

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

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| BITUMINOUS CASUALTY CORPORATION, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | NO. 06-1047 |
| | : | |
| v. | : | |
| | : | |
| RONALD HEMS, an individual, and HEMS BROTHERS a/k/a HEMS BROTHERS RUBBISH REMOVAL, a partnership, | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

Giles, J.

May 3, 2007

Introduction

Bituminous Casualty Corporation, which insured Defendants in Pennsylvania, filed this declaratory judgment action seeking a declaration that it does not owe Defendants a defense or indemnity in connection with an underlying landfill clean up action brought by the New Jersey Department of Environmental Protection against Robert Hems and Hems Brothers in the New Jersey State Court.

Presently before the court are Plaintiff's motion for summary judgment against Defendants, Defendants' response, and Plaintiff's reply to Defendants' opposition to the Motion for Summary Judgment. Upon consideration of the motion, Defendants' response thereto, and

the record pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff's motion is granted.

Factual Background

Plaintiff is an insurance company incorporated under the laws of Illinois with its principal place of business in Rock Island, Illinois. Defendant, Roland J. Hems is a Pennsylvania citizen and Defendant, Hems Brothers, a/k/a Hems Brothers Rubbish Removal was at one time a partnership, of which Ronald J. Hems was a general partner (collectively referred to herein as "Defendants"). Defendants were in the business of transporting waste materials from industrial sites to disposal sites. Plaintiff is seeking summary judgment and a declaration finding that it is under no obligation to defend or indemnify under automobile liability insurance policies that were previously issued to Defendants.

Plaintiff insured Defendants under personal automobile liability insurance policies for three successive one-year terms spanning from 1977 to 1980.¹ (Compl. at ¶ 6.) According to Plaintiff, these policies afforded minimal limits of property damage liability coverage, including \$5,000 under the first two policies, which were effective from February 2, 1977 through February 2, 1978 and February 2, 1978 through February 2, 1979, and \$10,000 under the third policy, which was effective from February 2, 1979 through February 2, 1980. (See id.)

Defendants transported waste products generated by Axon Industrial, Inc., among others, to landfill sites in the state of New Jersey. On August 1, 2005, the New Jersey Department of

¹ Policy Nos. AB-24-158, AB-29-362, and BC-1-460-943.

Environmental Protection (NJDEP) filed suit in Superior Court of New Jersey against Aaxon Industrial, Inc., among others, for the reimbursement of damages it alleged it incurred, and will continue to incur, as a result of the discharge of hazardous waste at the Florence Land Recontouring Landfill Superfund site, a New Jersey landfill. NJDEP's complaint alleges that at various times between 1973 and December 1981, Aaxon Industrial, Inc., among others, transported and discharged hazardous substances to the landfill. NJDEP seeks to recover costs from Aaxon Industrial, Inc. and other parties pursuant to the New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. §§58: 10-23.11 et seq., and the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J. Stat. Ann. §§13: 1E-100 et seq.

On November 18, 2005, Aaxon, Industrial, Inc., filed a Joint Third Party Complaint for contribution and indemnity. In December 2005, Defendants notified Plaintiff Bituminous that Hems and Hems Brothers were joined as third party defendants in the NJDEP's action.

Defendants contend that the standard **automobile liability** insurance policies issued by Plaintiff cover environmental pollution claims, and that Plaintiff is obligated by the terms of the policies to defend and indemnify Defendants for damages it may be obligated to pay to Aaron Industrial, Inc. in NJDEP's underlying claim. (Def't. Ans. and Counterclaim at ¶ 4.) Defendants are also prosecuting a declaratory judgment action against all of its insurers, including Bituminous Casualty Corporation, in the Superior Court of New Jersey in Burlington County.

The original policies at issue in the matter have not been located by either of the parties.²

² Claims manager for Plaintiff's Pittsburgh office stated that he contacted personnel at the location Plaintiff maintains a repository, where expired policy information is stored, and requested that they conduct a diligent search for any and all information regarding policies issued

Plaintiff provided specimen liability coverage forms that it used in similar automobile liability insurance policies in Pennsylvania during the relevant time period, declarations pages for policies, as well as a number of schedules, and forms associated with each of these policies.³

Aside from the declarations, schedules and form endorsements, the remainder of the policies are lost. Using these specimen forms as its basis, Plaintiff claims that the coverage afforded by the policies does not apply to environmental pollution claims arising from the contamination of a landfill, and thus, it has no obligation to defend or indemnify Defendants in the underlying action. (Compl. at ¶ 9.)

by Plaintiff to Defendants. (Compl., Ex. A, Aff. of Robert McAchren at ¶ 4.) Despite such efforts, Plaintiff was unable to locate the property damage liability coverage forms contained in the policies issued to Defendants. Defendants submitted a copy of a single cancelled check issued by Bituminous to Hems for policy no. AB-24-158, otherwise, Defendants indicated that he is not in possession of any additional policy documents issued by Bituminous to Hems and conceded that the policies are lost.

³ Bituminous has supplied declaration pages for policies Nos. AB-24-158 (effective dates 2/2/1977-2/2/1978); AB-29-362 (effective dates 2/2/1978-2/2/1979); and BC-1-460-943 (effective dates 2/2/1979-2/2/1980). For Policy No. AB-24-158, Plaintiff provided copies of Basic Personal Injury Protection Endorsement (form no. AP-140 (7-75)), an Arbitration Endorsement (form no. CP-04-61 (1-74)) concerning the Uninsured Motorists Insurance portion of the policy, a Premium Payment Endorsement (form no. L-142d (7-75)), a Schedule for Designated, Owner or Covered Automobiles, and an Additional Elimination or Change Endorsement. For Policy No. AB-29-362, Plaintiff provided copies of a No Fault Auto Schedule, a Home Office Out Card, a Schedule a Designated, Owned or Covered Automobiles, a Basic Personal Injury Protection Endorsement (form no. AP-140 (7-75)), an Arbitration Endorsement (form no. CP-04-61 (1-74)) pertaining to the Uninsured Motorists Insurance portion of the policy, a Premium Payment Endorsement (L-142d (7-75)), and an Individual Named Insured Endorsement (form no. CP-03-15 (1-74)). For Policy No. BC-1-460-943, Plaintiff provided copies of a Schedule of Commercial Autos, a Basic Personal Injury Protection Endorsement (form no. AP-140 (7-75)), an Arbitration Endorsement (form no. CP-04-61 (1-74)), and Individual Named Insured Endorsement (form no. CP-03-15 (I-74)), a Premium Payment Endorsement (form no. L-142d (7-75)), a No Fault Auto Schedule, a Limit Increase Endorsement, and an Addition, Elimination or Change Endorsement.

Plaintiff now moves for summary judgment for a declaration that it does not owe Defendants a defense or indemnity with respect to the claims arising out of the discharge of waste at the Florence Land Recountouring Landfill in New Jersey.

Legal Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), 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 summary judgment as a matter of law.” Celetox Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In order to defeat a motion for summary judgment, disputes must be both 1) material, meaning concerning facts that will affect the outcome of the issue under substantive law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322-23. In reviewing a motion for summary judgment, the court “does not make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion.” Seigel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995).

Discussion

A. Choice of Law

The policies contain no choice of law provision. The parties dispute whether the action should be governed by Pennsylvania law or New Jersey law.

In diversity cases the federal courts must follow choice of law rules prevailing in the states in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). This action was commenced in the United States District Court for the Eastern District of Pennsylvania. Therefore, the court turns to Pennsylvania's choice of law rules.

Pennsylvania employs a flexible approach to choice of law inquiries. Gould Inc. v. Continental Cas. Co., 822 F. Supp. 1172, 1175 (E.D. Pa. 1993). Pennsylvania's choice of law analysis is set forth in Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (Pa. 1964). This choice of law analysis includes the significant relationships approach of the Restatement (Second) of Conflicts of Laws (1969) and the governmental interests approach.⁴ The Restatement states that the contacts to be taken into account in determining the law applicable to the issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile,

⁴ Section 193 of the Restatement applies to contracts concerning casualty insurance and states:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship...to the transaction and the parties, in which event the local law of the other state will be applied.

residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1969).

Before applying this approach, however, the court must first determine whether there is a true conflict between the potentially applicable bodies of law. On Air Entm't Corp. v. Nat'l Indem. Co., 210 F.3d 146, 149 (3d Cir. 2000). Under general conflict of law principles, where the laws of two jurisdictions would produce the same result on a particular issue, there is a “false conflict” and the court should avoid the choice of law question. See Luker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994). Upon a finding of a conflict of laws, the court will then examine the competing interests of the states involved and determine which state has the most significant contacts with the controversy.

The insurance policies at issue in the matter are missing or lost. Before making a determination regarding the existence of liability, it is necessary to determine the existence or issuance of the policies and the terms of the policies. Under both Pennsylvania law and New Jersey law regarding lost policies, the party seeking the benefits of a lost contract (the insured) bears the burden of establishing the existence or issuance of a lost or missing insurance policy, and the terms thereof by clear and convincing evidence. See Compass Tech. v. Tseng Lab, Inc., 71 F.3d 1125, 1133 (3d Cir. 1995); Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1425 (D. Del. 1992); Hacker v. Price, 71 A.2d 851 (Pa. Super. 1950). There is no conflict of law regarding lost policies under the law of either state.

Plaintiff has conceded that it issued personal automobile liability insurance policies for three consecutive years between 1977 and 1980. Further, Plaintiff located the declarations pages

and certain schedules and form endorsements for the three successive one-year policies issued to Defendants. Because Plaintiff was unable to locate the property damage liability coverage forms contained in the policies issued, it has identified basic automobile liability coverage forms that were in use in similar automobile policies that were issued in Pennsylvania during the relevant time period. In arguing that there is sufficient evidence to support the existence of the automobile liability policies at issue, Defendant relied upon the declarations, schedules, forms and standard policies submitted by Plaintiff. Defendant has not offered evidence that any additional policies existed. Therefore, the record restricts consideration to the policy language proffered by Plaintiff. See State Farm Mut. Auto. Ins. Co. v. Bish, No. 03-CV-1379, 2006 WL 2773474, at *4 (W.D. Pa. Sept. 25, 2006) (“The general rule is that where an original policy is unobtainable, the introduction of a specimen policy that an insurer affirms is a true and correct copy of the policy, does not violate the best evidence rule.”).

Next, the court will apply the choice of law analysis to the question of liability under the subject policies. Pennsylvania’s choice of law rules provide that the construction of contract must be governed by the law of the jurisdiction having the greater interest in the controversy. This approach is in line with the contacts considered by the significant relationships approach of the Restatement (Second) of Conflicts of Law. See Melville v. Am. Home Assurance Co., 584 F.2d 1306, 1311 (3d Cir. 1978); Transamerica Ins. Co. v. Thomas M. Durkin & Sons, Inc., Civ.A. No. 90-0968, 1991 WL 206765 (E.D. Pa. Oct. 1, 1991).

Plaintiff argues that Pennsylvania law should apply because Defendants are Pennsylvania residents, the subject insurance policies were procured by a Pennsylvania agent, and the purpose

of the policies at issue was primarily to insure against liability incurred by Defendant Hems as a motorist in the Commonwealth of Pennsylvania. In response, Defendants contend that New Jersey law governs the coverage matters in the suit. Under Pennsylvania choice of law rules, Defendants argue, New Jersey has a greater interest in this matter because the landfill site is in New Jersey, and both the underlying environmental lawsuit and Hems' lawsuit against all of his insurers are proceeding in New Jersey.

Plaintiff offers as analogous Triangle Publications, Inc. v. Liberty Mut. Ins. Co., 703 F. Supp. 367 (E.D. Pa. 1989), a case concerning a landfill in New Jersey and claims by a Pennsylvania corporation under comprehensive general liability policies entered into in Pennsylvania. There, the court found that Pennsylvania law governed the action between the Pennsylvania insured and the Massachusetts insurer. Id. at 367. The court reasoned that while the waste site in the matter was located in New Jersey, New Jersey was only incidentally connected to the controversy between the insurer and insured. Id. Because the contract was negotiated and entered into in Pennsylvania, the insured was domiciled in the state, and it was the site of all of the insured's property, Pennsylvania had the more significant interest in the controversy.⁵ Id.

⁵ Compare the choice of law rule applied in New Jersey to insurance coverage disputes based on the general rule that "the law of the place of the contract ordinarily governs the choice of law because this rule will generally comport with the reasonable expectations of the parties governing the principal situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of applicable law." Leski, Inc. v. Fed. Ins. Co., 736 F. Supp. 1331, 1332 (D.N.J. 1990) (quoting State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 417 A.2d 488, 492 (1980)). Nevertheless, the court in Leski Inc. v. Federal Insurance Co., applying New Jersey law to a matter concerning comprehensive general liability policies negotiated and entered into in Pennsylvania and liability for clean up of a landfill located in New

In contrast, the court in Transamerica Insurance Company v. Durkin & Sons, Inc., Civ.A. No. 90-0968, 1991 WL 206765 (E.D. Pa. Oct. 1, 1991), considered policies issued by a California insurer to a waste hauling and disposal company incorporated in Pennsylvania, where the policyholder was seeking defense and indemnification for claims against it arising from disposal of waste at a New Jersey landfill. That court concluded that New Jersey law would govern the matter. Id. at *8. It reasoned that, by its terms, the policy contemplated that the waste could be disposed of at a site outside Pennsylvania because it had required the insured to identify the disposal sites in its contract bid proposal. Id. The court found, under these facts, that New Jersey's interest in clean up of a landfill located within its borders exceeded Pennsylvania's interest in construing the comprehensive general liability policies. Id.

Notably, the policies at issue are automobile liability insurance policies, as opposed to comprehensive general liability policies. The latter are all risks contracts providing general insurance coverage for bodily injury or property damage unless specifically excluded. Clearly, New Jersey has an interest in the cleanup of landfills located within its borders. However, to the extent that insurance coverage may exist for underlying environmental claims against an insured, such coverage has been found to arise under comprehensive general liability policies and not under personal automobile liability policies. Id. at *14.

Jersey, concluded that while Pennsylvania had several contacts relevant to the choice of law determination and an obvious interest in the agreement reached, it should apply New Jersey law to the question of liability because New Jersey had a greater interest in the cleanup of landfills located within its borders and policy in favor of facilitating commerce among the states supported applying New Jersey law.

The policies in this matter were issued to Defendants through a Pennsylvania agent. The policies provided for automobile liability insurance coverage to insure against liability incurred on the roadways of Pennsylvania. Additionally, the policies further evince that they were issued under Pennsylvania's "Assigned Risks Plan" statutory scheme. 75 Pa.C.S. §1741 et seq. Under the policies, the risk that Defendants sought to shift was its potential liability for bodily injury or property damage as a Pennsylvania operator of a motor vehicle. The court finds that, pursuant to the choice of law analysis, Pennsylvania has a substantial and overriding interest in the general interpretation of automobile liability insurance contracts applicable to all its citizens and issued under its statutory scheme.

Accordingly, the court finds that Pennsylvania has the more significant contacts with the controversy and that Pennsylvania law governs the question of liability.

B. Liability Under the Standard Forms

In its motion for summary judgment, Plaintiff argues that the standard automobile liability coverage form affords no coverage for the purposeful landfill dumping claims. Specifically, it claims that: (1) Defendants cannot demonstrate that the property damage alleged in the underlying action "arise[s] out of the ownership, maintenance or use" of an automobile; (2) the claims against Defendant do not meet the policy definition of an occurrence and are therefore not covered; and (3) coverage is precluded by the pollution exclusion.

Under the terms of the standard automobile liability policies that insurer issued in Pennsylvania during the time period in question, Plaintiff agreed to insure Defendants for

liabilities incurred as a result of bodily injury or property damage caused by an “occurrence” and “arising out of the ownership, maintenance or use, including loading and unloading . . . of an owned automobile.” (Compl., Ex. A, Section A(I).) The term “occurrence” is defined as an “accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” Id. The property damage alleged in the underlying action does not “arise out of the ownership, maintenance or use” of an automobile, nor does the Defendant’s conduct meet the policy definition of an “occurrence.”

Moreover, the basic form, and thus, each of the three policies, also contained a provision excluding coverage for the following forms of pollution damage:

[B]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.⁶ (Compl., Ex. A, Section A(I) (G).)

The central issue with respect to the scope of coverage involves the “sudden and accidental” exception to the “pollution exclusion” clause. In Sunbeam Corp. v. Liberty Mutual Ins. Co., 566 Pa. 494, 504, 781 A.2d 1189 (Pa. 2001), the Supreme Court of Pennsylvania held that the meaning of the “sudden and accidental” exception to the standard pollution exclusion clause included in insurance liability policies should be interpreted based on the custom and usage of terms in the industry. The Sunbeam court concluded that the exception applies to both gradual and abrupt pollution or contamination as long as it is unexpected and unintended. Id. at 504.

⁶ The exclusion does not apply if such discharge, dispersal, release or escape is “sudden and accidental.”

While the insurer bears the burden of proving that the pollution exclusion applies to prevent coverage, the burden of establishing the "sudden and accidental" exception to the pollution exclusion rests with the insured. Northern Ins. Co. v Aardvark Assoc. Inc., 942 F.2d 189, 194-195 (3d Cir. 1991). Defendants do argue that the policies' provision regarding liability contemplated coverage for damages that occurred while loading or unloading a covered vehicle. However, Defendant fails to address the applicability of the "pollution exclusion" and to meet his burden of showing that the "sudden and accidental" exception to the exclusion applies in this case.

The claims against Defendant in the underlying action arise out of the discharge, release and dispersal of waste or other pollutants upon land, and allege that Defendant transported and discharged hazardous substances at a landfill in New Jersey. The pollution at issue in the NJDEP case was gradual and spanned a period of eight years. Defendants cannot allege that this continuous and systematic arrangement for the disposal of waste at the landfill was "sudden and accidental," or unexpected and unintentional. The New Jersey landfill dumping was certainly not accidental. Rather, it was purposeful business activity as to which resulting property damage could have been expected, or should have been anticipated, by the insured. The standard "pollution exclusion" included in the automobile liability insurance policies issued to Defendants specifically excludes coverage for Defendants' waste hauling and landfill dumping activities.

In short, Defendants have failed to demonstrate that the policies provided coverage for the landfill cleanup in the underlying suit by NJDEP.

Conclusion

Based upon the undisputed evidence, viewed in a light most favorable to Defendants, with all reasonable inferences therefrom going to the non-moving party, Defendants have failed to show there is any material issue of fact remaining for jury determination. Therefore, summary judgment is granted in favor of Plaintiff.

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| Defendants. | : | |

FINAL ORDER

AND NOW, this 3rd day of May 2007, it hereby ORDERED that having issued an opinion in the above-captioned matter as referenced in the order of February 13, 2007 (Docket No. 30), judgment is entered in favor of Plaintiff, Bituminous Casualty Corporation, and against Defendants, Ronald Hems and Hems Brothers.

It is further ORDERED that all outstanding motions (Docket Nos. 17, 22, and 24) are DENIED as MOOT.

BY THE COURT:

S/ James T. Giles

J.