SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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

Plaintiffs,

-against-

AT&T, CORP.; AT&T, INC.; ALCATEL-LUCENT USA, INC.; et al.,

Defendants.

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Index No. 653090/2013
Motion Date: 3/10/2014
Motions: 004 & 009

EILEEN BRANSTEN, J.

Motion sequence numbers 004 and 009 are hereby consolidated for disposition.

In motion sequence number 004, Defendants request dismissal or a stay of this action pursuant to CPLR 3211(a)(4) in favor of an action filed on November 19, 2013 in New Jersey Superior Court, entitled *AT&T Corp., AT&T, Inc. & Alcatel-Lucent USA, Inc. v AIU Insurance Co., et al.*, Docket No. UNN-L-4084-13 (Super Ct., Law Div: Union County) (the "NJ Action"). Defendants also seek dismissal on the grounds of forum non convienens, pursuant to CPLR 327(a), and for failure to join a necessary party pursuant to CPLR 3211(a)(10). In motion sequence number 009, plaintiffs seek to enjoin Defendants from proceeding with the NJ Action.

I. Background

Defendants AT&T Corp. ("AT&T"), AT&T, Inc. and Alcatel-Lucent USA, Inc. ("Alcatel") (collectively, "Defendants") have been sued throughout the United States by two groups of plaintiffs: (1) individuals alleging injury from exposure to asbestos in products manufactured, distributed, sold and/or distributed by Defendants or its predecessor companies and (2) certain current and former employees claiming to have been injured due to asbestos exposure during the course of their employment.

On September 6, 2013, Plaintiff Certain Underwriters at Lloyd's, London ("Lloyd's") filed this action, seeking a declaration that its members do not owe Defendants defense or indemnity under numerous insurance policies issued by Lloyd's to American Telephone & Telegraph Company[1] and Western Electric Company Ltd. ("Western Electric") between 1953 and 1985. In the event that it is found to owe such coverage, Lloyd's contends that the other defendant insurers in this action likewise owe coverage pursuant to their respective policies. Accordingly, the complaint asserts claims against these additional insurer defendants for contribution and indemnification. An amended complaint was filed on December 2, 2013, in which a number of insurance companies were realigned as plaintiffs.

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[1] AT&T is the same entity that was known for many years as the "American Telephone and Telegraph Company." (Affidavit of Paula Phillips ¶ 4.)

On March 14, 2014, New Jersey Superior Court Judge James Hely dismissed the NJ Action against all defendants without prejudice. Judge Hely ruled that comity and common sense counsel a New Jersey court not to interfere with a similar earlier-filed case in another jurisdiction that is capable of affording adequate relief to the parties and doing complete justice. *See* Plaintiffs' March 18, 2014 Letter, attaching March 14, 2014 NJ Action Transcript ("NJ Action Tr.") at 65-72. However, Judge Hely also stated: "If New York thinks they don't want to handle the case, I'll be happy to entertain it again." *Id.* at 71.

II. Discussion

Since the NJ Action is no longer pending, plaintiffs' motion for injunctive relief enjoining the prosecution of the NJ Action is denied as moot. Defendants' request for relief pursuant to CPLR 3211(a)(4) is also technically moot since the NJ Action is no longer pending. *See L-3 Commc'ns Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 8 (1st Dep't 2007). However, since the dismissal was without prejudice, the Court will consider both CPLR 3211(a)(4) and 327(a) as a basis for dismissal.

A. *Defendants' CPLR 3211(a)(4) Motion*

Dismissal may be granted under CPLR 3211(a)(4) when "there is another action pending between the same parties for the same cause of action in a court of any state or the United States . . . ." "New York courts have consistently held that even though the first-in-time rule is a factor to be considered in choosing the appropriate forum for litigation," it is neither controlling nor dispositive, especially where the competing actions are commenced close in time. *L-3 Commc'ns Corp.*, 45 A.D.3d at 9. However, plaintiffs' choice of forum should not be disturbed unless the court finds that this action was filed "in an attempt to deprive [Defendants] of [their] choice of forum and to gain a tactical advantage," *AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 496 (1st Dep't 2001), otherwise it would be [Defendants] who would benefit from shopping for what they perceive to be the most favorable forum." *Matter of Topps Co., Inc. S'holder Litig.*, 19 Misc. 3d 1103(A), at *3 (Sup. Ct. N.Y. Cnty. 2007).

This litigation was in response to correspondence sent on AT&T's behalf, dated December 6, 2012 and July 19, 2013. *See* Verification of Kevin Connolly ("Connolly Verif.") Exs. A-B. AT&T sought reimbursement from Lloyd's under three first-level policies in effect from October 1964 through October 1967. AT&T's reimbursement request encompassed AT&T's defense and indemnity costs in connection with three claims brought by Florida-based employees of AT&T's former subsidiaries, Western Electric and Southern

Bell. These are the Herndon, Dorman and Adams claims (the "Florida Claims"). However, the correspondence from AT&T is clear that, although coverage in the amount of $8.6 million was being sought at that time for the Florida Claims, AT&T was being sued "in many hundreds of asbestos cases" and expected to be making similar claims for coverage in the future. *See* Connolly Verif., Ex. A. In the July 19, 2013 letter, counsel for AT&T did not threaten litigation in New Jersey or any forum or by a date certain; instead, counsel merely stated that "AT&T will pursue more formal processes against your clients if they continue to disclaim coverage." *Id.* Ex. C. However, AT&T did not pursue litigation over the Florida Claims or any other asbestos claims until November 19, 2013, and only in response to Lloyd's commencement of this declaratory judgment action in New York. The court is unpersuaded that Lloyd's raced to a New York courthouse to gain a tactical advantage over Defendants or deprive them of a New Jersey forum.

B. *Defendants' Forum Non Conveniens Arguments*

The standard on a motion to dismiss under CPLR 3211(a)(4) "is similar to that undertaken in applying the doctrine of forum non conveniens – whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system." *Flintkote Co. v. Am. Mut. Liab. Ins. Co.*, 103 A.D.2d 501, 506 (2d Dep't 1984), *aff'd*

67 N.Y.2d 857 (1986); *see also White Light Prods. v. On The Scene Prods.*, 231 A.D.2d 90, 93 (1st Dep't 1997).

The doctrine of forum non conveniens, codified in CPLR 327(a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-479 (1984). The factors to be considered in deciding a forum non conveniens motion "include the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013) (citing *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d at 479). "Other factors may include the location of potential witnesses and documents and the potential applicability of foreign law." *Elmaliach*, 110 A.D.3d at 208 (citing *Shin–Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 176–177 (1st Dep't 2004)). "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," *Anagnostou v. Stifel*, 204 A.D.2d 61, 61 (1st Dep't 1994) (internal citations and quotation marks omitted), even where the plaintiff is not a resident of New York. *See OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 703 (1st Dep't 2011).

Defendants maintain that none of the directly implicated parties is a New York resident, and contend that AT&T Corp. and Alcatel have maintained their principal places of business in New Jersey for decades.[2] This argument ignores the fact that AT&T has been continuously incorporated in New York since 1885. *See* Affidavit of Andrew Donaldson ("Donaldson Aff.") ¶¶ 6-7. Although Defendants contend that "AT&T has maintained its principal place of business in New Jersey since 1985," *see* Aff. of Pamela Phillips ("Phillips Aff.") ¶ 5, AT&T's filings with the Securities and Exchange Commission from 1993 to 2000 disclose that AT&T's "principal executive offices" were located at 32 Avenue of the Americas, New York, New York. *See* Affirmation of Ellen T. McCabe ("McCabe Affirm.")[3] Ex. C. As late as 2002, AT&T was claiming, in a diversity case, that its principal place of business was still New York. *CoreComm-ATX, Inc. v. AT&T Corp.*, No. 02-1890, 2002 WL 1023155, at *1 (E.D. Pa. May 22, 2002); *see also American Tel. & Tel. Co. v. MCI Commc'ns Corp.*, 736 F. Supp. 1294, 1306 (D.N.J. 1990) ("while AT&T maintains a considerable presence in New Jersey, it is a New York corporation with its principal place of business in that state").

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[2] AT&T Inc. is a Delaware corporation with its principal and only place of business in Dallas, Texas. *See* Affidavit of Paula Phillips ¶ 13.

[3] The McCabe Affirmation was submitted in support of motion sequence 009.

Regardless of when AT&T's principal place of business may have moved to New Jersey, it appears that the company was headquartered in New York during the time period when the majority of the policies at issue were written and issued to AT&T and Western Electric in New York. *See* Am. Compl. ¶¶ 4-61, 65 & Attach. 1; NJ Action Compl. ¶¶ 16-69 & Attach. A; Donaldson Aff. ¶¶ 6-7. Further, AT&T is still registered and continues to do business in New York; it employs a large number of people in the state and owns or leases 3.9 million square feet of realty in New York. *See* Phillips Aff. ¶ 8. *Century Indem. Co. v. Liberty Mut. Ins. Co.*, 107 A.D.3d 421 (1st Dep't 2013), upon which Defendants rely, is distinguishable for a variety of reasons, one of the most important being that the insured was a Massachusetts corporation at the time the policies were issued and the insurance coverage was for liability relating to the manufacture of products in Massachusetts.

Defendants also claim that New Jersey has a more meaningful connection to the underlying asbestos lawsuits. However, according to plaintiffs, Defendants consistently have reported a far greater number of asbestos cases filed in New York than in New Jersey. *See* Donaldson Aff. ¶¶ 15-21; Connolly Verif., ¶¶ 5-20. Defendants' own proof is that, as of December 2013, approximately 870 asbestos cases have been brought against AT&T in 25 states. *See* Affidavit of Emily Ludwikowski ¶ 4. Yet, Defendants identify only four pending cases in New Jersey against Alcatel compared to at least 272 pending cases against AT&T

in New York. *See* Affidavit of Alexis P. Mendoza ¶¶ 3-4; Affirmation of Julie R. Evans ¶ 10. Judge Hely also considered this issue, ruling:

> Alcatel and AT&T claim that some number of asbestos claims made by individuals are for New Jersey residents. The presentations of these numbers is rather murky in the motion papers. It seems to depend on how one defines a claim. Any way you count the claims, there are more than 200 claims with regard to New York individuals.

(NJ Action Tr. at 70.) The proof submitted on the motions before this court concerning the New York versus New Jersey claims, and Defendants' defense costs in each state, is also murky; however, one thing is clear, New York has its fair share of asbestos cases against AT&T and Alcatel.

Plaintiffs argue that New York law applies to this dispute, and contend that Defendants conceded as much in their pre-litigation coverage. While Defendants dispute that they conceded anything, they carefully ignore the choice of law issue. *See* Defs.' Reply Br. at 7 n.8. To the extent that it is ultimately determined that New Jersey law applies to all or a portion of the insurance policies at issue, this court is perfectly capable of applying the common law of a sister state. *See* CPLR 4511(a); *Zainal v. America-Europe-Asia Int'l Trade & Mgmt. Consultants*, 248 A.D.2d 279, 279 (1st Dep't 1998) ("The application of the law of sister states does not present an undue burden" on New York courts).

Defendants' final argument to support dismissal of this action under CPLR 3211(a)(4) is that documents and witnesses relevant to this coverage dispute are located in New Jersey.

While it appears that most of Alcatel's relevant documents and witnesses are located in New Jersey where Alcatel has been located since its creation in 1996, *see* Affidavit of Alexis P. Mendoza ¶¶ 3, 7, Defendants' proof with respect to AT&T is less than clear. For instance, AT&T claims that it maintained its Risk Management Department in New Jersey from 1985 until 2006, yet AT&T fails to mention where this department is currently located. *See* Phillips Aff. ¶ 9. Another allegation is that "[n]o current or former Risk Management employees either work or reside in New York," *id.* ¶ 10, but again, AT&T fails to identify where these employees actually do work or reside. Thus, Defendants have not established that litigating this dispute in New York would constitute a hardship and any inconvenience in bringing witnesses and documents across the river from New Jersey to New York is minimal.

Accordingly, for the foregoing reasons, Defendants' CPLR 3211(a)(4) motion is denied.

C. *Defendants' Necessary Party Arguments*

Defendants next make the argument that the New Jersey Property Liability Insurance Guarantee Association ("NJPLIGA") is a necessary party to this action and not subject to personal jurisdiction in New York. They claim to be seeking relief from NJPLIGA as the guarantor of claims under insurance policies that were sold by seven insolvent insurers, one such company being the now-insolvent Home Insurance Company ("Home"), which provided

first-level coverage to AT&T over self-insured retention or deductibles from October 15, 1967 to October 15, 1978. *See* Affidavit of James Dorion ¶ 8. Home was placed into liquidation on June 11, 2003 by the Superior Court of New Hampshire. While it may be true that NJPLIGA is not subject to jurisdiction in New York, *see Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 192 Misc. 2d 468, 471 (Sup. Ct. N.Y. Cnty. 2002), the court is not persuaded that NJPLIGA is a necessary party.

There is no claim that Home provided any coverage for the Florida Claims and nothing in Defendants' pleading in the NJ Action implicate the Home policies in connection with any actual or pending asbestos claims. *See* NJ Action Compl. ¶¶ 5, 6, 72. According to the transcript of the argument before Judge Hely, "[NJPLIGA] doubts it will have any involvement or culpability for paying claims." *See* NJ Action Tr. at 68. NJPLIGA is a statutory entity that covers claims made by New Jersey residents under insurance policies that were sold by insolvent insurers and was created by the New Jersey Property-Liability Insurance Guaranty Association Act, N.J.S.A. § 17:30A-1, et seq. (the "Act"). A "Covered Claim" must be made by a "claimant or insured [who] is a resident of this State at the time of the insured event provided that for an entity other than an individual, the residence of the claimant or insured is the state in which its principal place of business was located at the time of the insured event." N.J.S.A. § 17:30A-5. The insured (AT&T) was not a New Jersey

resident within the meaning of section 17:30A-5 at the times the Home policies were placed. *Am. Emp' Ins. Co. v. Elf Atochem N. Am., Inc.*, 157 N.J. 580, 597 (1999).

Defendants argue that, even if the insured was not a New Jersey resident at the time of the insured events, the Act provides for NJLIGA to respond to a claim by a non-resident insured so long as the underlying tort claimant is a resident of New Jersey. Most courts have squarely rejected the concept that a non-resident insured can rely on the underlying tort plaintiffs' residence to meet the definition of "Covered Claim" under the Act. *Owens Corning v. Mississippi Ins. Guar. Ass'n*, 947 So.2d 944, 946-948 (Miss. 2007); *Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund*, 423 Mass.165 (1996); *T&N, plc v. Pennsylvania Ins. Guar. Ass'n*, 44 F.3d 174, 179-180 (3d Cir. 1994); *P & F Indus., Inc. v. Pennsylvania Ins. Guar. Ass'n*, 443 Pa. Super. 279 (Pa. Super. Ct 1995). "[T]he claims that are relevant are those that [the Guaranty Association] is being asked to pay. Since [the insured] is the one with the claim, its residence is the one which should be examined." *T&N, plc*, 44 F.3d at 180.

Even assuming that AT&T could make a claim against NJLIGA, based on the fact that some of the asbestos plaintiffs were residents of New Jersey during the relevant time periods, section 17:30A-12(a) of the Act provides as follows:

> Any person having a covered claim which may be recovered from more than one insurance guaranty association or its equivalent shall be required to exhaust first his rights under the statute governing the association of the place of residence of the insured at the time of the insured event . . . .

Thus, under the Act, it appears that AT&T would have to first submit any claims resulting from Home's insolvency arising prior to 1985 to the New York Liquidation Bureau before it could make a claim against NJLIGA. In addition, AT&T has no claim against NJLIGA until it first exhausts the policy limits of the solvent insurers affording coverage. NJSA § 17:30A-12(b); *Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Prop.-Liab. Ins. Guar. Ass'n*, 215 N.J. 522 (2013).

As for the other six insolvent insurance companies – Centaur Insurance Company, City Insurance Company, Highlands Insurance Company, Pine Top Insurance Company, Great Atlantic Insurance Company and Midland Insurance Company ("Midland"), Defendants fails to identify the relevant time frames for these excess policies. *See* NJ Action Compl. ¶ 72. In addition, in support of its motion to dismiss the NJ Action, NJPLIGA contended that it had no knowledge of the insolvency of five of these companies and that "any claims now filed against Home and Midland would be bar dated as well past the filing deadline established by the domiciliary courts of competent jurisdiction." (McCabe Affirm. Ex. A ¶¶ 5-10.)

For all of these reasons, the Court concludes that NJLIGA is not a necessary party to the instant coverage dispute and denies Defendants' motion to dismiss pursuant to CPLR 3211(a)(10).

D. *Defendants' Remaining Arguments*

Defendants also argue for dismissal of this action on the ground that the NJ Action is more comprehensive and therefore should proceed since it embraces the most parties and eliminates the potential for duplicative rulings. Thus, since the NJ Action includes claims against three companies – American Centennial Ins. Co., National Indemnity Co. (NICO), and Resolute Management, Inc., New England Division ("Resolute") – that are not parties to this action, Defendants contend that this action should be dismissed in favor of the NJ Action. Plaintiffs counter that the addition of Resolute, a reinsurer of Lloyd's, and NICO, a third-party claims agent engaged by Lloyd's, is tactical, designed only to make the NJ Action appear dissimilar and more comprehensive that this action.

Since Defendants make no claim that any of these three entities are not subject to personal jurisdiction in New York, the Court concludes that dismissal of this action on this basis is not warranted. Defendants are free to assert counterclaims and cross-claims pursuant to CPLR 3019. Likewise, even if the relief Defendants were seeking in the NJ Action was broader than the relief being sought by the plaintiffs in the amended complaint filed in this action, Defendants are free to broaden the coverage dispute by way of their responsive pleading.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants AT&T Corp., AT&T Inc. and Alcatel-Lucent USA, Inc. (seq. no. 004) to dismiss this action pursuant to CPLR 3211(a)(4), CPLR 3211(a)(10), and CPLR 327(a) is denied; and it is further

ORDERED that defendants AT&T Corp., AT&T Inc. and Alcatel-Lucent USA, Inc. shall serve and file an answer to the amended complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiffs' motion (seq. no. 009) for injunctive relief is denied as moot; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on November 18, 2014, at 10 AM.

Dated: September 24 2014

ENTER:

Hon. Eileen Bransten, J.S.C.