is further

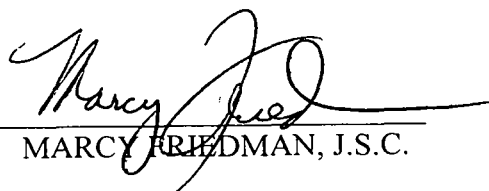
ORDERED that defendant Sterling & Sterling, Inc.'s motion for summary judgment (seq. 006) is denied; and it is further

ORDERED that the claims against Sterling & Sterling, Inc. are severed and shall continue; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference in Part 60, Room 248, 60 Centre Street, New York, New York on September 25, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
August 11, 2014


MARCY FRIEDMAN, J.S.C.