R&Q Reinsurance Co. v Allianz Ins. Co.
2017 NY Slip Op 31516(U)
July 17, 2017
Supreme Court, New York County
Docket Number: 653744/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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R&Q REINSURANCE COMPANY,

Plaintiff, Index No.: 653744/2014

-against- Mot. Seq. No. 002

ALLIANZ INSURANCE COMPANY,

Defendant.

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SALIANN SCARPULLA, J.S.C.:

Defendant Allianz Global Risks US Insurance Company, successor-in-interest to, and sued herein as, Allianz Insurance Company ("Allianz"), moves, pursuant to CPLR §327 (a), to dismiss plaintiff R&Q Reinsurance Company's ("R&Q") amended complaint based on *forum non conveniens*.

R&Q, formerly known as INA Reinsurance Company ("INA"), is a Pennsylvania corporation with a principal place of business in Philadelphia, PA. Allianz is an Illinois corporation, with a principal place of business in Chicago, IL. Both companies are licensed to do business in the State of New York.

Between January 1, 1982 and January 1, 1984, Allianz provided excess umbrella insurance coverage to Kentile Floors, Inc. ("Kentile"), a New York corporation that made flooring products via a manufacturing process that included asbestos. Allianz issued two umbrella policies, one for 1982 and one for 1983, each with a limit of $5,000,000 per occurrence for "sums paid as damages in settlement of a claim or in satisfaction of a judgment for which [Kentile] is legally liable . . . includ[ing] investigation, adjustment,

appraisal, appeal and defense costs paid or incurred by [Kentile]." Allianz's underwriter, Kentile's retail insurance broker, Johnson & Higgins ("J&H"), and Kentile's wholesale insurance broker, Stewart Smith East Inc. ("Stewart"), were all located in New York during the negotiation and issuance of both policies.

As part of its coverage, Allianz solicited INA, through Allianz's reinsurance broker, Guy Carpenter and Company ("Guy Carpenter"), to reinsure Allianz's umbrella policies issued to Kentile. Reinsurance, as defined by R&Q, "is a means by which policy holding insurance companies transfer the risk of loss associated with its policies to other insurance or reinsurance companies in exchange for" a portion of the underlying premiums paid to the insurer.

At the time Allianz and INA were negotiating, R&Q alleges that at least one of the Allianz underwriters involved with the negotiations was located in New York. Allianz allegedly knew that Kentile used asbestos in its manufacturing process, and that asbestos related claims had been asserted against Kentile. Allianz failed to disclose either of these facts at the time INA agreed to reinsure its policies, and INA allegedly was "otherwise unaware" of these facts. Kentile's use of asbestos, and the existence of asbestos lawsuits against it, "substantially increased the insurance risk that Kentile presented," due to "potential exposure for loss or damage arising from exposure to asbestos."

INA ultimately entered into a reinsurance contract, or certificate, with Allianz for 1982, for coverage up to a maximum of $2,000,000. The certificate was issued to "[Allianz], c/o [Guy Carpenter], 110 William Street, New York, New York 10038," and countersigned at INA's New York office. INA and Allianz entered into a similar certificate in New York in 1983. R&Q alleges that, prior to entering into the 1983 certificate, INA's underwriter asked Allianz if Kentile had any asbestos exposure; Allianz said it did not.

Plaintiff alleges that "[t]housands of individuals have asserted, and continue to assert, claims against Kentile alleging injury from exposure to asbestos. These lawsuits exhausted Kentile's primary policy, and R&Q alleges that Allianz has paid Kentile under various umbrella policies, including the 1982 and 1983 policies. R&Q further alleges that, by 2006, Allianz had billed R&Q for the maximum coverage limit of $2,000,000 under the 1982 certificate, and $2,000,000 under the 1983 certificate. R&Q paid in full under the certificates.

On June 21, 2012, Allianz and Kentile entered into a settlement agreement, under which Allianz paid Kentile an additional $5,500,000 to resolve all of its remaining obligations to Kentile under all of the umbrella policies. Part of that payment was allocated to the 1982 and 1983 umbrella policies, which, when combined with previous

payments that had been made, exceeded the $5,000,000 net loss coverage limits for those policies.

R&Q alleges that, later that year, Allianz billed it for further amounts paid to Kentile and allocated to the 1982 and 1983 umbrella policies. These bills exceeded the coverage limits for the 1982 and 1983 certificates. Notwithstanding the coverage limits, on April 12, 2013, R&Q paid Allianz $44,588.12 under the 1982 certificate, and $44,585.49 under the 1983 certificate. At that time, R&Q was still unaware of Allianz's prior knowledge regarding Kentile's asbestos exposure at the time R&Q agreed to reinsure Allianz's policies. R&Q alleges that it only discovered Allianz's alleged concealment and misrepresentations during discovery in this action, sometime around May 29, 2015.

R&Q commenced this action on December 5, 2014. The complaint states causes of action for breach of contract, unjust enrichment, restitution, and money had and received, and R&Q seeks a declaratory judgment capping R&Q's liability under the 1982 and 1983 certificates at $4,000,000. On January 8, 2015, Allianz answered and interposed two counterclaims against R&Q for breach of contract and for a declaratory judgment that R&Q's liability under the 1982 and 1983 certificates was not capped at $4,000,000.

