Berkshire Hathaway Specialty Ins. Co. v H.I.G Capital, LLC
2018 NY Slip Op 32258(U)
September 6, 2018
Supreme Court, New York County
Docket Number: 652750/17
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, EXECUTIVE RISK INDEMNITY INC., and STARR INDEMNITY & LIABILITY COMPANY,

Index No. 652750/17

Plaintiffs,

-against-

H.I.G CAPITAL, LLC,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

Defendant H.I.G. Capital, LLC (HIG) moves for leave to reargue this Court's prior decision, or in the alternative, to renew its motion for partial summary judgment with respect to plaintiff Berkshire Hathaway Specialty Insurance Co. (Berkshire).

Berkshire, Zurich American Insurance Company, Executive Risk Indemnity Inc. and Starr Indemnity & Liability Company (Starr) (together, insurers) commenced this action seeking a declaration of their rights and obligations, if any, under two programs of claims-made liability insurance policies issued to HIG.

Starr issued an insurance policy to HIG for the period May 31, 2014 to May 31, 2015 (Starr policy). On December 11, 2014, the United Kingdom Pensions Regulator (UK regulator) issued a warning notice (2014 warning notice) to HIG's European affiliates in connection with HIG's May 2011 acquisition of Silentnight Group Limited (Silentnight), a bedding and mattress manufacturer in the UK. Silentnight operated a benefit scheme for its

employees (pension scheme) which was purportedly facing a large deficit at the time of HIG's acquisition.

The UK regulator alleges that, in acquiring Silentnight, HIG improperly separated the pension scheme from the financial support provided by Silentnight, resulting in the pension scheme's inability to meet its obligations to pensioners and entry into UK's Pension Protection Fund, a statutory backstop to ensure payment of benefits to pension plan participants. The 2014 warning notice seeks the imposition of joint and several liability against HIG and its affiliates in the amount of £17.16 million, the amount of the pension scheme deficit at the time of the acquisition.

HIG provided notice of the 2014 warning notice to its insurers. By letter dated August 31, 2016, Starr denied coverage in part on the basis of a warranty and representation letter that HIG previously signed when it submitted an insurance application.

Berkshire issued to HIG an insurance policy for the period May 31, 2016 to May 31, 2017 (Berkshire policy); other insurers also issued policies to HIG for the same time period in excess of Berkshire's policy.

The regulator issued a second warning notice on June 22, 2016 (2016 warning notice) against HIG's European affiliates in an amount far in excess of the £17.16 million sought in the 2014 warning notice. In the 2016 warning notice, the UK regulator

alleges that HIG actually engineered its acquisition of Silentnight for the purpose of shedding the company of its pension liabilities.

HIG provided notice of the 2016 warning notice to insurers. Berkshire denied coverage for the 2016 warning notice and denied advancement of defense costs on the basis of a prior notice and related wrongful acts exclusions.

Prior Decision

HIG previously moved for partial summary judgment against Berkshire and Starr. With respect to Starr, HIG sought a declaration that the warranty and representation letter is ambiguous and that Starr cannot rely on that letter to deny coverage for its claim arising out of the 2014 warning notice. With respect to Berkshire, HIG sought a declaration that it has a duty to advance defense costs under the Berkshire policy, stemming from the 2016 warning notice. The insurers cross-moved for summary judgment declaring that the insurers have no obligation to provide coverage under the policies.

This Court denied both HIG's and Starr's motions as to coverage under the Starr policy, finding issues of fact (Tr 3/14/18 at 19:14-15). The Court denied HIG's motion for summary judgment in its entirety, and otherwise granted the insurers' cross-motion for summary judgment, and declared as follows:

1) the 2014 warning notice and the 2016 warning notice

constitute a single claim first made before the 2016 policies' inception and thus, the 2016 policies do not apply to, and afford no coverage for the 2016 warning notice, including any duty to advance defense costs; and

2) the prior notice exclusion bars coverage under the 2016 loss incurred in connection with the 2016 warning notice, including any duty to advance defense costs (NYSCEF Doc No 215).

I.

HIG moves for reargument and/or renewal, asserting that this Court erred in determining that Berkshire has no duty to defend or indemnify because the UK determinations panel has not yet issued a final decision, there exists the potential for coverage, and this Court did not have the opportunity to review the warning notices in full, as they were filed under seal in the UK proceedings and presented to this Court only in redacted form.

Berkshire opposes the motion, and maintains that the Court correctly held that the insurers have no duty to advance defense costs or indemnity because the warning notices conclusively eliminate any potential for coverage under the policies. With respect to renewal, the insurers argue that the UK proceeding will not result in any determination that can alter this Court's conclusion that no defense obligation exists.

The motion for leave to reargue is granted, and upon reargument, the Court adheres to its prior determination. The

motion is otherwise denied as to renewal.

Under New York law, "an insurer must defend whenever the four corners of the complaint suggest - or the insurer has actual knowledge of facts establishing - a reasonable possibility of coverage" (*Mendes & Mount v Am. Home Assurance Co.*, 97 AD2d 384, 388 [1st Dept 193]).

The Berkshire policy provides that "[m]ore than one Claim involving the same Wrongful Act or Related Wrongful Acts of one or more Insureds shall be a single Claim (Exhibit 7, annexed to the Levine Aff.). "Related Wrongful Acts" are defined as "all Wrongful Acts that are logically or casually connected by any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes" (*Id.*). Given the wide breadth of this language, the Court correctly concluded that the 2014 and 2016 warning notices constitute a single claim under the Berkshire policy. Both warning notices concern the same transaction, namely, the acquisition of Silentnight, issued by the same UK regulator, affecting the same pension scheme.

Because the UK regulator sent the first warning notice in 2014, before the 2016 policy incepted, and the transaction at issue in the 2014 warning notice clearly involving Related Wrongful Acts as defined in the 2016 policy, there is no reasonable potential for coverage of any claim arising out of the

2016 warning notice. Neither the future course of the UK proceeding, nor submission of the unredacted warning notices to the Court, warrant a different result. Because the warning notices conclusively eliminate any potential for coverage and the absence of any duty to advance defense costs, summary judgment as to indemnity was also appropriate.

With respect to that portion of the motion which seeks renewal, HIG does not submit any new facts not offered on the prior motion that would change this Court's prior determination.

II.

Following submission of this motion, the parties' supplemented their briefing regarding choice-of-law as it pertains to the sole remaining claim/counterclaim. The remaining claim/counterclaim concerns coverage under the Starr policy for the warning notices, the ambiguity of the warranties and representation letter and HIG's putative claim against Starr for bad faith.

Both parties correctly submit that there is an actual conflict between New York and Florida substantive law concerning the standard to be applied in determining whether an insurer acted in bad faith, which affects the scope of this action. Under Florida substantive law, an insured may not assert a claim for bad faith against the insurer until coverage has been decided, and the duty is evaluated under a negligence standard

(*see Vest v Travelers Ins. Co.*, 753 So2d 1270, 1276 [Sup Ct FL 2000]).

In contrast, under New York law, the duty of an insurer to act in good faith is implied in all insurance policies, is treated as a contract claim and litigated together with coverage in a single action (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 317-20 [1995]).

Nonetheless, the parties disagree as to which state's law applies, with HIG arguing that Florida law applies, while Starr argues that New York law applies.

If an actual conflict exists, New York law applies the center of gravity or grouping of contacts' choice of law theory to contract claims (*Matter of Allstate Ins. Co. [Stolarz]*, 81 NY2d 219, 225-26 [1993]). Under this approach, courts consider the spectrum of significant contacts including the place of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties (*Id.*; *Restatement* [Second] of Conflict of Laws § 188 [2]).

Indisputably, New York is the place where the policy was negotiated, underwritten, quoted, bound and delivered. Starr is domiciled in New York; HIG's principal place of business is Florida, although it maintains a New York office. HIG's insurance broker, Crystal & Company (broker), is located in New

York, and negotiated in New York on HIG's behalf. Starr avers that it had virtually no direct communication with HIG with respect to the negotiation, underwriting and issuance of the Starr policy, which was all conducted through HIG's broker.

As to place of performance, the Starr policy requires all notices, included claims-related notices, to be sent to New York, and Starr's handling of the claim took place entirely in New York. There is a "Florida Amendatory Endorsement," attached to the Starr policy which replaces the representations and warranties clause in the policy. However, the endorsement also states that if there is an inconsistency between an amendatory endorsement and any other term in the policy, the terms and conditions which are more favorable to the insured shall apply (NYSCEF Doc 16, 18). As to the premium, the Starr policy states that it "does not include FL Hurricane Surcharge" (*Id.*). There is no single location of risk as the risks insured by Starr were spread throughout the world.

The Court concludes that the majority of the factors plainly point to New York law.

ORDERED that the motion for leave to reargue is granted, and upon reargument, the Court adheres to its prior decision, and is otherwise denied.

Dated: September 6, 2018 ENTER:

J.S.C.

CHARLES E. RAMOS

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