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

PRESENT: HON. CAROL EDMEAD Justice PART 35

ESTEE LAUDER INC.

- v -

ONEBEACON INSUR. GROUP, et al

INDEX NO. 602379/2005

MOTION DATE 9/6/2012

MOTION SEQ. NO. 008

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

FILED

FEB 29 2012

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 008 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion to amend is granted to the extent that the amended complaint in the form annexed to the moving papers, but omitting the proposed fourth cause of action, shall be deemed to have been served upon service by movant of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that the note of issue filed on May 6, 2011, is vacated, and the new deadline for filing a note of issue is December 17, 2012; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 438, 60 Centre Street, on April 10, 2012, at 10:00 a.m.; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant and upon the Trial Support Office (Room 158).

Dated: 2/23/2012

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

ESTEE LAUDER INC.,

Plaintiff,

-against- Index No. 602379/05

ONEBEACON INSURANCE GROUP, LLC (successor in-interest to CGU INSURANCE, f/k/a EMPLOYERS GROUP OF INSURANCE COMPANIES, EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA and COMMERCIAL UNION INSURANCE COMPANY), ONEBEACON INSURANCE COMPANY and ONEBEACON AMERICA INSURANCE COMPANY,

Defendants.

----------X

CAROL R. EDMEAD, J.S.C.:

Plaintiff Estee Lauder Inc. (Lauder) moves, pursuant to CPLR 3025 (b) and (c), for leave to file a third amended complaint, so as to add a fourth and fifth cause of action alleging, respectively, bad faith coverage denial pertaining to duty to defend and bad faith coverage denial pertaining to paying undisputed defense costs. The damages that Lauder seeks in these proposed claims are the legal expenses that it has incurred in litigating this action. The facts underlying this action are set forth in *Estee Lauder, Inc. v OneBeacon Ins. Group, LLC*, 2006 WL 5110780, 2006 NY Misc LEXIS 4140 (Sup Ct, NY County 2006), *revd* 62 AD3d 33 (1st Dept 2009). In brief, Lauder sought coverage for three administrative and court proceedings in which it was alleged to have discharged, or to have caused to be discharged, toxic wastes in certain landfills located in Long Island.

As an initial matter, a motion to conform a pleading to the evidence, pursuant to CPLR 3025 (c), is appropriately made after

a cause of action in tort. *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353 (1st Dept 2005); *Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349 (1st Dept 2003). However, a claim for extra-contractual liability for legal expenses may be asserted where the insurer's denial of coverage shows "such bad faith ... that no reasonable carrier would, under the given facts, be expected to assert it." *Sukup v State of New York*, 19 NY2d 519, 522 (1967). "Proof of an insurer's bad faith `requires an extraordinary showing of disingenuous or dishonest failure to carry out a contract' (*Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 437 [1972]). ... These requirements cannot possibly be met where the insurance carrier has an arguable case for denying coverage." *Dawn Frosted Meats v Insurance Co. of N. Am.*, 99 AD2d 448, 448 (1st Dept), *affd* 62 NY2d 895 (1984), citing *Sukup*, 19 NY2d at 522.

OneBeacon's immediate predecessor-in-interest, Randall America, Inc. (Randall), disclaimed coverage with regard to two actions for which Lauder sought coverage, by letter dated July 24, 2002, stating that the company could not "locate any further evidence of the terms and conditions" of the pre-1971 policy, which Lauder claimed that it had been issued by Randall's predecessor-in-interest, CGU Insurance (Commercial Union). Kotula Affirm., Exh. EE.[1] By letter dated November 1, 2002, OneBeacon noted that the commercial general liability policy that Commercial Union had issued to Lauder, that was in effect beginning in 1971, contained

[1] This document, which was filed under seal, was not provided to the court with the papers on this motion. It was subsequently provided at the court's request.

a pollution exclusion that precluded coverage for environmental contamination claims. With regard to Lauder's tender of defense on the basis of a Commercial Union policy, allegedly in effect as of September 18, 1968, OneBeacon noted that, other than a certificate of insurance provided by Lauder, OneBeacon had been "unable to find any ... evidence to confirm the existence and terms of this alleged policy," and that, accordingly, OneBeacon was disclaiming coverage. Higgins Affirm., Exh. 14, at 1.

Lauder's proposed fourth cause of action alleges that all three disclaimers were made in bad faith, inasmuch as OneBeacon and Randall had in their possession, at the time of the disclaimers, the 1971 policy, which by its terms was a renewal policy, and thus, constituted incontrovertible proof of the one-time existence of the alleged 1968 policy. Neither Randall, nor OneBeacon, could, in good faith, positively assert that, assuming that Commercial Union had issued a 1968 policy, that policy, like the 1971 policy, contained a pollution exclusion. However, in view of the presumption that the terms of a renewal policy are the same as the terms of the policy that it renewed (*see Estee Lauder, Inc.*, 62 AD3d at 39-40), and therefore, the presumption that any 1968 policy would have contained a pollution exclusion, Randall's and OneBeacon's disclaimers on the grounds that they could not ascertain the terms of the allegedly lost policy is not evidence of bad faith on their part.

To be sure, the Appellate Division held that, notwithstanding the presumption of continuity of policy terms, OneBeacon had the

burden of proving, which it failed to do, that the lost policy "contained a pollution exclusion *during the entire policy period*." *Id.* at 41 (emphasis added). That Randall and OneBeacon failed to anticipate that holding is not evidence of bad faith, let alone constituting an "extraordinary showing of disingenuous or dishonest failure to carry out a contract." *Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d at 437.

Lauder points out that, in the course of discovery in this action, OneBeacon expressly stated that the lost policy had never existed. That denial is irrelevant to the issue of whether OneBeacon and Randall acted in bad faith, at the time that they disclaimed coverage for the reasons that they then gave.

Lauder's proposed fifth cause of action alleges that OneBeacon's failure to pay any part of Lauder's defense costs in the three actions, despite the Appellate Division's grant of Lauder's motion for summary judgment that it was entitled to be paid its defense costs in two of the actions, and OneBeacon's acknowledgment that it was obligated to pay the costs of defending the third action, as well, is evidence of bad faith, as well as constituting a breach of the implied covenant of good faith and fair dealing in the lost 1969 policy. Generally, a tort claim that is redundant to a breach of contract claim cannot stand. Here, however, the proposed fifth cause of action seeks damages that are entirely different from the damages that the three breach of contract claims seek. *Compare Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005) (claim based on same

occurrences and seeking damages identical to those sought in quasi-contractual claim are redundant thereto). Accordingly, the court will consider the fifth cause of action on its merits.

The decision of the Appellate Division in this case stated that Lauder was entitled to a declaration that its defense costs in two of the three actions "must be paid promptly by OneBeacon to the extent that they are reasonable and necessary." *Estee Lauder, Inc.*, 62 AD3d at 40 n 6. OneBeacon argues that it is entitled to question whether a significant portion of Lauder's defense costs were paid for the defense of an uninsured related company, and to raise arguments as to the reasonableness of Lauder's claimed defense costs. It is undisputed that, no later than June 2010, Lauder provided OneBeacon with unredacted invoices evidencing Lauder's legal expenses. While OneBeacon may have defenses to Lauder's proposed fifth cause of action, OneBeacon's failure to pay any of Lauder's defense costs, to date, viewed in the context of the Appellate Division's order that reasonable and necessary costs be paid "promptly," shows that Lauder's proposed fifth cause of action is not "palpably insufficient as a matter of law." *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d at 652.

Accordingly, it is hereby

ORDERED that the motion to amend is granted to the extent that the amended complaint in the form annexed to the moving papers, but omitting the proposed fourth cause of action, shall be deemed to have been served upon service by movant of a copy of this order

with notice of entry; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that the note of issue filed on May 6, 2011, is vacated, and the new deadline for filing a note of issue is December 17, 2012; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 438, 60 Centre Street, on April 10, 2012, at 10:00 a.m.; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant and upon the Trial Support Office (Room 158).

Dated: February 23, 2012

ENTER:

J.S.C.

HON. CAROL EDMEAD