

Scottsdale Ins. Co. v Alphonse Hotel Corp.
2011 NY Slip Op 32853(U)
October 18, 2011
Supreme Court, New York County
Docket Number: 115474/09
Judge: Joan A. Madden
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: Hon. Joan A. Madden
Justice

PART 11

Index Number : 115474/2009
SCOTTSDALE INSURANCE
vs.
ALPHONSE HOTEL
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE 6/9/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for Amend + for summary judgment
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 is decided in accordance with the annexed memorandum Decision + Order.

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

FILED

OCT 25 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: October 18, 2011

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

HON. JOAN A. MADDEN ^{J.S.C.}

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
SCOTTSDALE INSURANCE COMPANY,
Plaintiff,

-against-

Index No. 115474/09

ALPHONSE HOTEL CORP d/b/a HOTEL CARTER
and HOTEL LAFAYETTE,
Defendant.

FILED

OCT 25 2011

-----X
Joan A. Madden, J.

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Alphonse Hotel Corporation d/b/a Hotel Carter and Hotel Lafayette

("Alphonse") moves for leave to file an amended answer to assert an affirmative defense of lack of capacity to sue and also moves for summary judgment dismissing the complaint against it based on the added defense. Plaintiff Scottsdale Insurance Company ("Scottsdale") opposes the motion, which is denied.

Background

This action arises from a transaction in which Scottsdale, an Ohio corporation, wrote a surplus lines insurance policy (the "Insurance Policy") for general liability insurance for Alphonse at the request of Alphonse's insurance broker. The policy period of the insurance appears to have commenced on April 29, 2006, and ended on April 29, 2007. Scottsdale acknowledges that Alphonse paid \$55,680.00 as a deposit towards the insurance it requested, but maintains that Alphonse owes an additional \$98,385.04 in insurance premiums to Scottsdale. Scottsdale claims that it rendered monthly accounts of the indebtedness owed by Alphonse, including account statements for the amount of \$98,385.04, which were accepted without objection by Alphonse.

On or around November 4, 2009, Scottsdale filed a complaint against Alphonse, which asserts causes of action for breach of contract and for an account stated.

In its answer, Alphonse generally denies the allegations in the complaint and asserts affirmative defenses of failure to state a claim and that Alphonse paid all amounts due and owing to Scottsdale in full.

During the course of discovery, Alphonse demanded that Scottsdale produce evidence that it is licensed or authorized to conduct insurance business in New York. In response to this discovery demand, Scottsdale produced various documents including a printout (the "Printout") from the website of the New York State Department of Insurance (the "Insurance Department"), which Scottsdale asserts shows that it is a licensed insurer in New York. However, Alphonse maintained that the discovery documents provided by Scottsdale and the deposition witness produced by Scottsdale did not establish capacity for Scottsdale to sue in New York.

On February 10, 2011, upon the consent of Scottsdale, a preclusion order was issued prohibiting Scottsdale from producing at trial any document or testimony which has not been produced to date concerning Scottsdale's authority to conduct insurance business in the State of New York.

Alphonse now seeks to amend its answer pursuant to CPLR 3025(b) in order to assert the additional affirmative defense that Scottsdale may not maintain this action since it is a foreign corporation, which is not licensed or authorized to conduct insurance business in the State of New York.

Alphonse asserts that the proposed defense of lack of capacity is meritorious and seeks summary judgment based on the defense. In particular, Alphonse argues that discovery produced by Scottsdale does not establish that Scottsdale is licensed to write insurance in New York as required under New York Insurance Law ("Insurance Law") §1102(a).¹ Scottsdale must

¹ Insurance Law §1102(a) provides in pertinent part that "No person, firm, association, corporation or joint-stock company shall do an insurance business in [New York] unless authorized by a license... or exempted by the provisions of [the Insurance Law] from such

be licensed to do insurance business and that, in the absence of such authority, it lacks the capacity to sue. In addition, Alphonse argues that Scottsdale has not shown that it is in compliance with the regulations contained in 11 NYCRR §§27.0-27.24 (“Regulation 41”), which concern the limited circumstances in which insurers who are not authorized in New York may write policies for sale in New York. In particular, Alphonse asserts that the Printout fails to sufficiently indicate that Scottsdale is authorized or licensed to conduct insurance business in New York and is not competent evidence without an affidavit or certificate from an appropriate official from the Insurance Department. Alphonse also submits correspondence between Scottsdale and the Insurance Department, including a letter dated March 26, 1990 from Wendy E. Cooper (the “Superintendent”), Acting Superintendent of Insurance, to Jack A. King (“King”), “Vice President, Legal” of Scottsdale. In the March 26 Letter, the Superintendent appears to assert that Scottsdale is an unlicensed insurer and, as such, must comply with the requirements of Regulation 41 in order to transact business with New York licensed excess lines brokers.

Alphonse also contends that Scottsdale is prohibited from bringing this action by Business Corporation Law (“BCL”) §1312, which provides that a “foreign corporation doing business in [New York] without authority shall not maintain any action or special proceeding in [New York].” Alphonse argues that, pursuant to BCL §1304(a), a foreign corporation becomes authorized to do business in New York by applying for a certificate of authority from the New York Department of State (the “State Department”). Alphonse asserts that the evidence shows that Scottsdale was doing business in New York because Geoffrey Hasbach, the witness Scottsdale produced for deposition, testified that Scottsdale writes coverage in New York and has a high volume of business in New York.

requirement.”

In opposition, Scottsdale asserts that the Printout shows that Scottsdale is licensed to conduct insurance business in New York State, as it specifies Scottsdale's current writing powers, and lists Scottsdale's name, address and website, and that the court can take judicial notice of the information of the website. Scottsdale also contends that, while it is licensed to write insurance in New York, it is not "doing business" in New York for the purposes of invoking BCL § 1312 as a foreign corporation's acts of soliciting sales or placing orders in New York are not enough to invoke the statute. Scottsdale asserts that, in light of the above, Alphonse's request to amend its answer must be denied.

Scottsdale also requests that the court search the record and grant summary judgment in its favor and in support of this request it submits Alphonse's insurance application, terms and conditions of Alphonse's insurance policy, audit worksheets and statements of account.

In reply, Alphonse argues that Scottsdale's request that the court search the record and award it summary judgment is improper and that if Scottsdale seeks affirmative relief, "it must do so by the proper method of filing a notice of cross motion." Alphonse also asserts that the evidence provided by Scottsdale is not self-explanatory and is insufficient to establish Scottsdale's entitlement to affirmative relief.

Discussion

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). However, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 A.D.3d 404, 405 (1st Dept), lv dismissed, 12 N.Y.3d 880 (2009). At the same time, leave to amend will

be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 A.D.3d 499 (1st Dept 2010)(citation omitted). In addition, “[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment” Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 365 (1st Dept 2007).

Since no prejudice has been shown based on Alphonse’s delay in adding an affirmative defense of lack of capacity, the only question here is whether the proposed affirmative defense of lack of capacity is of sufficient merit. While Insurance Law §1102(a) has been interpreted to require an insurance company to be licensed in New York State before bringing an action here (Kelly v. Bremmerman, 23 A.D.2d 346, 351 (4th Dept 1965), aff’d, 21 NY2d 195 (1967); Signal Mut. Indem. Ass’n, Ltd. v. Rice Mohawk U.S. Const., 1996 WL 337294 (S.D.N.Y. 1996); Couch on Insurance, § 3:40 [2011]), the information on the Printout is supplied by the Insurance Department and shows that Scottsdale became a recognized insurance provider in New York on June 28, 1994. The Printout further shows that Scottsdale has writing powers for various lines of insurance business, including in relevant part “Personal Injury Liability” and “Property Damage Liability,” and that the definitions of these terms can be found in New York Insurance Law (“Insurance Law”) §1113. As such, the relevant information on the Printout, which the court verified on the Insurance Department’s website, shows that Scottsdale is a licensed insurance provider in New York. See Jones Lang LaSalle of New York, LLC v. New York City School Constr. Auth., 31 Misc.3d 424, 427 (Sup. Ct. N.Y. County 2011)(court takes judicial notice that New York Secretary of State’s website reflected plaintiff’s name change).

Moreover, the letter from the Superintendent of Insurance, dated March 26, 1990, is not evidence to the contrary as it was written in 1990, over four years before the recognized date listed for Scottsdale on the Printout. Furthermore, since the evidence shows that Scottsdale is a licensed insurance provider in New York, the court need not address Alphonse's arguments that Scottsdale is barred from maintaining this suit by virtue of Regulation 41, which pertains to unauthorized insurers.

While Scottsdale has not shown that it has a certificate of authority to conduct business from the State Department, it is not required to do so in order to demonstrate that it has authority to write insurance in New York. Although BCL §1304(a) specifies that a corporation becomes authorized to do business in New York by applying for a certificate of authority from the State Department, foreign insurance companies such as Scottsdale are expressly exempted from the provisions of BCL §1304(a) under Insurance Law §108. Section 108 provides that "[i]f any provision of the business corporation law conflicts with any provision of this chapter, the provision of this chapter shall prevail..."² Of relevance here, under Insurance Law §108(e), BCL §1304 is not applicable to a foreign insurer, like Scottsdale. As such and in consideration of the evidence that Scottsdale is licensed to conduct insurance business in New York, Scottsdale is not barred by BCL §1312 from bringing this action.

Accordingly, as Scottsdale has the legal capacity to sue, the motion to amend and for summary judgment dismissing the complaint must be denied.

Scottsdale's request that the court grant summary judgment in its favor upon searching the record is also denied. While Scottsdale attaches Alphonse's insurance application, the terms

² Additionally, Insurance Law §108(g)(1)-(2) provides that when applying the business corporation law to insurance companies, unless the context indicates otherwise, "secretary of state" means "superintendent of insurance" and "department of state" means "insurance department."

and conditions of the Insurance Policy, audit worksheets, and statements of account, Scottsdale provides no affidavit from a person with knowledge to confirm the validity of the business records and provide an explanation of those documents which are not self-explanatory. See Spitzer v. Schussel, 17 Misc.3d 1120(A),*3 (Supreme Court, New York County 2007)(unauthenticated, unexplained business records submitted by defendant's attorney were insufficient to establish prima facie entitlement to summary judgment); see also McDonald v. Tishman Interiors Corp., 290 A.D.2d 266, 267 (1st Dept 2002).

Conclusion

In view of the above, it is

ORDERED that the motion to amend and for summary judgment by defendant Alphonse Hotel Corporation d/b/a Hotel Carter and Hotel Lafayette is denied; and it is further

ORDERED that plaintiff Scottsdale Insurance Company's request that the court search the record and grant summary judgment in its favor is also denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on ^{December 1, 2011} ~~October 20, 2011~~ at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

October 18, 2011
Dated: ~~September 20, 2011~~


J.S.C.

HON. JOAN A. MADDEN
J.S.C.

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE