Allied World Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.
2022 NY Slip Op 32419(U)
July 21, 2022
Supreme Court, New York County
Docket Number: Index No. 650461/2019
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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ALLIED WORLD INSURANCE COMPANY,

Plaintiff,

- v -

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

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INDEX NO. 650461/2019

MOTION DATE 07/18/2022

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendant for summary judgment dismissing this case is granted and the cross-motion by plaintiff for partial summary judgment on its first and second causes of action is denied.

Background

In 2015, non-party Sabra conducted a nationwide recall of certain hummus products after the Michigan Department of Agriculture and Rural Development discovered listeria in these products. Sabra issued another recall in 2016 after the CDC and the U.S. FDA identified listeria in certain Sabra products in Virginia. Plaintiff contends that PepsiCo also handled the 2016 recall. It argues that less than a month after tendering the 2016 recall insurance claim to defendant, the 2016 policy was amended to add six endorsements to address the 2016 recall claim.

Plaintiff provided insurance to Sabra while defendant provided insurance to PepsiCo. Plaintiff asserts that PepsiCo tendered both its 2015 and 2016 recall-related claims to its own product contamination insurer (defendant) while Sabra tendered the 2016 recall claim to its product contamination insurers (which included plaintiff). Plaintiff brought this case seeking contribution from defendant for the 2016 recall.

Defendant now moves for summary judgment. It claims that Sabra had a vertical tower of recall insurance coverage which included a $5 million recall insurance policy issued by Ace European Group Ltd ("Ace"), a $5 million excess recall insurance policy issued by plaintiff and a $5 million excess recall insurance policy issued by Liberty Mutual Insurance Co. ("Liberty"). Defendant argues that each of these three insurance companies paid the full amount of their policies to Sabra. Defendant disputes plaintiff's contention that Sabra was also an insured on defendant's policy issued to PepsiCo pursuant to an endorsement that included PepsiCo's subsidiaries on defendant's policy.

Defendant argues that the language under the policy it issued to PepsiCo demonstrates that Sabra was not an insured. It maintains that the only insureds under its policy were PepsiCo and those subsidiaries and joint ventures in which PepsiCo had a 50% or greater ownership. Defendant states that Sabra is 50% owned by Frito-Lay (a subsidiary of PepsiCo) and 50% by the Strauss Group, an unaffiliated company based in Israel. Defendant argues that plaintiff cannot rewrite defendant's policy in order to seek contribution.

Defendant observes that PepsiCo and Sabra all agree that Sabra is not an insured under the policy and that only plaintiff (Sabra's insurer) believes it has a valid claim. Defendant also argues that even if plaintiff were entitled to some form of contribution under defendant's policy,

any allocation scenario would have resulted in plaintiff paying the full $5 million anyway. It claims plaintiff would have suffered no damages.

In opposition and in support of its cross-motion,[1] plaintiff insists that Sabra was an insured under defendant's policy. In fact, plaintiff claims that defendant's policy provides primary insurance coverage for Sabra for losses associated with the 2016 recall. Plaintiff characterizes its coverage as non-contributory excess insurance and is excess to defendant's policy. It cross-moves for declaratory relief that defendant must provide coverage for the 2016 recall and that its policy is excess to defendant's policy.

Plaintiff argues that PepsiCo controls Sabra and operates it business through divisions. One of these divisions is Frito-Lay North America which operates Sabra through a joint venture with another entity. Plaintiff maintains that PepsiCo's 2015 10-K indicated a three percent growth in net revenue for Frito-Lay which was purportedly powered by a significant increase in growth by Sabra. It claims that PepsiCo consolidated Sabra's financial success into PepsiCo's financial statements in accordance with GAAP (accounting principles) based on the fact that PepsiCo controlled Sabra.

In reply, defendant disputes that PepsiCo's financial statements were consolidated with Sabra's financials. It argues that plaintiff mischaracterizes these financial statements and that they do not stand for the proposition that PepsiCo controlled Sabra.

In reply to its cross-motion, plaintiff insists that PepsiCo's equitable ownership in Sabra was 50% and so PepsiCo controlled Sabra, thereby permitting Sabra to make a claim under defendant's policy.

[1] The Court recognizes that defendant insisted that plaintiff's cross-motion was untimely (NYSCEF Doc. No. 272). But the cross-motion clearly related back to the timely summary judgment motion filed by defendant; it was made against the party (defendant) that moved for summary judgment and it related to the same subject matter as the motion made by defendant. Therefore, the Court will consider both the motion and cross-motion on the merits.

Discussion

"A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor. Thus, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 NYS2d 86 [2014] [internal quotations and citations omitted]).

"An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 57 NYS3d 85 [2017] [internal quotations and citations omitted]).

The parties agree that defendant provided an insurance policy to non-party PepsiCo. That policy contained an endorsement stating that "Named Insured also includes the following: Named Insured means the organization first named as the Named Insured on the Declarations Page of this Policy (the "First Named Insured"). Named Insured also includes subsidiaries and joint ventures in which PepsiCo Inc. has 50% or greater ownership. All other terms and conditions, and exclusions shall remain the same" (NYSCEF Doc. No. 227 at NUFIC 0391).

It is undisputed that Sabra is not a subsidiary of PepsiCo. Rather, it is a joint venture of Frito-Lay, and Frito-Lay is a subsidiary of PepsiCo. Specifically, Sabra is a joint venture between Frito-Lay (which owns 50% of Sabra) and an Israeli company that owns the remaining 50%. The Court finds that a plain reading of this unambiguous provision yields only one conclusion: that Sabra is not covered under the policy defendant issued to PepsiCo.

Defendant's policy with *PepsiCo* covers, by its terms, companies that are subsidiaries of *PepsiCo* and companies in which *PepsiCo* has a joint venture. Sabra is neither. Plaintiff's efforts to show that PepsiCo makes money from the Frito-Lay/Israeli Company joint venture (Sabra) does not transform Sabra into a direct subsidiary of PepsiCo. There is an entity in between them: Frito-Lay. And plaintiff does not provide any dispositive evidence or caselaw that a subsidiary/joint venture of a subsidiary is entitled to insurance coverage from a parent company two levels above it. Undoubtedly, the insureds involved in this matter are highly sophisticated and massive entities that were entirely capable of inserting language to include entities such as Sabra in PepsiCo's insurance policy. The endorsement could have easily included language extending coverage to all of PepsiCo's subsidiaries and the subsidiaries/joint ventures of PepsiCo's subsidiaries. But it did not.

Instead, as detailed by defendant, Sabra sought out and obtained insurance coverage on its own. The record shows that Sabra purchased both primary and excess insurance coverage for exactly the issue here—a reported recall from contamination relating to Sabra's hummus. And Sabra apparently received $15 million from three different insurers.

To embrace plaintiff's view would require the Court to essentially rewrite the insurance policy. It would likely also mean that many more entities would be included under this policy regardless of whether they are direct subsidiaries of PepsiCo. If plaintiff's theory was correct,

then any subsidiary/joint venture of Frito-Lay could seek coverage under defendant's policy. This Court cannot embrace that expansive reading of the policy at issue.

Because the Court is issuing a determination on the merits that denies plaintiffs' request for declaratory relief, it must issue a declaration in defendant's favor rather than merely dismiss plaintiff's claim (*Spada v Aspen Univ., Inc.*, 202 AD3d 494, 495, 163 NYS3d 27 [1st Dept 2022]).

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment dismissing this case is granted, the cross-motion by plaintiff is denied, and the Clerk is directed to enter judgment accordingly in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor; and it is further

DECLARED that plaintiff is not entitled to contribution from defendant in connection with the amount plaintiff paid to Sabra relating to the loss that is the subject of the instant complaint and defendant is not obligated to provide coverage to Sabra in connection with the loss that forms the basis of the instant complaint.

7/21/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**