

<b>Brooklyn Union Gas Co. v Century Indem. Co.</b>
2022 NY Slip Op 30420(U)
February 9, 2022
Supreme Court, New York County
Docket Number: Index No. 403087/2002
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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INDEX NO. 403087/2002

BROOKLYN UNION GAS COMPANY,

MOTION SEQ. NO. 029

Plaintiff,

- v -

DECISION + ORDER ON MOTION

CENTURY INDEMNITY CO and MUNICH REINSURANCE AMERICA INC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 029) 200, 201, 202, 203, 204, 205, 206

were read on this motion to EXCLUDE EVIDENCE AT TRIAL

Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset, and Michael Lechliter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for plaintiff. O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for defendant Century Indemnity Company.

No appearance for defendant Munich Reinsurance America Inc.

Gerald Lebovits, J.:

In this insurance-coverage litigation arising from cleanup of the Gowanus Canal in Brooklyn, the parties have filed numerous pretrial motions in limine. This motion concerns documents relating to notice that Brooklyn Union Gas Company provided to nonparty insurer AEGIS Insurance Services, Ltd. Brooklyn Union asks this court to exclude these documents as irrelevant.

Brooklyn Union's motion is granted in part and denied in part.

BACKGROUND

In June 1991, Brooklyn Union wrote to AEGIS, one of its excess insurers, to provide a "Notice of Circumstances" that might give rise to a future claim and to preserve Brooklyn Union's right to make future claims under the AEGIS policy. (See Century Indemnity Co. v Keyspan Corp. (2007 NY Slip Op 508957[U], at \*4 [Sup Ct, NY County May 7, 2007] [Stallman, J.], affd sub nom. Century Indem. Co. v Brooklyn Union Gas Co., 58 AD3d 573,

574-575 [1st Dept 2009].<sup>1</sup>) Approximately a year-and-a-half later, in February 1993, Brooklyn Union provided Century notice of an occurrence under the Century excess policies. (*Id.* at \*5.)

Century previously moved for summary judgment on whether Brooklyn Union's 1993 notice to Century was timely. Century contended, among other things, that given the 1991 notice to AEGIS, Brooklyn Union also then owed notice to Century under the Century policies, rendering the later 1993 notice untimely as a matter of law. (*See Century Indemnity*, 2007 NY Slip Op 508957[U], at \*6.) Judge Stallman disagreed and denied the motion. He held that Century had failed to establish that Century and AEGIS are similarly situated insurers, such that providing notice to one would establish that notice was also due to the other. (*Id.* at \*7.) On appeal, the First Department affirmed, emphasizing that the "coverage and notice provisions of the respective insurers' policies differ materially." (*Century Indemnity*, 58 AD3d at 574.)

The current motion addresses documents relating to Brooklyn Union's interactions with AEGIS that Brooklyn Union believes Century may seek to introduce at trial on the issue of timeliness of notice. Brooklyn Union contends that given the differences in the two sets of insurance policies and their requirements, these documents are irrelevant and unduly prejudicial. This court agrees in part, but only in part.

## DISCUSSION

The relevance and admissibility of the documents at issue on this motion are fact-specific and contextual. This court's analysis therefore proceeds document by document, as set forth below.<sup>2</sup>

**1991 Notice of Circumstances (NYSCEF No. 661):** Brooklyn Union's motion to preclude introduction of this document is granted in part and denied in part.

This court does not agree with Brooklyn Union that the First Department's 2009 *Century Indemnity* decision renders AEGIS-related documents necessarily irrelevant and inadmissible. The differences in policy language and notice standards between the AEGIS and Century policies may affect (and limit) the relevance of AEGIS-related documents to the timeliness of notice to Century. And references to AEGIS—a separate insurer that issued policies to Brooklyn Union with materially different terms—have the potential to confuse the jury and distract it from focusing properly on the Century policies at issue here. But that is different from saying that AEGIS documents never contain information that might be relevant to the Century-specific notice inquiry.

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<sup>1</sup> This action previously was assigned to Judge Stallman. It was later transferred to the undersigned.

<sup>2</sup> The litigation between Brooklyn Union and Century comprises two separate actions before this court: this action and *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/2001. The motions in limine filed in the two actions overlap almost completely. The NYSCEF citations given below correspond to the *Century Indemnity* docket, in which this motion is motion sequence 038.

