

Brooklyn Union Gas Co. v Century Indem. Co.

2022 NY Slip Op 30475(U)

February 11, 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. 030

Plaintiff,

- v -

CENTURY INDEMNITY CO and MUNICH REINSURANCE
AMERICA INC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 030) 207, 208, 209, 210, 211, 212, 213

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.:

This motion is another of the many pretrial motions in limine filed by the parties in insurance-coverage litigation between Brooklyn Union Gas Company and Century Indemnity Company arising from cleanup of the Gowanus Canal and other sites contaminated by manufactured-gas plants operated by Brooklyn Union.

This motion arises from a dispute over one particular provision in several multi-year excess policies that Century's corporate predecessor issued decades ago to Brooklyn Union. Each policy covered "occurrences" (as defined in the policy), and imposed a per-occurrence limit on coverage. The parties argue over whether those limits apply for the full period of the policy (as Century contends); or whether they apply only annually, resetting each year of the multi-year policy period (as Brooklyn Union maintains). The First Department held in this action in 2019 that the multi-year Century policies are ambiguous on this point. (*See Century Indem. Co. v Brooklyn Union Gas Co.* 170 AD3d 632, 633 [1st Dept 2019].)

Century has served an expert report opining that under the insurance industry's well-settled custom and practice for multi-year policies, per-occurrence limits apply for the full policy period unless annual limits are expressly specified. Brooklyn Union moves to preclude this

expert from testifying at trial.¹ According to Brooklyn Union, his opinion is irrelevant because extrinsic evidence of industry custom and practice cannot be used to resolve an ambiguity in an insurance policy.

The motion is denied.

DISCUSSION

I. Whether Custom-and-Practice Extrinsic Evidence is Admissible as a General Matter

Brooklyn Union argues that the expert testimony at issue is irrelevant and inadmissible on the ground that ambiguities in an insurance policy assertedly must be construed against the drafter without reference to extrinsic evidence such as industry custom and practice. (*See* NYSCEF No. 679 at 5-8.) Brooklyn Union is incorrect.² (*See Southwest Mar. & Gen. Ins. Co. v Preferred Contrs. Ins. Co.*, 143 AD3d 577, 577 [1st Dept 2016] [rejecting argument that an ambiguous policy must necessarily be construed against that policy’s drafter, because “the parties may submit extrinsic evidence as an aid in construction” of the policy] [internal quotation marks omitted].)

When an insurance policy provision is ambiguous, the court considers first whether the parties have submitted extrinsic evidence that might resolve the ambiguity. If the parties have not submitted extrinsic evidence, the extrinsic evidence submitted is conclusory or otherwise sheds little light on the ambiguity, or the extrinsic evidence points decisively in one direction, the court may resolve the ambiguity as a matter of law, construing the policy against the drafter.³ (*See e.g. State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985], citing *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973] [conclusory extrinsic evidence]; *New York State Ins. Fund v Everest Natl. Ins. Co.*, 125 AD3d 536, 537 [1st Dept 2015] [no extrinsic evidence]; *Fairchild v Genesee Patrons Coop. Ins. Co.*, 238 AD2d 841, 842 [3d Dept 1997] [decisive extrinsic evidence].) If, on the other hand, admissible extrinsic evidence addresses—but does not resolve—the ambiguity, interpreting the provision at issue is for the factfinder. (*See e.g. Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522, 523 [1st Dept 2017], citing *American*

¹ 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 036.

² Indeed, on Brooklyn Union’s position, the First Department apparently erred in 2019 by not going on to resolve the annual/term limit question itself after finding the Century policies ambiguous on that point. (*See Century Indemnity*, 170 AD3d at 633.)

³ Century contends (*see* NYSCEF No. 687 at 4-5) that because Brooklyn Union is a large and sophisticated policyholder, maintaining a \$100,000 self-insured retention, it would be inappropriate to construe the insurance policies against Century. Given this court’s conclusion with respect to Century’s proffered extrinsic evidence, this court need not and does not reach this contention.

Surety Co. of N.Y. v National Fire Ins. Co. of Hartford, 25 AD2d 734, 734 [1st Dept 1966]); *Demetrio v Stewart Tit. Ins. Co.*, 124 AD3d 824, 826 [2d Dept 2015].)

Here, Century has proffered detailed extrinsic evidence (in the form of an expert’s report and, presumably, future trial testimony) to resolve the ambiguity in the multi-year Century policies about whether their per-occurrence limits apply on an annual or term basis. Brooklyn Union argues in the alternative that this extrinsic evidence is categorically inadmissible. It contends that only course-of-dealing extrinsic evidence—not evidence about the insurance industry’s typical customs and practices—may be put before the factfinder to resolve a policy ambiguity. (See NYSCEF No. 679 at 11-12; NYSCEF No. 696 at 6-7.) This court disagrees.

In *Underwood v Greenwich Insurance Co.*, the Court of Appeals held that custom-and-practice evidence is admissible to explain the intentions of the parties with respect to an insurance contract that is not clear and unambiguous on its face, reversing a directed verdict for erroneously excluding such evidence. (See 161 NY 413, 423-424 [1900]; *Nelson v Sun Mut. Ins. Co.*, 71 NY 453, 458-459 [1877] [approving trial court’s admission of custom-and-practice evidence to explain marine-insurance term of art]; see also *SR Intl. Business Ins. Co. v World Trade Ctr. Props., LLC*, 467 F3d 107, 134-136 [2d Cir 2006] [holding that court properly admitted at trial custom-and-practice evidence on the meaning of “occurrence” in the insurance policies at issue].) Brooklyn Union seeks to distinguish *Underwood* on the ground that it dealt with an interim insurance “binding slip,” not a full-fledged insurance policy. (See NYSCEF no. 696 at 9.) Brooklyn Union does not, however, explain why that distinction should make a difference. Nor is *Underwood*’s analysis of the admissibility of custom-and-practice evidence based on circumstances peculiar to binding slips.

Brooklyn Union has not identified precedent disapproving of the use of custom-and-practice extrinsic evidence in the insurance context (or suggest that only course-of-dealing evidence may be considered). Brooklyn Union relies on *Mostow v State Farm Insurance Co.* (88 NY2d 321 [1996]). (See NYSCEF No. 679 at 9-10; NYSCEF No. 696 at 6-7.) But *Mostow* does not address what evidence may be used to resolve an ambiguous insurance policy. *Mostow* holds only that the “test to determine *whether* an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy.”⁴ (88 NY2d at 326-327 [emphasis added]; see also *Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [discussing *Mostow* rule in context of explaining how to determine whether an insurance-policy provision is ambiguous]; *Gaidon v Guardian Life Ins. Co. of Am.*, 255 AD2d 101, 101 [1st Dept 1998] [holding, under *Mostow*’s “reasonable expectations of the average insured” standard, that the insurance policies at issue were unambiguous].)

⁴ In *Rickerson v Hartford Fire Ins. Co.* (149 NY 307 [1896]), the Court of Appeals reversed a post-trial judgment based upon the erroneous admission of custom-and-practice evidence. That reversal, though, was based not on a principle that admitting custom-and-practice evidence to resolve an insurance-policy ambiguity is impermissible, but on the failure of the evidence in that case to establish the asserted custom and practice on which its proponent was relying. (See *id.* at 315-316.)

Brooklyn Union's focus on the admissibility of custom-and-practice evidence in the particular context of the insurance industry is also misplaced, in any event. An insurance policy is a contract. It is "subject to principles of contract interpretation" that govern the "construction of contracts generally." (*Universal American*, 25 NY3d at 680 [internal quotation marks omitted].) Custom-and-practice extrinsic evidence may properly be considered in New York to shed light on the meaning of an ambiguous contractual provision. (*See e.g. B.M. Heede, Inc. v Roberts*, 303 NY 385, 390 [1952]; *accord J.P. Morgan Inv. Mgt. Inc. v AmCash Group, LLC*, 106 AD3d 559, 559-560 [1st Dept 2013].)

To be sure, evidence of an industry custom, practice, or usage will suffice to resolve an ambiguity only upon a showing either "that the parties are actually aware of the established usage of the term, or that 'the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it.'"⁵ (*AmCash Group*, 106 AD3d at 559, quoting *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 343 [1st Dept 1997].⁶) This can be a high bar. But holding in a given case that a party has failed to establish the requisite uniform and well-settled custom is different from holding that evidence of custom is categorically inadmissible.

II. Whether Century's Proffered Custom-and-Practice Evidence is Admissible

The question for this court, given its conclusion that custom-and-practice evidence may be admissible in general, is whether the particular expert report proffered by Century is admissible at trial in this action.

