Energy Conservation Group, LLC v Applied Underwriters, Inc.
2018 NY Slip Op 30782(U)
March 19, 2018
Supreme Court, Queens County
Docket Number: 710762/2015
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

x

THE ENERGY CONSERVATION GROUP, LLC, SKAGGS-WALSH, INC., 1509 HEMPSTEAD TPKE CORP., COLLEGE POINT TERMINAL, INC., SKAGGS-WALSH ELECTRICAL, INC. and ALLISON A. HEANEY,

Plaintiff(s)

-against-

APPLIED UNDERWRITERS, INC., APPLIED RISK SERVICES, INC., APPLIED RISK SERVICES OF NEW YORK, INC., NORTH AMERICAN CASUALTY COMPANY, CONTINENTAL INDEMNITY COMPANY, APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., and CAPACITY GROUP OF NY, LLC.

Defendant(s)

x

Index Number 710762 2015

Motion Date October 31, 2017

Motion Cal. Number 146

Motion Seq. No. 16

The following papers numbered 1 to 6 read on this motion by the defendants for an order pursuant to CPLR §3211(a)(1), 1001, and 1003 dismissing the complaint against them.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1-3
Memoranda of Law	4-6

Upon the foregoing papers it is ordered that the motion is denied.

This action arose from a dispute between the plaintiff and the defendants concerning a balance totaling $1,663,655 as of December 8, 2015, allegedly owed by plaintiff pursuant to Reinsurance Participation Agreements (RPA's). According to the defendants, pursuant to a 2010 RPA, the plaintiff "participated in risk sharing in their own worker's compensation

coverage for a three year term starting on October 1, 2010 and effective through October 1, 2013." On October 1, 2013, the plaintiff and Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA) signed a new RPA for an additional three year term running from October 1, 2013 through October 1, 2016.

Applied Underwriters, Inc. (AUI), a Nebraska corporation, and its affiliates, Applied Risk Services, Inc., Applied Risk Services of New York, Inc., North American Casualty Company, Continental Indemnity Company (CNI), and AUCRA (collectively the Applied defendants), are six of the seven defendants in this action. AUI is a financial services company and an indirect subsidiary of Berkshire Hathaway, Inc., the company controlled by Warren Buffet.

CNI issued Worker's Compensation policies to the plaintiffs, and the insurer alleges that it issued the policies on forms and at rates approved by the New York State Department of Financial Services. Pursuant to a reinsurance pooling agreement, The California Insurance Company (CIC), a subsidiary of AUI, reinsured five annual Worker's Compensation policies issued by CNI to the plaintiffs for the period of October 1, 2010 to October 1, 2015. In turn, CIC reinsured its reinsurance (a process known as "retroceding") with AUCRA pursuant to a reinsurance agreement.

The plaintiff, New York companies that provide home heating oil delivery and related services, allege that the Applied defendants participated in an illegal scheme to offer reinsurance and to illegally collect insurance premiums without a license to do business in New York. The Applied defendants also allegedly did not file an RPA and related documents with New York State regulators, and the documents allegedly attempt to illegally transfer all risks back to the plaintiff in violation of New York law.

The plaintiff seeks a judgment declaring that the RPA's are illegal, but that CNI insurance policies issued thereunder are lawful and in effect. The plaintiff also seeks, *inter alia,* the return of all monies paid to the defendants pursuant to the RPA's, and punitive damages.

The plaintiff began this action by the filing of a summons with notice on October 15, 2015, and filed an amended summons and a complaint on October 19, 2015. On November 3, 2015, the attorney for the Applied defendants sent to the attorney for the plaintiff a demand for arbitration filed by AUCRA calling for arbitration in Queens County, New York. On or about December 8, 2015, AUCRA served an amended demand for arbitration concerning the 2010 RPA only, because the 2013 RPA has no arbitration clause.

The AUCRA 2010 RPA contains an arbitration clause which provides in relevant part: "13. ***(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to subparagraph (B) of paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association. (B) *** All disputes arising with respect to any provision of this agreement shall be fully subject to the terms of this arbitration clause."

The RPA also contains a choice-of-law and choice-of- forum clause: "16. This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this agreement that is not subject to the dispute resolution provisions of paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws."

On December 10, 2015, the plaintiff submitted a motion for an Order, *inter alia,* staying arbitration. Pursuant to a decision and order dated March 15, 2016, this Court granted the branch of the motion which sought an order staying arbitration of the dispute between the parties, finding that the arbitration clause was invalid under Nebraska law.

On October 11, 2017, the Applied defendants obtained the instant order to show cause , submitted on October 31, 2017, which seeks the dismissal of the action against them pursuant to the forum selection clause.

"[A] contractual forum selection clause is documentary evidence *** that may provide a basis for dismissal pursuant to CPLR 3211(a)(1) ***" *(Lischinskaya v. Carninval Corp.*, 56 AD3d 116, 123).

The Court finds that the Applied defendants waived any right they may have had under the forum selection clause to have this dispute determined by the courts of Nebraska by actively litigating this case in this Court since 2015. Where a defendant has substantially delayed in seeking to enforce a forum selection clause and where a "significant degree of activity ha[s] already taken place," there is "a particularly high burden to carry," in seeking to enforce a forum selection clause (*Anagnostou v. Stifel*, 204 AD2d 61, 61). The Applied defendants have already in this court participated in three disclosure conferences, propounded and responded to interrogatories, made document requests, and noticed depositions. They have moved for summary judgment and have engaged in other activity. The plaintiff began this action on October 15, 2015. The Applied defendants offered no plausible excuse for their two year delay in seeking to enforce the forum selection clause.

The instant motion is the sixteenth in the motion sequence. The reliance by the Applied defendants on *Lischinskaya v. Carnival Corp.*, (*supra*) is misplaced because of the longer delay, the greater activity here, and the greater degree of prejudice. The plaintiff has already incurred very heavy costs and expenses in this case. *Lischinskaya v. Carnival Corp (supra)* does not stand for the proposition that a defendant may delay indefinitely in seeking to enforce a forum selection clause merely because it raised the affirmative defense in its answer, especially where the extent of the activity may have induced a plaintiff to believe that enforcement of the forum selection clause will not be sought. "[F]orum selection clauses are valid absent a showing that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching ***" (*VOR Assoc. v. Ontario Aircraft Sales & Leasing*, 198 AD2d 638, 639; *Tatko Stone Prod., Inc. v. Davis-Giovinzazzo Const. Co.*, 65 AD3d 778, 779). Under the circumstances of this case, enforcement of the forum selection clause would be unreasonable and unjust.

Dated:

J.S.C.

FILED
MAR 19 2018
COUNTY CLERK
QUEENS COUNTY