Here, for example, the June 1991 notice discusses the present and anticipated future status of government-mandated investigation and remediation at the manufactured-gas-plant (MGP) sites at issue in the upcoming trial, and liability for contamination and cleanup at those sites. All of this information goes to when it would have been reasonably likely that Brooklyn Union would suffer covered losses reaching the Century policies. (*See Century Indemnity*, 2007 NY Slip Op 508957[U], at \*7-\*8, \*11 [discussing the relevance of these factors to the timeliness of notice to Century].) The information has independent probative value without regard to the purpose of the underlying document in which it appeared.

That said, to avoid jury confusion and undue prejudice to Brooklyn Union, the document may be introduced at trial only with redactions. The redactions must eliminate both (i) references to AEGIS (including the nature of this document as a notice-of-circumstances under the AEGIS policy); and (ii) references to other MGP sites beyond those that will be at issue at trial.

**Copies of 1990 Brooklyn Union claims-handling guidelines for AEGIS (NYSCEF No. 663, CN\_619):** Brooklyn Union’s motion to preclude introduction of these documents is granted. The documents pertain only to Brooklyn Union’s procedures for interacting with AEGIS—particularly measures to maintain and track files on open AEGIS-related matters. Those procedures do not shed light on Brooklyn Union’s contemporary understanding of the status of pollution at the MGP sites at issue in the upcoming trial, nor government-mandated investigation and remediation of that pollution.

This court is not persuaded by Century’s contention that language in the guidelines about notifying AEGIS “of any major incidents with obvious liability and/or exposure, even in the absence of claims and suits” (NYSCEF No. 663 at 4) sheds light on Brooklyn Union’s thinking in providing the June 1991 notice of circumstances to AEGIS. (*See* NYSCEF No. 664 at 13.) The environmental harm at the MGP sites at issue did not result from discrete “major incidents” with “obvious liability and/or exposure.” And, as Brooklyn Union contends (NYSCEF No. 673 at 11), the guidelines’ distinction between liability and exposure indicates a policy of providing notice to AEGIS of newly occurred incidents merely because of a “potential” for liability—which might fall short of a “reasonable likelihood” of liability.

Additionally, introducing these guidelines—which would entail introducing other background evidence on AEGIS and its dealings with Brooklyn Union—creates a substantial and obvious risk of jury confusion and undue prejudice to Brooklyn Union.

**1991 AEGIS letter to Brooklyn Union Acknowledging Receipt of Notice of Circumstances (NYSCEF No. 663, CN\_683):** Brooklyn Union’s motion to preclude introduction of this document is granted. The document does not shed light on Brooklyn Union’s interactions with Century, or on what Brooklyn Union knew when about the likelihood that it would be required to undertake costly remediation of MGP sites. Nor is AEGIS’s brief, generic suggestion in this letter that Brooklyn Union should provide notice to other carriers probative of whether a reasonable insured in Brooklyn Union’s position—not a reasonable insurer in AEGIS’s position—would have foreseen a reasonable likelihood of liability. And that aspect of the AEGIS letter would be impossible to understand without far more context about AEGIS, again creating a risk of undue prejudice and jury confusion.

**1992 Tracey Bell Memorandum (NYSCEF No. 663, CN\_702):** The admissibility of this memorandum as a whole is the subject of a separate motion in limine (motion sequence 039), and will be dealt with there. *If* the court concludes on motion sequence 039 that the memo is admissible (a matter on which the court expresses no opinion here), that decision will also address how best to redact the sentence of the memo referencing AEGIS, to avoid jury confusion.

**1992 Letter About Standstill Agreements With AEGIS (NYSCEF No. 663, CN\_705):** Brooklyn Union's motion to preclude introduction of this document is granted. The document does not discuss any subject that would bear on the timeliness of notice to century.

**June 1992 Notice of Circumstances (NYSCEF No. 663, CN\_708):** Brooklyn Union's motion to preclude introduction of this document is granted. This notice pertains only to an MGP site that is not at issue in the upcoming trial.

**1992 AEGIS letter upon receipt of 1992 notice (NYSCEF No. 663, CN\_712):** Brooklyn Union's motion to preclude introduction of this document is granted for the reasons given above with respect to CN\_619 and CN\_708.

**Draft Standstill Agreement Between Brooklyn Union and AEGIS (NYSCEF No. 663, CN\_720):** Brooklyn Union's motion to preclude introduction of this document is granted in part and denied in part. The context of the document, particularly the prefatory paragraph describing the agreement, suggests it was prepared by Brooklyn Union in the fall of 1992, months before Brooklyn Union provided notice to Century.<sup>3</sup> And portions of the second and fourth Whereas paragraphs (relating to potential legal action by the City of New York arising from pollution at the trial MGP sites) shed light on what Brooklyn Union knew when about the likelihood of liability.

This court does not agree with Brooklyn Union's apparent suggestion (*see* NYSCEF No. 673 at 12) that this information lacks probative value because it is contained in an unsigned draft agreement. That Brooklyn Union was willing even in a draft agreement to acknowledge the possibility of New York City bringing MGP-related claims against it is meaningful. Brooklyn Union is free to contest the import or weight of a statement in the fall of 1992 that "the City of New York may allege causes of action against Brooklyn Union arising from releases of hazardous materials" at the MGP sites. (NYSCEF No. 663 at 25.) But that is different from deeming this statement inadmissible.

As with the 1991 Notice of Circumstances, though, this document may be introduced only with redactions sufficient to eliminate both references to AEGIS and to other MGP sites not at issue at trial, to avoid jury confusion and undue prejudice.

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<sup>3</sup> The draft does not indicate an author. But the document carries a Brooklyn Union bates-stamp, and states at the top that it is a "Draft for Client Review." (NYSCEF No. 663 at 25.) This court infers that the document was Brooklyn Union's draft, rather than AEGIS's.

**November 1992 Letter from Brooklyn Union to AEGIS (NYSCEF No. 663, CN\_721):** Brooklyn Union's motion to preclude introduction of this document is granted. That Brooklyn Union and AEGIS were negotiating a standstill agreement addressing potential coverage litigation between them is not, standing alone, relevant to the timing of notice to Century. And unlike CN\_720, this document does not contain information bearing on that issue.

**January 1993 Letter to AEGIS about NYC Lawsuit (NYSCEF No. 663, CN\_727):** Brooklyn Union's motion to preclude introduction of this document is granted. This document relates only to the Coney Island MGP site, which is not at issue in this trial. It is also cumulative of New York City's notice of intent to sue.

**June 1993 Draft Supplemental Notice of Circumstances to AEGIS (NYSCEF No. 663, CN\_739):** Brooklyn Union's motion to preclude introduction of this document is granted in part and denied in part. The information in this document about the context of remediation and litigation at the MGP sites at issue is relevant to when Brooklyn Union reasonably anticipated a likelihood of liability that would reach the Century policies. This document admittedly was prepared *after* Brooklyn Union gave notice to Century. But given the short gap in time between the date of notice (January 1993) and the likely date of this document (May or June 1993) the information in the document remains relevant and probative of what Brooklyn Union knew or should have known in the months preceding the notice to Century.

As with other documents at issue on the motion, this document may be introduced only with redactions sufficient to eliminate references both to AEGIS and to other MGP sites.

**1998 Standstill Agreement Between Brooklyn Union and AEGIS (NYSCEF No. 663, CN\_830):** Brooklyn Union's motion to preclude introduction of this document is granted. Unlike CN\_739, the five-year gap between the date of notice to Century and the date of the standstill agreement is too large for the information in the document to be relevant and probative on the timeliness of the Century notice.

**Undated Michael Walsh Memorandum (NYSCEF No. 663, CN\_1013):** Brooklyn Union's motion to preclude introduction of this document is granted. The memo is undated, and no contextual information indicates whether it was prepared before or after Brooklyn Union gave notice to Century (and, if after, how far after). Additionally, the dollar figure given in the memo appears to be an aggregate amount for all 34 MGP sites. Standing alone, that figure does not shed light on Brooklyn Union's reasonable forecast of remediation costs or liability at the particular subset of MGP sites at issue in the upcoming trial.


**1991 Notice of Circumstances (NYSCEF No. 663, CN\_1077):** Brooklyn Union's motion to preclude introduction of this document is granted: It is a duplicate of NYSCEF No. 661.

**1985 MGP Report Attached to 1991 AEGIS notice (NYSCEF No. 663, 68-103):** Brooklyn Union's motion to preclude introduction of this document is granted. The document discusses the manufactured-gas process, and its corollary environmental harms, as a general matter, rather than with specific reference to the trial MGP sites. It therefore would be probative

only on whether Brooklyn Union was aware before January 1993 of the possibility of significant environmental contamination at those MGP sites. The document's limited probative value for that purpose is significantly outweighed by the potential prejudice to Brooklyn Union from introduction of the document—particularly given the existence of several other sources of information about Brooklyn Union's knowledge about contamination at the MGP sites. (See *Century Indemnity*, 2007 NY Slip Op 50957[U], at \*11 [describing these sources of information].)

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Brooklyn Union's motion in limine is granted in part and denied in part as described above.

  
**HON. GERALD LEBOVITZ**  
J.S.C.

2/9/2022  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE