SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

- v -

JENKINS BROS., A NEW JERSEY CORPORATION DISSOLVED IN 2004, AND THOSE DEFENDANTS LISTED ON SCHEDULE A WHO HAVE OBTAINED JUDGMENTS AGAINST, OR REACHED SETTLEMENTS WITH, JENKINS BROS. INDIVIDUALLY AND AS REPRESENTATIVES OF THOSE CLASS OF PERSONS LISTED ON SCHEDULE B WHO HAVE FILED SUIT AGAINST JENKINS BROS.

Defendants.

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INDEX NO. 651980/2018

MOTION DATE 11/30/2020, 11/30/2020

MOTION SEQ. NO. 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 115, 129, 130, 137, 138

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 124, 125, 126, 127, 128, 139

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for partial summary judgment is denied, defendants' motion for summary judgment is granted, and defendants' motion for leave to file a sur-reply is denied as moot.

Background

In this action for a declaratory judgment, plaintiff, Liberty Mutual Insurance Company ("Liberty") commenced suit against nine individual defendants ("the Individual Defendants") who had brought claims alleging damages arising out of exposure to asbestos deriving from Jenkins' Bros. products. Jenkins Bros. was a New Jersey corporation that used asbestos in its products and allegedly caused, at least in part, the Individual Defendants' exposure and resulting injuries.

Jenkins Bros. manufactured valves which were found to have contained asbestos. Jenkins Bros. filed for bankruptcy in 1989 and was involuntarily dissolved in 2004. At the onset of their injuries, the Individual Defendants brought suits against Jenkins Bros. to recover for their

injuries. Because Jenkins Bros. had already been dissolved, Liberty, Jenkins Bros. insurer, was ordered to accept service on behalf of Jenkins Bros. and was declared the "real party-in-interest" that is bound to "defend and indemnify" its insured. In re N.Y.C. Asbestos Litig., 116 AD3D 571 (1st Dept. 2014), lv. dismissed, 23 NY3d 1030 (2014). Thereafter, Liberty accepted service of process on behalf of Jenkins Bros. and has appeared and defended Jenkins Bros. in all such suits. (NYSCEF Doc. No. 97.) Liberty has also routinely negotiated settlements on behalf of Jenkins Bros.

When it first began negotiating settlements on behalf of Jenkins Bros., Liberty funded 100% of the settlements. (NYSCEF Doc. No. 86.) However, in late 2014, Liberty assigned a new claims manager, Lincoln Davis, to the Jenkins Bros. account. Mr. Davis initiated a new policy on behalf of Liberty wherein Liberty would not fund the full amount of the settlements it had previously negotiated on behalf of Jenkins Bros. In 1987, Liberty had started incorporating an asbestos exclusion into its policies. Mr. Davis opined that because Liberty had canceled the Jenkins Bros. policies in 1980, any insurance allocation for the period from 1980-1987 should not be paid by Liberty, and he coined this period of time the "Orphan Share" period. From that point on, notwithstanding that Liberty negotiated the full amount of the settlements on behalf of Jenkins Bros., Liberty would fund only a portion of the settlement amounts, excluding any portion of the damages that Liberty attributed to the Orphan Share period.

Liberty then commenced the instant action, seeking a declaratory judgment from this Court that Liberty is not required to fund any portion of the previous settlements attributed to the Orphan Share period. The Individual Defendants have asserted counterclaims for breach of contract and for a declaratory judgment that Liberty is liable for the full amount of the settlements previously negotiated. Liberty now moves for summary judgment and dismissal of defendants' counterclaims. Liberty argues that the individual defendants have no standing to seek a declaratory judgment because no judgments were ever issued to the Individual Defendants. The individual defendants also move for summary judgment.

Discussion

In Keyspan Gas E. Corp. v Munich Reins. Am., Inc., the Court of Appeals detailed the distinctions between an "all sums" and "pro rata" approach to insurance coverage for progressive injury claims spanning across multiple policy periods:

> In general, two primary methods of allocation are used by the courts to apportion liability across multiple policy periods: all sums and proration. All sums allocation "permits the insured to collect its total liability … under any policy in effect during the periods that the damage occurred, up to the policy limits." By contrast, under pro rata allocation, assuming complete coverage, "an insurer's liability is limited to sums incurred by the insured during the policy period; in other words, each insurance policy is allocated a 'pro rata' share of the total loss representing the portion of the loss that occurred during the policy period." Pro rata shares are often, although not exclusively, calculated based on an insurer's "time on the risk," a fractional amount corresponding to

> the duration of the coverage provided by each insurer in relation to the total loss.

31 NY3d 51, 58 (2018) (internal citations omitted).

Liberty argues that this Court should adopt a pro rata allocation, and that under such approach Liberty is not responsible for the amounts of the Individual Defendants' settlements that are attributed to the Orphan Share period.

The Individual Defendants assert that Liberty's arguments endorsing a pro rata allocation are a red herring, as this Court need not determine which allocation method is appropriate, because Liberty has already been found to be a "real party-in-interest." The Individual Defendants argue that New York law provides that if a party is found to be the real party-in-interest, as has already been determined, it is liable to pay the full amount of a victim's losses. In opposition, Liberty asserts that it was declared the real party-in-interest solely for purposes of service of process. Liberty's argument is unavailing. The plain language of the prior court order unambiguously found that Liberty was "the real party-in-interest and is contractually bound to defend and indemnify the defendant." Germain v A.O. Smith Water Prod. Co., 41 Misc. 3D 1228(A) (Sup Ct, NY County, 2013), aff'd sub nom. In re New York City Asbestos Litig., 116 AD3D 571 (1st Dept. 2014). Moreover, in affirming such holding, the Appellate Division stated that:

> [Liberty] accepted premiums from Jenkins and agreed to defend and indemnify Jenkins for tortious conduct committed during the coverage periods. This coverage includes liability for conduct that may have led to injuries such as asbestos disease which carries a long latency period between exposure and manifestation of disease. [Liberty's] coverage obligations should not be nullified on the mere happenstance that the corporation was dissolved at the time these latent injuries manifested.

Id. 116 AD3D at 572-73.

Furthermore, even if it was plausible for this Court to read the prior orders as finding Liberty to be the real party in interest solely for service of process, Liberty's conduct since that time all but eviscerates such a notion, as Liberty has stood in the shoes of the tortfeasor, Jenkins Bros,. in all relevant and meaningful ways, including, most significantly, by negotiating the settlements with the Individual Defendants. Indeed, this Court finds that the doctrine of estoppel precludes Liberty from arguing that is not responsible to fund fully settlements that Liberty itself negotiated.

The Individual Defendants argue, in the alternative, that should this Court reach the allocation issue, it should adopt an all sums approach in this case, which "'permits the insured to 'collect its total liability ... under any policy in effect during' the periods that the damage occurred,' up to the policy limits." In re Viking Pump, Inc., 27 NY3d 244, 255 (2016).

The Individual Defendants assert that the pro rata doctrine only exists to allocate liability between an insurer and its *policyholder* or another insurer, not to allocate liability between an insurer and the third-party victims seeking compensation pursuant to the policy. In fact, the cases Liberty cited in support of its position involve allocation between policyholders and insurers. Such is not the case here, where Liberty seeks a declaratory judgment not against the policyholder but against the victims of the tortfeasor.

The policy considerations at play in the cases cited by Liberty involve reasoned determinations that the policyholder should not be relieved of the consequences of its decision to underinsure or not insure, and that such failure to manage risk adequately should not become the obligation of the insurance company. However, no such considerations are at play here, where the Individual Defendants are the asbestos victims who were not involved whatsoever in Jenkins Bros.' decisions as to when and how to purchase insurance. Moreover, Liberty does not dispute that the policies still have ample available limits remaining and are not close to exhaustion.

This Court finds that, based on the unique facts and circumstances of this case, Liberty, as the real party-in-interest, is obligated to fund 100% of the previously negotiated settlements, including for any period of time that Liberty now attributes to the so-called Orphan-Share period.

Furthermore, although this Court need not reach the allocation determination, if it did, it would find in favor of an all sums allocation, as the pro rata allocation is not appropriate where, as is the case here, the allocation to be determined is between the insurer and the tort victims.

The Liberty policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (NYSCEF Doc. No. 94.) In this Court's view, the "trigger event in the policy at issue is *an occurrence which results in injury,* not the injury itself. In re Liquidation of Midland Ins. Co., 269 AD2d 50, 61, 709 N.Y.S.2d 24 (1st Dept. 2000) (further holding "such policy language requires an occurrence (inhalation) during the coverage period, and not the injury itself (the actual onset of asbestosis)").

Moreover, in a similar case where the policy language was not explicitly determinative, as here, the First Department affirmed that an all sums approach was the appropriate allocation method. In re Liquidation of Midland Ins. Co., 171 AD3d 564 (1st Dept. 2019) (holding "[t]he motion court correctly concluded that losses covered under the insurance policies at issue as a result of asbestos exposure that occurred over the course of multiple successive policy periods must be allocated pursuant to the 'all sums' method, as generally required, rather than pro rata across the successive policies").

The Court has considered Liberty's remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, it is hereby ordered that plaintiff's motion for partial summary judgment is denied and defendants' motion for summary judgment is granted, and this Court hereby declares that plaintiff is obligated to fund fully the Individual Defendants' settlements at issue in this litigation.

6/11/2021
DATE

ARTHUR F. ENGORON, 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