Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.
2005 NY Slip Op 30526(U)
January 5, 2005
Supreme Court, New York County
Docket Number: 600777/01
Judge: Barbara R. Kapnick

[*1]

SCANNED ON 1/10/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice PART 12

0600777/2001

CERTAIN UNDERWRITERS
vs
FOSTER WHEELER CORPORATION

SEQ 042

PARTIAL SUMMARY JUDGMENT

INDEX NO. 600777/01

MOTION DATE

MOTION SEQ. NO. 042

MOTION CAL. NO.

motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 10 2005
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 1/5/05

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al.,

Plaintiffs,

- against -

FOSTER WHEELER CORPORATION, et al.,

Defendants.

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DECISION/ORDER
Index No. 600777/01
Motion Seq. Nos. 042 and 043

BARBARA R. KAPNICK, J.:

Motion Sequence Numbers 042 and 043 are consolidated for disposition.

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies ("LMI") seeks in this action a declaration with respect to the allocation of responsibility between Foster Wheeler Corporation and its primary and excess insurers for asbestos related personal injury claims that Foster Wheeler has paid since 1993, and that LMI and to a lesser extent Liberty Mutual Company ("Liberty Mutual") have reimbursed it pursuant to a reservation of rights.

Defendant Foster Wheeler Corporation now moves (under motion sequence number 042) for summary judgment declaring that New Jersey substantive law should govern all disputed issues in this action.

Defendants Everett Reinsurance Company, formerly known as Prudential Reinsurance Company, and Mt. McKinley Insurance Company formerly known as Gibraltar Insurance Company also move (under motion sequence number 043) for summary judgment declaring that New York substantive law should govern the disputed issues in this action. Although these defendants have since reached a settlement with Foster Wheeler, a number of other insurance companies have adopted their position and submitted briefs in favor of applying New York law.

Traditionally, conflict of law questions relating to contracts were resolved by application of "the law of the place where the contract was made or was to be performed." See, Matter of Allstate Ins. Co. v. Stolarz, 81 N.Y.2d 219, 225 (1993).

However,

> [c]urrently, the courts apply the more flexible "center of gravity" or "grouping of contacts" inquiry, which permits consideration of the "spectrum of significant contacts" in order to determine which state has the most significant contacts to the particular contract dispute (Matter of Allstate Ins. Co., supra, at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936 [internal quotations omitted]; see, Madison Realty v. Neiss, 253 A.D.2d 482, 676 N.Y.S.2d 672).

Eagle Insurance Company v. Singletary, 279 A.D.2d 56, 58-59 (2nd Dep't 2000). See also, Urlic v. Insurance Company of the State of Pennsylvania, 259 A.D.2d 1 (1st Dep't 1999), lv. to app. den. 94

N.Y.2d 763 (2000); Munzer v. St. Paul Fire and Marine Insur. Co., 203 A.D.2d 770 (3rd Dep't 1994).

> Traditional choice of law factors are to be given "heavy weight" in a grouping of contacts analysis (citations omitted). In general, significant contacts in a case involving contracts, in addition to the place of contracting, are the place of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties (see, Zurich Ins. Co. v. Shearson Lehman Hutton, [84 N.Y.2d 309]; Matter of Allstate Ins. Co., supra; Restatement [Second] of Conflict of Laws § 188[2]). As to insurance contracts specifically, significance has been attached to the " 'local law of the state which the parties understood was to be the principal location of the insured risk * * * unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [of the Restatement] to the transaction and the parties' " (Zurich Ins. Co. v. Shearson Lehman Hutton, supra, at 318 ... quoting Restatement [Second] of Conflict of Laws § 193).

Eagle Insurance Company v. Singletary, supra at 59.

> Thus,
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> [i]n cases involving insurance contracts, New York courts have looked principally to the following factors: the location of the insured risk; the insured's principal place of business; where the policy was issued and delivered; the location of the broker or agent placing the policy; where the premiums were paid; and the insurer's place of business.

Olin Corp. v. Insur. Co. of North America, 743 F.Supp. 1044, 1049 (S.D.N.Y. 1990), aff'd, 929 F.2d 62 (2nd Cir. 1991). See also, Maryland Casualty Co. v. Continental Casualty Co., 332 F.3d 145 (2nd Cir. 2003).

Location of the insured risk

In the instant case, the policies which were issued from 1940 through 1982, covered a risk of national scope involving multiple states.

"It is commonplace for courts applying New York choice-of-law rules to disregard (or at least discount) the location of the insured risk when the risk is located in two or more states." Maryland Casualty Co. v. Continental Casualty Co., supra at 153. In such cases, the principal location of the insured risk is "deemed to be the state where [the insured] is incorporated and has its principal place of business, from which it negotiated the special terms of the Policy, and where the Policy presumably was delivered to it (thus constituting the state where the contract was made)." Steadfast Insurance Co. v. Sentinel Real Estate Corp., 283 A.D.2d 44, 50 (1st Dep't 2001)

Insured's principal place of business

There is no dispute that the insured, defendant Foster Wheeler Corporation, moved its headquarters from New York to New Jersey in 1962. Foster Wheeler contends that all the insurance companies with which it has not reached a settlement agreement and which remain parties to this action issued policies to Foster Wheeler after 1962.

