SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

CURRENT LIGHTING & ELECTRIC, INC. et al. -against- BERKSHIRE HATAHWAY et al.	Index No.: 652316/2017 (Action 1) DECISION/ORDER
ALTERNATIVE FUELS TRANSPORTATION, INC. et al. -against- BERKSHIRE HATHAWAY et al.	Index No.: 652702/2017 (Action 2) DECISION/ORDER

In these two actions for, among other things, fraud and violations of the Insurance Law, plaintiffs move, pursuant to Insurance Law § 1213 (c) and CPLR Article 63, for an order compelling any "unauthorized entity" to post a bond as a condition of its appearance in the respective actions. In Action 1 (Index No. 652316/2017), plaintiffs Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC (collectively, Current Lighting) seek a bond in the amount of $43,636,417.13. In Action 2 (Index No. 652702/2017), plaintiff Alternative Fuels Transportation, Inc. (Alternative Fuels) seeks a bond in the amount of $12,844,860.53.

Berkshire Hathaway Inc. (Berkshire Hathaway) is a named defendant in both actions, as are nine affiliated entities referred to by the parties as the Applied Defendants—namely, California Insurance Company (CIC), Commercial General Indemnity Inc. (CGI), Applied Underwriters, Inc. (Applied Underwriters), Applied Risk Services, Inc. (ARS), Applied Risk Services of New York, Inc. (ARS NY), ARS Insurance Agency, Inc. (ARS Insurance), North

American Casualty Company (NACC), Continental Indemnity Company (Continental), and Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA). In Action 1, the Applied Defendants separately move for an extension of time to answer the complaint. Current Lighting cross-moves for, among other relief, disqualification of DLA Piper LLP (DLA Piper) as counsel for the defendants who are licensed in New York, based on an alleged conflict of interest between the licensed and unlicensed defendants. Defendant Berkshire Hathaway separately moves in both Actions to dismiss the complaint on the ground, among others, of lack of personal jurisdiction.

Plaintiffs plead that defendants are engaged in an illegal workers' compensation reinsurance scheme. On July 19, 2017, this court decided a motion for an Insurance Law § 1213 (c) bond in an action brought by another plaintiff against Berkshire Hathaway and the Applied Defendants based on the same alleged scheme, which is discussed at length in the court's decision. (See Breakaway Courier Corp. v Berkshire Hathaway Inc., 2017 WL 3084991 [Sup Ct, NY County, July 19, 2017, No. 654806/2016] [the Breakaway decision].) The parties in the three actions are represented by the same counsel, and the arguments made in support of and in opposition to plaintiffs' bond motions are virtually identical to those addressed in the Breakaway decision. In deciding the instant motions, the court will rely on the Breakaway decision, familiarity with which is presumed.

Plaintiffs do not dispute that defendants Continental, CIC, ARS NY, and NACC are licensed in New York (the Licensed Defendants), and do not contend that these defendants are subject to the bond requirement of Insurance Law § 1213 (c). (See Current Lighting Reply Memo. Bond Mtn., at 1 n 2; Alternative Fuels Reply Memo. Bond Mtn., at 1 n 2.) The remaining Applied Defendants are not licensed in New York (the Unlicensed Applied

Defendants). For the reasons stated, and on the authorities cited, in the Breakaway decision, the court holds that the complaints sufficiently plead that defendants Applied Underwriters, AUCRA, and CGI engaged in acts subjecting them to the requirements of Insurance Law § 1213 (c). (2017 WL 3084991, at * 6.) The complaints do not, however, plead any allegations linking ARS or ARS Insurance to plaintiffs in connection with these matters. The § 1213 (c) bond requirement therefore is not triggered with respect to the latter two defendants.

The court rejects the Applied Defendants' argument that the court has discretion, under § 1213 (c), to dispense with the bond posting requirement for all of the defendants based on the facts that Continental and CIC, the entities that issued plaintiffs' workers' compensation policies, are licensed in New York, are rated "A+" by A.M. Best, have significant assets, and are alleged to be jointly and severally liable with the Unlicensed Applied Defendants. An identical argument was rejected by the court in the Breakaway decision, to which the court adheres.

The court also rejects the Applied Defendants' argument, not made in Breakaway, that plaintiffs must demonstrate a likelihood of success on the merits, irreparable injury, and the balance of equities in their favor before a bond is ordered pursuant to Insurance Law § 1213 (c). Section 1213 (c) does not by its terms require such a demonstration, and the Applied Defendants do not cite any authority in which a Court has analyzed or even alluded to such factors in deciding whether to enforce § 1213 (c). Indeed, the statute has been interpreted to bar any consideration of the substance of a plaintiff's allegations until a bond is filed. (See Levin v Intercontinental Cas. Is. Co., 95 NY2d 523 [2000].) In Levin, the Court of Appeals held that § 1213 (c) barred a foreign unauthorized reinsurer from moving to dismiss a complaint based on the statute of limitations and documentary evidence until it complied with the bond posting requirement of that section. If a foreign unauthorized insurer must post a bond before it is

permitted to demonstrate that "a complaint is so flawed that it cannot survive a motion to dismiss" (id., at 528 [internal quotation marks omitted]), a plaintiff plainly need not make a showing of a likelihood of success before demanding compliance with that section.

Insurance Law § 1213 (c) does not, however, require Berkshire Hathaway to post a bond or procure a license before moving to dismiss based on lack of personal jurisdiction. (Breakaway, 2017 WL 3084991, at * 8.) Consistent with Breakaway, the court will hear oral argument on the jurisdictional question before determining whether Berkshire Hathaway is subject to § 1213 (c). The substantive branches of Berkshire Hathaway's motions will be held in abeyance and argued, if possible, together with the overlapping branches of any motions by the Applied Defendants to dismiss the complaints.

The court further holds that plaintiffs' proposed bond amounts are not rationally related to their potential recoveries in these actions. (See id., at * 9-10.) For the reasons stated in the Breakaway decision, the court finds that the affidavits of Martin Schwartzman, plaintiffs' expert, do not furnish a reliable basis for setting the bond amounts. (Id., at * 9.) Nor is such a basis furnished by the additional affidavits of Herbert Goodfriend, submitted by plaintiffs on these motions.

Upon review of the allegations of the complaint and the evidence in the record, the court in its discretion determines that a bond in the amount of $11,102,000 is appropriate in Action 1, and that a bond in the amount of $2,825,950.92 is appropriate in Action 2. These amounts represent the amounts that plaintiffs have paid to defendants under defendants' alleged workers' compensation and reinsurance participation program.[1] (Action 1 Compl., ¶ 61; Action 2 Compl.,

[1] In view of this method of calculating the bond amounts, the court need not resolve the parties' dispute as to whether plaintiffs' liability under the reinsurance participation agreement (RPA) is unlimited, as plaintiffs contend, or whether there is a limit on the maximum costs for which plaintiffs may be liable under the RPA, as the Applied Defendants contend. The record is not sufficiently developed to enable the court to resolve this issue. In any event,

¶ 61.) As in Breakaway, it is not possible, at this preliminary stage, to segregate and exclude from these figures the premium payments that plaintiffs may not be entitled to recover given that they do not seek rescission of the workers' insurance policies. (See id., at * 10.) For the reasons stated in the Breakaway decision, the court declines to apply a discount to the amount of the bond based on the fact that Continental and CIC are licensed in this State and have significant assets. (See id.)

The court further holds that a single bond posted collectively by Applied Underwriters, AUCRA, and CGI in each action will satisfy § 1213 (c), provided that they can agree that the entire bond will remain available in each action to satisfy a judgment in plaintiffs' favor against any one of these three unlicensed defendants. (See Breakaway, 2017 WL 3084991, at * 11.)

The Applied Defendants' motion for an extension of time to respond to the complaint in Action 1 is moot given Current Lighting's service of an amended complaint on or about August 21, 2017. The Applied Defendants' request for costs and attorneys' fees in connection with this request for an extension is denied.[2]

The branch of Current Lighting's cross-motion to disqualify DLA Piper, or for discovery on an alleged conflict of interest, will be denied. The court assumes, without deciding, that Current Lighting has standing to bring to this court's attention a possible conflict of interest between the Licensed Defendants and the Unlicensed Applied Defendants. The court also assumes, without deciding, that Current Lighting does not seek disqualification "for tactical purposes, such as to delay litigation and deprive an opponent of quality representation"—a

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the court rejects plaintiffs' apparent contention that the bond amounts should include speculative amounts that the Applied Defendants may in the future claim are due from plaintiffs or amounts that plaintiffs have declined to pay.

[2] In the future, the parties are directed to meet and confer with a view to reaching agreement on such applications. In the event they are unable to reach agreement, unnecessary motion practice should be avoided, and relief should be sought in the first instance by conference call.

strategy to which a court must be alert. (See Mayers v Stone Castle Partners, LLC, 126 AD3d 1, 6 [1st Dept 2015]; see also Solow v Grace & Co., 83 NY2d 303, 310 [1994].) No showing is made, however, that an impermissible conflict of interest exists between the Licensed and Unlicensed Applied Defendants. The asserted conflict is based on the Applied Defendants' position on the bond motions that the Unlicensed Applied Defendants should not have to post a bond because the assets of the Licensed Defendants are sufficient to cover any judgment. The Applied Defendants' opposition to the posting of a bond does not involve the assertion of claims by any of the defendants against any other defendant. At this juncture, the court does not find that the various defendants are not united in interest. Moreover, counsel for the Applied Defendants represents that those defendants have waived any conflict. (See Stephens Aff., ¶¶ 4-5; Silver Aff., ¶ 3; see People v Gomberg, 38 NY2d 307, 314 [1975] ["[T]he court may rely upon counsel's assurances that he had fully discussed the potentiality of conflict with his clients and received their continued approbation"].)

The remaining branches of Current Lighting's cross-motion will also be denied. To the extent that this motion seeks relief as to when the Licensed Defendants, as opposed to the Unlicensed Applied Defendants, must respond to the complaint, the motion has been rendered moot by Current Lighting's service of an amended complaint, and will be denied. In any event, as discussed above in connection with the Applied Defendants' motion for an extension of time to respond to the complaint, motion practice on such requests should be avoided. To the extent that the motion seeks to quash an audit request made by Applied Underwriters to Current Lighting's management, Current Lighting offers no basis for relief from the audit, which appears to have been scheduled in the usual course of business.

It is accordingly hereby

(I) ORDERED that the motion of plaintiffs Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC (collectively Current Lighting) in Action 1 (Index. No. 652316/2017) for an order compelling certain defendants to post a bond before appearing in that action is decided as follows:

1. It is hereby ORDERED that defendants Applied Underwriters, Inc., Applied Underwriters Captive Risk Assurance Company, Inc., and Commercial General Indemnity Inc. (collectively, the Bond Defendants), as a condition of their appearance in Action 1, shall either (i) deposit with the clerk of this court cash or securities or file with such clerk a bond with good and sufficient sureties in the amount of $11,102,000 consistent with this decision, or (ii) procure a license to do an insurance business in this state; and it is further

2. ORDERED that the branch of this motion seeking to have defendant Berkshire Hathaway, Inc. (Berkshire Hathaway) post a bond before appearing in Action 1 is severed and held in abeyance pending determination of whether this court has jurisdiction over Berkshire Hathaway or whether jurisdictional discovery should be ordered; and it is further

3. ORDERED that the motion is otherwise denied; and it is further

(II) ORDERED that the motion of plaintiff Alternative Fuels Transportation, Inc. (Alternative Fuels) in Action 2 (Index. No. 652702/2017) for an order compelling certain defendants to post a bond before appearing in that action is decided as follows:

1. It is hereby ORDERED that the Bond Defendants, as a condition of their appearance in Action 2, shall either (i) deposit with the clerk of this court cash or securities or file with such clerk a bond with good and sufficient sureties in the amount of $2,825,950.92 consistent with this decision, or (ii) procure a license to do an insurance business in this state; and it is further

2. ORDERED that the branch of this motion seeking to have defendant Berkshire Hathaway post a bond before appearing in Action 2 is severed and held in abeyance pending determination of whether this court has jurisdiction over Berkshire Hathaway or whether jurisdictional discovery should be ordered; and it is further

3. ORDERED that the motion is otherwise denied; and it is further

(III) ORDERED that the motion of the Applied Defendants (as defined above) in Action 1 for an extension of time to respond to the complaint in that action is denied in its entirety; and it is further

(IV) ORDERED that the cross-motion of Current Lighting in Action 1 to disqualify the Applied Defendants' counsel and for other relief is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
August 24, 2017

MARCY FRIEDMAN, J.S.C.