Lamorak Ins. Co. v Certain Undrwriters at Lloyd's, London
2018 NY Slip Op 31492(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 656466/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LAMORAK INSURANCE COMPANY
f/k/a OneBeacon America Insurance Company,

Plaintiff,

-against-

CERTAIN UNDRWRITERS AT LLOYD'S, LONDON AND LONDON MARKET INSURANCE COMPANIES, CONTINENTAL CASUALTY COMPANY, GENERAL REINSURANCE CORPORATION, FIREMAN'S FUN INSURANCE COMPANY, MUNICH REINSURANCE AMERICA, INC., f/k/a AMERICAN RE-INSURANCE COMPNAY, and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

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DECISION AND ORDER
Index No.: 656466/2017

Motion Sequence No.: 010

O. PETER SHERWOOD, J.:

In the instant motion, Olin Corporation [Olin] seeks to intervene in this action between various of Olin's insurers, in which the insurers dispute contribution and indemnification issues related to payments for environmental remediation costs for property owned by Olin. Olin has been litigating against its insurers (both plaintiff Lamorak Insurance Company (Lamorak) and the defendants) in federal court for decades. Olin settled with the defendants in 2009 and 2011. After a trial, Olin received a judgment against Lamorak which reflected "all sums" owed to Olin by its insurers (Complaint, NYSCEF Doc. No. 1, ¶ 7). Here, Lamorak seeks contribution and indemnification from the defendants. The settlement agreements include a term requiring Olin to indemnify the defendants for any recovery by Lamorak, and the federal judgment against Lamorak will be reduced by the amount deemed to be contribution of the defendants (*see id.*, ¶ 10).

Olin also argues that at least one defendant, Certain Underwriters at Lloyd's London and London Market Insurance Companies (London), has a financial incentive to lose the suit against Lamorak, as London's subsidiaries reinsured Lamorak. According to Olin, Lamorak's recovery from London, which will be covered by Olin, is more in London's interests than winning the instant suit and having to pay on the reinsurance for Lamorak's payment to Olin (Memo, NYSCEF Doc. No. 204, at 2-3). Accordingly, London will lose money if this action resolves in its favor (*id.* at

3). Olin claims it may intervene as of right, pursuant to CPLR 1012(a)(3), as this action may adversely affect its property interest in the judgments from the federal actions (Memo at 3). Olin alternatively argues the court should allow it to intervene under CPLR 1013, because Olin has claims and defenses sharing common questions of law and fact with those here (Memo at 3).

London and Lamorak separately oppose Olin's intervention, London, only in part. Lamorak argues this case is about Lamorak's claims for contribution against the defendants, and does not involve Olin (Lamorak Opp, NYSCEF Doc. No. 251, at 7). According to Lamorak, it is merely following the instructions of the Second Circuit to litigate "the effect of Olin's prior global settlement with the [insurers]") (*Olin Corp. v OneBeacon Am. Ins. Co.*, 864 F3d 130, 151 [2d Cir 2017], *see* Lamorak Opp at 7). In the federal action, Lamorak was held liable for all sums due to the insured in that litigation, and it would be inequitable for Lamorak to be punished by having to cover all of Olin's losses, just because the other insurers settled (Lamorak Opp at 8-9). Insurer contribution cases in other jurisdiction are straightforward, and do not involve the policyholder (*id.* at 9-10).

Lamorak contends that, for Olin to intervene in this litigation, it must show that its interests are "so divergent" from the defendants' interests so as to render the defendants' representation of Olin's interests "inadequate" (*id.* at 11, quoting *Vantage Petroleum v Bd. of Assessment Review, etc., of Town of Babylon*, 91 AD2d 1037, 1039 [2d Dept 1983], *affd sub nom. Vantage Petroleum v Bd. of Assessment Review of Town of Babylon*, 61 NY2d 695 [1984]). In New York, insurers and indemnitors are deemed not to have the independent interest required to intervene (Lamorak Opp at 12, *citing Reif v Nagy*, 149 AD3d 532, 534 [1st Dept 2017]). If Olin has defenses to indemnification, they should be pursued in a separate action (Lamorak Opp at 12-13). As far as Olin argues the defendants are not defending this case in good faith, that is a defense to indemnification, and should be addressed in that separate action (*id.* at 13-14). Lamorak also disputes Olin's argument that the defendants are not actively litigating, or that their litigation tactics are so insufficient as to be inadequate to protect Olin (*id.* at 14). To the contrary, Olin has praised the efforts of one of the defendants here, and Olin's proposed motion to dismiss makes largely the same flawed arguments (*id.* at 15). Nor can Olin show it will be bound by a judgment in this action (*id.* at 17-19). That Olin was permitted to intervene in the federal action regarding contribution related to other sites is irrelevant here *id.* at 17-18). Lamorak also contends that Olin does not have a right to intervene as of right under CPLR 1012(a)(3), because the judgment is not

the type of property contemplated by the rule (Lamorak Opp at 19). This case will only have an indirect effect on Olin (*id.* at 20).

London argues that Olin should not be allowed to intervene and bring in issues it already briefed, argued, and lost in the prior federal action, such as whether a non-settled insurer can seek contribution from a settled insurer (London Opp, NYSCEF Doc. No. 249 at 9). Olin's argument about London's contrary incentives has also been rejected by a federal court (*id.* at 13). London's interests are not aligned with Lamorak's, and those two entities are litigating a related claim in Massachusetts now (*id.* at 14). While they may have some of the same claims administrators, those entities have created a conflicts wall, so they can protect London's and Lamorak's divergent interests (*id.*). London has cooperated with Olin, and London's decision not to make the meritless arguments Olin wants does not mean London's interests are "so divergent" from Olin's (*id.* at 10). However, while London objects to Olin's intervention to make arguments as to London's bad faith in litigating this case, London concedes Olin "has a real and substantial interest in the outcome of this litigation" and "potentially stands to have its federal court Judgment reduced by tens of millions of dollars based on the outcome of this proceeding," and does not object to Olin's intervention as to the amount London owes Lamorak (*id.* at 17).

Pursuant to CPLR 1012(a)(3), intervention as of right is available "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." Pursuant to CPLR 1013, the court may grant leave for a non-party to intervene "when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." "Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action. Distinctions between intervention as of right and discretionary intervention are no longer sharply applied" (*Yuppie Puppy Pet Products, Inc. v St. Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]).

Here, Olin has a bona fide interest in the outcome of this action, and Olin's proposed answer with affirmative defenses seeks to assert defenses to Lamorak's claim against London based on Lamorak's alleged conduct in scheming with London and London affiliated companies

to limit Lamorak's losses to Olin (Olin Proposed Answer, NYSCEF Doc. No. 205, ¶ 53). The issues raised by Olin share common questions of law and fact with this case.

Accordingly, the motion to intervene is GRANTED. Olin may intervene in this case and file either the proposed motion to dismiss or the proposed answer within ten days of the filing of this decision and order.

This constitutes the decision and order of the court.

DATED: July 3, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.