The existence of an industry custom, practice, or usage, and whether the parties had actual or constructive knowledge of it, "is a question of fact for the jury." (*Walls*, 49 NY at 469.) It must be proven, or not, like other questions of fact. (*See Matter of Estate of Atkinson*, 103 AD2d 960, 960 [3d Dept 1984], citing *Frye v State*, 192 Misc 260, 265 [Ct Cl 1948].) Thus, the

⁵ This requirement also accounts for the Court of Appeals's holding in *Home Indemnity*, which Brooklyn Union asserts to have rejected custom-and-practice evidence (*see* NYSCEF No. 679 at 11-12). That is, in *Home Indemnity* the extrinsic evidence at issue was an affidavit that "stated no more than that the phrase 'as interests may appear' was a term of art," without also establishing "that the limitation claimed to result from that term of art had been brought to the attention of those who negotiated on behalf of" the contractual counterparty. (66 NY2d at 672.) That information, standing alone, could not establish a well-settled industry custom of which the parties could be presumed to be aware when agreeing on the language of the contract. Nor could one party's subjective understanding of a phrase's meaning control, absent evidence that the party communicated this understanding to its contracting counterparty. (*See Matter of Reuters*, 213 AD2d at 344, citing *Schlanger v Heyman*, 185 AD 599, 600 [1st Dept 1918].)

⁶ *See also e.g. Underwood* (161 NY at 423-424 [approving the admission of evidence of "'usage, when it is reasonable, uniform, [and] well-settled,'" such that "'it must be supposed that [the parties'] contract was made in reference to it'"], quoting *Walls v Bailey*, 49 NY 464, 469 [1872]); *Gough v Jewett* (32 AD 79, 80-81 [2d Dept 1898] [holding the custom-and-practice evidence at trial insufficient to justify a presumption that the parties had assigned a particular technical meaning to a word in the contract]).

expert report at issue here must provide a basis from which a reasonable juror could conclude that when Brooklyn Union purchased the underlying Century policies, a uniform, well-settled custom existed in the insurance industry that per-occurrence limits in a multiyear policy would apply to the policy's full term unless the limits specified that they applied only annually.⁷ (*Compare Deveso v Chandler*, 210 AD 684, 690 [4th Dept 1924] [holding that whether the usage at issue was sufficiently uniform, well-settled, and generally known "as to raise a presumption that [the parties] had it in mind . . . was under the evidence a question from the jury], *aff'd* 241 NY 559 [1925], with *Home Indemnity*, 66 NY2d at 672 [holding that the term-of-art affidavit in that case "did not supply the evidentiary facts needed to present an issue for the jury"].⁸)

This evidentiary burden is not demanding. (*See e.g. Scott v Brown*, 29 Misc 320, 321 [App Term 1899] [holding that "the evidence upon [the] question" of custom in that case "was slight," but nonetheless "enough to present the question of fact to a jury"].) This court concludes that Century has satisfied its burden here. The expert report at issue describes the expert's basis for knowledge and expertise on this issue; it describes and explains the particular industry practice at issue (and the reasons for that practice) in detail; it opines that the practice in question has been uniform and well-settled in the industry for decades, extending back into a period in which some of the underlying Century policies were written; and it explains why it would be fair in these circumstances to infer that both Brooklyn Union and Century's predecessor were aware of and acted consistently with the industry practice with respect to the policy terms at issue on this motion. (*See generally* NYSCEF No. 681 at 2-14.) This showing is sufficient to put before the jury testimony about the industry practice attested to in the report that Brooklyn Union is moving to exclude.

To be sure, the report is not unassailable. One might question, for example, the report's lack of discussion of industry practice in the decades preceding the period the report covers, given that those decades encompassed the majority of the underlying policies in this case. Nor does the report articulate the expert's basis for knowledge of industry practice in those preceding

⁷ The statement in *Matter of Reuters* that "the defense of trade usage is not *admissible* to influence the construction of a contract" absent a showing of uniform well-settled usage is not to the contrary. (231 AD2d at 343-344 [emphasis added], quoting *Schlanger*, 185 AD at 600.) In isolation, that statement might be read to require the court to conduct a much more demanding inquiry before permitting custom-and-practice evidence to go to the jury. But the quoted language from *Schlanger* is itself drawn from *Walls*; and, as discussed above, *Walls* treats the question of custom-and-practice evidence as an ordinary fact issue (rather than imposing a more demanding threshold admissibility requirement). And *Matter of Reuters* dealt only with a motion to compel compliance with a subpoena, not a motion to preclude evidence at trial. The Court there denied the motion for failure to show that the subpoenaed information "would be relevant or necessary to disprove the existence of a well-settled, uniformly-acted-upon and long-continued usage." (231 AD2d at 344.) That is materially different from the question presented here.

⁸ The Second Circuit, concluding that the "precise standard for determining whether a party has met its burden of production with respect to custom-and-usage evidence has not been clearly articulated under New York law," articulated a similar test in *World Trade Center Properties*. (*See* 467 F3d at 135.)

decades. These questions would be legitimate subjects for cross-examination at trial should the expert testify. But they are not a basis to exclude the expert's testimony altogether at this threshold stage.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Brooklyn Union's motion in limine is denied.


HON. GERALD LEBOVITZ
J.S.C.

2/11/2022
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE