

Certain Underwriting Members of Lloyd's, London v Navigators Mgt. Co., Inc.
2011 NY Slip Op 34279(U)
October 25, 2011
Supreme Court, New York County
Docket Number: 651817/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

CERTAIN UNDERWRITING MEMBERS OF LLOYD'S, LONDON,

Plaintiffs,

-against-

NAVIGATORS MANAGEMENT COMPANY, INC., (f/k/a New York Marine Managers, Inc.),

Defendant.

INDEX NO. 651817/2010

MOTION DATE Oct. 4, 2011

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1-4

5-7

8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: October 25, 2011

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 49**

-----X
**CERTAIN UNDERWRITING MEMBERS OF
LLOYD’S, LONDON,**

Plaintiffs,

-against-

**NAVIGATORS MANAGEMENT COMPANY, INC.,
(f/k/a New York Marine Managers, Inc.),**

Defendant.
-----X

**DECISION AND
ORDER**

Index No. 651817/2010

O. PETER SHERWOOD, J.:

I. Overview

On motion sequence 001, defendant, Navigators Management Company, Inc. (“Navigators”), moves for summary judgment on all claims brought against it. The causes of action are for breach of contract, unjust enrichment, breach of good faith and fair dealing, and money had and received. Plaintiffs, Certain Underwriting Member of Lloyd’s London (“Lloyd’s”), cross-move for summary judgment on their breach of contract claims (first through third causes of action) and, in the alternative, to amend the complaint should the court find that Lloyd’s lacks standing to sue. On motion sequence 002, Navigators moves to strike evidence it asserts is inadmissible communications of settlement discussions between the parties.

II. Background

The essential facts are not in dispute. Lloyd’s wrote reinsurance agreements (referred to as “Treaties”) with insurers. It entered into three reinsurance treaties with Navigators pursuant to which Lloyd’s agreed to reimburse Navigators in the amount of the reinsured losses Navigators incurred as a result of catastrophic events, including acts of terrorism. As a result of the bombing of Pan Am Flight 103 (“Flight 103”) on December 21, 1988 and an explosion on the Piper Alpha oil production

platform (“Piper Alpha”) on July 6, 1988, Lloyd’s paid Navigators tens of millions of dollars in reinsurance claims.

The Treaties provided that a proportionate share of any subrogation recovery Navigators obtained be paid to Lloyd’s. The Treaties have no explicit provision regarding whether interest would be required if Navigators delayed payment of subrogation recoveries. Navigators obtained substantial subrogation recoveries in 2002, 2003, and 2005 but failed to reimburse Lloyd’s until September 2009, after Lloyd’s made demands therefor. Navigators received subrogation recoveries with respect to the Piper Alpha loss in 2002 and 2003. It received subrogation recoveries relating to the Flight 103 loss in 2005. In January 2009, Navigators advised Lloyd’s of the Piper Alpha recoveries and in August 2009, admitted it had received recoveries relating to Flight 103. Payment of the principal owed was made in September 2009.

Beginning in the Spring of 2009, Lloyd’s made repeated demands of representatives of Navigators for payment of interest on the recoveries withheld (*see* Affidavit of Collum Duncan, ¶4). Navigators declined to agree or acknowledge that any interest was due despite its unexplained multi-year delay of payment (*see id.*). On October 15, 2009, Navigators declared that “no interest is due or owing” and flatly refused to make any interest payments (*see* Lloyd’s Rule 19-a Statement, ¶19). Lloyd’s commenced this litigation on October 22, 2010. The amount of interest claimed exceeds \$4 million.

III. Standard of Review

To succeed on a motion for summary judgment, a movant must establish its claim or defense “sufficiently to warrant the court as a matter of law in directing judgment” (CPLR §3212[b]), and it “must do so by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]). To defeat a motion for summary judgment, the opposing party must “show facts sufficient to require a trial for any issue of fact” (CPLR 3212 [b]). “The 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 from the case.” (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent “has met its burden, it is incumbent upon [the opposing party] to establish, by admissible evidence, that a triable issue of fact exists” (*SCP Inc. v Bermuda Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]).

IV. Discussion

The issues in this case are straightforward: a) whether Lloyd’s has standing to sue; b) whether in the absence of a contractual or statutory right, there is an entitlement to interest and c) assuming Lloyd’s had such a right, whether they waived it when they accepted tender of the principal apart from interest. Navigators owed Lloyd’s money, but purposefully delayed making payment for years. Lloyd’s now wants interest reflecting the time the money was withheld. Navigators refuse to pay any interest.

A. Standing to Sue

As to the standing defense, Navigators asserts that effective June 30, 2009, Lloyd’s transferred to Equitas Insurance Limited (“Equitas”) its “1992 and prior non-life business” including the right to bring the suit at issue here. In Navigators’ view, only Equitas has standing to sue. The defense lacks merit. As Lloyd’s note, a High Court in London has declared in a Transfer Order relating to the Equitas transaction, that:

The transfer effected by the scheme, even if sanctioned by this court, will not be recognized or enforced in the courts of the USA unless and until a formal application is made by Equitas to a US court, in which event recognition will be a matter for determination of that court.

Equitas has made no such application, and thus, according to Lloyd's, the Transfer is not recognized in the United States.

Even if the Transfer were recognized in the United States, the Transfer would not preclude the right of Lloyd's to bring this lawsuit. The Transfer Order provides for Lloyd's to transfer assets "subject to all encumbrances (if any) affecting the Transferring Assets." (Aff'd of Randi Ellias, Ex. B, p. 2). Schedule 2 of the Transfer Order defines encumbrance as "any...third party right or interest, and any other type of preferential arrangement," including the right to sue in subrogation (*id*, Schedule 2, p.6). Consequently, Equitas took subject to the encumbrance and did not receive in the Transfer Order any right to bring this lawsuit.

