Hartford Underwriting Ins. Co. v Leardon Boiler Works, Inc.
2014 NY Slip Op 31567(U)
June 19, 2014
Supreme Court, New York County
Docket Number: 602069/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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HARTFORD UNDERWRITING INSURANCE COMPANY,

Index No. 602069/2009
Motion Seq. No. 005

Plaintiff,

-against-

LEARDON BOILER WORKS, INC., RITE WAY TANK MAINTENANCE CORP., ROSE ASSOCIATES, INC., HESS CORPORATION, PETROLEUM SERVICES, INC., AND LAWLESS AND MANGIONE ARCHITECTS & ENGINEERS, D.P.C. (A/K/A LAWLESS AND MANGIONE ARCHITECTS & ENGINEERS LLP),

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, plaintiff Hartford Underwriting Insurance Company ("Hartford") moves by order to show cause for a declaration that its obligation under its two policies issued to defendant Greenman-Pederson, Inc. ("GPI"), if any, to reimburse GPI is limited to the costs GPI incurred to defend Hartford's claims against GPI only (and does not include costs incurred with respect to GPI's counterclaims or cross claims), and for a stay of the hearing concerning the amount of reasonable attorney's fees GPI may recover from Hartford in this action, pending a decision on this motion.

Hartford commenced this action seeking a declaration that Hartford does not owe GPI defense or indemnity in an underlying action entitled *Michael Treat v. Port Authority of NY & NJ*, Index No. 109570/2006 (the "underlying action") and that GPI's others insurers - Continental Casualty Co. ("CNA") and Syndicate 2020 at Lloyd's of London ("Lloyd's") - owe GPI defense and indemnity instead. GPI's answer included counterclaims for declarations that, *inter alia*,

Hartford did owe such a defense and indemnity and cross claims that CNA and Lloyd's owed such duties.[1]

By order dated August 7, 2012 (the "August 2012 order"), the Court determined that Hartford and Lloyd's have a duty to defend and indemnify GPI, and that CNA has a primary duty to defend and indemnify GPI in the underlying action.

Hartford now moves for an order declaring that it is not required to reimburse GPI for costs incurred in GPI's prosecution of its counterclaim and cross-claims. Hartford points out that the August 2012 order only granted GPI attorney's fees in "defending" this action. And, caselaw holds that a litigant is not entitled to recover amounts expended in an affirmative action brought by an assured to settle its rights, but only when cast in a defensive posture when facing a disclaimer of coverage claim by the insurer. Therefore, any legal costs GPI incurred in prosecuting its five counterclaims against Hartford and two cross-claims against Lloyd's, are not recoverable by GPI.

In opposition, GPI argues that Hartford is responsible for all its attorney's fees to the extent GPI was put into a "defensive posture" by Hartford's action in suing its insured, and that GPI's efforts to obtain a defense and indemnity under its policies with Hartford was the result of its "defensive posture." GPI's counterclaims and cross-claims for coverage were the result of GPI's defensive posture against carriers affirmatively trying to avoid providing GPI with defense and insurance coverage. And, GPI's defense of its right to coverage from CNA and Lloyds

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[1] GPI asserted five counterclaims: waiver and estoppel, negligence in failing to provide Lloyd's timely notice on GPI's behalf, breach of duty to defend (for which GPI does not seek attorney's fees), violation of General Business Law 349, and wrongful disclaimer. According to GPI, the negligence and breach of duty to defend counterclaims have not been litigated and were not subject to any motion practice. GPI cross-claimed against Lloyd's for coverage under its policy with Lloyd's, and waiver and estoppel.

benefitted Hartford, since GPI's arguments were consistent with those of Hartford's against the other two carriers. Courts reject approaches of exalting form over substance, and an examination of the substance of the "defensive posture" undertaken is required. By wrongfully disclaiming coverage and defense, GPI was forced to defend, and assert two cross-claims against Lloyd's to avoid being deemed to have waived coverage from Lloyd's. Further, GPI's cross-claim supported Hartford's claims that Hartford placed Lloyd's on proper notice on GPI's behalf to warrant coverage from Lloyd's. Hartford has consistently complained to GPI that GPI must pursue a claim for defense against Lloyd's. And, Hartford's summary judgment motion necessitated GPI's cross-motion for the opposite relief. GPI had to establish Hartford's obligation regarding the underlying action in order to prevail in GPI's defense and counterclaims for coverage. Further, had GPI not asserted counterclaims against Hartford, it would have made the same affirmative defenses in defending and opposing Hartford's moving arguments. GPI was also forced, as a co-defendant, to defend and cross move for relief when Hartford moved against Lloyd's and when Lloyd's cross moved against GPI. None of the cases Hartford cites applies to the attorney's fees GPI seeks as they are factually distinguishable.

