IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

AEP GENERATION RESOURCES INC.et al.,	:	Case No. 18CV004317
Plaintiffs,	:	
v.	:	Judge Daniel R. Hawkins
AG INSURANCE SA/NV (f/k/a AG de Compagnie Belge and as successor to L'Etoile S.A. Belge d'Assurances), et al.,	:	
Defendants.	:	

ORDER AND ENTRY ON DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT NEW YORK LAW APPLIES TO CERTAIN POLICIES AT ISSUE

Hawkins, J.

This matter is before the Court on the motion of Defendants, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies for summary judgment that New York law applies to certain policies at issue. Plaintiffs oppose the motion. An oral argument on this motion was held on December 19, 2022. After full and careful review, this Court issues the following decision.

I. Background

In May 2018, the named Plaintiffs filed this action against numerous

Defendant insurers seeking insurance coverage under certain third-party liability insurance policies issued for the benefit of Plaintiffs by the Defendant insurance companies. *Complaint,* ¶1. Specifically, Plaintiffs seek damages arising from the Defendant insurers' breach of contract as well as an order from this Court declaring the present and future rights, duties, and liabilities of the parties pursuant to the insurance policies. *Id.* ¶2. Additionally, Plaintiffs seek an order from this Court directing the Defendant insurers to indemnify Plaintiffs for sums they are obligated to pay arising out of property damage caused by coal combustion residuals at Plaintiffs' powerplants in Ohio, West Virginia, and Virginia. This matter is currently before the Court on the motion of Certain Defendant Insurers for summary judgment that New York law applies to the certain policies at issue. Plaintiffs oppose the motion and assert that Ohio law applies.

II. Summary Judgment Standard

Under Civ.R. 56(C), summary judgment is appropriate when the moving party is entitled to judgment as a matter of law because there is no dispute of material fact. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). The party moving for summary judgment must inform the trial court of the basis for the motion and point to parts of the record that demonstrate the absence of a genuine issue of material fact, *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996), and it must do so in the manner required by Civ.R. 56(C). *Castrataro v. Urban*, 10th Dist. No. 03AP-128, 2003-Ohio-4705, ¶ 14. Once the moving party has met this burden, the non-moving party's reciprocal burden to point to parts of the record demonstrating an issue of

material fact is triggered. *Dresher* at 293. Additionally, "[s]ummary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 358-59 (1992).

III. Law and Analysis

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (collectively referred to as "LMI") argue that New York law should apply to the certain policies ("Policies") at issue in this case. Specifically, LMI argues that when LMI "severally subscribed to the Policies in favor of AEP that were in effect between 1969 and 1978 […] AEP's headquarters, place of incorporation, principal offices, and the head of insurance department were all in New York." *LMI's Partial Motion for Summary Judgment that New York Law Applies to Certain Policies at Issue,* p. 1. Additionally, LMI argues that the Policies were coextensive with all covered activities, including those that took place at AEP's headquarters in New York as well as the numerous states in which its subsidiaries operated. *Id*. p.2. Further, LMI argues that the Policies were negotiated between entities in New York, Canada, and the United Kingdom. *Id*. Lastly, LMI argues that the Policies were entered and delivered in New York.

LMI asserts that there is a conflict between New York and Ohio law and thus, a choice of law analysis must be conducted. *Id*. p.4. LMI further asserts there are two primary differences between New York and Ohio law. *Id*.

First, LMI has pled a late notice defense. *Id.* Specifically, LMI asserts if LMI is successful on the late notice defense, it would completely bar Plaintiffs' case against the insurer that did not receive timely notice. *Id.* LMI further asserts that in New York, a party is not required to show prejudice under New York law to succeed on a late notice defense. *Id.* Conversely, LMI asserts that Ohio requires a showing of prejudice to succeed. *Id.*

Second, LMI asserts that if Plaintiffs demonstrate that there are indeed covered damages under the Policies, the Court will need to determine how the damages will then be allocated amongst the parties and any periods where Plaintiffs were uninsured or self-insured. *Id.* p.5. LMI asserts that Ohio subscribes to the "all-sums" allocation standard whereas New York follows a pro-rata allocation standard. *Id.*

LMI then argues that due to the difference in Ohio law and New York law, the choice of law analysis must be conducted. *Id.*

With respect to the Section 188 principles, LMI asserts that the place of negotiation and the place of contracting point heavily to New York. *Id.* pp. 6-8. LMI further asserts that the place of performance and subject matter of the policies are "largely inconsequential" because the Policies cover liabilities in all states. *Id.* p.8. Lastly, LMI asserts that the domicile, residence, nationality, place of incorporation, and place of business of the parties point to New York since AEP was incorporated in New York and its headquarters were in New York at the time the contract was executed. *Id.* p. 10.

With respect to Section 6 principles, LMI asserts that the needs of interstate and international systems favors New York since AEP solicited the Policies from New York and the efforts to negotiate and execute the contract were conduct amongst New York and other nations. *Id*. p. 11. LMI further asserts that the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, and the protection of justified expectations also favor New York law because when the Policies were subscribed, the insured was incorporated and headquartered in New York. *Id*. LMI additionally asserts that the basic policies underlying the particular field of law is enforcement of contracts, which New York and Ohio law both mandate that insurance policies should be interpreted by their express language. *Id*. p. 12. Next, LMI asserts that certainty, predictability and uniformity of result weighs in favor of New York law because it would be predictable that New York law apply since there were "numerous relevant contacts with New York whereas there were few, if any, in Ohio. *Id*. Lastly, LMI asserts that the ease of determination and application of the law to be applied is of little import because it is built into Ohio's choice of law analysis. *Id.*

In its memo contra, Plaintiff asserts that Ohio law should apply because 1) LMI has not carried their burden of demonstrating an actual conflict of law between Ohio and New York which eliminates the need to conduct a choice of law analysis, and 2) if a conflict does exist, Ohio's choice of law analysis would result in Ohio law being applied. *AEP Plaintiffs' Opposition to LMI's Motion for Partial Summary*

Judgment that New York Law Applies to Certain Policies at Issue, p. 2.

Plaintiffs assert that under Ohio law, Ohio law controls if the two states "would use the same rule of law or would otherwise reach the same result." *Id.* p.3. citing *Fireman's Fund Ins. Co. v. Hyster-Yale Grp., Inc.,* 2019-Ohio-1522, 135 N.E.3d 499, ¶13 (8th Dist.) (emphasis added). Plaintiffs further assert that New York law does not necessarily differ from Ohio law with respect to damages allocation. *Id.* p. 4. Specifically, Plaintiff asserts that New York Courts actually apply either a pro rata allocation or an all sums allocation based upon "the particular language of the relevant policy." *Id.* quoting *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.,* 31 N.Y. 3d 51, 58-59 (2018). Stated further, policy language that restricts the insurer's liability to "all sums incurred and occurrences happening 'during the policy period' generally supports a pro rata allocation." *Keyspan Gas*, at 58-59. Plaintiffs assert that here, the Policies in question state that the LMI Policies agree to indemnify the AEP Plaintiffs for "any and all sums which they shall be legally obligated to pay… by reason of damage to or destruction of property, by reason of or resulting from any trade or business of the named Assured." *Id.*, see also LMI Ex. 1 at AEPCCRINSLIT00001068. Plaintiffs argue that the Policies do not contain the restricting language of "during the policy period," thus Ohio law and New York law would reach the same result of an all sums allocation. *Id.*

Ohio's choice of law rules "do not themselves determine the rights and liabilities of the parties, but rather guide decision as to which local rule will be

applied to determine these rights and duties." *Ohayon v. Safeco Ins. Co.,* 91 Ohio St. 3d 474 (2001) quoting 1 Restatement of the Law 2d, Conflict of Laws (1971) 3, Section 2, Comment a (3). Before engaging in any choice of law analysis, a court must first determine whether such analysis is necessary. If the competing states would use the same rule of law or would otherwise reach the same result, there is no need to make a choice of law determination because there is not conflict of law. *Craft v. W. Reserve Mut. Cas. Co., 2004 Ohio 4105, (Ohio Ct. App., Jackson County July 28, 2004)*, citing *Akro-Plastics v. Drake Indus.* (1996), 115 Ohio App.3d 221, 224. Local law applies if the party alleging that the law of a foreign jurisdiction applies fails to demonstrate a conflict between local law and the law of that jurisdiction. *Canadian Overseas Ores Ltd. v. Compania, Etc.* (S.D.N.Y. 1982), 528 F. Supp. 1337, 1339-1340, affirmed (2d. Cir. 1984), 727 F.2d 274.

The Restatement of the Law 2d, Conflict of Laws general choice of law factors are articulated in Section 6 which provides: a) the needs of the interstate and international systems, b) the relevant policies of the forum, c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, d) the protection of justified expectations, e) the basic policies underlying the particular field of law, f) certainty, predictability and uniformity of result, and g) the ease of determination and application of the law to be applied. Restatement 2d of Conflict of Laws, §6(2)(a)-(g).

In *Ohayon v. Safeco Ins. Co.,* the Ohio Supreme Court held that Ohio applies different choice of law principles to actions sounding in contract than to actions

sounding in tort. 91 Ohio St. 3d 474, 476 (2001). For actions sounding in contract, Ohio adopted Section 187 of the Restatement of Conflicts. *Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.* (1983)., 6 Ohio St. 3d 436, 438-439 6 Ohio B. Rep. at 482, 453 N.E. 2d 683. Section 187, states in pertinent part, that "the law of the state chosen by the parties to a contract will govern their contractual rights and duties." *Schulke* at 477. In the absence of such a choice, Section 188 enumerates factors that courts should consider which the Ohio Supreme Court adopted in *Gries Sports Ent., Inc. v. Modell* (1984), 15 Ohio St. 3d 284, 15 Ohio B. Rep. 417, 473 N.E. 2d 807 (syllabus). *Schulke* at 477. Section 188 factors 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, (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Gries,* at syllabus citing Section 188 of 1 Restatement of the Law 2d, Conflict of Laws, adopted and applied. Section 188 factors should be taken into account in applying the principles of Section 6 to determine the law applicable to an issue. *Morton Int'l, Inc. v. Aetna Casualty & Surety Co.,* 1991 Ohio App. LEXIS 4657, *15, (1st Dist. 1991).

Here, the parties each cite *Keyspan* to discuss New York's applicable law with respect to damages allocation. *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.,* 31 N.Y.3d 51 The LMI Defendants Insurers assert that *Keyspan* holds that under New York law, the Policies would be subject to *pro rata* allocation. *Defendants' Motion for Partial Summary Judgment*, p.5. Conversely, Plaintiffs assert that *Keyspan* holds

that New York has "not adopted a strict pro rata or all sums allocation rule." *Plaintiff's Memo contra,* p. 4. Rather, New York courts apply the pro rata allocation rule or pro rata allocation rule based upon "the particular language of the relevant insurance policy." *Id*. Further, Plaintiffs argue that in New York, policy language which restricts an insurer's liability to "all sums incurred and occurrences happening 'during the policy period' generally lends to a pro rata allocation rule. *Id.* Whereas, policy language which does not contain that limitation may "require all sums allocation." *Id*. comparing *Consolidated Edison Co. of N.Y. v. All Satte Ins. Co.,* 98 N.Y. 2d 208, 224 (2022) and *In re Viking Pump*, 27 N.Y. 3d 244, 261 (2016). Plaintiffs argue that because the Policies at issue state that the LMI Policies will indemnify the AEP Plaintiffs for "any and all sums which they shall be legally obligated to pay[…]," the limiting language is absent, therefore New York law would apply the all sums allocation rule. Thus, if both Ohio and New York would apply the all sums approach, Ohio law controls since the two states would reach the same result. *Id. see Fireman's Fund Ins. Co*., at ¶13.

Here, this Court finds that pursuant to the holdings in *Keyspan, Consolidated Edison, and In re Viking* and the language of the Policies at issue, New York law would apply the "pro rata allocation" approach since the Policy contains the limiting language. (See *Defendant LMI's Motion for Partial Summary Judgment*, Exhibit 1, AEP CCRINSLIT0001068-1069 "[t]he word 'occurrence' shall be understood to mean 'one happening or series of happenings arising out of or caused by one event taking place during the term of this contract.'" AEP CCRINSLIT0001068-1069 (emphasis

added)). Thus, the Court must now proceed to Ohio's choice of law analysis by applying the Section 6 factors with the Section 188 factors taken into account.

The Court now turns to the Section 188 principles that need to be taken into account when applying the Section 6 factors.

First, with respect to the place of contracting, the parties disagree where the place of contracting occurred. Plaintiffs assert it was London, England because the Policies at issue became "enforceable in London after payment was made by the London brokers and confirmed received by the London Policy Signing Office." *See Plaintiffs' Memorandum in Opposition*, p.13 citing Mikoni Aff., Ex. A. at 206:21-211:15. The LMI Defendants assert it was New York because Plaintiffs paid for the premiums for the Policies from a New York bank account. *Defendant LMI's Motion for Partial Summary Judgment* pp.7-8. Pursuant to the Restatement of the Law Second Conflict of Laws, "the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect." Cmt. on Subsection (2). Here, this Court finds there is no clear "last act necessary" location. Therefore, the Court finds that this element simply does not point in favor of one jurisdiction over another.

The next Section 188 principle is the place of negotiation. Plaintiffs assert the Policies were negotiated between LMI and brokers in London England. *Plaintiffs' Memorandum in Opposition*, p.13. Defendants assert the Policies were negotiated in New York, Canada, and London. *Defendant LMI's Motion for Partial Summary Judgment*, p.6. Again, the court finds there is no clear place of negotiation. Thus,

the Court will advance to the next principles.

The next two Section 188 principles are the place of performance and the subject matter of the policies. Plaintiffs argue that Ohio is the place of performance because that is where LMI must pay the AEP Plaintiffs. House Aff. at ¶11; Helfrich Aff. at ¶6. Defendants argue that the contacts are "largely inconsequential to this case because the LMI Policies cover liabilities for AEP in all states." *Defendant LMI's Partial Motion for Summary Judgment* p.8.

Here, this Court finds that Ohio is the place of performance because that is where payment is to be rendered in the event of a loss. This Court also finds that two of the CCR plants at issue, were located in Ohio, and none of the plants at issue were located in New York.

The final Section 188 Principle is the domicile, residence, nationality, place of incorporation, and place of business of the parties. The LMI Defendants assert that at the time of contracting, AEP was incorporated in New York and its headquarters were in New York. *Defendant LMI's Motion for Partial Summary Judgment*, p. 10. Plaintiffs assert that the parent company AEP, which was once headquartered in New York, is not even a party to this litigation. *Plaintiffs' Memorandum in Opposition*, p.14. Further, Plaintiffs assert that all of the AEP Plaintiffs are now headquartered in Ohio. *Id*. Lastly, the LMI Defendants have asserted no argument as to New York being their domicile, residence, nationality, place of incorporation, or place of business of the parties. *See, Defendant LMI's Motion for Partial Summary Judgment*. Thus, this Court finds the final Section 188 Principle weighs

in favor of the application of Ohio law.

With respect to the first Section 6 principle, the needs of the interstate and international systems, the Tenth Circuit Court of Appeals held that this factor seeks "to further harmonious relations between states and to facilitate commercial intercourse between them." *Hoiles v. Alioto*, 461 F.3d 1224, *12 (Tenth Circuit 2006), citing Restatement (Second) of Conflict of Laws (1971) 6 cmt. d.

Here, this Court finds that American Electric Power Company, Inc. is the entity that previously had connections to New York, however, this entity is not a named party in this lawsuit. Additionally, this Court finds that the LMI insurers were not headquartered or incorporated in New York, neither were they admitted insurers in New York. Additionally, LMI Defendant Insurer's 30(B)(5) witness testified with respect to choice of law provisions that "if a claim occurred, we would have to respond to the claim and that could be we may have to comply with whatever state law would be involved with – in connection with that claim." Plaintiffs' Memorandum in Opposition, Exhibit B, *Deposition of Peter Stringer Wilson,* Vol. II, p. 172: 19-23. Further, none of the CCR sites which are central to the litigation at issue are located in New York, while some are in Ohio. Thus, the needs of the interstate and international systems favor application of Ohio law.

Next, with respect to the second and third Section 6 factors, relevant policies of the forum, and the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the Court must consider and compare the policies of the states having an interest in the dispute.

(See *Hoiles*, *15).

With respect to the second and third factors, this Court finds that Ohio's interest as the domicile of Plaintiffs, the situs of two of the CCR plants being located in Ohio, and the place of performance in the event of a loss being Ohio overcomes New York's interest being one of the locations where the contracts were negotiated and where the bank account which paid the premiums for the Policies was located. Thus, this Court finds application of Ohio law outweighs application of New York law.

Next the Court turns to the fourth factor which is the justified expectations of the parties. Here, the LMI Defendants argue that because AEP was not headquartered in Ohio and that policies issued to companies in New York should be enforced according to its laws, the justified expectations of the parties would be that New York law applies. *LMI Defendant's Motion for Summary Judgment*, pp. 11-12. The Plaintiffs argue however, that even according to LMI's 30(B)(5) witness, "if a claim occurred, we would have to respond to the claim and that could be we may have to comply with whatever state law would be involved with – in connection with that claim." *Plaintiffs' Memorandum in Opposition,* Exhibit B, *Deposition of Peter Stringer Wilson,* Vol. II, p. 172: 19-23 and *Memorandum in Opposition*, p.15. Here, this Court finds that this factor weighs in favor of Ohio law.

With respect to the fifth factor, the basic policies underlying the particular field of law, LMI asserts that "this is of little import in this case since both New York and Ohio law mandate that insurance policies be interpreted by looking at the

express language contained therein." *LMI's Motion for Partial Summary Judgment*, p. 12. This Court agrees with the LMI Defendants with respect to the fact that although the two states may apply different rules to the policies, that does not deviate from the basic contract law tenant of following the express policy provisions. Thus, the Court will proceed to the next factor.

This Court now turns to the sixth factor: certainty, predictability, and uniformity of result. Here, the LMI Defendants argue that this factor weighs in favor of New York law because of the numerous relevant contacts with New York which would support the certainty and predictability of results. *Id*. Plaintiffs argue that the Policies at issue did not include a New York choice-of-law clause, thereby suggesting that the LMI Defendants did not place value on uniformity. *Plaintiffs Memorandum in Opposition*, p. 15. Further, Plaintiffs argue that applying Ohio law to the policies at issue would result in consistent application of one state's law versus applying multiple states laws to the same policy language. *Id*. Here, this Court finds that application of Ohio law would best support certainty, predictability and uniformity of result.

Lastly, this Court turns to the seventh factor: ease in the determination and application of law to be applied. Again, this Court agrees with Defendant LMI's argument that this factor is of little import because it is built into Ohio's overall choice of law analysis. *See LMI Defendant's Motion for Partial Summary Judgment*, p. 15.

In conclusion, this Court finds application of Ohio law to the policies at issue

outweighs application of New York law to the policies at issue in this matter.

IV. Conclusion

Based upon the foregoing, this Court finds the LMI Defendant's Motion for Partial Summary Judgment as to Choice-of-Law to not be well-taken and hereby **DENIES** the same. Ohio law shall apply to the policies at issue.

IT IS SO ORDERED.

Judge Daniel R. Hawkins

Copy via electronic notification:

All counsel of record

Franklin County Court of Common Pleas

Date: 07-12-2023

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Type: ENTRY

It Is So Ordered.

/s/ Judge Daniel R. Hawkins