J.P. Morgan Sec. Inc. v Vigilant Ins. Co.
2017 NY Slip Op 31690(U)
August 7, 2017
Supreme Court, New York County
Docket Number: 600979/09
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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J.P. MORGAN SECURITIES INC., J.P. MORGAN CLEARING CORP., and THE BEAR STEARNS COMPANIES LLC,

Index No. 600979/09

Plaintiffs,

-against-

VIGILANT INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, FEDERAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., LIBERTY MUTUAL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendants.

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Hon. C. E. Ramos, J.S.C.:

In our April 17, 2017 decision granting summary judgment in plaintiffs[1] favor and denying defendants'[2] cross-motion for summary judgment, this Court directed the parties to settle an order and judgment (NYSCEF Doc No. 956), and thereafter, permitted the parties to submit additional briefing on the issue

[1] Plaintiffs are J.P. Morgan Securities Inc. (JP Morgan), formerly known as Bear, Stearns & Co. Inc. (BS&Co.), and J.P. Morgan Clearing Corp., formerly known as Bear Stearns Securities Corporation (BSSCorp.), and The Bear Stearns Companies LLC, formerly known as The Bear Stearns Companies Inc. (TBSC) (together, Bear Stearns). In 2008, TBSC, through its merger with a subsidiary of JPMorgan Chase & Co. became a subsidiary of JPMorgan Chase & Co.

[2] Defendants are Vigilant Insurance Company (Vigilant), The Travelers Indemnity Company, Federal Insurance Company, National Union, Liberty Mutual Insurance Company, Certain Underwriters at Lloyd's, London, and American Alternative Insurance Company (together, the Insurers) (all insurers other than Vigilant, the excess Insurers).

of pre-judgment interest.

In their proposed counter-order and judgment, the excess Insurers asserted that no judgment should be entered against them because the insurance coverage underlying the excess insurance policies has not been exhausted (Finnerty Aff., ¶ 5). In addition, the Insurers urge this Court not to award pre-judgment interest from April 4, 2006 to the date of entry and judgment and, in any event, not to impose interest at the statutory rate of nine percent per annum, on the grounds that New York's prejudgment interest statute violates the Due Process and Takings Clauses of the United States and New York Constitutions (*Id.*, ¶ 6).

In support of its proposed order and judgment, JP Morgan maintains that because all of the Insurers breached their agreements concurrently, Bear Stearns incurred a much larger loss through the loss of use of the funds since 2006, the year of the Insurers' breach.

The following memorandum decision addresses solely the issues of exhaustion, pre-judgment interest and constitutionality. To this extent, this Court amends its prior decision and order.

Discussion

This Court rejects the excess insurers' argument that a judgment and pre-judgment interest cannot be entered against them

at this time. In its decision and order granting JP Morgan's motion for summary judgment and denying the Insurers' cross-motion, this Court determined that Bear Stearns incurred a covered loss (first loss) of $140 million when it paid the SEC to settle the regulatory actions in 2006, and another $14 million loss when its settled the class actions in 2010. The first loss exceeded each excess insurers' coverage limits - six layers of Bear Stearns' insurance coverage tower - on the very date that the it was incurred, in April 2006. To this extent, the first loss triggered each of the policies simultaneously.

Moreover, this Court already determined that all of the Insurers breached the policies by wrongfully disclaiming coverage: they unreasonably withheld their consent to settle (*JP Morgan Securities Inc. v Vigilant Ins. Co.*, 53 Misc 3d 694 [Sup Ct, NY County 2016], *affirmed* 151 AD3d 632 [1st Dept 2017]), and refused to pay covered losses when Bear Stearns demanded payment, in 2006 (*Id.*, _ Misc 3d _, 51 NYS3d 369 [Sup Ct, NY County, 2017]).

Once the Insurers repudiated liability and Bear Stearns made payment of its own covered losses, the law regards the Insurers as being in breach, and as a result, Bear Stearns possesses a liquidated claim (*Schwartz v Liberty Mut. Ins. Co.*, 539 F3d 135, 148-49 [2d Cir 2008]). To this effect, the Court granted summary judgment in JP Morgan's favor, and denied the Insurers' cross-

motion.

In the insurance context, pre-judgment interest runs from the date of a breach on the part of an insurer and a liquidated claim (*Id.*; *Varda, Inc. v Ins. Co. of North America*, 45 F3d 634, 640 [2d Cir 1995]; *Aetna Cas. and Sur. Co. v Home Ins. Co.*, 882 FSupp 1328, 1354 [SD NY 1995]; *see also Schwartz v Liberty Mutual Ins. Co.*, 539 F3d 135, 149-50 [2d Cir 2008]). Thus, JP Morgan is entitled to pre-judgment interest from April 4, 2006, which is the date that Bear Stearns demanded payment from the Insurers for the settlement of the SEC regulatory action.

The exhaustion provisions upon which the excess insurers rely in an attempt to avoid a judgment and pre-judgment interest do not do not warrant a different result (*see Id.*). As discussed *supra*, Bear Stearns suffered a single large loss which exceeded each of the Insurers' limits, on the very date that it was incurred. There is no question that Vigilant's primary policy would not have covered the first loss, which thereby would trigger coverage under seven of the excess policies simultaneously. Thus, this is not a situation where the excess insurers' liability depends on some future contingency, such as a potential subsequent loss that might reach the excess layers (*compare Liberty Mut. Ins. Co. v Insurance Co. of State of Pennsylvania*, 43 AD3d 668, 669 [1st Dept 2007]). Here, it is undisputed that the excess Insurers' coverage was reached on the

date of the first loss.

The excess Insurers' proposition that no insured can ever recover damages from an excess insurer despite incurring a covered loss that reaches, and even exceeds that excess insurers' limits until the insured establishes that the primary insurer has paid up to its limits, is without a sound basis.

First, where an insurer repudiates a claim and disclaims coverage, an insured's purported failure to comply with a condition contained in the policy is excused (*JP Morgan Securities Inc.*, 53 Misc3d at 701; *Varda Inc.*, 45 F3d at 640; *Granite Ridge Energy, LLC v Allianz Global Risk U.S. Ins. Co.*, 979 FSupp2d 385, 393-94 [SD NY 2013] ["'An insurance carrier may not, after repudiating liability, create grounds for its refusal to pay by demanding compliance with proof of loss provisions of the policy'"]).

Moreover, it would be inequitable to permit the excess Insurers to benefit from Vigilant's erroneous repudiation of liability, that is the very event which delayed exhaustion of the underlying primary policy in the first place.

JP Morgan, as the prevailing party on its claim for breach of contract, is entitled to prejudgment interest from the earliest ascertainable date (CPLR 5001). The purpose of pre-judgment interest is the cost of deprivation of the use of another person's money for a specified period of time (*Love v*

State, 78 NY2d 540, 544-45 [1991]).

This Court rejects the Insurers' contention that the assessment of prejudgment interest at the statutory rate in New York at nine percent is unconstitutional. Numerous courts have considered this very issue. The Court of Appeals itself has concluded that the statutory rate of interest, as calculated by the Legislature, is not unreasonable, and need not be measured by fluctuations in the interest rates for public or private securities or lending (*Matter of County of Nassau [Eveandra Enters.]*, 42 NY2d 849 [1977]). The statutory rate judicially acceptable, and to this extent, is proper.

Accordingly, it is

ORDERED that this Court's April 17, 2017 decision and order (NYSCEF Doc No. 912) is hereby AMENDED to include the above memorandum decision.

DATED: August 7, 2017

ENTER:

CHARLES E. RAMOS
J.S.C.