Insurance Co. of N. Am. v ACCO Material Handling Solutions Inc.
2017 NY Slip Op 30408(U)
February 28, 2017
Supreme Court, New York County
Docket Number: 651468/2016
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

-against-

ACCO MATERIAL HANDLING SOLUTIONS INC., BABCOCK INTERNATIONAL GROUP PLC, FKI INDUSTRIES INC., and THE CROSBY GROUP LLC,

Defendants.

Index No. 651468/16
Motion Seq. No: 001
Motion Date: 6/21/2016

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Eileen Bransten, J.:

This is an action for a declaratory judgment by plaintiff Insurance Company of North America (ICNA), seeking a determination as to the scope and nature of its obligations, as issuer of certain liability insurance policies, in connection with asbestos-related claims asserted against defendants. Defendants ACCO Material Handling Solutions Inc. (ACCO), FKI Industries Inc. (FKI), and the Crosby Group LLC (CROSBY) move, pursuant to CPLR §3211(a)(4), 327, 2201 and 3001, for an order dismissing the complaint, or staying this action in favor of a pending action between certain of the parties in Pennsylvania. For the reasons stated below, the motion is granted in part and denied in part. The request for a stay in litigation is granted and all other relief sought is denied with leave to renew pending resolution of the underlying Pennsylvania action.

I. Background[1]

ICNA is an insurance company organized under the laws of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania.

ACCO is a manufacturer, incorporated in Delaware, with its principal place of business in York, Pennsylvania. Under several different names, it has operated there for approximately 100 years, manufacturing products which contained asbestos. FKI, which is ACCO's parent, is incorporated in New York and has its principal place of business in Tulsa, Oklahoma.

CROSBY is a domestic limited liability company registered in Delaware with its principal place of business in Tulsa, Oklahoma. CROSBY acted as the manager of claims asserted against ACCO in connection with asbestos-containing products manufactured by ACCO's predecessors.

Relevant here, during the years 1980 to 1986, ICNA issued insurance policies to Babcock International Inc., and ACCO Inc., which were the predecessors of ACCO's current parent, FKI.

Recently, at least 70 claims have been filed against ACCO by persons exposed to ACCO's asbestos-containing products. According to ACCO, it has been largely successful in defending against such claims, but it has incurred significant defense costs.

[1] The facts cited in this section are drawn from the Complaint, unless otherwise noted.

A. Litigation History

On February 16, 2016, ACCO, FKI and CROSBY, as policyholders ("Policyholders"), commenced an action in Pennsylvania ("Pennsylvania Action"), for breach of contract against Century Indemnity Company (CENTURY), the successor to ICNA. The complaint alleges CENTURY failed to comply with its obligations under the general liability insurance policies ICNA sold to FKI, or its predecessors, for the years 1984 and 1985. The complaint asserts that, under the policies, CENTURY is required to defend the Policyholders against claims alleging bodily injury that occurred, at least in part, during the policy periods.

Over the past several years, the Policyholders have faced numerous claims alleging bodily injury due to alleged exposure to asbestos-containing products previously manufactured in York, Pennsylvania, by ACCO's predecessors. CENTURY has allegedly refused to defend the underlying claims, and the policy holders claim CENTURY is in breach of its obligations under the policies. The Pennsylvania plaintiffs allege they have incurred in excess of $1,750,000 defending the underlying asbestos personal injury claims, and will continue to incur additional defense costs going forward.

In a Decision dated December 30, 2016, the Pennsylvania court denied a motion by CENTURY which sought to dismiss or stay the Pennsylvania Action on the ground of forum *non conveniens*.

B. The Instant Action

In the meantime, ICNA commenced the instant action on March 18, 2016 (New York Action). The Complaint seeks a declaration as to the parties' respective rights and obligations under the six insurance policies issued by ICNA from 1980 to 1986, including the policies at issue in the Pennsylvania Action.

A central dispute between the parties in both actions is whether or not the Policyholders can satisfy the deductibles of the 1984 and 1985 policies, which were $500,000 each, by aggregating defense costs from all of the underlying claims and applying them to the two years covered by the policies. ICNA argues that such costs must be allocated equitably over the years in which each alleged bodily injury took place.

As of the commencement of the New York Action, the Policyholders had allegedly incurred approximately $1,750,000 in defense costs for all of the underlying claims. However, they have not alleged the defense costs for any single claim has exceeded $500,000.

II. Discussion

Defendants move to dismiss, or stay, the New York Action on the ground that there is already an action pending between the same parties in Pennsylvania for the same relief. Defendants further contend Pennsylvania is the more convenient forum for adjudication of

the parties' dispute. In the alternative, Defendants seek a stay of the New York action to ensure there are not inconsistent findings in both cases.

Plaintiff ICNA argues the motion should be denied because the New York Action is more comprehensive in that it implicates all of the policies issued from 1980 to 1986, whereas the Pennsylvania Action only addresses the 1984 and 1985 policies.

A. Priority of Pending Litigation

CPLR §3211(a)(4) provides that a party may move to dismiss one or more causes of action asserted against him or her on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state..." Whether to grant such dismissal is a matter of discretion for the court. CPLR §3211(a)(4); *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 (1st Dept. 2007).

"New York courts generally follow the first-in-time rule, which instructs that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 (1st Dept. 2007), internal quotation marks and citation omitted; *see Seneca Specialty Ins. Co. v T.B.D. Capital, LLC*, 143 AD3d 971, 972 (2d Dept. 2016). "[W]here another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent

jurisdiction." *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 93 (1st Dept. 1997).

Dismissal under CPLR 3211(a)(4) is warranted when the relief sought is "the same or substantially the same" with respect to the two pending actions. *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90 at 94. This criterion is not met when "relief demanded is antagonistic and inconsistent, or purposes of two actions are entirely different." *Id.* Further, in order to reach dismissal, "it is necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions." *Id.*

It is undisputed the Pennsylvania Action was commenced first. Thus, there is a strong presumption the New York Action should be dismissed, or stayed, in favor of the Pennsylvania Action as a matter of comity, in order to avoid inconsistent rulings. *See Ace Prop. & Cas. Ins. Co. v Federal-Mogul Corp.*, 55 AD3d 479 (1st Dept. 2008). However, the analysis cannot end there. We must also assess whether there is "sufficient identity" as to both the Pennsylvania and New York actions.

1. Sufficient identity as to both the parties

Not only was the Pennsylvania Action commenced first, there is near identity of parties in both actions. ACCO, FKI and CROSBY, which are defendants here, are

plaintiffs in the Pennsylvania Action. Although ICNA is not the defendant in that action, it is undisputed that its successor, CENTURY, is the defendant.

Plaintiff ICNA points out that the New York Action has an additional defendant, Babcock, which was FKI's predecessor, and which is not a party to the Pennsylvania Action. However, the fact that a party is a defendant in one action but not the other action is not dispositive. *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d at 370. Nor has ICNA demonstrated that the presence of Babcock alone warrants maintenance of the New York Action over that of the Pennsylvania Action.

Thus, it appears there is sufficient identity of the parties in both actions.

2. *Sufficient identity as to both causes of action*

As for causes of action, both the Pennsylvania and New York matters clearly involve insurance policies issued by Century to defendants in the 1980s. The New York matter involves six policies which spanned between 1980 and 1986. The Pennsylvania action is limited to the policies issued in 1984 and 1985. Plaintiff ICNA argues the Pennsylvania action is much more comprehensive and, therefore, fails to meet the standard of sufficient identity. This "comprehensive" argument was previously rejected in *Century Indem. Co. v. Mine Safety Appliances Co.*, 398 N.J. Super. 422, 440-41 (App. Div. 2008); Order, *Mine Safety Appliances Co. v. Century Indem. Co.*, No. GD-0613611 (Pa. Ct. Com. Pl. Dec. 18, 2006). In *Mine Safety Appliances*, ICNA argued only its New Jersey action – which

included more policies and parties than the policyholder's Pennsylvania action – could provide complete relief. The New Jersey and Pennsylvania courts rejected those arguments and concluded the dispute should proceed in Pennsylvania, notwithstanding less policies were at issue in that action. Following the same logic, this Court sees no reason why Plaintiff cannot get the requisite relief from Pennsylvania in this instant matter.

B. Forum Non Conveniens

In the alternative, Defendants seek dismissal on forum *non conveniens* grounds. "[T]he inquiry involved in deciding a motion predicated on CPLR 3211 (a)(4) is similar to that undertaken in applying the doctrine of forum *non conveniens*—whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system." *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d at 95, internal quotation marks and citation omitted.

In the case at hand, numerous factors demonstrate that Pennsylvania, not New York, is the appropriate forum, at this juncture, in which to litigate the parties' dispute. This Court is of the opinion Pennsylvania has a much stronger connection than New York to both the parties and the facts underlying both actions.

1. Contacts with the State of Pennsylvania

First, and perhaps most significantly, ICNA is a Pennsylvania company, with its principal place of business in Philadelphia, Pennsylvania. ACCO, although incorporated

in Delaware, has had its principal place of business in York, Pennsylvania for approximately 100 years. Further, all of the products which gave rise to the underlying claims were manufactured in Pennsylvania.

Plaintiff ICNA points out that FKI, which is ACCO's parent, is incorporated in New York. However, FKI has its principal place of business in Tulsa, Oklahoma. Thus, this factor does not weigh heavily in favor of maintaining this action in New York.

Despite the foregoing, ICNA argues New York is the more appropriate forum because the policies were issued through a New York broker. This is unpersuasive.

It has been held, "[i]n the case of a liability insurance policy covering risks in multiple states, the state of the insured's principal place of business has a greater concern with issues of policy construction and application bearing on the amount of available coverage than do the states where contracting, negotiation, or payment of the premium happened to occur." *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 27 (1st Dept. 2006), *aff'd* 9 NY3d 928 (2007). Here, ACCO's principal place of business is Pennsylvania, where the products were manufactured. Thus, the fact that the policies may have been executed through a New York broker does not demonstrate that New York is the more appropriate forum.

The court also notes, by Plaintiff ICNA's own admission, the majority of the underlying claims are for injuries which were sustained by individuals in West Virginia,

not New York. Thus, New York has little, if any, connection to the underlying claims. It is difficult to see how New York can be more of a convenient jurisdiction than Pennsylvania. Notably, this Court also notes the Pennsylvania court recently declined to dismiss the Pennsylvania Action on the ground of forum *non conveniens*, which increases the possibility of inconsistent rulings should this Court permit the New York Action to proceed.

2. *Unavailability of forum*

In opposition, Plaintiff ICNA argues there is a possibility it may not be afforded full relief in the Pennsylvania Action. Specifically, it notes its claims in New York encompass certain policies which are not at issue in that action, i.e., those four insurance policies issued from 1980 to 1983. According to defendants ACCO, CROSBY and FKI those prior policies are not at issue because there has been no demand for payment under them. The parties dispute appears limited to the 1984 and 1985 policies and the question surrounding whether defendants have adequately satisfied their annual $500,000 deductible. While Plaintiff ICNA argues the earlier policies are at issue, it does not appear yet ripe insomuch as its relevance and applicability are only triggered if the underlying claims yield judgments and settlements that exceed those policy deductibles. See, *Am. Home Assur. Co. v. Port Auth. Of N.Y. & N.J.*, 40 Misc. 3d 1236(A) at *5 (Sup. Ct., N.Y. Cty. 2013) ("courts will not entertain a declaratory judgment action when any decree that the court

might issue will become effective only upon the occurrence of a future event that may or may not come to pass").

Plaintiff ICNA also raises the possibility that its ability to bring a counterclaim for declaratory judgment in the Pennsylvania Action may be limited by Pennsylvania law which, according to ICNA, states that Pennsylvania courts do not have jurisdiction to render declaratory judgments unless all interested parties are joined, including the underlying claimants. *See Vale Chem. Co. v Hartford Acc. and Indem. Co.*, 516 A2d 684 (PA. 1986).

Plaintiff ICNA states many of the underlying claimants are not subject to jurisdiction in Pennsylvania. Courts have found, in response to this argument, that although "Vale's requirement provides an insurmountable barrier to institution of a declaratory judgment action in Pennsylvania", there has nevertheless been a feeling of satisfaction "that adequate relief can be obtained (by ICNA) in breach of contract actions instituted in Pennsylvania courts". *Century Indem. Co. v. Mine Safety Appliances Co.*, 398 N.J. Super. 422, 429.

Still, "where there is a prior action pending in another State and there is a question as to whether the parties can be afforded full relief therein, the preferred course is to stay the New York action pending a final determination of the prior action." *Lawler v. TropWorld Casino and Entertainment Resort*, 238 AD2d 383, 383-384 (2d Dept. 1997).

In light of these factors, here, the Court finds a stay of the New York Action is warranted rather than dismissal of the Complaint.

Accordingly, it is

ORDERED the motion to dismiss is granted to the extent further proceedings in this action are stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by Order to Show Cause to vacate or modify this stay upon the final determination of the action/proceeding known as ACCO Material Handling Solutions, Inc., FKI Industries Inc., and the Crosby Group LLC v. Century Indemnity Company, as Successor to Insurance Company of North America, Index No. 2016-SU-000466-B9, pending before the Court of Common Pleas of York County, Pennsylvania; and it is further

ORDERED that the movant is directed to file a copy of this order with notice of entry with the Trial Support Office (Room 158).

DATED: February 28, 2017

ENTER:

J.S.C.

HON. EILEEN BRANSTEN
J.S.C.