SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 600175/2007

LUMBERMENS MUTUAL CASUALTY CO.

v

COMMONWEALTH OF PENNSYLVANIA

Sequence Number : 002

DISMISS

INDEX NO. ____

MOTION DATE 12/7/07

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-F	1-2
Answering Affidavits — Exhibits A-L	3-4
Replying Affidavits - Exhibits A-B; A-B	5-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss and cross motion for a preliminary injunction are decided in accordance with the annexed memorandum decision and order.

FILED
JAN 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 1/24/08

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

----------x

LUMBERMENS MUTUAL CASUALTY COMPANY and AMERICAN MOTORIST INSURANCE COMPANY,

Plaintiffs,

Index No. 600175/2007

-against-

Decision and Order

THE COMMONWEALTH OF PENNSYLVANIA and THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,

Defendants.

----------x

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs seek a judgment declaring the rights and obligations of the parties under an insurance policy issued to defendants, for a claim arising from environmental damage that arose during a construction project on an interstate highway. Defendants Commonwealth of Pennsylvania and Pennsylvania Department of Transportation (PennDOT) move to dismiss the amended complaint of plaintiff Lumbermens Mutual Casualty Company (Lumbermens), on the grounds of (a) sovereign immunity; (b) forum non conveniens, pursuant to CPLR 327; (c) comity; and (d) lack of standing. Defendants also contend that this declaratory action is unnecessary, in that plaintiffs may assert all of their claims as affirmative defenses in the Pennsylvania action brought by defendants.

Pursuant to CPLR 6301, Lumbermens cross-moves for a preliminary injunction enjoining defendants from pursuing their breach of contract action in Pennsylvania (Commonwealth of Pennsylvania, Department of Transportation v Kemper Indemnity Insurance Company, Docket No. January Term 2007-004490 (Court of Common Pleas, Philadelphia County, Pennsylvania) until the

conclusion of this declaratory judgment action. By decision dated September 25, 2007, American Motorists Insurance Company (AMICO) was added as a plaintiff to this action.

BACKGROUND

PennDOT is an agency of the Commonwealth of Pennsylvania. In March 2000, Pennsylvania commenced construction of an eighteen-mile stretch of interstate highway to be known as Interstate 99 (the project). Kemper Indemnity Insurance Company (Kemper), an Illinois corporation duly authorized to transact the business of insurance in the State of New York, provided defendants with a General Contractor's Pollution Liability Policy (Kemper policy) for the project.

The Kemper policy provided coverage from February 10, 2000 to February 10, 2004. Defendants are named insureds under the Kemper policy. The Kemper policy affords coverage in the amount of $10 million per loss, and, in the aggregate, subject to a Self-Insured Retention, coverage in the amount of $1 million per loss. It should be noted that the Insured's Broker Representative, Willis Corroon Corporation of Pennsylvania (Willis), is located in Radnor, Pennsylvania. The Kemper policy was executed in Pennsylvania.

The project required a significant cut-and-fill operation, wherein soil was to be excavated from one area of the highway and then used to fill in other areas of the highway. During preliminary engineering on the project in late 1998, the presence of pyritic material was detected. Pyrite is a metal and sulfur-bearing material that, when exposed to air and water, oxidizes, turning the sulfurous material to sulfuric acid. This sulfuric acid dissolves the metals in the rock, which can lead to potential contamination of streams and groundwater if left untreated.

In February 2003, the construction activities of defendants further exposed pyritic rock, and defendants attempted to treat the pyritic material and the acid run-off. However, defendants were

unable to neutralize and contain the sulfuric acid discharges emanating from the pyritic material, though they continued to excavate and expose additional pyritic material. As a result, serious environmental damage occurred. Defendants now seek coverage for costs associated with the removal of the pyritic material from the environment, which they estimate could be in excess of $60 million.

While Kemper was in the process of reviewing and analyzing the various documents and materials that defendants provided to Kemper regarding their claim, and while Kemper was having discussions with defendants regarding relevant information, Kemper issued defendants various coverage letters, dated January 7, 2005, October 24, 2005, March 16, 2006 and May 15, 2006. On November 30, 2006, defendants' counsel, located in Pennsylvania, sent Kemper's claim adjuster a detailed coverage letter. Following receipt of this letter, Kemper's claim adjuster requested a meeting with defendants' counsel to discuss the coverage issues. This meeting was held on December 28, 2006.

Following the December 28, 2006 meeting, defendants' counsel wrote to Kemper's claims adjuster, stating, "[a]t the conclusion of our meeting, I advised you that since Kemper is unwilling to pay this claim, we will be instituting litigation shortly on behalf of PennDOT. You requested an opportunity to respond to my letter of November 30, 2006 before we filed suit and I agreed. Please provide a written response to my November 30, 2006 letter no later than January 19, 2007, as we intend to file a Complaint the following week" (Edelman Affirm., Ex D [January 5, 2007 letter from Robert B. Bodzin]). Kemper did not respond to the November 30, 2006 letter.

On January 17, 2007, Lumbermens, the parent company of Kemper, commenced this action seeking a declaration as to the rights and obligations of the parties under the Kemper policy.

Lumbermens is also the parent company of a group of associated insurance companies operating under the trade name of Kemper Insurance Companies, which group includes the wholly-owned subsidiary, Kemper.

In addition to asserting that Lumbermens or any related company has no obligation to provide defendants with coverage for the claim under the Kemper policy, the complaint states that, pursuant to Sections VIII (M) and VIII (N) of the policy, Kemper and defendants agreed to submit to the jurisdiction of any court in the State of New York "for the resolution of any coverage dispute between the parties," and that "the substantive law of the State of New York will govern any coverage disputes between the parties arising from the Kemper policy" (Edelman Affirm., Ex A [Complaint ¶¶ 10-13]).

On January 29, 2007, defendants commenced an action in the Court of Common Pleas of Philadelphia County, Pennsylvania, seeking payment of claims made under the Kemper policy. Defendants' complaint in the Pennsylvania action sets forth causes of action sounding in breach of contract, unjust enrichment and bad faith.

Defendants move to dismiss the verified amended complaint for declaratory judgment. Lumbermens cross-moves for a preliminary injunction enjoining defendants from proceeding with the Pennsylvania action. By stipulation, the Pennsylvania action has been stayed pending a resolution from this Court of defendants' motion to dismiss the amended complaint.

While this motion was pending, the Court granted Lumbermens's motion for leave to add AMICO as a plaintiff. By so-ordered stipulation dated November 1, 2007, the parties agreed that AMICO is added as a party nunc pro tunc to defendants' pending motion to dismiss and as a cross-movant with respect to the cross motion for a preliminary injunction.

DISCUSSION

Defendants' Motion to Dismiss

As a threshold issue, defendants challenge Lumbermens's standing to bring this action. Defendants argue that the proper plaintiff is either Kemper or AMICO.

Contrary to defendants' argument, Lumbermens has standing to bring this action for declaratory judgment. It is well settled in New York that a parent company of a wholly owned subsidiary, whose pecuniary interest is directly affected, has standing to prosecute and defend its subsidiary's claims (Matter of Waldbaum, Inc. v Finance Adm'r of City of N.Y., 74 NY2d 128, 133 [1989]; Matter of Saint Gobain v Assessor of Town of Wheatfield, 17 AD3d 1112, 1112-1113 [4th Dept 2005] [parent corporation lacked standing to challenge tax assessment of property owned by its wholly owned subsidiary, when it failed to establish that its pecuniary interests were or could be adversely affected by an illegal assessment];Alexander & Alexander of N.Y. v Fritzen, 147 AD2d 241, 245 [1st Dept 1985] [no standing where parent corporation and subsidiary were separate and distinct entities]).

Here, Lumbermens has established that its pecuniary interests in the outcome of this case are directly affected. In her affidavit of June 13, 2007, Mary Reardon, director of corporate claims for Lumbermens, stated that Lumbermens was and remains the parent company of a group of affiliated insurance companies operating under the trade name of Kemper Insurance Companies. Kemper was a member of Kemper Insurance Companies, and, prior to August 31, 2004, Kemper was a wholly-owned indirect subsidiary of Lumbermens. Kemper ceased writing insurance policies in 2003. As of August 31, 2004, Kemper merged with another of Lumbermens's wholly-owned subsidiaries, American Motorists Insurance Company (AMICO), with all of the assets and liabilities transferred

from Kemper to AMICO, as the surviving company.

Reardon also noted that, pursuant to the Administrative Services Agreement with Kemper, and the Amended and Restated Quota Share Pooling Agreement with American, Lumbermens now reinsures all policies issued by Kemper and provides all services and employees necessary to manage and resolve any claims that were made under the Kemper policies. These services include any handling of claims-related activities and obligations, including, but not limited to, negotiating, investigating, resolving and or defending claims tendered pursuant to policies previously issued by Kemper, such as the policy in the instant case. As such, the responsibility for any payment to which defendants may be entitled to under the Kemper policy would be entirely conceded to Lumbermens. Accordingly, Lumbermens has standing to bring its declaratory action.

The addition of AMICO as a plaintiff moots any argument that plaintiffs lack standing to seek a preliminary injunction enforcing the choice of forum provision in the Kemper policy. As this Court indicated in its September 25, 2007 decision, Kemper merged with AMICO. To the extent that rights under the policy at issue were retained by Kemper Indemnity Insurance Company at the time of merger, these rights were apparently then vested in AMICO.

Defendants argue that they did not consent to the merger, but submit no support for the proposition that their consent was required for the merger. Although defendants characterize the merger of Kemper and AMICO as an assignment of rights for which consent was required, they have not shown that Kemper and AMICO's merger was structured in this manner.

In sum, plaintiffs have standing to bring this action.

Next, defendants maintain that the Commonwealth of Pennsylvania is immune from suits arising from a contract, except where the suit is brought before the Board of Claims. Although

defendants concede that New York is not required to recognize the sovereign immunity of another state, defendants contend that New York should do so in the absence of a public policy to the contrary. Plaintiffs argue that Pennsylvania's sovereign immunity does not apply, because they seek declaratory relief, not monetary damages. They further contend that, because defendants choose New York law and New York as a forum for suits, recognizing Pennsylvania's sovereign immunity would run afoul of "the policy of the courts of this state to enforce contractual provisions for choice of law and selection of a forum for litigation" (Koob v IDS Fin. Servs., 213 AD2d 26, 32 [1st Dept 1995]).

> "Although the Commonwealth [of Pennsylvania] traditionally had sovereign immunity from suit, the establishment of the Board of Claims waived that immunity by providing a tribunal whose specific duty was to entertain contract actions against the Commonwealth. The statute gives the Board of Claims 'exclusive jurisdiction to hear and determine claims against the Commonwealth arising from contracts hereafter entered into with the Commonwealth, where the amount in controversy amounts to $300.00 or more'"

(Shovel Transfer and Storage, Inc. v Simpson, 523 Pa 235, 239 [1989][footnote and internal citation omitted]). It is undisputed that the amount in controversy is more than $300, given estimates of $60 million for the environmental cleanup.

Although defendants have cited Pennsylvania cases where sovereign immunity did not bar an action for declaratory relief, those cases are inapposite. "[W]here a request for a declaration of rights can have no effect nor serve any purpose other than as the legal predicate for a damage or other immunity-barred claim in the same action, the demand for declaratory relief ought to fall along with the claim it serves to support" (Stackhouse v Commonwealth of Pennsylvania, Pennsylvania State Police, 892 A2d 54, 62 [Pa Cmwlth 2006]). Here, plaintiffs seek a judgment declaring, among other things, that the Kemper policy does not cover the loss; plaintiffs could have easily asserted these as

defenses to the action for breach of contract that Pennsylvania ultimately brought against plaintiffs. "[T]he Board of Claims is empowered to entertain all contractual claims against the Commonwealth irrespective of the type of relief sought or the fact that the Board of Claims may not have the power to grant the relief requested." Shovel Transfer and Storage, Inc., 523 Pa. at 240. Following the reasoning of Stackhouse, this Court finds that plaintiffs' causes of action fall within Pennsylvania's sovereign immunity.

New York courts do not automatically extend to sister states blanket sovereign immunity as a matter of comity, thereby denying a litigant the right to sue another state in New York (see Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d 65, 72 [2006] [New York's compelling interest in protecting its residents, as well as its preeminence as commercial and financial capital, outweighed the State of Montana's interest in limiting venue]; see Ehrlich-Bober & Co. v University of Houston, 49 NY2d 574 [1980][comity is not a mandate, but rather a voluntary decision to defer to the policy of another state]).

In Deutsche Bank Securities, the Court of Appeals declined to recognize the sovereign immunity of the Montana Board of Investments, a Montana state agency. The Court held,

> "[W]here, as here, a lawsuit arises from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of our financial markets, New York courts should not dismiss the action as a matter of comity. Where a more fundamental governmental interest of another jurisdiction is implicated against a less compelling New York policy, or where there is no material conflict between the two, our courts of course remain open to reasonable deference to the law of another jurisdiction as a matter of mutual respect an interstate harmony"

(Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d at 73). Here, this action against Pennsylvania arises from a commercial transaction, i.e., an insurance policy. By virtue of the forum selection clause, plaintiffs argue that Pennsylvania and PennDOT have significant contact with New

York. However, defendants argue that the forum selection clause is unenforceable.

