

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

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| NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, as successor by merger to TRANSCONTINENTAL INSURANCE COMPANY; CONTINENTAL INSURANCE COMPANY, as successor-in-interest to certain policies issued by HARBOR INSURANCE COMPANY; | : Index No. 08105522 E |
| | : IAS Part 53 |
| | : Hon. Charles E. Ramos |
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| Plaintiffs, | : AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE |
| - against - | : |
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| TRAVELERS CASUALTY AND SURETY COMPANY, formerly THE AETNA CASUALTY AND SURETY COMPANY; et al. | : Motion Seq. No. _____ |
| | : |
| Defendant. | : |
| -----X | |

Paul E. Breene avers and states:

1. I am an attorney admitted to the practice of law in the State of New York and a partner in the firm Reed Smith LLP, counsel to Defendant, Counterclaimant and Cross-Claimant Metex Mfg. Corporation (“Metex”) in this action.

2. I am submitting this Affirmation in support of the joint request of Metex and Defendant, Counterclaimant and Cross-Claimant Liberty Mutual Insurance Company (“Liberty Mutual”) for an Order to Show Cause: (a) directing the New York State Insurance Department (“Department”), James J. Wynn, the Superintendent of the Department (“Superintendent”), the Department’s Property/Casualty Insurer Security Fund (“Fund”), the New York State Liquidation Bureau (“NYLB”), and the Commissioner of Taxation and Finance

(“Commissioner”), all acting on behalf of Defendant The Home Insurance Company (In Liquidation) (“Home”) (collectively “Respondents”) to:

i. Appear before this Court for the purpose of reporting on the status of the review, processing and payment of claims by the NYLB for asbestos liabilities of Kentile Floors, Inc. (“Kentile”), which was insured by Home from 1977 through 1981, and, more specifically, to explain: (a) why no payment has been made on behalf of Home on any asbestos bodily injury claim asserted against Kentile involving alleged exposures in New York (“Kentile Asbestos Claim”); (b) which Kentile Asbestos Claims have been submitted by NYLB to the Receivership Court for authorization to be paid and when they were submitted; (c) which Kentile Asbestos Claims have been received by NYLB but have not yet been submitted to the Receivership Court for authorization to be paid; (d) why those Kentile Asbestos Claims have not been submitted for authorization, and when NYLB expects to submit them;

ii. Establish a procedure before Justice York for submission to the Court of requests for approval to pay Kentile Asbestos Claims in a timely manner so that such requests may be approved by the Court for payment by the NYLB;

iii. In accordance with the procedure established before Justice York, to submit all prior and existing Kentile Asbestos Claims for approval by that Court and for payment by the NYLB by a date certain; and

(b) granting such other and further relief as this Court may deem just and proper under the circumstances.

3. As set forth below at ¶¶ 11-16, the NYLB already has appeared before this Court and made representations to the Court and the parties regarding its actions and planned actions which are at issue in this Order to Show Cause. In prior correspondence to this Court, the NYLB also stated that it is “our understanding that *unless requested by the Court*, the Security Fund need not make further appearances in this proceeding.” See *infra* Exhibit 6 at 4 (emphasis added). Consequently, the NYLB should not have any objection to the requested appearance sought through this Order to Show Cause.

4. This is a declaratory judgment action commenced by certain insurers of Kentile against Kentile, Metex, the Reorganized Debtor that emerged from Kentile’s Chapter 11

bankruptcy proceedings, and other insurers of Kentile. Kentile has been and continues to be a defendant in thousands of actions alleging personal injury resulting from exposure to asbestos products manufactured and sold by Kentile, *i.e.* the Kentile Asbestos Claims.

Home Insurance Policies

5. Home provided five annual “Manuscript Excess Liability” insurance policies to Kentile, effective from January 1, 1977 through January 1, 1982 (“Home Policies”). Each of the Home Policies has an aggregate limit of \$5 million applicable to product liability claims such as the Kentile Asbestos Claims.

6. Each of the Home Policies is immediately above a primary comprehensive general liability (“CGL”) policy issued by Aetna Insurance Company (“Aetna”) (1977-78) or National Union Fire Insurance Company (“National Union”) (1979-1981). Each of the underlying primary CGL policies included an aggregate limit of \$1 million applicable to products liability claims.

7. There is no dispute that the aggregate limit applicable to product liability claims in each of these underlying primary CGL policies has been exhausted by payment of judgments or settlements for Kentile Asbestos Claims. Copies of the notices of exhaustion provided by Aetna and National Union are annexed as Exhibits 1 and 2, respectively.

8. Although the primary policy underlying each of the Home Policies has been exhausted, Home has not made any payment on any Kentile Asbestos Claim. Home was declared insolvent and unable to meet its insurance obligations by a New Hampshire Court on June 13, 2003. The Insurance Commissioner of the State of New Hampshire was appointed as Liquidator of Home. A copy of the order of the New Hampshire Court is annexed as Exhibit 3.

Robert A. Sevigny, the Commissioner of Insurance of the State of New Hampshire, in his capacity as Liquidator of Home, is a named defendant in this action.

NYLB and Ancillary Receivership of Home

9. By Order of Justice Louis V. York, dated September 24, 2003 (annexed as Exhibit 4), the Superintendent of Insurance of the State of New York was appointed as Ancillary Receiver of Home pursuant to New York Insurance Law Article 74.

10. Justice York's Order triggered the application of the Fund with regard to eligible claims asserted against Kentile. The NYLB is the entity that carries out the claims handling duties of the Superintendent in his capacity as Ancillary Receiver and as administrator of the Fund. The Fund is the entity created under New York Insurance Law Article 76 to pay claims on behalf of an authorized but insolvent New York insurer. Finally, the Commissioner is the custodian of funds for the Fund.

NYLB's Prior Representations to This Court

11. On January 14, 2010, in response to an Order to Show Cause issued by this Court, representatives of NYLB informed the Court that Kentile had submitted to NYLB information concerning more than 900 Kentile Asbestos Claims that had been settled and paid, for which Kentile was making a claim "against the New York Security Fund." *See* Transcript of Hearing, January 14, 2010, annexed as Exhibit 5 ("Tr."), at 11-12. The NYLB stated that it had taken that information and "we have subjected it to audit; we have subjected it to an allocation report, or analysis" in order to determine "to what extent the Home would have been required to pay under its policies" on those claims. Tr. at 12-13. The NYLB represented to the Court that "[w]e did an allocation analysis to determine that coverage exists for the New York covered claims" and that

“[w]e have some preliminary projections as to what kinds of payments may have to be made” from the Security Fund. Tr. at 18.

12. Finally, in response to questions from the Court about the exhaustion of coverage available through the Fund and the effect of such exhaustion on the next layer of coverage above the Home Policies (Tr. at 18-19), the NYLB representatives stated that “[w]e have strong indication there is coverage and a lots (sic) of coverage,” and that the NYLB would “undertake to get back to you on that issue as to whether the policies have been exhausted.” Tr. at 18, 21.

13. In a follow-up report to the Court dated January 28, 2010, the Fund confirmed that in “April 2009, Kentile submitted approximately 964 settled and paid asbestos claims (“Settled Claims”) to the Security Fund for payment.” See Letter dated January 28, 2010 from David Axinn, Deputy General Counsel of NYLB to The Hon. Charles E. Ramos, annexed as Exhibit 6 (“January 28, 2010 Letter”), at 2. The January 28, 2010 Letter expressly stated that NYLB’s consultant had informed counsel for Kentile “that the [Security Fund] on behalf of The Home Insurance Company in Liquidation will cover Kentile asbestos bodily injury claims (other than those as to which policy defenses exist), up to \$1,000,000 per injured claimant (subject to the aggregate policy limit contained in the Home policies), where the injured party suffered injurious exposure to asbestos in New York and suffered injury in fact during the policy period.” *Id.* at 2-3. The January 28, 2010 Letter confirmed that there were five Home Policies, each with an aggregate limit of \$5 million, such that “the aggregate limit of all payment by the Security Fund to Kentile is \$25 million for all claims determined to be eligible for coverage under Article 76.” *Id.* at 3.

14. The January 28, 2010 Letter also confirmed that Kentile already had “provided the Security Fund with information concerning the Settled Claims” and that the “Security Fund

completed its allocation analysis at the end of 2009 and is now in the process of determining the manner in which those claims covered by the Security Fund will be submitted to the Receivership Court and to the Domestic Liquidator.” See January 28, 2010 Letter at 3. Specifically, NYLB stated that it was required to submit each claim to the Receivership Court for allowance and “would require prior court approval to bundle the submission of these claims into a single order.” *Id.* However, NYLB assured the Court that it was “taking all diligent steps to resolve the remaining issues and begin making eligible payments” on the Kentile Settled Claims, had “requested a conference with the Receivership Court to discuss the most efficient manner to submit claims for an allowance” and expected “to hear from the Receivership Court later this week” on that request. *Id.* at 4. .

15. In addition to the Settled Claims, NYLB reported that “Kentile has more than 23,000 pending asbestos claims, which may be eligible for Security Fund coverage (‘Pending Claims’).” *Id.* at 3. Based on its analysis, NYLB predicted “that Security Fund payments to Kentile for covered Settled and Pending Claims will exceed the Security Fund’s \$25 million coverage limit,” but that “at present the Settled Claims submitted by Kentile will not exhaust the Security Fund’s \$25 million limit.” *Id.* The Letter estimated that “it may take between two and four years for a sufficient number of Kentile’s Pending Claims to become covered Settled Claims and exhaust the Security Fund’s limit.” *Id.*

16. Finally, the January 28, 2010 Letter stated at 4 that the Fund already had “held discussions this month with the Domestic Liquidator for the purpose of determining what documentation the Domestic Liquidator requires in order to reimburse the Security Fund for covered payments.”

17. Thereafter, the NYLB's consultant obtained voluminous documentary support for prior settlements of Kentile Asbestos Claims from Kentile's defense counsel.

NYLB's Subsequent Refusal to Contribute to Prior Settlements

18. Notwithstanding the representations that it had made to the parties and to this Court, in a letter dated March 10, 2011 the NYLB reversed course and took the position that it will not pay on the Settled Claims submitted by Kentile. Specifically, the NYLB stated that “we have concluded that the security fund statute will not allow payment on the closed files,” because the statute purportedly “requires a claim to be ‘unpaid,’ which is not the case here with the closed claims.” *See* Letter dated March 10, 2011 from Ellen M. Russell to Paul E. Breene, annexed as Exhibit 7 (the “March 10 Letter”).

19. Thus, even though it had represented, both to me, as counsel for Metex, and to this Court and to the other parties in this case that it would contribute to the Settled Claims, the NYLB has not contributed to a single past or present settlement of any Kentile Asbestos Claim.

20. The statements made by the NYLB in the March 11 Letter, that claims must remain “unpaid” for the NYLB to have any liability for them, are even more shocking and disingenuous in light of my prior conversations and dealings with the NYLB and its consultants. Prior to the appearance of the NYLB before this Court, in January 2010, and prior to the NYLB sending this Court its January 28 letter report, I had numerous telephone conferences with both Ms. Russell, the NYLB’s head of claims and the author of the March 10 Letter, and with David Axinn, Esq., an attorney with the NYLB. During those conversations I made it absolutely clear that up to that time—and continuing to this day—the Home’s share of indemnity payments owed by Kentile with respect to asbestos settlements was being paid by various other Kentile insurance

companies. Thereafter, and for more than a year, until the March 10 Letter, the NYLB represented to me and to this Court that it was processing these Settled Claims and intended to submit them to Justice York for approval of payment. It therefore came as quite a shock when, after having relied, to our detriment, on the NYLB's protestations of good faith for 14 months, we received the March 10 Letter which gave the lie to everything the NYLB had said, both to Metex and to this Court.

21. Thus, more than two years into the process of trying to get the NYLB to begin paying claims, the NYLB for the first time took the position that it would only pay "unpaid claims" as of March 10, 2011. Thereafter, as set forth in more detail in the accompanying affidavit of Robert L. Hoegle, Esq., counsel for Liberty Mutual, Liberty Mutual sought to avoid any future funding issue by informing the NYLB of its expected contributions to settlements of Kentile Asbestos Claims early in the process so that the NYLB could obtain any necessary Court approval of its payments on a current basis.

22. Thereafter, despite the NYLB's claims that it was "processing features[claims]" for payment, the NYLB has refused to make any payment whatsoever, ostensibly on the grounds that it is not subject to the "21 day rule", forcing Liberty Mutual to pay the Home's share of even current settlements or be in breach of the settlement agreements entered into. Of course, once Liberty Mutual pays these claims, the claims are no longer "unpaid" in the NYLB's mind so that, according to the March 10 Letter, they are no longer payable by the NYLB.

23. The NYLB has created a classic "Catch—22." It refuses to make timely payments on admittedly covered claims, and then when others are forced to make those payments in its stead, it claims that the payments are no longer due because they are no longer "unpaid."

Conclusion

24. The NYLB has refused to contribute to past settlements and to participate in pending settlements in a timely manner. Over the past seventeen months since it appeared before this Court, the NYLB has not paid one dollar for the past or present settlement of any Kentile Asbestos Claim, and its actions have been contrary to its prior representations to me and to this Court.

25. The Court should order the NYLB to appear and explain: (a) why no payment has been made on behalf of Home on any Kentile Asbestos Claim; (b) which Kentile Asbestos Claims have been submitted by NYLB to the Receivership Court for authorization to be paid and when they were submitted; (c) which Kentile Asbestos Claims have been received by NYLB but have not yet been submitted to the Receivership Court for authorization to be paid; (d) why those Claims have not been submitted for authorization, and when NYLB expects to submit them.

26. No prior application for the relief sought herein has been made by Metex to this or any other court.

WHEREFORE, Metex, along with Liberty Mutual, respectfully requests that the Court enter the Order to Show Cause.


Paul E. Breene