Air-Sea Packing Group, Inc. v Applied Underwriters, Inc.
2020 NY Slip Op 32254(U)
May 21, 2020
Supreme Court, Queens County
Docket Number: 711035/2019
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

AIR-SEA PACKING GROUP, INC.,

Plaintiff(s)

-against-

APPLIED UNDERWRITERS, INC., APPLIED UNDERWRITER CAPTIVE RISK ASSURANCE COMPANY, INC., APPLIES RISK SERVICES, INC., APPLIES RISK SERVICES OF NEW YORK, INC.,NORTH AMERICAN CASUALTY COMPANY, CONTINENTAL INDEMNITY COMPANY, AND CALIFORNIA INSURANCE COMPANY

Defendant(s)

x

Index Number 711035 2019

Motion Date November 19, 2019

Motion Cal No.

Motion Seq. No. 1

The following papers EF15-EF24 read on this motion by the defendants for, *inter alia*, an Order pursuant to CPLR §3211(a)(1) dismissing the complaint against them, and on this cross-motion by the plaintiff for an Order: (1) pursuant to Insurance Law §1213(c), compelling defendant Applied Underwriters Captive Risk Assurance Company, Inc. and any of the other defendants that are not licensed to do business in New York to post a bond and (2) striking defendants' motion to dismiss, or, alternatively, staying consideration of defendants' motion to dismiss until a bond is posted.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF12-EF15
Notice of Cross Motion - Affidavits - Exhibits	EF17-EF20
Answering Affidavits - Exhibits	EF22
Reply Affidavits	EF23-EF24

Upon the foregoing papers it is ordered that the branch of the defendants' motion which is for an Order dismissing the complaint pursuant to CPLR §3211(a)(1) because of the forum selection clause in the Reinsurance Participation Agreement (RPA) is denied. The branch of the motion which is for an Order pursuant to CPLR §3211(a)(7) dismissing the Third Cause of Action is granted. The branch of the motion which is for an Order pursuant

to CPLR §3211(a)(7) dismissing the Seventh Cause of Action is granted. The remaining branches of the defendants' motion are denied. The plaintiff's cross-motion is granted to the extent that defendant Applied Underwriters, Inc. and defendant Applied Underwriters Captive Risk Assurance Company, Inc. shall each post a $1,000,000 bond.

I. Background

Plaintiff Air-Sea Packing Group, Inc. (Air-Sea) provides moving, packing, shipping, storage, and transportation services. Defendant Applied Underwriters, Inc. is a Nebraska Corporation which allegedly does business in New York State as an underwriter, issuer, reinsurer, claims handler, and administrator of worker's compensation insurance policies. Defendant Applied Underwriters Captive Risk Assurance Company, Inc (AUCRA), an Iowa corporation headquartered in Nebraska, allegedly does business in New York State as a reinsurer.

Defendant Applied Underwriters, Inc., defendant AUCRA, and related defendants run a worker's compensation insurance program known as EquityComp which provides loss-sensitive worker's compensation insurance coverage to businesses. Plaintiff Air-Sea participated in the program from April, 2014 to October, 2016.

As part of its insurance transactions with the defendants, plaintiff Air Sea entered into a Reinsurance Participation Agreement (RPA) with AUCRA. The plaintiff alleges that reinsurance agreements are lawful only between insurance companies under New York Law. The defendants allegedly did not inform the plaintiff that it was illegal for it to purchase reinsurance and did not inform the plaintiff that AUCRA was not licensed in New York State to write insurance or reinsurance policies. Moreover, the plaintiff alleges that the EquityComp program does not provide actual worker's compensation for the insured, but through the RPA, which was not approved by the New York Compensation Insurance Rating Board, shifts all risk of loss back to the insured.

The RPA between AUCRA and plaintiff Air Sea contains a forum selection clause which provides: "Any legal suit, action or proceeding arising out of, related to or based upon this agreement, or the transactions contemplated hereby or thereby must only be instituted in *** the State of Nebraska *** and each party irrevocably submits to the exclusive jurisdiction of such Courts ***."

Plaintiff Air Sea began the instant action on June 25, 2019 for the purpose of, *inter alia*, obtaining a judgment declaring the RPA to be void and unenforceable under Insurance Law § 2347. The First Cause of Action asserts that the RPA violates New York Insurance Law §2347, the Second Cause of Action asserts that the RPA is a reinsurance agreement, the

Third Cause of Action alleges misrepresentations concerning the RPA, the Fourth Cause of Action seeks the equitable rescission of the RPA, the Fifth Cause of Action alleges that the RPA was, *inter ala*, prohibited by law, the Sixth Cause of Action alleges misrepresentations concerning the RPA, and the Seventh Cause of Action alleges negligence in the handling of worker's compensation claims.

II. Post Submission Correspondence from the Parties

This Court acknowledges that after the submission of the instant motion on November 19, 2019 it received a letter dated December 10, 2019 from plaintiff Air-Sea's attorney and a letter dated December 16, 2019 from the defendants' attorney. The letters concern a Conservation Order issued on November 4, 2019 by the Superior Court for San Mateo County California that appointed a conservator for the California Insurance Company (CIC), one of the defendants in this case. The parties in this action dispute whether the Conservation Order has, or even can have, a staying effect on this action. The letters raise many complex issues which should be the subject of a motion for a stay, if necessary. These issues cannot be effectively resolved on the basis of letters which do not treat the issues with sufficient depth. Moreover, since the instant motion and cross- motion have already been fully briefed and submitted by the parties, no one would be prejudiced by their disposition at this time.

III. Discussion

A. The Motion by the Defendants

1. The Forum Selection Clause

The instant motion by the defendants first seeks the dismissal of this action pursuant to the forum selection clause in the RPA."[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 [2008]).

A "forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be[, inter alia,] unreasonable, unjust, [or] in contravention of public policy " (*Erie Ins. Co. of New York v. AE Design, Inc.*, 104 AD3d 1319, 1320 [2013]). In determining whether a forum selection clause is valid and enforceable, New York Courts will apply New York Law (*See*, e.g, *Erie Ins. Co. of New York v. AE Design, Inc*, *supra*). In order to escape a forum selection clause a plaintiff must demonstrate that its enforcement "would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching ***" (*Koko Contracting, Inc. v. Cont'l Envtl. Asbestos Removal Corp.*, 272 AD2d 585, 586, [2000]; *Boss v. Am. Exp. Fin. Advisors, Inc.*,

15 AD3d 306 [2005], aff'd 6 NY3d 242 [2006]).

In arguing that the forum selection clause compels the dismissal of this entire New York action because it is valid and enforceable, the defendants rely heavily on *Milmar Food Grp. II, LLC v. Applied Underwriters, Inc.*, 61 Misc.3d 812 [(N.Y. Sup. Ct. 2018]) where affiliated New York employers insured under a RPA brought an action against Applied Underwriters, Inc. and related insurance companies for, *inter alia*, a declaratory judgment that their RPA with the Nebraska insurer was void and unenforceable. As in the case at bar, Milmar participated in the EquityComp program, and, as in this case, the RPA contained a forum selection clause broadly requiring disputes arising under the RPA to be resolved in Nebraska. The *Milmar* Court held that the forum selection clause in the RPA was valid and enforceable. The *Milmar* Court found that "[t]here is no evidence that it would be unreasonable, unjust, or in contravention of New York public policy to require Milmar to abide by its agreement to litigate its claims against AUCRA in Nebraska" (*Milmar Food Grp. II, LLC v. Applied Underwriters, Inc., supra*, 820). "Moreover," the *Milmar* Court continued, "the RPA's Nebraska forum selection clause may be invalidated due to fraud or overreaching only if the fraud/overreaching is specific to the forum selection clause itself," (*Milmar Food Grp. II, LLC v. Applied Underwriters, Inc., supra*, 821), and "Milmar's claim of fraud and overreaching is directed to the RPA as a whole, and not specifically to the forum selection clause"(*Milmar Food Grp. II, LLC v. Applied Underwriters, Inc., supra*, 821).

Plaintiff Air Sea argues that this court should not follow *Milmar* because of a prior case brought in Nebraska by AUCRA against Air-Sea (*Applied Underwriters Captive Risk Assurance Company, Inc. v. Air-Sea Packing Group, Inc.*, District Court of Douglas County, Nebraska Cl 18-4125). There, AUCRA brought an action in the Nebraska District Court to recover money allegedly owed under the parties' RPA. AUCRA asserted that the Nebraska Court had jurisdiction over Air-Sea pursuant to the state's long-arm statute and pursuant to the choice of forum clause in the RPA. Noting many similar cases brought in the Douglas District Court where a lack of personal jurisdiction had been found and the affirmance of one of those cases by the Nebraska Court of Appeals (*Applied Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc.*, 923 NW2d 789 [2019]), the District Court dismissed the Nebraska action against Air Sea. Finding that "there is no need to rehash the facts and the law," the District Court concluded : "Nebraska courts do not have personal jurisdiction over Air-Sea Packing, and the Choice of Forum clause does not give Nebraska personal jurisdiction over it."

In *Applied Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc.* (*supra*), AUCRA brought an action against E.M. Pizza, Inc., a California corporation with its principal place of business in California, to recover a sum that the insurer claimed was owed under a RPA. The Nebraska Court of Appeals first rejected AUCRA's argument that a basis

for jurisdiction existed under the state's long arm statute "because despite E.M. Pizza's sufficient minimum contacts with Nebraska, it would not be fair and reasonable to exercise personal jurisdiction under Nebraska's long-arm statute" *(Applied Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc., supra*, 799). The appellate court then went on to reject the exercise of jurisdiction pursuant to the forum selection clause, stating "Although each party would be equally burdened regardless of the forum chosen, the fact that a Nebraska Court would be required to apply California workers' compensation laws to a dispute that primarily affects California workers necessitates that AUCRA's forum selection clause be disregarded. Under § 25-414, Nebraska does not have to be the most convenient forum, but it must be a reasonably convenient forum, and we determine that it is not" (*Applied Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc., supra*, 801–02).

New York Law requires this court to evaluate the reasonableness of applying a forum selection clause (*see, Koko Contracting, Inc. v. Cont'l Envtl. Asbestos Removal Corp., supra*), and in *Applied Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc. (supra*), the Nebraska Court of Appeals has already determined that application of the forum selection clause would be unreasonable in a very similar case. As far as the reasonableness of applying the forum selection clause is concerned, *E.M. Pizza* cannot be successfully distinguished on the basis that here it is the insured that is bringing the action against the insurer. This court does not have to determine here whether all of the criteria of the Nebraska Choice of Forum Act are met; it need only determine whether the forum selection clause can reasonably be applied. The Nebraska Court of Appeals clearly held that it could not be reasonably applied in a very similar case, and this court will follow *E.M. Pizza* rather than *Milmar*, which was decided earlier.

Thus the defendants are not entitled to a dismissal of this action pursuant to CPLR §3211(a)(1) because of the forum selection clause in the RPA.

II. The Individual Causes of Action

A. The First Cause of Action

The plaintiff's First Cause of Action seeks a judgment declaring that the RPA is void and unenforceable under Insurance Law §2347 and awarding damages in an amount commensurate with all premiums paid under the EquityComp Program. Section 2347 provides, *inter alia,* "(a) Any rate change affecting the general rate level for the kind of insurance authorized ***shall be approved by the department ***." Paragraph 114 of the complaint alleges " Upon information and belief, all Defendants acted in concert in failing to file the RPA with either the NYCIRB or the New York State Department of Financial Services." The defendants argue that the First Cause of Action should be dismissed because

there is no private cause of action under Section 2347. Their argument is not persuasive. The plaintiff's cause of action does not seek fines or penalties based upon the defendants' alleged violations of the Insurance Law. The plaintiff seeks a declaration of illegality, the rescission of the RPA, and damages representing premiums paid under the RPA.

B. The Second Cause of Action

The Second Cause of Action seeks, *inter alia,* a declaratory judgment that the RPA is void and unenforceable under the Insurance Law as an unlawful reinsurance agreement. The court finds that the plaintiff's submissions on the instant motion adequately state a Cause of Action for a judgment declaring that the RPA was an unlawful reinsurance agreement, and the defendant's submissions to the contrary merely raise issues of fact on the present state of the record that cannot be determined under CPLR §3211(a) (7) (*see, Tower Broad., LLC v. Equinox Broad. Corp.*, 160 AD3d 1435 [2018]).

C. The Third Cause of Action

The Third Cause of Action is for violation of Insurance Law §4226, "Misrepresentations, misleading statements and incomplete comparisons by insurers" which provides in relevant part: " (a) No insurer authorized to do in this state the business of life, or accident and health insurance, or to make annuity contracts shall: (1) issue or circulate, or cause or permit to be issued or circulated on its behalf, any illustration, circular, statement or memorandum misrepresenting the terms, benefits or advantages of any of its policies or contracts ***" (Emphasis added) The defendants correctly argue that the statute does not apply to worker's compensation insurance.

D. The Fourth Cause of Action

The Fourth Cause of Action alleges that the defendants "made knowing misrepresentations of fact concerning the alleged workers' compensation program that it was providing to plaintiff" and "as a result of defendants' misrepresentations plaintiff was induced to enter into the RPA ***" Contrary to the defendants' contention, *Schlessinger v. Valspar Corp.* (21 NY3d 166 [2013]) does not require the dismissal of the Fourth Cause of Action because here, the plaintiff is not asserting a private right to enforce a statute. The plaintiff is seeking its remedies under the common law. A contract induced by fraud may be rescinded and thereby rendered unenforceable by the culpable party (*Int'l Exterior Fabricators, LLC v. Decoplast, Inc.*, 128 AD3d 1016 [2015) *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 AD3d 273 [2005]). "To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in

injury ***" (*Gosmile, Inc. v. Levine,* 81 AD3d 77, 81 '[2010]). In the case at bar, the Court finds that the plaintiff's submissions on the instant motion adequately state a cause of action for fraud in the inducement, and the defendant's submissions to the contrary merely raise issues of fact on the present state of the record that cannot be determined under CPLR §3211(a) (7) (*see*, *Tower Broad., LLC v. Equinox Broad. Corp.*, *supra*).

E. The Fifth Cause of Action

The Fifth Cause of Action is for violation of General Business Law § 349 "Deceptive acts and practices unlawful." The statute, a broad consumer protection statute, declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law § 349[a]; *see, North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d 5 [2012]). "The elements of a Cause of Action to recover damages for deceptive business practices under General Business Law §349 are that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice" (*Valentine v. Quincy Mut. Fire Ins. Co.*, 123 AD3d 1011, 1015 [2014]; *Nafash v. Allstate Ins. Co.*, 137 AD3d 1088 [2016]). Contrary to the defendants' contention, the conduct alleged in the complaint is sufficiently consumer oriented to satisfy the requirements of GBL §349 (*See, Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 147 AD3d 122 [2017] [complaint by employer members of group self-insured trust alleged that administrator unlawfully disseminated materially misleading information to employers seeking workers' compensation coverage]; *Nat'l Convention Servs., L.L.C. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 239 F. Supp. 3d 761[S.D.N.Y. 2017][rejecting the defendants' argument that an employer's provision of workers' compensation insurance to its employees is inherently not "consumer-oriented" within the meaning of §349]).

F. The Sixth Cause of Action

The Sixth Cause of Action is for common law fraud. To state a cause of action for common law fraud, a plaintiff must allege: (1) that the defendant made material representations that were false or concealed a material existing fact; (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff; (3) that the plaintiff was deceived; (4) that the plaintiff justifiably relied on the defendant's representations and (5) that the plaintiff was injured as a result of the defendant's representations (*see, Lama Holding Co. v. Smith Barney,* 88 NY2d 413 [1996]; *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995]; *Tsinias Enterprises Ltd. v. Taza Grocery, Inc.*, 172 AD3d 1271 [2019]). The plaintiff sufficiently stated a cause of action for common law fraud.