Discussion

It is undisputed that the Court's August 2012 Order granted GPI's cross-motion "for attorneys' fees against Hartford in defending this action" and referred "the issue of the amount of reasonable attorney's fees GPI may recover against Hartford in defending this action" to a Special Referee to hear and report. The issue is whether such order excludes any costs GPI incurred in pursuing its counterclaims and cross-claims in its answer.

It is "the rule in New York" that a recovery of attorney's fees "may not be had in an

affirmative action brought by an assured to settle its rights . . . but only when he has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 416 N.Y.S.2d 559 [1979] (an "insurer is not liable for attorneys' fees and disbursements necessarily incurred in the policyholder's successful prosecution of the action it brought to compel the insurer to comply with its policy obligations (*cf., Johnson v. General Mut. Ins. Co.*, 24 N.Y.2d 42, 49-50, 298 N.Y.S.2d 937 [1969] (attorneys' fees are a consequential damage of the breach of the duty to defend)).

However, the Court of Appeals in *Mighty Midgets* acknowledged that "the grant of counsel fees to an insured when he is cast by his insurer in a defensive position in litigation has its genesis in the insurer's responsibility to defend, which 'reaches the defense of any actions arising out of the occurrence'" (*Mighty Midgets*, 47 N.Y.2d at 21).

In *Aetna Cas. & Sur. Co. v. Dawson* (84 A.D.2d 708, 444 N.Y.S.2d 10 [1st Dept 1981]), the petitioner, Aetna Casualty & Surety Company, commenced a CPLR proceeding against its insured to stay arbitration as a result of a demand for arbitration served upon it by its insured. The First Department rejected the lower court's application of *Mighty Midgets (supra)* as a basis for directing the insurer to pay the insureds' counsel fees. Although the insurer commenced the proceeding, the defense of which the insured sought attorneys' fees, the First Department reasoned that it was *the insurer* that was "cast in a defensive, not offensive, posture" because "it was not petitioner but respondents [insureds] who, by serving a demand to arbitrate . . . took the initiative and brought CPLR Article 75 into play. In moving to stay arbitration petitioner [insurer] was merely answering the demand by the only statutory means provided," *i.e.*,

commencing an action under the CPLR.

Here, it was not GPI, but Hartford which, by commencing this action for a declaration that it has no duty to defend or indemnify, took the initiative and brought GPI's claims into play (*cf. Aetna Cas. & Sur. Co. v. Dawson*, 84 A.D.2d 708, 444 N.Y.S.2d 10 [1st Dept 1981]).

In *Hurney v. Mattson* (59 A.D.2d 934, 399 N.Y.S.2d 449 [2d Dept 1977]), plaintiffs commenced a negligence action against insureds/defendants. The insureds/defendants' insurance carrier, Sentry Insurance ("Sentry") disclaimed coverage and refused to defend them as defendants. The insureds/defendants then commenced *a third-party action* against Sentry for (1) damages in the event that they were to be found liable to the plaintiffs and (2) the cost of their defense. Sentry then counterclaimed for a declaration as to its obligation to provide coverage and defense. The trial court ruled on Sentry's counterclaim, and directed Sentry to defend defendants/insureds in the main action. Upon the insureds/defendants' request for attorney's fees incurred in defending the counterclaim, the Appellate Division concluded that "Their *posture* in the counterclaim, brought as a result of the insurer's breach of its obligation to defend, *was that of defendants*" (emphasis added).

Thus, notwithstanding that the insured/defendants instituted the third-party action against its insurer, and that they were labeled "third-party plaintiffs," the expenses they incurred were from a defensive posture.