The proponents of applying New York law, however, note that Foster Wheeler continued to maintain `executive offices' in New York after 1962 and was incorporated in New York for a good portion of the relevant time period.

They also note that although Foster Wheeler has settled with a number of insurers that sold policies to Foster Wheeler prior to the relocation of its headquarters from New York to New Jersey, the policies issued to Foster Wheeler prior to 1962 remain at issue in this action by virtue of Foster Wheeler's claims for contribution under the excess insurance policies obtained from LMI.

Place where the policy was issued and delivered

Foster Wheeler contends that it negotiated the bulk of its primary coverage directly from its New Jersey headquarters, and that almost 90% of the insurance policies were `delivered' to that location. See, Federal Insur. Co. v. McCampbell, 247 A.D.2d 359 (2nd Dep't 1998).

The parties in favor of applying New York substantive law, however, dispute Foster Wheeler's claim that negotiations took place at Foster Wheeler's New Jersey headquarters, and contend rather that the documentary evidence demonstrates that a majority of the policies were negotiated by and delivered to Foster

Wheeler's brokers in New York (see, Crucible Materials Corp. v. Aetna Casualty & Surety Co., 228 F.Supp.2d 182 [N.D.N.Y. 2001]) and/or were countersigned in New York.

For instance, Liberty Mutual, a Massachusetts company, has represented that the Foster Wheeler account remained in New York and Liberty's New York personnel remained `the point people' for Foster Wheeler until Liberty lost the account to Hartford Accident & Indemnity Company ("Hartford") in 1972. Hartford, a Connecticut company, has also represented that it negotiated all of its policies in New York out of its New York offices, countersigned the policies in New York, issued the policies out of New York and delivered the policies to Foster Wheeler's broker in New York.

Likewise, First State Insurance Company ("First State") has represented that nine out of thirteen excess policies it issued to Foster Wheeler between February 1, 1970 and October 1, 1982 were procured using First State's New York agents and Foster Wheeler's New York agents and were negotiated solely in New York.

Location of the broker or agent placing the policy

Foster Wheeler concedes that some of the policies were placed through New York insurance brokers, but argues that this fact should by no means be dispositive. See, Regional Import & Export Trucking Co. v. North River Insurance Co., 149 A.D.2d 361 (1st Dep't 1989).

The proponents of applying New York law, on the other hand, argue that the fact that Foster Wheeler hired New York based brokers to negotiate and/or place its entire excess insurance program, which encompassed 230 policies, is significant given the scope of the program. In fact, they contend that all activities concerning Foster Wheeler's excess insurance program emanated from New York prior to 1986.[1]

Where the premiums were paid

Foster Wheeler contends that the premiums for the vast majority of the subject policies were paid from its New Jersey headquarters.

The proponents of applying New York law, however, point to the fact that Foster Wheeler maintained accounts and drew its corporate checks from Chemical Bank in New York until 1986.

Insurer's place of business

The policies at issue in this case were issued by insurers of various states although all or most of them were apparently licensed to do business in New York.

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[1] For instance, it appears that through February 1965, the New York offices of Marsh & McClennan and Frank B. Hall helped obtain and received LMI policies on behalf of Foster Wheeler. In addition, it appears that between February 1967 and February 1970, the New York office of Wohlreich & Anderson obtained and received additional LMI policies on behalf of Foster Wheeler, and from 1971 through 1975, Foster Wheeler employed the New York offices of Marsh & McClennan and Johnson & Higgins to obtain coverage from LMI.

In addition, the proponents of applying New York law contend that the parties had no expectation that New Jersey law would apply, as demonstrated by the absence of any governing law provisions in the policies.

Weighing all the above factors while remaining mindful that in considering such factors the courts are not to engage "in a mindless scavenger hunt to see which state can be found to have more contacts, but rather in an effort to detect and analyze what interest the competing states have in enforcing their respective rules" (Fireman's Fund Insur. Co. v. Schuster Films, Inc., 811 F.Supp. 978 [S.D.N.Y. 1993]), this Court finds that New York State has the most significant contacts to the instant dispute.

Accordingly, based on the papers submitted and the oral argument held on the record on April 1, 2004, Foster Wheeler's motion to declare that New Jersey substantive law governs the disputed issues in this action is denied, and the motion to declare that New York substantive law governs the disputed issues in this action is granted.

This constitutes the decision and order of this Court.

Dated: January 5, 2005

BARBARA R. KAPNICK
J.S.C.