Forum selection clauses "are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 [1996]). As defendants indicate, enforcement of the parties' forum selection clause would be unreasonable, because PennDOT lacks the power to agree that Pennsylvania may be sued in a forum other than Pennsylvania's Board of Claims. Pursuant to Article 1, Section 11 of Pennsylvania's Constitution, only the General Assembly of the Commonwealth of Pennsylvania has the power to designate the forum where Pennsylvania may be sued, as a condition of the waiver of Pennsylvania's sovereign immunity (see also 1 Pa CSA § 2310). "Sovereign immunity of the Commonwealth cannot be waived by an act of its agent; it can only be waived by a specific enactment of the Legislature" (Hoffner v James D. Morrissey, Inc., 389 A2d 702 [Pa Cmwlth 1978]).

This Court will not disregard the constitutional limits upon the power of Pennsylvania's agencies in order to enforce the forum selection clause, especially given that New York has similar constitutional restrictions upon its own state agencies (see Conklin v Palisades Interstate Park Commn., 282 App Div 728 [2d Dept 1953]["The State has assumed liability for damages of this character [wrongful detention] only on express condition that the claimant complies with the limitations of Court of Claims Act. There is no statutory authority which permits an agency of the State or an official to waive such condition."]). It would be unreasonable to enforce a forum selection clause which Pennsylvania courts themselves would have declared invalid (cf. New Foundations, Inc. v Commonwealth of Pennsylvania, Dept. of General Services, 893 A2d 826, 830 (Pa Cmwlth 2006) ("Because we would conclude that a Commonwealth agency on its own has no power to abrogate such immunity, DGS could not have bargained away its own immunity through

the terms of the Agreement of Sale"). New York courts would not enforce such a provision if a New York state agency found itself in a situation similar to PennDOT. Therefore, this Court does not enforce the subject forum selection clause, which designates New York as the place of litigation.

Other than relying on the unenforceable forum selection clause, plaintiffs have not demonstrated that defendants otherwise "knowingly projected themselves into New York . . ." (Deutsche Bank Sec., Inc, 7 NY3d at 73). Accordingly, the Court recognizes Pennsylvania's sovereign immunity as a matter of comity. "Involvement in affairs properly within the province of the courts of another state is objectionable on the ground of comity" (Koob, 213 AD2d at 35). New York's policy of enforcing a forum section clause is less compelling than Pennsylvania's interest in maintaining the constitutional limits on the powers of its agencies.

As plaintiffs indicate, this Court previously considered the issue of whether New York should recognize Pennsylvania's sovereign immunity when plaintiffs moved for leave to amend to add AMICO as a plaintiff, which defendants opposed on the ground of sovereign immunity, among other grounds. This Court rejected recognition of Pennsylvania's sovereign immunity at that time because of the existence of the forum selection clause. The enforceability of the forum selection clause was not raised in the prior motion to amend. The parties submitted briefs on the enforceability of the forum selection clause after AMICO was added as a plaintiff. Therefore, the law of the case doctrine does not dictate a different result. In any event, "a court may review a previously-decided matter where there is a need to correct clear error" (National Mtge. Consultants v Elizaitis, 23 AD3d 630 [2d Dept 2005]).

Therefore, defendants' motion to dismiss is granted, and the action is dismissed for lack of subject matter jurisdiction. The Court does not reach defendants' remaining arguments in favor of

dismissal.

Plaintiffs' Cross Motion for Preliminary Injunction

Because this action is dismissed for lack of subject matter jurisdiction, plaintiffs' cross motion for a preliminary injunction is denied. "It is well settled that the pendency of a viable action is an indispensable prerequisite to the granting of a preliminary or temporary injunction" (Uniformed Firefighters Assn. of Greater New York v City of New York, 173 AD2d 206 [1st Dept], affd 79 NY2d 236 [1992]).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted, the action is dismissed for lack of subject matter jurisdiction, and the Clerk is directed to enter judgment in defendants' favor accordingly; and it is further

ORDERED that plaintiffs' cross motion for a preliminary injunction is denied.

Dated: January 24, 2008
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
JAN 31 2008
COUNTY CLERK'S OFFICE
NEW YORK