On January 9, 2015, Allianz removed this action to the United States District Court for the Southern District of New York, Case No. 15-cv-00166 LGS. According to R&Q's counsel, on March 4, 2015, the parties appeared for an initial conference before the federal court during which the court inquired as to whether venue in the Southern District was proper. In response, the parties stated that there were no venue issues. On March 20, 2015, the federal court remanded the action back to this court, holding that by filing counterclaims against R&Q in its answer, Allianz had forfeited its right to remove the action from state court.

The parties appeared before this court for a preliminary conference on May 6, 2015, and thereafter engaged in discovery. To date, R&Q has produced 9,765 pages of documents, and Allianz has produced more than 100,000 pages of documents, all in New York. During discovery, R&Q claims that it learned of Allianz's prior knowledge of Kentile's asbestos exposure, as well as other potential issues with the certificates.

After attempting and failing to obtain Allianz's consent to file an amended complaint, R&Q sought and obtained this court's leave to file an amended complaint. The court deemed the amended complaint filed as of January 28, 2016. The amended complaint alleges six cause of action: 1) fraudulent concealment/intentional misrepresentation; 2) breach of contract; 3) unjust enrichment, restitution, and money had and received; 4) a declaratory judgment capping R&Q's liability under the 1982 and 1983

certificates at $4,000,000 total; 5) "no valid contract"; and 6) breach of contract for failure to pay premiums under the 1983 certificate.

On January 29, 2016, more than a year after R&Q commenced this action, Allianz commenced an action against R&Q in California Superior Court (the "California action"). Allianz asserted, as causes of action, the two counterclaims that Allianz filed in this action.

R&Q moved to dismiss or stay the California action "on the basis of inconvenient forum." On March 30, 2016, the court in the California action granted R&Q's motion and stayed the California action finding that "New York is a suitable alternate forum for this action as both of the parties are part of a breach of contract action currently pending in New York." The court also found that there was a substantial nexus between New York and the underlying reinsurance transactions, as all of the underwriters and brokers were located in New York, the underlying policies were issued to a New York corporation at its New York address, and, "Allianz was apparently willing to produce its witnesses in New York, when it availed itself of the New York state court's jurisdiction by filing its counterclaims against R&Q in the New York action."

Further, the court in the California action stated that the fact that Allianz filed counterclaims and produced documents in New York suggested that Allianz "was able to accommodate the New York forum." Finally, Allianz failed to "set forth any strong

public interest rationales for having the action heard in California, other than the fact that [Allianz's] residence and principal place of business was in California at the time the contracts were originally executed over 25 years ago."

Meanwhile, on February 2, 2016, Allianz once again removed this action to the Southern District of New York, Case No. 16-cv-00794. On September 6, 2016, the federal court remanded the action back to this court, holding that R&Q's amended complaint did not revive Allianz's right of removal. Allianz then filed an answer to the amended complaint, and re-asserted its two previously-filed counterclaims. Allianz now moves, pursuant to CPLR § 327 (a), to dismiss the amended complaint based on *forum non conveniens*.

Discussion

Under CPLR § 327 (a), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." The applicability of the *forum non conveniens* doctrine "is a matter of discretion to be exercised by the trial court and the Appellate Division." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 (1984).

A defendant challenging the forum has the burden "to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after

considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not." *Id.* at 479. Factors a court must weigh on a motion to dismiss based on *forum non conveniens* include "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling." *Prestige Brands, Inc. v. Hogan & Hartson, LLP*, 65 A.D.3d 1028, 1029 (2d Dept. 2009) (internal quotation marks and citations omitted). If the court finds that a substantial nexus exists between New York and the underlying transactions, a plaintiff's choice of forum will not be disturbed unless the above factors weigh "strongly in favor of the defendant." *Anagnostou v. Stifel*, 204 A.D.2d 61, 61 (1st Dept. 1994) (internal quotation marks and citations omitted).

Allianz argues that several of the *forum non conveniens* factors weigh in its favor. First, Allianz asserts that both parties are foreign corporate entities, inasmuch as R&Q and Allianz are incorporated, respectively, in Pennsylvania and Illinois. Allianz further argues that most witnesses and documents will be located outside of New York. As a result, Allianz claims, it will be burdensome to litigate this case in New York and will create a hardship for key potential witnesses living in California, Pennsylvania, and Washington.

Allianz argues that the acts giving rise to the complaint, i.e., Allianz's alleged fraudulent conduct, the transactions between the parties, and the acceptance of the certificates, occurred in California, and California law will govern the case. Finally, Allianz says, California is an adequate alternative forum to try this case, whereas it would be a burden on this court to do so.

In opposition, R&Q argues that none of the *forum non conveniens* factors weigh in Allianz's favor. As an initial matter, R&Q points out that the California action already deemed New York an appropriate forum in which to try this case. Further, because the underlying insured and all of the relevant players in the reinsurance transactions were located in New York, there is a substantial nexus between the reinsurance transactions and New York. R&Q also notes that Allianz itself represented to the federal court that there was no venue problem in the Southern District.

Next, R&Q states that Allianz is not burdened by litigating in New York, as it has already availed itself of New York's jurisdiction by filing counterclaims in New York, and producing thousands of documents in New York. Finally, R&Q says that because Allianz is a major corporation, with ample resources, it will not be significantly inconvenienced by having to litigate in New York.

Here, the facts, as set forth in the complaint and supplemental materials, show a substantial nexus between New York and the underlying reinsurance transactions. All the

relevant party employees, as well as the insurance brokers for both parties and Kentile, were located in New York at the time of the transactions. Indeed, Kentile itself, the underlying insured under Allianz's policies, was a New York corporation, and the underlying coverage action concerning Kentile was litigated in New York. Moreover, the reinsurance policies were also negotiated, brokered, issued, and delivered in New York. *See Continental Ins. Co. v. Garlock Sealing Tech., LLC*, 23 A.D.3d 287, 288 (1st Dept. 2005) (finding that the record shows "there is a substantial nexus between this action and New York, five of the insurance policies at issue having been issued, negotiated, brokered and paid for here"). In addition, Allianz's alleged misrepresentation to INA, that Kentile had no asbestos exposure, was made in New York.[1]

With regard to the parties' domicile, the fact that neither party is a resident of New York is not dispositive; "a defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident." *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 287 (1st Dept. 2006) (citations omitted). Allianz's reliance on *Economos v Zizikas* (18 A.D.3d 392, 394 (1st Dept. 2005), is unavailing, as the plaintiff therein engaged in "blatant forum shopping," where the case had only a transitory connection to New York. *Id.* at 394. Further, neither party is a resident of California, Allianz's

[1] While Allianz alleges that the underlying transactions in this case should be considered to have occurred in California, on a motion to dismiss based on *forum non conveniens*, the court must take the facts alleged by R&Q as true. *See Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 579 (1980).

proposed alternate forum. Thus, the factor of the parties' domicile does not weigh in favor of dismissal on *forum non conveniens* grounds.

Additionally, Allianz has failed to demonstrate that litigating this action in New York would be unduly burdensome based on the location of the documents. Indeed, "[w]here the parties have engaged in substantial pretrial discovery and invested a great deal of valuable time and resources, the presumption against dismissal on the basis of forum non conveniens greatly increases." *Intertec Contr. v. Turner Steiner Intl.*, 6 A.D.3d 1, 5 (1st Dept. 2004). Here, more than 100,000 pages of relevant documents have been produced in New York since this action was commenced two years ago.

As to the location of witnesses, assuming, arguendo, that none of the parties' potential witnesses are currently located in New York, it would be just as inconvenient for R&Q's witnesses from Pennsylvania to have to travel to California, as it would be for Allianz's witnesses from California to travel to New York. Both parties belong to large, multi-national conglomerates, and thus have ample resources to bring potential witnesses to New York. *See Intertec Contr.*, 6 A.D.3d at 6 ("Furthermore, any hardship to either plaintiffs or defendants in bringing potential witnesses into New York would be minimal since they are both large multinational corporations with ample resources"). The cases cited by Allianz are not to the contrary, as the relevant witnesses and documents in those cases were located substantially farther from New York, and in different countries. *See,*

e.g. Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd., 9 A.D.3d 171, 178 (1st Dept. 2004) (relevant documents were located in India, and any witnesses were located overseas). Thus, potential hardship to witnesses does not weigh in Allianz's favor.

By its own actions, Allianz demonstrated that New York is not an inconvenient forum. On two occasions, Allianz has availed itself of the jurisdiction of the New York courts by filing counterclaims in response to R&Q's initial and amended complaints. After removing the case to the Southern District the first time, Allianz allegedly represented in open court that there was no venue problem in the Southern District.[2] Additionally, the court in the California action, performing a similar analysis to that herein, determined that New York is an adequate forum for this dispute, and that Allianz failed to demonstrate what interest California had in trying the case. *See also Seneca Ins. Co.*, 269 A.D.2d at 275 ("plaintiffs can readily establish that California is a less convenient forum, the California court having found New York to be the more convenient forum").

Finally, as to the applicable law, assuming, arguendo, that Allianz is correct, and California law would apply to interpret the certificates, New York courts frequently interpret and apply the laws of other jurisdictions. *See Continental Ins. Co.*, 23 A.D.3d at 288 ("New York courts would be perfectly capable of and would not be unduly burdened

[2] See Affirmation of Bruce M. Friedman, ¶ 7).

by applying [another state's] law, should the need arise.") Thus, the potential for the applicability of California law does not weigh in favor of a forum change.

Allianz's remaining contentions are unavailing.

In balancing the factors discussed above, I find that the Allianz has not met its burden of demonstrating that New York is an inconvenient forum. I therefore deny Allianz's motion to dismiss the amended complaint based on *forum non conveniens*.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Allianz Global Risks US Insurance Company, successor-in-interest to, and sued herein as, Allianz Insurance Company, to dismiss the complaint pursuant to CPLR § 327 (a) is denied.

This constitutes the decision and order of this Court.

7/17/17
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER		
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
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