SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

WT HOLDINGS INCORPORATED,

Index No.: 600925/09

Plaintiff,

– against –

DECISION/ORDER

ARGONAUT GROUP, INC.

Defendant.

Plaintiff WT Holdings, Inc. (WT Holdings) brings this action for indemnification for alleged breaches of representations and warranties made by PXRE Reinsurance Company (PXRE) in a stock purchase agreement (SPA) under which plaintiff acquired PXRE's stock. Defendant Argonaut Group, Inc. (Argonaut) was a party to the SPA and guarantor of PXRE's indemnification obligations. WT Holdings moves, pursuant to CPLR 2221 (e), for leave to renew the branch of its prior cross-motion for summary judgment regarding damages. This motion, and defendant's prior motion for summary judgment, were decided by decision and order of this Court (Fried, J., now retired), dated July 10, 2012 (prior decision).

In moving for leave to renew, plaintiff seeks to advance a new measure of damages based on purchase price or, in the alternative, to produce evidence in support of the measure of damages accepted in the prior decision by the Court. On the prior motion, plaintiff argued that it was entitled to "benefit of the bargain damages." As explained at the oral argument of the instant motion, the benefit of the bargain theory sought the difference between the value of PXRE as warranted and the actual value of PXRE. The assertedly new theory, which plaintiff

characterizes as the "purchase price theory," seeks "the difference between the price that WT Holdings paid Argonaut to purchase its subsidiary PXRE and the equitable price if Argonaut had represented the value of PXRE correctly." (Dec. 4, 2014 Oral Argument Tr. at 3.) Plaintiff further explains that the purchase price theory seeks damages "equal to the difference between the purchase price it paid for PXRE and the price it would have paid but for PXRE Corp.'s false representations and warranties." (P.'s Memo. Of Law In Supp. at 6.) The claim underlying the purchase price theory is that PXRE made representations which breached warranties, among others, that reserving practices of PXRE were conducted in accordance with accepted insurance company practices, and that liabilities were accurately stated. In particular, plaintiff claims that PXRE set case reserves for losses arising out of certain aviation reinsurance contracts for the September 11, 2001 World Trade Center attacks in an amount that was approximately $13.1 million lower than the amount of the case reserves that its reinsureds reported, resulting in a corresponding understatement of PXRE's liabilities in the amount of $13.1 million. (Id. at 2-3.) According to plaintiff, based on a formula in the SPA for calculating purchase price, if these liabilities had been accurately reported, the purchase price would have been approximately $10.5 million less than that paid by plaintiff. (Id. at 5-6.)

On the prior motion, as review of plaintiff's brief indicates, plaintiff alleged the same breaches of representations and warranties regarding the same understatement of case reserves. Only there, plaintiff sought the full $13.1 million in damages, stating: "The warranties discussed above assured WTH [WT Holdings] that every claim in PXRE's records was reflected in its reserves. In fact, $13,116,454 in September 11 aviation claims were not reflected in those reserves. As a result, PXRE's liabilities were understated by the same $13.1 million. It follows that PXRE's actual value at the time of the transaction was over $13.1 million less than its value

as warranted by Argonaut. The entire amount is recoverable as damages." (P.'s Memo. Of Law In Opp. to D.'s Motion for Summary Judgment at 34 [NYSCEF Doc. No. 71-1].) At the oral argument of the prior motion, plaintiff also articulated its so-called purchase price theory. (Jan. 10, 2012 Tr. at 24-30 [Roeber Aff. In Opp., Ex. A].)

In the prior decision, based on its interpretation of the SPA, the Court held that plaintiff was entitled to damages only under the indemnification provision – a sole remedy provision; that plaintiff had waived a cause of action for damages for breach of contract measured by the benefit of its bargain; and that plaintiff was therefore not entitled to recover damages for benefit of the bargain under the indemnification provision. The Court further held that the indemnification provision provided for indemnification of plaintiff for "Loss," as defined in the SPA, arising from any inaccuracy of representations by defendant-seller. Reasoning that the definition of Loss was "ambiguous," the Court stated that the parties "did not intend that WT would be entitled to indemnification for every loss it paid under the reinsurance contracts. Whether indemnification was only intended for losses paid in excess of case reserves on each reinsurance contract is a more reasonable construction, but neither party has established the meaning of the defined term as a matter of law." Further, the Court noted that "[e]ven if the meaning of 'liability' in the definition of 'loss' includes reserves, it would not require indemnification for 'any reserve.'" (WT Holdings, Inc. v Argonaut Group, Inc., 36 Misc 3d 1213[A], 2012 WL 2899014, * 2-4 [Index No. 600925/09, July 10, 2012].)

CPLR 2221 (d) (2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. . . ." CPLR 2221 (e) provides, in pertinent part, that a motion for leave to renew "(2) shall be based upon new facts not offered on the prior motion that would change the prior

determination. . . ; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion."

It is well settled that the purpose of a motion for leave to reargue "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application." Foley v Roche, 68 AD2d 558, 567-568 [1st Dept 1979] [internal citations omitted]; accord William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992], lv dismissed and denied 80 NY2d 1005, rearg denied 81 NY2d 782 [1993].) A motion for leave to renew must ordinarily "be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." (Foley, 68 AD2d at 568.) However, the court may, in its discretion, grant renewal "in the interest of justice, upon facts which were known to the movant at the time the original motion was made. . . . [E]ven if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness." (Tishman Constr. Corp. of New York v City of New York, 280 AD2d 374, 376-377 [1st Dept 2001] [internal citations and quotation marks omitted]; Sirico v F.G.G. Productions, Inc., 71 AD3d 429, 433 [1st Dept 2010].)

Notwithstanding plaintiff's denomination of its motion as one for renewal, the court holds that that the motion seeks reargument as to the purchase price theory. Plaintiff fails to demonstrate any material difference between the benefit of the bargain theory and the purchase price theory. Plaintiff's coining of the latter term cannot obscure the fact that both theories are

based on the difference between the value of PXRE as warranted and its actual value at the time of purchase – whether the actual value is measured by the purchase price as determined under an SPA formula, or by some other yardstick. In either event, the prior decision concluded that the indemnification provision permits recovery only of Loss as defined in the SPA, and that such definition does not include benefit of the bargain damages. To the extent that the purchase price theory is actually a new theory, its assertion violates the settled precept that a reargument motion is not a vehicle for an unsuccessful party to advance different arguments than those made on the prior motion.

On the instant motion, plaintiff also seeks to introduce evidence in support of a claim, which it characterizes as its "Excess Payments Theory," that it has paid approximately $4.3 million in excess of PXRE's pre-transaction case reserves. (P.'s Reply Memo. Of Law at 11.) Plaintiff contends that such payments qualify as Loss within the meaning of the SPA; that it did not introduce evidence of such payments on the prior summary judgment motion because it advanced only its benefit of the bargain theory; and that it did not in any event incur losses exceeding the case reserves until after the prior decision was issued. (Id. at 11-12.) This branch of the instant motion is a renewal motion to the extent it seeks to offer new evidence. However, it ignores the finding in the prior decision that the term Loss is ambiguous. Plaintiff thus in effect seeks reargument to the extent that it requests a determination that the term Loss includes plaintiff's post-closing payment of claims in excess of PXRE's pre-transaction reserves. (See P.'s Reply Memo. at 13-14 [in connection with its excess payments theory, requesting a determination of "the proper measure of WT Holdings' indemnifiable 'Losses'" [emphasis plaintiff's].) Moreover, plaintiff does not make any showing as to the particular excess payments that plaintiff made, and as to why they are recoverable as Loss. Rather, although it is the

uniform practice for the movant on a renewal motion to adduce the new evidence that the movant seeks to have considered in the event renewal is granted, plaintiff inexplicably takes the position that it will produce the evidence in the event renewal is granted.

Plaintiff also apparently seeks leave to serve a separate motion to reargue the prior motion insofar as it resulted in the Court's rejection in the prior decision of benefit of the bargain damages. (P.'s Memo. Of Law in Supp. at 9-10.) The court declines to grant leave to reargue for the purpose of reconsidering the measure of damages under the SPA.[1] Plaintiff does not undertake any analysis of the various provisions affecting the interpretation of the defined term Loss, and does not make any showing as to why the court erred in making the prior finding that the term Loss does not include benefit of the bargain damages. Plaintiff's reliance on Matter of Westmoreland v Entech, Inc. (100 NY2d 352 [2003]) in support of its request for leave to serve another reargument motion is misplaced. Westmoreland involved an indemnification provision which, like that at issue here, provided for indemnification of liabilities or losses arising out of breaches of representations and warranties contained in a stock purchase agreement. The Court held that the indemnification provision covered breaches of specific representations regarding a methodology applied in calculating net asset value (i.e., representations concerning preparation of a closing date certificate and schedules in accordance with GAAP). This case does not support the contention that the indemnification provision authorizes a wholesale recalculation of purchase price without regard to the specific representations that were allegedly breached.

Plaintiff, represented by new counsel, in effect seeks to re-litigate the prior motion.

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[1] This holding is not based on the law of the case doctrine which prohibits a judge from modifying a ruling on the merits made by a judge of coordinate jurisdiction. (Martin v City of Cohoes, 37 NY2d 162, 165 [1975].) Here, the court assumed Justice Fried's docket upon his retirement, and "'[e]very court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made.'" (Wells Fargo Bank, N.A. v Zurich Am. Ins. Co., 59 AD3d 333, 335 [1st Dept 2009], lv denied 12 NY3d 713 [2009], quoting Aridas v Caserta, 41 NY2d 1059, 1061 [1977] [other internal citations omitted].)

Although counsel may disagree with prior counsel's litigation strategy, reargument does not lie on that basis.

It is accordingly hereby ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
March 3, 2015

MARCY FRIEDMAN, J.S.C.