G. The Seventh Cause of Action

The Seventh Cause of Action, which is for negligence, alleges that "[u]nder the structure of the EquityComp Program, Defendants were responsible for the administration of worker's compensation claims brought against the Plaintiff" and "[d]efendants breached their duty to handle workers' compensation claims brought against plaintiff in a competent manner." "[A]simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622 [2010].)) Insofar as the tort of negligence is concerned, the plaintiff did not adequately allege that the defendants violated a legal duty independent of the contract (*see*, *Feinman v Parker*, 252 AD2d 869 [1998]). The defendants had a contractual duty to perform their work with due care (*See*, *Corrado v East End Pool & Hot Tub, Inc.*, 69 AD3d 900 [2010]). A cause of action alleging that work performed under the contract was performed in a less than competent manner sounds in breach of contract, not negligence (*see, Park Edge Condominiums, LLC v. Midwood Lumber & Millwork, Inc.*, 109 AD3d 890, [2013]). "[C]laims based on negligent or grossly negligent performance of a contract are not cognizable" (*City of New York v. 611 W. 152nd St., Inc.*, 273 AD2d 125, 126 [2000]; *Kordower-Zetlin v. Home Depot U.S.A., Inc.*, 134 AD3d 556 [2015]; *Drezin v. New Yankee Stadium Cmty. Benefits Fund, Inc.*, 94 AD3d 542 [2012]). Moreover, to the extent that the plaintiff purports to have alleged a breach of the duty of good faith and fair dealing, such a claim is contractual in nature. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance ***" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

B. The Cross- Motion by the Plaintiff

The plaintiff has cross-moved for an Order pursuant to Insurance Law §1213(c), compelling any defendant which is not licensed to do business in New York to post a bond. Only defendant Applied Underwriters, Inc. and defendant AUCRA are such defendants.

Insurance Law §1213 provides in relevant part: "(c)(1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the Court, in an amount to be fixed by the Court sufficient to secure payment of any final judgment which may be rendered in the proceeding" (*see*, *Chao Jiang v. Ping An Ins.*, 179 AD3d 517 [2020]).

Numerous courts in New York, including this court, have required defendant Applied and defendant Aucra to post a bond in similar cases (*see, e.g.,* decision dated July 19, 2017 in *Breakaway Courier Corporation v. Berkshire Hathaway, Inc* [Sup Ct NY County, Index No. 654806/2016]; decision dated March 15, 2016, in *Energy Conservation Group LLC v. Applied Underwriters, Inc.* [Sup Ct Queens County Index Number. 710762/2015 , Grays, J.]; *Milmar Food Group II v. Applied Underwriters, Inc.,* 58 Misc3d 497]).

Insurance Law §1213(c) requires a bond that is "sufficient to secure payment of any final judgment which may be rendered in the proceeding." The amount of the bond is a matter within the court's discretion (*see*, *Levin v. Intercontinental Cas. Ins. Co.*, 95 NY2d 523[2000]), and the Court of Appeals has recognized that "[t]he calculation must be made at an early stage of the litigation, prior to the resolution of potentially complex factual and legal issues" (*Levin v. Intercontinental Cas. Ins. Co., supra*, 529). Under all of the circumstances of this case, this Court has determined that Applied Underwriters, Inc. and AUCRA shall each post a bond in the amount of $1,000,000. Although this is less than the amount requested by plaintiff Air Sea, it should be "sufficient to secure payment of any final judgment" from such financially strong insurers. As this Court noted in *Energy Conservation Group (supra)*, "The Applied defendants are Berkshire Hathaway Companies all rated A+ (Superior) by A.M. Best, the leading financial rating service for insurance companies."

Any other requests not specifically addressed herein are denied.

Dated: 5/21/20

J.S.C.

FILED
5/22/2020
11:40 AM
COUNTY CLERK
QUEENS COUNTY