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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Granite State Insurance Company

- v -

ACE American Reins. Co.

INDEX NO. 604347/04

MOTION DATE 6/23/06

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8/4/06

HON. RICHARD B. LOWE, III
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: IAS PART 56
----------X

GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Plaintiffs,

Index No. 604347/04

-against-

ACE AMERICAN REINSURANCE COMPANY, formally known as INA Reinsurance Company,

Defendant.

----------X

Richard B. Lowe III, J.:

This action follows plaintiffs' request that their reinsurance company, Ace American Reinsurance Company (ACE) cover monies paid out by plaintiffs on claims by five separate insureds, all of which claimed losses which they were required to pay to their insureds in toxic tort or property damage actions. Plaintiffs move for summary judgment.

Background

Plaintiffs Granite State Insurance Company, Insurance Company of the State of Pennsylvania, and National Union Fire Insurance Company of Pittsburgh, Pa. purchased, between them, 11 facultative reinsurance policies from ACE, to cover 11 policies of insurance issued to five separate insureds, all of which were evidenced by identical facultative reinsurance certificates (the Certificates). All of the Certificates contain the following provisions:

1. APPLICATION OF CERTIFICATE

The Reinsurer agrees to indemnify the Company against loss or damage which the Company is legally obligated to pay under the Company's policy reinsured, resulting from occurrences taking place during the period this Certificate is in effect, subject to the Reinsurance Accepted limits shown in the declarations. The liability of the Reinsurer shall follow that of the Company and, except as otherwise specifically provided herein or designated as non-concurrent reinsurance in the declarations, shall be subject in all respects to all of the terms and conditions of the Company's policy except such as may purport to create a direct obligation of the Reinsurer to the original Insured.

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4. LOSS SETTLEMENT

All claims involving this reinsurance, when settled by the Company shall be binding on the Reinsurer, which shall be bound to pay its proportion of such settlements ... .

Payment of its proportion of the loss and expense paid by the Company will be made by the Reinsurer to the Company promptly following receipt of proof of loss ... .

All five of the insured companies sustained massive liability arising from three causes: property damage claims; claims arising from exposure to asbestos; and claims arising from exposure to a toxic chemical. After "diligently investigating the claims and negotiating with the insureds" (Plaintiffs' Memorandum of Law, at 1), plaintiffs paid the claims.

Plaintiffs allegedly notified ACE on a timely basis of the claims, along with the required proofs of loss. Although plaintiffs apparently expected that the claims would be paid "promptly," as set forth in the Certificates, ACE greeted plaintiffs' claims with a substantial number of questions and requests for documentation. While plaintiffs maintain that they provided all of the information requested, ACE insists that they have not, and that, in fact, plaintiffs continue to avoid giving ACE vital information which it seeks to this day. Plaintiffs commenced this action when it became apparent to them that payment was not forthcoming.

Plaintiffs seek summary judgment, pursuant to CPLR 3212, based on the language of the

Certificates which calls for prompt payment by ACE of plaintiffs' claims. ACE responds that (1) it received late notice of the claims; and (2) that it cannot pay the claims without discovery concerning the proofs of loss to which it is allegedly entitled.

Discussion

It is well established that "'[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact.'" *Wolff v New York City Transit Authority*, 21 AD3d 956, 956 (2d Dept 2005), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The party opposing the motion must come forward with evidence sufficient to create an issue of fact for the jury. *Pinto v Pinto*, 308 AD3d 571 (2d Dept 2003).

A. Reinsurance

"Reinsurance is the insurance of one insurer ('the reinsured') by another insurer ('the reinsurer') by means of which the reinsured is indemnified for loss under insurance policies issued by the reinsured to the public [internal quotation marks and citations omitted]." *Travelers Casualty and Surety Company v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 587 (2001). "Through this indemnity relationship, the reinsured seeks to 'cede' or spread its risk of loss among one or more reinsurers." *Id.*

B. Notice

Under the Certificates, "[t]he Company shall advise the Reinsurer promptly of any occurrence and any subsequent developments pertaining thereto which, in the opinion of the Company, may involve the reinsurance hereunder." Grais Aff., Ex. 6, § 3. ACE argues, however, that plaintiffs delayed in bringing the claims to ACE's knowledge, causing it to be

prejudiced.

While there is a "presumption of prejudice" which applies to late notice received by an insurer from its insured (*Unigard Security Insurance Company, Inc. v North River Insurance Company*, 79 NY2d 576, 583 [1992]), no such presumption applies to late notice of a claim between an insurer and its reinsurer. *Id.*

ACE has produced no evidence of prejudice, and is unlikely to be able, after any amount of discovery, to prove that it suffered any prejudice. Under New York law, the reinsurer must demonstrate how it was prejudiced by late notice. *Id.* Elizabeth Hinkle, ACE's witness, testified that, in the case of each primary insurer, she could not say in what way ACE would have been better off, financially or otherwise, had it received notice of the claims earlier. By producing Ms. Hinkle as a witness, ACE failed to establish that it had sustained any prejudice.

Nor has any documentary evidence been presented that would establish prejudice. In fact, ACE's insistence that further discovery might establish evidence of prejudice is rather dubious, as ACE, if anyone, should know if it was prejudiced. This evidence is simply not of the sort which is required by CPLR 3212 (f), which calls for denial of summary judgment when "facts essential to justify opposition may exist but cannot then be stated ... ." Therefore, ACE's defense of untimely notice does not defeat summary judgment.

C. "Follow the Fortune"

The "Application of Certification" set forth above delineates the "follow the fortune" doctrine, whereby the reinsurer must indemnify its reinsured, and is not in a position to "second guess" good-faith determinations made by its reinsurer to pay claims. *Travelers Casualty and Surety Company v Certain Underwriters at Lloyds of London*, 96 NY2d at 596; *see also*

Christiania General Insurance Corp. of New York v Great American Insurance Company, 979 F2d 268 (2d Cir 1992). The "follow the fortune" clause "leaves reinsurers little room to dispute the reinsured's conduct of the case." *Unigard Security Insurance Company, Inc. v North River Insurance Company*, 79 NY2d at 583.

ACE maintains that it is entitled to extensive discovery, based on the "Application of Certificate," set forth above, which, it avers, only requires ACE to reimburse plaintiff for claims that ACE is "legally obligated to pay," upon proper proof of loss. ACE is adamant that, despite the massive discovery which has so far taken place, it has not been satisfied as to these requirements. In fact, ACE has explained that "[b]efore any reinsurer should be required to pay a bill - particular bills amounting to millions of dollars - it is entitled to have an understanding of the nature of the losses and the way that the cedent determined to present the claim to the reinsurer." ACE's Memorandum of Law, at 1.

ACE errs in claiming that it needs extensive discovery as to whether it has received proper "proof of loss." Plaintiffs' loss is the monies they have been required to pay under their policies with their insureds. *See Insurance Company of State of New York v The Associated Manufacturers' Mutual Fire Insurance Corporation*, 70 App Div 69, 71 (1st Dept 1902), *affd* 174 NY 541 (1903) ("[t]he amount of the loss to be paid by the defendant was to be evidenced by the plaintiff's adjustment and payment"). There is no need to read any ambiguity into this phrase, or to apply industry standards to determine its meaning, as ACE contends. ACE's argument is, in actuality, directed at whether plaintiffs were "legally obligated to pay" the losses it seeks to recover from ACE.

The "follow the fortunes" doctrine is crafted to forestall extensive scrutiny of a cedent's

settlement by its reinsurer. "In the absence, therefore, of fraud or bad faith on the part of the plaintiff, the defendant, by the terms of its policy ... is in no position to object to the mode of adjustment as made by the plaintiff." *Id.* Therefore, ACE cannot rely on an argument that it is merely unsatisfied with the way plaintiffs comported themselves in settling the claims, but will have to show that plaintiffs acted fraudulently or in bad faith in so doing.

> To permit the reinsurer to revisit coverage issues resolved between the insurer and its insured would place insurers in the untenable position of advancing defenses in coverage contests that would be used against them by reinsurers seeking to deny coverage. Accordingly, "follow the fortunes" doctrine generally forecloses relitigation of coverage disputes ... .

North River Insurance Company v Cigna Reinsurance Company, 52 F3d 1194, 1206 (3d Cir 1995). Further, as expounded by the Court in *North River Insurance Company,* allowing reinsurers to "conduct a de novo review of [the insurer's] decision-making process" would be likely to ensure that insurers, facing intense discovery of their decision-making process by their reinsurers "would ultimately litigate every coverage issue before making any attempt at settlement." *Id.*

ACE argues that it has been denied the information necessary to establish that plaintiffs' claims have any validity, or whether they seek coverage for losses which are not covered under the Certificates, because plaintiffs have consistently refused to comply with ACE's requests for relevant information, both prior to the commencement of this litigation, or in the discovery demanded of plaintiffs in this action. ACE avers that, as a result, it cannot tell whether plaintiffs have presented valid claims after legitimate investigation, or whether they acted in bad faith in ceding their claims to ACE. ACE attempts to show that there are questions of fact as to both of these issues.

Section 1 of the Certificates provides, among other things, that plaintiffs "shall make available for inspection and place at the disposal of the Reinsurer at reasonable times any of [their] records relating to this Reinsurance or claims in connection therewith." ACE does not deny that it did not ask to review plaintiffs' files on this matter until over 30 months after the first claim was made, and did not make any demands for discovery until six months after the action was commenced. Nor do they deny that they have been furnished with over 200 boxes of material from plaintiffs, upon which plaintiffs have waived all right of privilege.[1] However, plaintiffs have not responded to certain interrogatories served upon them by ACE, and there has, as yet, been no deposition of any witness from plaintiffs' side.

ACE has failed to convince this court that further discovery is called for in the bulk of this action, as it cannot articulate just what it is looking for or why the discovery it has received is insufficient, beyond speculating that it will find evidence to defend itself.

In fact, out of painstaking perusal of the voluminous documents ACE has obtained or has had access to, ACE has identified only seven letters which it claims invite inspection into the possibility of bad faith or overreaching on plaintiffs' part. All refer to one insured, identified as Castle & Cook, Inc. (Castle-Cooke), whose claims arose from the exposure of 26,000 persons to a pesticide known as DBCP. The court finds that these letters create a factual question, albeit, a meager one, as to plaintiffs' handling of the claims paid under the Castle-Cooke policy, i.e., whether plaintiffs acted in bad faith in paying the claim, so as to defeat the "follow the fortunes" doctrine. In none of the other four cases has ACE raised any questions of fact as to why this

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[1]ACE describes this document production as "limited discovery." ACE's Memorandum of Law, at 20.

doctrine should not apply. Therefore, summary judgment is granted as to all of the other claims, which ACE is required to pay. Summary judgment is denied as to all claims arising from the Castle-Cooke policy. Plaintiffs are given leave to renew their motion for summary judgment following the end of discovery.

Settle Order.

Dated: August 4, 2006

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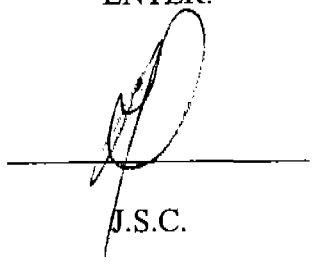

J.S.C.