

Dominion Fin. Corp. v Asset Indem. Corp.

2008 NY Slip Op 31812(U)

June 24, 2008

Supreme Court, New York County

Docket Number: 0600096/2007

Judge: Emily Jane Goodman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT

EMILY JANE GOODMAN

PART 17

Index Number : 600096/2007

DOMINION FINANCIAL

VS.

ASSET INDEMNITY BROKERAGE

SEQUENCE NUMBER : # 001

DISMISS

Justice

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

to be 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

to be dismissed

decided as attached

FILED JUN 30 2008 COUNTY CLERKS OFFICE NEW YORK

Dated:

6/24/08

[Signature]

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
DOMINION FINANCIAL CORP.,

Plaintiff,

Index No. 600096/07

-against-

ASSET INDEMNITY CORP.,

Defendant.

-----x
Emily Jane Goodman, J.:

This is an action for negligence by plaintiff Dominion Financial Corporation (Dominion) against defendant Asset Indemnity Corporation (Asset Indemnity), arising from defendant's alleged failure to properly place insurance coverage on behalf of plaintiff. Defendant moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the Complaint. In the alternative, defendant seeks leave to file and serve an Amended Answer and to compel discovery. Defendant also seeks an order disqualifying plaintiff's counsel. Plaintiff cross-moves, pursuant to CPLR 3025(b), for permission to file and serve an Amended Complaint.

The Complaint alleges that in December of 2003, Dominion was approached by non-parties Eric and Ian Brown, who wanted to borrow \$2 million to finance the operations of their parking garage business. Dominion eventually made loans to three corporate entities that owned the leases for the garages in question (Borrowers). The Complaint states that the parties agreed that each

of the Borrowers would engage an affiliated company, FB Acquisition Corporation (FB), to operate the three garages and make the scheduled payments directly to Dominion.

Dominion states that it required that a third-party be engaged to secure the funds that it was lending to the Borrowers. It alleges that FB and/or Eric Brown engaged Asset Indemnity to assist FB in procuring surety coverage. On January 30, 2004, non-party United Assurance issued three surety bonds to Dominion to secure the monies lent by Dominion to the Borrowers.

In November of 2005, Dominion commenced a suit against United Assurance in the United States District Court for the Southern District of New York. Dominion alleged that United Assurance had breached its obligations under the surety bonds by failing to make certain payments due to Dominion arising from certain defaults by FB several months earlier in 2005.

Dominion states that United Assurance failed to post a bond as required by the District Court. On August 29, 2006, a default judgment was entered against United Assurance for \$2 million. However, Dominion asserts that it was not able to recover the money and now asserts that United Assurance has no appreciable assets.

On November 3, 2006, FB Acquisition executed a written agreement whereby it assigned any claims it had against Asset Indemnity to Dominion. Dominion then commenced the instant action

in January of 2007, asserting two claims for negligence against Asset Indemnity. The first cause of action is a direct claim for negligence. The second cause of action is asserted pursuant to the assignment from FB.

The gravamen of the Complaint is that, in placing the coverage, Asset Indemnity failed to properly investigate United Assurance's solvency, as well as its management and claims practices. Asset Indemnity also allegedly failed to confirm that United Assurance maintained funds in trust for the benefit of its insureds and failed to ensure that United Assurance was eligible under New York law to provide excess-line coverage.

Asset Indemnity now moves to dismiss the Complaint for failure to state a cause of action. It argues that Dominion cannot assert a claim for negligence because the parties were not in privity of contract. As such, it argues that it had no duty to Dominion which would support a claim for negligence.

In general, the duty of an insurance broker runs to its customer and not to third-parties with whom there is no privity of contract. See, Dezer Properties II, LLC v Kaye Ins Associates, Inc, 38 AD3d 213 [1st Dept 2007]; Merchants Ins Co of New Hampshire, Inc v The Gage Agency, Inc, 21 AD3d 1332 [4th Dept 2005]; Arredondo v City of New York, 6 AD3d 328 [1st Dept 2004]. Here, it is undisputed that Dominion and Asset Indemnity were not in privity

since it was FB that hired Asset Indemnity, not Dominion. As such, Asset Indemnity's duty was to its client, FB, not to Dominion. Therefore, the first cause of action for negligence is dismissed.

The second cause of action is also for negligence. However, that claim is asserted by Dominion as the assignee of FB, which was in privity of contract with Asset Indemnity. As such, Asset Indemnity has not demonstrated that this claim should be dismissed for lack of privity.

Asset Indemnity argues that Dominion has no rights to assert under the surety bonds because it assigned those bonds to its then lender, Valley National Bank, in 2004. However, at most, Asset Indemnity has demonstrated that Dominion assigned the bonds as collateral in connection with a loan from Valley National Bank. It has not demonstrated that the assignment was absolute or otherwise deprived Dominion of the right to pursue claims under the bonds. See, Agristor Leasing v Barlow, 180 AD2d 899, 900 [3d Dept 1992], citing Southern Associates, Inc v United Brands Co, 67 AD2d 199 [1st Dept 1979]; Fifty States Management Corp v Pioneer Auto Parks, 44 AD2d 887 [4th Dept 1974].

Dominion cross-moves for permission to file and serve an Amended Complaint, asserting two additional causes of action. "While CPLR 3025 provides that leave to amend a pleading shall be freely granted, leave to amend is not to be granted upon the mere

request of a party without a proper basis." Morgan v Prospect Park Associates Holdings, LP, 251 AD2d 306 [2d Dept 1998], citing Wieder v Skala, 168 AD2d 355 [1st Dept 1990]. "In determining whether to grant leave, a court must examine the underlying merit of the proposed claims, since to do otherwise would be wasteful of judicial resources." Id, citing McKiernan v McKiernan, 207 AD2d 825 [2d Dept 1994]; see, Toscano v Toscano, 302 AD2d 453 [2d Dept 2003].

Dominion's first proposed new claim, for breach of contract, alleges that Dominion was a third-party beneficiary of the agreement between Asset Indemnity and FB to procure surety coverage for Dominion. "A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.'" State of California Public Employees' Retirement System v Shearman & Sterling, 95 NY2d 427, 434-35 [2000], quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336 [1983]; see Edge Management Consulting, Inc. v Blank, 25 AD3d 364 [1st Dept 2006].

Here, the proposed Amended Complaint adequately alleges that

Dominion was an intended third-party beneficiary of the agreement between Asset Indemnity and FB to procure surety coverage for Dominion. Among other things, Dominion submits an affidavit from Eric Brown, who states that FB contracted with Asset Indemnity for the specific purpose of procuring some type of third party security for Dominion. He states that he expressly told Asset Indemnity's principal that the security was being sought for Dominion's benefit. He also states that he participated in a three person conference call with Asset Indemnity's principal and Dominion's principal to discuss how best to structure the transaction so as to provide such surety coverage for Dominion. Brown also asserts that Asset Indemnity sent United Assurance's financial statements directly to Dominion. Based on these factors, the court finds that Dominion has adequately alleged a claim for breach of contract as a third party beneficiary of the contract between FB and Asset Indemnity.

Dominion's second proposed claim is also for breach of contract, which Dominion asserts in FB's name, pursuant to FB's assignment of its rights to Dominion on November 3, 2006. Based on that assignment, the court finds that Dominion's second proposed claim is also adequately pleaded.¹

¹ The court notes that Asset Indemnity raised certain additional arguments in support of its motion to dismiss the Complaint, based on additional affirmative defenses set forth in its proposed Amended Answer. As permission to serve had not

Finally, Asset Indemnity seeks an order disqualifying Donald Rosenthal from acting as the attorney for Dominion. Asset Indemnity asserts that Mr. Rosenthal may eventually be required to testify on the issue of late notice, ie whether Dominion was late in notifying United Assurance of the defaults under the bonds.² Asset Indemnity states that if Mr. Rosenthal was responsible for such late notification, then his interests may be adverse to those of his client.

The motion to disqualify is denied. At this point, it is not clear whether Mr. Rosenthal will be needed to testify in this action or whether his interests will be adverse to those of Dominion. Therefore, Asset Indemnity has not demonstrated that disqualification is warranted. See, S&S Hotel Ventures Ltd Partnership v 777 SH Corp, 69 NY2d 437 [1987]. Accordingly, it is

ORDERED that defendant's motion to dismiss the Complaint is granted as to the first cause of action and that cause of action is dismissed and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion to amend the Complaint is granted; and it is further

previously been granted, the arguments were raised prematurely. As the court has granted leave to serve an Amended Complaint, defendant may now serve its Amended Answer as of right.

²Asset Indemnity asserts that the original Complaint should be dismissed because Dominion was late in providing notice of the defaults to United Assurance. However, factual questions exist which preclude dismissal on those grounds.

ORDERED that plaintiff shall serve the Amended Complaint, in the form annexed to the moving papers, upon defendant within 20 days of receipt of a copy of this Decision and Order; and it is further

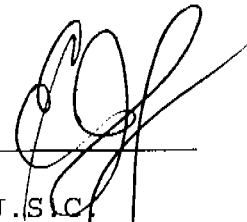
ORDERED that defendant shall serve its Amended Answer within 20 days after receipt of the Amended Complaint; and it is further

ORDERED that, in the discretion of the Court, and in light of the fact that discovery has now been substantially delayed, the automatic stay of discovery, provided in the CPLR, shall not apply if either party files a motion for summary judgment.³

This Constitutes the Decision and Order of the Court.

DATED: June 24, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JUN 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

³Although the Court did not reach Asset Indemnity's arguments concerning its additional affirmative defenses set forth in its proposed Amended Answer, it is aware of those arguments (and Dominion's counter-arguments), and has concluded that, absent agreement of the parties, discovery should continue, even if a motion for summary judgment is filed.