It is uncontested that GPI did not litigate or move for summary judgment on its second, fourth, and fifth counterclaims for breach of duty undertaken and negligence, violation of GBL 349, and wrongful disclaimer of coverage, respectively. Only the first counterclaim, for a declaratory judgment that Hartford "waived any grounds in support of a denial of coverage"

(¶83), and is "liable to GPI for all costs, expenses and damages incurred as a result of the untimely denial of coverage . . . ." (¶85), and third counterclaim, for a declaration that Hartford is "required to defend GPI in the *Treat* action" (¶119) are at issue herein.

To the degree GPI's claims, arguments, contentions, and arguments in opposing Hartford's complaint were *in response* to and *in rebuttal against* Hartford's affirmative action to establish its non-liability for the underlying claim, GPI's attorneys' fees, which were incurred solely as a consequence of Hartford's action, are recoverable. Whether couched as a "counterclaim" or otherwise, GPI's defensive posture in this action was triggered by virtue of Hartford's intial action in seeking to free itself from its obligations under its policy with GPI. Merely restating the insurer's claim in the inverse or in contraposition does not remove GPI from its defensive posture in this action, and does not, in this Court's opinion, constitute the type of "affirmative action brought by an assured to settle its rights" as contemplated by *Mighty Midgets* (*see Commercial Union Ins. Co. v. International Flavors & Fragrances*, 639 F.Supp. 1401 [SDNY 1986] (noting a distinction where the "counterclaim asserted by the insured was defensive in that it merely sought the opposite relief requested by the insurer")).

And, as to GPI's cross-claims against Lloyd's and CNA, GPI was compelled to assert such claims as a result of the defensive posture in which it was placed by virtue of Hartford's complaint filed against Lloyd's and CNA (*see, Long Island Tinsmith Supply Corp. v. Westbury Hebrew Congregation*, 885 N.Y.S.2d 712 (Table) [Sup. Ct., Nassau County 2009] ("while the statute is silent as to the time in which cross-claims are to be served, they are 'as a rule served within whatever time the defendant has to answer the main complaint under CPLR 3012'") *citing* (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:12)

As such, Hartford's instant application to exclude from GPI's award of attorney's fees those fees incurred in connection with GPI's counterclaims and cross claims is unwarranted.

The cases cited by Hartford are not persuasive. Some of those cases involved counterclaims prosecuted for fees, themselves, as opposed to counterclaims for coverage under the subject policy (*National Cas. Ins. Co. v. City of Mount Vernon*, 128 A.D.2d 332, 515 N.Y.S.2d 267 [2d Dept 1987] (holding that respondents were not entitled to recover the expenses incurred in *prosecuting their counterclaim for fees*); *Companion Life Ins. Co. of N.Y. v. All State Abstract Corp.*, 35 A.D.3d 519, 829 N.Y.S.2d 536 [2d Dept 2006] (counterclaim attorney's fee properly denied); *Allstate Ins. Co. v. Aetna Cas. & Sur. Co.*, 123 Misc.2d 932, 475 N.Y.S.2d 219 [Sup. Ct., Sullivan County 1984] ("insured's cross claim to recover the expenses in prosecuting the cross claim itself . . . does not give rise to actionable damages"); *U.S. Underwriters Inc. Co. v. Weatherization, Inc.*, (21 F Supp 2d 318 [SDNY 1998] (permitting an insured to recover fees "arising out of their defense to this [declaratory action], but *not those costs arising out of their pursuit of their counterclaims* for their costs]). And, the Court in *Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.* (639 F Supp 1401 [1986]) distinguished its facts in disallowing attorneys' fees sought in litigating the subject counterclaim, on the ground that the counterclaim asserted went "further than merely seeking the opposite of the relief demanded by CU [plaintiff]; it was offensive to the extent that it also sought damages.")).

Further, as GPI points out, in *Hartford Acc. & Indem. Co. v. Peck Mem. Hosp.* (162 A.D.2d 659, 558 N.Y.S.2d 959 [2d Dept 1990]), the insured who was denied costs for counsel fees against insurers "American and Transportation" had brought a *third party action* against said insurers and thus, was considered to have sought "affirmative relief" against them.

Quality Bldg. Constr., Inc. v. Delos Ins. Co. (2011 NY Slip Op 30888(U)) is also distinguishable, in that the insured was seeking fees incurred in its own, separate action filed against its insurer (even though the same insured was entitled to fees it incurred in a previously filed, but related action brought against it by a different insurer). Here, Hartford named GPI as a defendant, along with Lloyd's and CNA, thereby affirmatively pitting the insured GPI against all of its insurers.

Johnson v. General Mut. Ins. Co. (24 N.Y.2d 42, 298 N.Y.S.2d 937 [1969]), which disallowed an insured's "cross claim to recover the expenses in prosecuting the cross claim" for legal fees and declaratory relief is also distinguishable. First, the insured cross claimed for expenses in prosecuting the cross claims *and* for *consequential damages* arising from the cancellation of his insurance, wherein the insured could show that he was unable to mitigate his damages by obtaining substitute insurance or by other appropriate measures. Further, unlike Hartford, which commenced this action against its insured to free itself from its obligations to the insured, the actions in *Johnson* were commenced by *injured parties* against the insurer to compel the insurer to defend the insured in certain tort actions. Unlike the injured party plaintiffs in *Johnson*, Hartford unsuccessfully attempted to free itself from its defense obligations to its insured, and in so doing, directly caused its insured GPI to litigate this action from a defensive posture against it and against GPI's others insurers. Moreover, GPI here was forced to assert claims against its co-defendant insurers in order to defeat CNA's claims that it was only excess and owed no duty to GPI until the other insurance was exhausted.

Here, Hartford's complaint against GPI, CNA, and Lloyd's alleges that it issued two insurance policies to GPI, under which Hartford agreed to "pay on behalf of the insured those

sums that the insured becomes legally obligated to pay as damages" under certain conditions, and that Hartford's "right and duty to defend end[ded] when we have used up the applicable limit of insurance in the payment of judgments . . . .. (¶20). Hartford alleged that it initially agreed to provide a defense for GPI in the underlying action, with a reservation of rights, stating that coverage under its policies may be precluded. Upon a further investigation, Hartford determined that GPI was not entitled to coverage for the claims asserted in the underlying action under Hartford's policies. Consequently, Hartford filed causes of action for a declaration that it was not obligated to provide GPI with insurance coverage under Hartford's policies for the claims asserted in the underlying action (first and second causes of action). In turn, GPI asserted, in the form of counterclaims, that Hartford was obligated to provide coverage, which necessarily would include damages incurred as a result of the defense and indemnification of the underlying action.

As has been noted, the rule announced in *Mighty Midgets*, and upon which Hartford relies "has its peculiarities" (*Danaher Corp. v. Travelers Indem. Co.*, 2013 U.S. Dist. LEXIS 27214). This is not an instance where the insured, Hartford, initiated suit against its insureds to settle its rights; to the contrary, Hartford, the insurer, initiated suit against GPI to free itself from its obligations. And it has been stated that "in unusual circumstances, a court may look beyond the labels "plaintiff" and "defendant" to determine whether an insured is in an offensive or defensive position vis à vis its insurer in a dispute over the duty to defend (and indemnify)" (*id*).

The Court recognizes that the availability of legal costs for defending a declaratory judgment action brought by an insurer is a narrow exception to the well established rule that litigants are not permitted to recover attorneys' fees for the successful prosecution or defense of their rights (*Mighty Midgets*, 47 N.Y.2d at 21). However, the Court concludes that the exception

is not so narrow so as disallow legal expenses the insured, GPI, incurred in the course of asserting claims which are necessary in order to properly defend against Hartford's causes of action asserted against GPI.

Conclusion

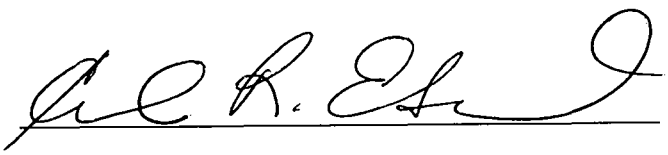
Based on the foregoing, the order to show cause by plaintiff Hartford Underwriting Insurance Company for a declaration that its obligation, if any, to reimburse defendant Greenman-Pederson, Inc. is limited to the costs GPI incurred to defend Hartford's claims against GPI only (and does not include costs incurred with respect to GPI's counterclaims or cross claims) is denied, except to the extent that Hartford Underwriting Insurance Company obligation, if any, to reimburse GPI shall include costs GPI incurred to defend Hartford's claims against GPI, and those costs GPI incurred with respect to GPI's first and third counterclaims, and GPI's cross claims; and it is further

ORDERED that the parties shall appear before Hon. Ira Gammerman on July 18, 2014.

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 19, 2014



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD