

Keyspan Gas E. Corp. v Munich Reins. Am., Inc.
2016 NY Slip Op 30427(U)
March 16, 2016
Supreme Court, New York County
Docket Number: 604715/1997
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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KEYSPAN GAS EAST CORPORATION,

Plaintiff,

-against-

MUNICH REINSURANCE AMERICA, INC., CENTURY
INDEMNITY COMPANY, NORTHERN ASSURANCE
COMPANY OF AMERICA

Defendants.

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HON. SALIANN SCARPULLA, J.:

DECISION/ORDER

Index No. 604715/1997
Motion Seq. No. 060

Defendant Century Indemnity Company (“Century”) moves for judgment notwithstanding a jury’s verdict in favor of the plaintiff Keyspan Gas East Corporation (“Keyspan”), or, in the alternative, for a new trial. This is the sixtieth (60th) motion in this eighteen (18) year old action concerning whether or not there is excess insurance coverage for the cost of environmental cleanup of seven manufactured gas plants (“MGPs”) located in Queens and Long Island.

Because trial on all of the MGPs was not feasible,¹ and at the urging of Century, I held a trial concerning two of the seven MGPs, Patchogue and Rockaway Park. Prior to the trial, in an October 17, 2014 decision that is now on appeal, I held that the cost of environmental cleanup should be allocated pro rata over the entire period during which property damage occurred at Rockaway Park, with exclusions for the period of time when

¹ Rulings of Justice Barbara Kapnick concerning two of the seven MGPs were on appeal. Expert discovery had not been completed concerning another of the MGPs.

insurance was unavailable prior to the policy periods 1953 to 1969, and for the period of time when insurance was unavailable after 1986, with no exclusion for the period between 1971 and 1982.

After a monthlong trial (5 days of jury selection, 16 full days of trial), the jury returned a verdict in favor of Keyspan. Specifically, the jury found that with respect to the Rockaway Park site: for the policy years in which the Century insurance policy was in force for the Rockaway Park MGP site, there was environmental damage to third-party property as a result of the operation of the MGP site, which damage was accidental; that accidental third-party property environmental damage also occurred as a result of the operation of the Rockaway Park MGP site during the years 1905-1952; that accidental third-party property environmental damage has occurred as a result of the operation of the Rockaway Park MGP site from 1970 to the present; and that Keyspan provided timely notice to Century for the Rockaway Park site.

With respect to the Patchogue site, the jury found that for the policy years in which the Century insurance policy was in force for the Patchogue site, there was environmental damage to third-party property as a result of the operation of the Patchogue MGP site, which damage was accidental; that accidental third-party property environmental damage also occurred as a result of the operation of the Patchogue MGP site during the years 1905-1952; that accidental third-party property environmental damage has occurred as a result of the operation of the Patchogue MGP site from 1970 to the present; and that Keyspan provided timely notice to Century for the Rockaway Park site.

In this motion, Century asserts four grounds upon which it urges me to overturn the jury verdict: 1) Century is entitled to judgment as a matter of law that Keyspan failed to satisfy the policies' prompt-notice provisions, or at least a new trial on that issue; 2) Century is entitled to judgment as a matter of law that property damage at the Rockaway Park site began no later than 1880, not 1905 as the jury concluded; 3) Century is entitled to judgment as a matter of law that damages should be allocated to Keyspan from the time property damage began to at least 1995, or at the very least a new trial on the question of insurance availability; and 4) Century is entitled to judgment as a matter of law that no property damage occurred during the policy period as to the Patchogue site.

Discussion

“Before granting a motion pursuant to CPLR 4404(a) to set aside a verdict and for judgment as a matter of law, the trial court must conclude that there is ‘simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial.’” *Roman v. Brooklyn Navy Yard Dev. Corp.*, 63 A.D.3d 1136, 1136-37 (2d Dep’t 2009) (quoting *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978)). In reviewing a party’s request for judgment as a matter of law, the trial court is required to view the testimony at trial in a light most favorable to the non-moving party. *Melcher v. Apollo Med. Fund Mgmt. L.L.C.*, 105 A.D.3d 15, 26 (1st Dep’t 2013); *KBL, LLP v. Cmty. Counseling & Mediation Servs.*, 123 A.D.3d 488, 489 (1st Dep’t 2014).

Pursuant to CPLR 4404(a), a court may also “order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, [or] in the

interest of justice.” A new trial “should be granted in the interests of justice only if there is evidence that substantial justice has not been done . . . as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, there is newly-discovered evidence, or there has been misconduct on the part of the attorneys or jurors.” *Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 267 (2d Dep’t 1998) (citation omitted); see also *Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363, 364 (1st Dep’t 2005).

1. Notice

The issue of whether Keyspan provided timely notice to Century with respect to the Rockaway Park and Patchogue sites was submitted to the jury at trial.² In rendering the verdict, the jury determined that Keyspan provided timely notice for both sites.

In this post-trial motion, Century argues that it is entitled to judgment as a matter of law that Keyspan’s notice was late. In the alternative, Century claims that the Court should grant a new trial because the jury verdict that notice was timely is contrary to the weight of the evidence. Century claims that the insurance policies require notice upon a “reasonable possibility” of an occurrence, and that this notice obligation was triggered years before Keyspan’s predecessor-in-interest, Long Island Lighting Company (“LILCO”), provided actual notice to Century in November 1994 for Rockaway Park, and December 1994 for Patchogue.

² On February 2, 2012, Justice Barbara Kapnick denied Century’s motion for summary judgment on the notice issue with respect to Rockaway Park and Patchogue. Specifically, Judge Kapnick found an issue of fact to whether Keyspan provided timely notice. Prior to trial, Century also moved for a directed verdict on the notice issue, which was denied (motion seq. 058).

The Century insurance policies at issue contain a notice provision which states that: “[u]pon the happening of an occurrence that appears *reasonably likely* to involve liability on the part of the company, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable.” Under this notice provision, Keyspan was required to provide notice when an occurrence was “reasonably likely” to involve liability, not when there was merely a “reasonable possibility” of an occurrence, as Century claims. *Century Indem. Co. v. Brooklyn Union Gas Co.*, 58 A.D.3d 573, 574 (1st Dep’t 2009) (noting that a distinction exists between a policy that requires notice when an occurrence is “reasonably likely” and a policy that requires notice when there is a “reasonable possibility” of the policy’s involvement).

At trial, Keyspan presented evidence to support its argument that it provided timely notice to Century. For example, Mr. Leissing testified that LILCO provided notice: (a) before DEC had legal authority to order the cleanup of MGP sites; (b) before DEC asserted a claim against LILCO; and (c) before LILCO had conducted any investigation of Rockaway Park or Patchogue. While Century points to evidence that support its theory that an occurrence was reasonably likely prior to 1994, the jury could have rationally concluded from all of the evidence presented at trial that Keyspan provided timely notice.

Century fails to demonstrate late notice as a matter of law, or that the verdict is contrary to the weight of the evidence. Accordingly, Century’s motion for judgment notwithstanding the verdict or for a new trial on the notice issue is denied.

2. Property Damage at Rockaway Park

Century argues that it is entitled to judgment as a matter of law that property damage at the Rockaway Park site began in 1880, and not 1905 as the jury concluded. Century claims that both parties' experts determined that property damage began within several years after the Rockaway Park site began operations in 1877, and therefore no rational jury could conclude that property damage began later than 1880.

Here, viewed in the light most favorable to Keyspan, the jury had a rational basis for concluding that property damage at Rockaway Park began in 1905. Keyspan's expert Dr. Shifrin testified that the Rockaway Park plant produced very small amounts of tar during the first twenty years of the plant's operations. Keyspan also presented evidence that the Rockaway Park site did not begin operations until the 1880s. From this evidence, the jury could have rationally inferred that property damage began in 1905.

Moreover, the jury was entitled to disregard the testimony of Century's expert, Mr. Anderson, who testified that any leaks and spills at the Rockaway Park began within two years of the start of operations, especially in light of Century's closing argument that no leaks or spills occurred at the site. Therefore, I deny Century's motion for judgment as a matter of law that property damage at the Rockaway Park site began in 1880.

3. Insurance Allocation

In my prior decision dated October 17, 2014, I determined that environmental cleanup costs with respect to the Rockaway Park site are to be allocated pro rata over the entire period during which property damage occurred at the site, with exclusions for the

period of time when insurance was unavailable prior to the policy periods 1953 to 1969, and for the period of time when insurance was unavailable after 1986, with no exclusion for the period between 1971 and 1982.³ This decision is currently on appeal to the First Department.

Century argues that it is entitled to judgment as a matter of law that damages should also be allocated to Keyspan for the periods, 1923 to 1932, and 1987 to 1995, because insurance was available in the marketplace at that time. Century also asserts that damages should be allocated to Keyspan from the year that property damage began until 1932 because: (a) insurance was illegal until 1922; and (b) Keyspan should be considered self-insured because it would not have purchased insurance during those years. In the alternative, Century moves for a new trial on the issue of insurance availability for the periods, 1923 to 1932, and 1987 to 1995.

In my prior decision, I held that “Century, as insurer, bears the burden of proving that insurance was generally available in the marketplace, and Keyspan, as insured, bears the burden of proving that insurance was not reasonably available to it. *Uniroyal v. America Re-Insurance Co.*, 2005 WL 4934215 (N.J. Super. Ct. App. Div. Sept 13, 2005).” I further determined that “the relevant inquiry is not ‘limited to whether an insured was able to continue obtaining coverage for the particular risk in the same policy type’ but may take into account whether the insured could purchase coverage of another policy type that would have provided similar coverage. *Olin Corp.*, 221 F.3d at 326.”

³ This decision also applies to the Hempstead site.

In an effort to prove that insurance was generally available prior to 1933, Century presented numerous documents to the jury, including a USF&G newsletter, an AGA report, an article from Casualty Insurer magazine, and sample insurance policy forms. In opposition, Keyspan's expert Mr. Talley testified that there was no insurance coverage available for the environmental liabilities at issue here, and that the documents and sample policies failed to demonstrate that relevant coverage was available in the 1920s. Based on the evidence submitted by Century and Keyspan, I find that the jury could have rationally concluded that insurance was unavailable before 1933.

Century's argument that damages should be allocated to Keyspan from the year that property damage began to 1932 is unavailing. Mr. Talley's testimony that insurance was illegal prior to 1922 is not sufficient to support a finding that damages should be allocated to Keyspan for that period. In addition, Century's assertion that Keyspan would not have purchased insurance is speculative.

As to the period after 1986, the jury could have rationally concluded that insurance coverage for historical environmental liabilities was unavailable during that time. Keyspan's expert Mr. Talley testified that this type of insurance was no longer available after 1986 due to the insurance industry's adoption of an "absolute pollution exception" and rigorous underwriting requirements for Environmental Impact Liability policies.

Accordingly, I deny Century's motion for judgment as a matter of law that damages should be allocated to Keyspan from the time property damage began to 1932, and from 1987 to 1995. In addition, Century's motion for a new trial on the issue of insurance availability for the periods, 1923 to 1932 and 1987 to 1995 is denied.

4. Property Damage at Patchogue

Century argues that it is entitled to judgment as a matter of law that no property damage occurred at Patchogue during the policy period. This argument rests on Century's conclusion that property damage requires an expansion in the contamination footprint or groundwater plume under New York law.

In my October 8, 2014 decision on Century's partial summary judgment motion on the issue of property damage, I declined to adopt Century's legal theory that property damage absolutely requires an increase in the contamination footprint or groundwater plume. In that decision, I interpreted *Olin Corp. v. Certain Underwriters at Lloyd's London*, 468 F.3d 120 (2d Cir. 2006) and held that property damage is not limited "to damage that physically, geographically and horizontally spreads during the policy period." I adhere to this decision because Century has not set forth any new legal arguments than those originally submitted to the Court in its prior motion.

Notwithstanding the foregoing, Keyspan's expert Dr. Powell testified that there was an ongoing spread of contamination at the Patchogue site, and that contaminants in water continue to spread and create a larger zone of groundwater contamination. Thus, even under Century's "footprint" theory, Century fails to demonstrate that it is entitled to judgment as a matter of law. For the above reasons, I deny Century's motion for judgment as a matter of law that no property damage occurred at Patchogue during the policy periods.

In accordance with the foregoing, it is

ORDERED that defendant Century Indemnity Company's motion for a judgment in its favor notwithstanding a jury's verdict in favor of the plaintiff Keyspan Gas East Corporation ("Keyspan"), or, in the alternative, for a new trial is denied in its entirety.

This constitutes the decision and order of the Court.

DATE: 3/16/16



SCARPULLA, SALIANN, JSC