B. Interest Claim

Navigators next argues that Lloyd's has no right to interest and that, even if they did, they waived that right when, in 2009, they accepted the subrogation recoveries without also receiving the interest claimed. Under the terms of the Reinsurance Treaty pursuant to which Lloyd's paid claims relating to the Flight 103 loss, Navigators is obligated to give an accounting within three months of the close of the quarter in which recoveries are received and to pay to Lloyd's their proportionate share of such recoveries within two months thereafter. As to the Reinsurance Treaties pursuant to which losses relating to the Piper Alpha explosion were paid, an accounting was required to be given within 45 days of the close of the quarter in which recoveries are received and payment made within 45 days thereafter. Navigators breached the contracts by failing to provide the required accountings in a timely fashion and failing to make payments promptly.

In New York, if a party to a contract breaches an obligation to make payment upon a fixed date, the adversely affected party is entitled to interest as damages for that breach (*see* Restatement

(Second) of Contracts §354 cmt. c [1979]; *Parkway Windows, Inc. v River Tower Assoc.*, 108 AD2d 660, 665 [1st Dept 1985]). Interest is in the nature of damages for withholding money that is due (*see TIG Insurance Co. v Newmont Mining Corp.*, 2005 WL 2446234*8[SDNY, October 4, 2005]). However, where the plaintiff accepted a late payment, knowing it was late, and without reserving its right to collect interest, it loses the right to claim interest (*see Shephard v City of New York*, 216 NY 251, 256-57 [1915][right to interest lost where “acceptance [of principal] was unconditional or without any suggestion of a future claim to interest”]).

In this case, Lloyd’s demanded payment of interest on the principal due both prior to and after it received payment of principal.¹ Having made the demand, Lloyd’s were entitled to retain the principal and thereafter assert a claim for unpaid interest as damages arising from the unreasonable delay of payment of their proportionate share of the subrogation sums recovered. The decision of the New York Court of Appeals in *Crane v Craig*, 230 NY 452 (1921) which held that “where the interest is not payable by the terms of the contract...the receipt of the principal bars a subsequent claim for interest” is not applicable here. In *Crane*, plaintiff had been awarded the principal sum

¹Documentary proof of these demands appear in email communications most of which were sent or received by Callum Duncan, a Navigators employee. In motion sequence number 002, Navigators has moved to strike evidence of the demands from the record pursuant to CPLR 4547 on the grounds that the emails are inadmissible evidence of settlement discussions. The rule of exclusion is applicable only when the evidence is being offered as proof of the claim or its amount and further only when the statements were made during negotiations aimed at compromising the dispute. Pre-dispute communications made outside the negotiation context (even if later repeated in a negotiation) do not fall within the exclusionary rule (*see* CPLR 4547; Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4547). None of these conditions are present here. The documents Navigators seeks to exclude were not offered for either of the purposes to which CPLR 4547 applies. Further, the documents are in the nature of pre-dispute communications made outside the negotiation context for two reasons; they reflect Lloyd’s demand for interest necessarily made before any settlement talks could begin and the communications involving Mr. Duncan cannot be considered settlement negotiations as he concedely had no authority to compromise the claim. The motion to strike must be denied.

plus interest. The issue presented to the Court of Appeals was “whether or not the acceptance of the principal awarded has barred the realtor from recovering ... *additional* interest” (emphasis added).

Having determined that Lloyd’s are entitled to a grant of the cross-motion for summary judgment as to their First (Treaty 8W2) Second (Treaty 7R1) and Third (Treaty 8P5) Causes of Action for breach of contract, Navigators’ motion for summary judgment as to those causes of action must be denied and the court need not address Navigators’ request to dismiss Lloyd’s Fourth through Eighth Causes of Action for breach of good faith and fair dealing, breach of fiduciary duty, unjust enrichment and money had and received. Accordingly, Navigator’s motion for summary judgment (motion sequence number 001) is denied in its entirety. Lloyd’s cross-motion for partial summary judgment as to its First through Third Causes of Action is granted. Navigators’ motion to strike certain documents relating to alleged settlement talks (motion sequence number 002) is denied.

Accordingly, it is

ORDERED that the motion of defendant, Navigators Management Co., Inc., for summary judgment dismissing the complaint (motion sequence number 001) is DENIED; and it is further

ORDERED that the cross-motion of plaintiffs, Certain Underwriting Members of Lloyd’s London, for partial summary judgment as to their First, Second and Third Causes of Action is GRANTED; and it is further

ORDERED that defendant’s motion to strike (motion sequence number 002) is DENIED; and it is further

ORDERED that within 14 days of service of this Decision and Order with notice of entry, counsel for the parties shall meet and confer for the purpose of determining the amount of damages to be awarded to the date of this Decision and Order and the daily interest to be assessed from said

date until judgment is entered at the statutory rate of 9% and, within 7 days thereafter to submit a stipulated order to be "so ordered" by the court; and it is further

ORDERED that if said stipulated order has not been submitted prior to December 12, 2011, counsel shall appear for a status conference at Part 49, Room 252 on Wednesday, December 14, 2011 at 9:30 A.M. for the purposes of fixing the form of order to be entered, setting a schedule of further proceedings, if needed and any other outstanding matters.

This constitutes the decision and order of the Court.

DATED: October 25, 2011

ENTER,


O. PETER SHERWOOD
J.S.C.