SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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RSUI INDEMNITY COMPANY

Plaintiff,

- v -

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant.

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INDEX NO. 651439/2020

MOTION DATE 09/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The motion for summary judgment by plaintiff is granted and the cross-motion for summary judgment by defendant is denied.[1]

Background

This insurance dispute arises out of underlying lawsuits related to a McDonald's restaurant in Waterloo, New York. Plaintiff is the excess insurer and defendant is the primary insurer.

In one of the underlying cases (the "Bennett" matter), an estate claimed that a patron at the restaurant died after contracting hepatitis ("HAV") from an infected restaurant employee. The other litigation (the "Class Action") against the McDonald's franchise ("Jascor") involved class members who alleged that they had purchased food from the restaurant and were

[1] The Court declines defendant's apparent request for a reply to its cross-motion as the parties have submitted extensive briefing on the key issues and a reply to a cross-motion is not automatic pursuant to CPLR 2214(b).

potentially exposed to HAV by consuming contaminated food and drinks prepared by the infected employee. The class members did not allege that they contracted HAV; rather, they endured various tests and vaccinations as a result of the potential exposure. The Class Action settled in June 2018.

Plaintiff claims that Brennan opted out and was excluded from this class and asserts that defendant spent $323,500 to settle the Class Action. It argues that defendant wrongfully asserts that the Brennan wrongful death claim resulted from the same occurrence as the Class Action such that the settlement in the Class Action reduced the per occurrence limit available for Bennett's case.

Plaintiff explains that Jascor was insured under a primary policy from defendant and an umbrella policy from plaintiff. Defendant's policy provides limits of $1 million per occurrence and $2 million in the aggregate. Plaintiff argues that its policy is excess to defendant's policy and does not apply until the policy limits are exhausted. Plaintiff argues that defendant cannot group the Class Action and Bennett's claim together. It insists that the fact that Bennett and the class members all ate at the same restaurant does not constitute a single occurrence under the policy.

In opposition and in support of its cross-motion, defendant argues that the Bennett Action and the Class Action are one occurrence under the terms of its policy because all of the underlying plaintiffs consumed food or drink at the same McDonald's restaurant from October 31, 2015 through November 8, 2015. It argues that the event that gave rise to each of the actions was the alleged manufacture of the contaminated food over a nine-day period, which is a generalized, singular event. Defendant maintains that there was a close temporal and spatial relationship between the incidents. It argues that the absence of aggregating or grouping

language in defendant's insurance policy is not necessary for the Court to conclude that the multiple incidents of potential exposure constitute one occurrence.

In reply, plaintiff emphasizes that there is no specific time period that automatically results in a close temporal relationship and that each of the exposures was a separate event. It argues that it does not matter how many injured persons are affected and here, the determinative factor is that separate meals were served.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

"An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 2017 NY Slip Op 04384 [2017] [internal quotations and citations omitted]).

In New York, courts employ the "unfortunate-event" test, where the insurance policy at issue does not contain aggregating or grouping language (*Mt. McKinley Ins. Co. v Corning Inc.*, 96 AD3d 451, 452, 946 NYS2d 136 [1st Dept 2012]). There is no dispute here that defendant's

policy did not include aggregating or grouping language which would automatically "group" these actions into a single occurrence. The unfortunate-event test "is based not solely on the cause but on the nature of the incident giving rise to damages" (*Appalachian Ins. Co. v Gen. Elec. Co.*, 8 NY3d 162, 170-71, 831 NYS2d 741 [2007]). "[S]everal factors emerge as relevant to distinguishing injuries or losses that arise from a single occurrence as opposed to those that constitute multiple occurrences: whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors. Common causation is pertinent once the incident—the fulcrum of our analysis—is identified, but the cause should not be conflated with the incident" (*id.* at171-72).

Applying the principles set forth above, the Court finds that the Bennett matter and the Class Action are separate incidents for purposes of the subject insurance policy. In *Appalachian*, the Court of Appeals found that individuals' exposure to asbestos constituted separate occurrences despite the fact that they had a common cause—the asbestos (*id.* at 174). The Court contrasted that finding with a previous litigation in which three cars collided seconds apart and constituted a single occurrence (*id*. at 172). Another example discussed was the collapse of two walls from heavy rainfall (*id*. at 171). The Court concluded that these were two separate occurrences because there was no evidence that the first collapse caused the second, which took place about an hour later (*id*.).

As the Court made clear in *Appalachian*, this Court's analysis should not confuse the incident with the cause (*id*. n 2). Here, there certainly is a common cause—the McDonald's employee who allegedly spread HAV to customers. But there is no close temporal or spatial relationship that could justify viewing these incidents as arising out of a single occurrence. Just

as with the asbestos analysis, the infected employee here served people on different days. And, as the parties admit, the Class Action concerned potentially exposed individuals (none of whom claimed that they had been infected) while the Bennett case alleges a wrongful death cause of action from HAV exposure. Simply because the potential exposure came from the same source does not compel a finding that it was a single occurrence under the facts presented here.

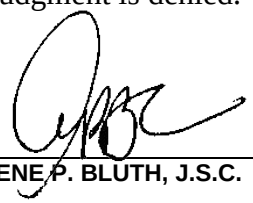
Defendant's characterization of the incidents as "occurring over a brief nine-day period" misses the point. The exposures happened to different people at different times. This is not a case, as defendant admits, where a single incident had differing outcomes such as a car accident involving multiple vehicles and multiple collisions. Nor is this a case like one cited by defendant, where cargo was being unloaded (and continuously dropped) over a nine-day period (*see Michaels v Mut. Marine Office, Inc.*, 472 FSupp 26 [SD NY 1979]). Unloading cargo is a stand-alone task; here, the employee presumably prepared food and drinks as orders arose.

It is not alleged that McDonald's catered a single birthday party at which all plaintiffs attended. Rather, the only connection between the incidents at issue here is that they all happened at the same restaurant and originated from the same infected employee. While the cause of the damages was the same, the events here were distinct—they did not arise from a single incident.

Accordingly, it is hereby

ORDERED and that the motion by plaintiff for summary judgment is granted and defendant's counterclaim is severed and dismissed; and it is further

ORDERED that the cross-motion by defendant for summary judgment is denied.



9/30/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE