

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL REFRACTORIES CO., et al. : CIVIL ACTION
v. :
TRAVELERS INSURANCE CO., et al. : NO. 88-2250
: NO. 88-2167

MEMORANDUM AND ORDER

HUTTON, J.

December 14, 1998

Presently before the Court are Defendant Liberty Mutual's ("Defendant" or "Liberty Mutual") Motion for Partial Summary Judgment (Docket No. 128), Praecept by Liberty Mutual with Corrected Pages to the Memorandum in Support of Motion for Partial Summary Judgment, the Memorandum of Law in Opposition thereto by Plaintiffs, General Refractories Company ("GRX") and Grefco, Inc. (collectively, "Plaintiffs") (Docket No. 134), Plaintiffs' Sur-Reply Memorandum of Law in Further Opposition to Defendant Liberty Mutual Insurance Company's Motion for Partial Summary Judgment (Docket No. 143), and Plaintiffs' Supplemental Memorandum of Law in Further Opposition to Defendant's Motion for Partial Summary Judgment (Docket No. 148). Also before the Court are Plaintiffs' unopposed Motion to Compel Discovery (Docket No. 127), Plaintiffs' Motion to Strike the Affidavit of Lisa Seydler (Docket No. 142), and Defendant Liberty Mutual Insurance Company's response thereto (Docket No. 147). The following affidavits are also presently before the Court: Affidavit of Lisa Seydler in Support of Defendant

Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 129), Affidavit of Richard D. Porotsky, Jr. in Support of Defendant Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 130), Affidavit of John N. Ellison, Esquire in support of Plaintiffs General Refractories Company's and Grefco, Inc.'s Memorandum of Law in Opposition to the Defendant's Motion for Partial Summary Judgment (Docket No. 135), Affidavit of William C. Upham in Support of Defendant Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 139), Supplemental Affidavit of Barry L. Katz, Esquire in Support of Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (Docket No. 144), Supplemental Affidavit of Michael Conley, Esquire in Support of Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (Docket No. 145).

I. BACKGROUND

A. Factual History

This is an insurance coverage case that has spanned ten years, and in which the Defendant, Liberty Mutual Insurance Company ("Liberty Mutual"), now files a motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The instant motions concern the claim of Plaintiff Grefco, Inc. ("Grefco") for reimbursement from Liberty Mutual, under insurance policies issued by Liberty Mutual to its insured Great Lakes Carbon Corporation ("Great Lakes") before 1966, of all defense and indemnity costs

paid on Grefco's behalf by its own insurers for claims brought against Grefco.

Taken in the light most favorable to the nonmoving party, the facts are as follows. In 1966, General Refractories Company ("General"), through three separate written agreements, purchased three businesses owned by the Great Lakes Carbon Corporation ("Great Lakes"), a Delaware corporation located principally in New York. By virtue of the sale agreements, Great Lakes transferred all of the assets and liabilities of the three entities (the "GLCC entities") to General. Before the closing date of the sale, General created a subsidiary, Grefco, Inc. ("Grefco"), for the purpose of directly receiving the assets, assuming the liabilities, and conducting the business of the GLCC entities. As a consequence, Grefco acquired all of the rights of the GLCC entities under thirteen (13) comprehensive general liability ("CGL") insurance policies sold to Great Lakes by Liberty Mutual.

Since closing the sale in 1966, both General and Grefco have been named as defendants in thousands of lawsuits and claims filed in federal and state courts. Claimants seek damages for bodily injury or disease resulting from exposure to asbestos and asbestos-containing products and/or silica and silica-containing products manufactured, sold and/or distributed by the General companies and/or the GLCC entities. In many of the actions, claimants allege that their exposure began or occurred before 1966

and thus have sued General and Grefco as successors-in-interest to the GLCC entities. Consequently, General and Grefco tendered these suits to Liberty Mutual for defense and indemnification under the theory that the terms of the 1966 sales agreements between General and Great Lakes transferred coverage under Great Lakes' pre-1966 CGL insurance policies to General and Grefco. Liberty Mutual still refuses to provide indemnification and defense to General Grefco under the policies. As of the date of this Order, Liberty Mutual has not provided any money to defend or indemnify General or Grefco against any of these claims under the insurance policies Liberty Mutual sold to Great Lakes.

B. Procedural History

In 1988, General Grefco and American Refractories Company filed a diversity lawsuit in the United States District Court for the Eastern District of Pennsylvania against Travelers Insurance Company, American Mutual Liability Insurance Company, National Union Fire Insurance Company, and Liberty Mutual seeking a judgment declaring the respective obligations of each insurance carrier to share in the defense and indemnification of the underlying asbestos-related and silica-related bodily injury suits pending against the defendants.¹

Grefco then filed a motion for partial summary judgment

¹Liberty Mutual is the only remaining defendant in this case because the other defendants have either settled or otherwise resolved their disputes with General and Grefco.

against Liberty Mutual on the issue of Grefco's claimed entitlement to coverage under the pre-1966 comprehensive general liability policies issued to Great Lakes by Liberty Mutual. Liberty Mutual filed a cross-motion for summary judgment claiming that no rights to coverage under Great Lakes' pre-1966 CGL policies were transferred to Grefco as a result of the 1966 sale instruments. Consequently, Liberty Mutual argued that it had no duty to defend or indemnify Grefco in the pending suits. In October 1995, this Court denied Grefco's motion for summary judgment and granted in full Liberty Mutual's cross-motion for summary judgment. In so doing, this Court held that the 1966 sale instruments did not manifest a specific intention to transfer Great Lakes' rights under the pre-1966 CGL policies to Grefco.

In January 1997, in reversing that decision, the Third Circuit held that under the plain meaning of the sale instruments between the parties, Great Lakes' rights to coverage under the pre-1966 CGL policies were transferred to Grefco. Pursuant to the Third Circuit's decision, in November 1997, this Court granted partial summary judgment in favor of Grefco. This Court found that pursuant to pre-1966 CGL insurance policies, Grefco is entitled to coverage for all claims of bodily injury or disease alleged to have been caused by exposure to asbestos, silica and/or diatomaceous earth products to the same extent that the GLCC entities would have been entitled to coverage for such claims under the pre-1966

insurance policies issued to Great Lakes. On July 1, 1998, the Defendant Liberty Mutual filed the instant motion seeking partial summary judgment regarding a number of issues relating to Plaintiff Greco's claim for reimbursement from Liberty Mutual.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider

the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Motion to Strike the Affidavit of Lisa Seydler

Plaintiffs General Refractories Company ("General Refractories") and Grefco, Inc. ("Grefco") moves to strike the affidavit of Lisa Seydler, one of Liberty Mutual's employees, submitted by Liberty Mutual in support of its Motion for Partial Summary Judgment. The Defendant argues, in substance, that Seydler's Affidavit is not based on her personal knowledge of the insurance transaction in question, and therefore fails to comply with the terms of Rule 56(e) of the Federal Rules of Civil Procedure. (Pls.' Mem. in Supp. of Mot. to Strike Aff. at 2.) The Plaintiffs also allege that in her affidavit Seydler "makes conclusory statements concerning the content of some of the documents." (Id.)

Rule 56(e) of the Federal Rules of Civil Procedure provides, in part, as follows:

Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein

Fed. R. Civ. P. 56(e). See also Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (stating that affidavits submitted in conjunction with a motion for summary judgment must contain admissible evidence within the personal knowledge of the affiant to which he or she is competent to testify); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3d Cir. 1988) (same).

Seydler's affidavit meets the requirements set forth in Rule 56(e). She is the Unit Director in the Environmental Department at Liberty Mutual and was called by the Defendant for an opinion on certain historic documents located by Liberty Mutual in the course of this case and certain recent events connected to this case. She affirmatively states that she has "personal knowledge of the matters set forth in this affidavit." (Aff. of Lisa Seydler at 1.) Furthermore, in her affidavit, Seydler does not purport to directly speak about the "insurance transaction." Therefore, the Court denies the Defendant's Motion to Strike the Affidavit of Lisa Seydler and will consider the response in evaluating the merits of the summary judgment motion.

B. Motion for Summary Judgment

The Defendant raises essentially two arguments in the instant motion for partial summary judgment. First, Liberty Mutual alleges that Grefco does not have a valid assignment of rights from

its own insurers to pursue any claims Grefco may have for contribution against Liberty Mutual. Thus, the Defendant argues that Grefco has no entitlement nor standing to seek reimbursement from Liberty Mutual of defense and indemnity amounts paid by Grefco's own primary and excess insurers. Second, Liberty Mutual asserts, in the alternative, that if the Court finds that Liberty Mutual owes reimbursement, the most in reimbursement Liberty Mutual can owe is its allocable share. The Court will address each argument in turn.

1. Right to Reimbursement

Under the law of the case doctrine, a district court generally will not reconsider questions that a circuit court has decided on a prior appeal in the same case or that it has already decided in an earlier decision in the same case. The doctrine is designed to protect traditional ideals such as finality, judicial economy and jurisprudential integrity. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988); Arizona v. California, 460 U.S. 605, 618-19 (1983). A more specific application of the principle, known as the "mandate rule," bars a district court from "reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals." United States v. Stanley, 54 F.3d 103, 107 (2d Cir. 1995); see Al Tech Specialty Steel v. Allegheny Intern. Credit, 104 F.3d 601, 605 (3d Cir. 1997); 18 Moore's Federal Practice § 134.23[1][a]. These rules apply in the

case of any issue that has actually been decided, whether expressly or by necessary implication. Stanley, 54 F.3d at 107; Bolden v. SEPTA, 21 F.3d 29, 31 (3d Cir. 1994). As long as the court or courts have manifested a decision on an issue, absent extraordinary circumstances the matter may be reviewed only upon appeal to a superior appellate court.

In January 1997, the Third Circuit held that under the plain meaning of the sale instruments between the parties, Great Lakes' rights to coverage under the pre-1966 CGL policies were unambiguously transferred to Grefco. Gen. Refractories Co. v. Travelers Ins. Co., No. 95 Civ. 2112 (3d Cir. Oct. 30, 1996), reh'g held, (3d Cir. Jan. 16, 1997). Pursuant to the Third Circuit's decision, in November 1997, this Court held that Grefco is entitled to stand in the shoes of Great Lakes with respect to rights under the Liberty Mutual CGL insurance policies:

[Great Lakes] transferred to Grefco the GLCC entities' insurance coverage rights under the pre-1966 insurance policies, including those purchased from defendant Liberty Mutual []. Pursuant to such policies, Grefco is entitled to coverage for all claims of bodily injury or disease alleged to have been caused by exposure to asbestos, silica and/or diatomaceous earth products to the same extent that the GLCC entities would have been entitled to coverage for such claims under the pre-1966 insurance policies issued to Great Lakes.

See Order dated Nov. 18, 1997, by Honorable Herbert J. Hutton, Gen. Refractories Co. et al., Nos. 88-2250, 88-2167.

Liberty Mutual does not dispute that the CGL insurance policies cover the underlying disputed claims. Rather, Liberty

Mutual argues that Grefco's rights to reimbursement from Liberty Mutual for contribution and indemnification are contingent upon a valid assignment from Travelers' to Grefco. According to Liberty Mutual, it is Travelers, not Grefco, that is entitled to seek contribution and indemnification from them because Travelers did not validly assign its rights to Grefco.²

The Court need not consider the validity of the assignment from Travelers to Grefco. The Third Circuit and this Court have rejected all previous efforts to carve exceptions on the transfer of all of the GLCC entities' rights to Grefco. Although neither the Third Circuit nor this Court has expressly discussed the issue of assignment in earlier decisions of this case, there can be no doubt that it has already been decided that Grefco is entitled to a full and complete recovery from Liberty Mutual for the underlying occupational disease actions as if it were the GLCC entities. Grefco's right to reimbursement from Liberty Mutual stems from it stepping into the shoes of Great Lakes with respect to rights under the Liberty Mutual CGL insurance policies, not from any assignment that may or may not have been properly executed by

²Grefco executed an agreement with Travelers on November 1, 1994, in which Travelers assigned to Grefco (and to General Refractories and ARX) "such rights as it may have or hereafter acquire to obtain, seek and pursue reimbursement, contribution or payment from" Grefco's own insurers, including National Union, INA, Harbor and Allstate (as successor to Northbrook), as specified in that agreement. The agreement did not include an assignment by Travelers of any claims or rights to contribution from Liberty Mutual. On June 24, 1998, Travelers executed an amendment to the November 1, 1994, agreement adding Liberty Mutual to the listing of insurers as to whom Travelers has assigned its rights of contribution and indemnification to Grefco. Liberty Mutual argues that this assignment is invalid.

Travelers.³ Accordingly, this Court finds that the Third Circuit's rulings and this Court's Judgment Order precludes Liberty Mutual from raising any contentions as to Grefco's right to reimbursement for contribution and indemnification from Liberty Mutual for claims regarding all underlying occupational disease actions.

2. Allocation Scheme

In its motion for partial summary judgment, Liberty Mutual alleges, in the alternative, that the most Liberty Mutual must reimburse Grefco is Liberty Mutual's allocable share of the defense and indemnity payments paid by those other insurers. (Lib. Mut. Br. at 22-23.) Specifically, Liberty Mutual argues that the most it owes is an equal share because the Liberty Mutual CGL insurance policies are not "other insurance" to the insurance provided by Travelers and the Excess Insurance Companies. (Id. at 27-37.) Liberty Mutual asserts, in the alternative, that to the extent the "other insurance" clauses apply, the most Liberty Mutual could owe would be its applicable pro rata share, based upon New York Law. (See id. at 37-48.) Because this Court finds that no

³Grefco has the right to "pick and choose" the insurance company that it wishes to respond to a covered claim. See Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 880 (Cal. 1995) (holding that "because the potential of coverage arose under [the CGL] policies, so too did its duty to defend [policy holder] in the underlying lawsuits"); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993) (holding that "the only logical resolution of this issue is for [policy holder] to be able to collect from any insurer whose coverage is triggered"). That right allows Grefco to designate the insurance company that will pay for the claim, subject to whatever right that company may have against other insurance companies. Montrose Chem., 913 P.2d at 880; J.H. France, 626 A.2d at 508.

actual case or controversy exists, Liberty Mutual is improperly requesting an advisory opinion.

Liberty Mutual's proposed form of order seeks an Order determining the "most Liberty Mutual can owe." Until the issue arises in the form of an actual case or controversy--i.e., until Liberty Mutual has presented and applied specific facts to its allocation theory--this Court's resolution of Liberty Mutual's allocation scheme arguments would be tantamount to an improper advisory opinion. See U.S. Const. Art. III, § 2, cl. 1; Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir. 1994); In re Busy Beaver Bldg. Ctrs., Inc., 127 B.R. 343, 344-45 (Bankr. W.D. Pa. 1991).

C. Motion to Compel Discovery

On June 26, 1998, the Plaintiffs filed the instant motion moving this Court to issue an Order compelling Defendant Liberty Mutual Insurance Company to respond to their discovery requests. This Motion is unopposed as the Defendant failed to respond. Thus, the Court treats the motion as uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. R. Civ. P. 7.1(c). Rule 7.1(c) states that, except for summary judgment motion, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, with fourteen (14) days after service of the motion

and supporting brief. In the absence of a timely response, the motion may be granted as uncontested" Id. Therefore, the Plaintiff's motion is granted.

An appropriate Order follows.

Company's response thereto (Docket No. 147), and the following affidavits: Affidavit of Lisa Seydler in Support of Defendant Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 129), Affidavit of Richard D. Porotsky, Jr. in Support of Defendant Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 130), Affidavit of John N. Ellison, Esquire in support of Plaintiffs General Refractories Company's and Grefco, Inc.'s Memorandum of Law in Opposition to the Defendant's Motion for Partial Summary Judgment (Docket No. 135), Affidavit of William C. Upham in Support of Defendant Liberty Mutual's Motion for Partial Summary Judgment (Docket No. 139), Supplemental Affidavit of Barry L. Katz, Esquire in Support of Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (Docket No. 144), Supplemental Affidavit of Michael Conley, Esquire in Support of Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (Docket No. 145), IT IS HEREBY ORDERED that:

(1) Plaintiffs' Motion to Strike the Affidavit of Lisa Seydler is **DENIED**; and

(2) Defendant Liberty Mutual Insurance Company's Motion for Partial Summary Judgment is **DENIED**; and

(3) Defendant Liberty Mutual Insurance Company **SHALL** provide full responses to Plaintiffs' Interrogatory Nos. 8-9 and 15-17 and to Document Request Nos. 1-9 within ten (10) days from the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.