

Mt. Hawley Ins. Co. v ACI Capital

2011 NY Slip Op 30633(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 106111/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla

PART 19

Index Number : 106111/2010
MT. HAWLEY INS. CO.
vs.
ACI CAPITAL
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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 determined in accordance with the accompanying decision/order.

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/11

Saliann Scarpulla
SALIANN SCARPULLA^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
MT. HAWLEY INS. CO.,

Plaintiff,
-against-

Index No.: 106111/10
Submission Date: 1/19/11

ACI CAPITAL, AS SUCCESSOR IN INTEREST TO
HOLLYWOOD TANNING SYSTEMS, INC., TAN
HOLDINGS, LLC, AS SUCCESSOR IN INTEREST
TO HOLLYWOOD TANNING SYSTEMS, INC.,
AND HOLLYWOOD TANNING SYSTEMS, INC.,
INDIVIDUALLY,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff: Law Offices of Curtis, Vasile, P.C.
2174 Hewlett Avenue
P.O. Box 801
Merrick, NY 11566
For Defendant ACI Capital:
Bleakley Platt & Schmidt, LLP
One North Lexington Avenue
White Plains, NY 10601

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MAR 17 2011
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Papers considered in review of this motion to dismiss:

- Notice of Motion 1
- Affs in Opp 2
- Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendant ACI Capital ("ACI") moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(1) and (a)(7).

Defendant Hollywood Tanning Systems, Inc. ("Hollywood") is engaged in the business of operating tanning salons. Plaintiff Mt. Hawley Insurance Company ("Mt. Hawley") commenced this action and filed an amended complaint dated August 13, 2010,

alleging that it issued a commercial general liability insurance policy to Hollywood for the policy period of 2004-2005 and a renewal period of 2005-2006. The policy contained certain deductible endorsements, which held Hollywood responsible for the first \$2500 of damages for each occurrence that led to a lawsuit or claim. Mt. Hawley alleged that during the two policy periods, several occurrences took place at locations covered by the policy, where various claimants alleged that they sustained injuries by reason of Hollywood's negligence. Pursuant to the insurance policy, Mt. Hawley undertook to provide for Hollywood's defense in connection with those claims. In each case, Mt. Hawley advanced sums of money that were otherwise the responsibility of Hollywood as the deductible for each occurrence.

According to the allegations of the complaint, ACI was successor in interest to Hollywood and defendant Tan Holdings, LLC ("Tan Holdings") was successor in interest to Hollywood. As such, on or about April 8, 2009, Mt. Hawley notified the defendants of their obligation to reimburse the payments pursuant to the insurance policy. In its complaint, Mt. Hawley alleged that the defendants have failed to pay the amount, \$42,500, allegedly due. Mt. Hawley asserted breach of contract and account stated causes of action.

ACI now moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(1) and (a)(7). In support of the motion, ACI's managing director Kevin S. Penn ("Penn") submits an affidavit maintaining that there are no facts alleged in the complaint to support Mt. Hawley's assertion that ACI is a successor in interest to

Hollywood, and in fact, ACI is not a successor in interest to Hollywood. Rather, pursuant to a Contribution and Asset Purchase Agreement (“AP Agreement”) dated April 18, 2007, only Tan Holdings purchased Hollywood’s assets. ACI was not a party to that agreement. In any event, pursuant to Section 2.5(a) of the AP Agreement, Hollywood retained “all Liabilities in respect of the ownership or the operation of the Business or Transferred Assets, including any products sold and/or services performed by Seller or the Subsidiaries, on or before the closing date [June 22, 2007].”

In opposition, Mt. Hawley argues that ACI owns Tan Holdings and submits no evidence proving that it is not the owner of Tan Holdings, and therefore, is liable for Hollywood’s debts pursuant to the AP Agreement. Specifically, Mt. Hawley explains that there are several business articles that refer to ACI as the “owner” of Hollywood and the signature of the purchaser under the AP Agreement is that of Kevin S. Penn, who is also managing director of ACI. Finally, Mt. Hawley argues that it was not a party to the AP Agreement and therefore, its right to recoup the deductibles advanced can not be affected by the sale of Hollywood’s assets.

Discussion

“On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not

entitled to such consideration.” *Franklin v. Winard*, 199 A.D.2d 220, 224 (1st Dept. 1993);
see also Leder v. Spiegel, 31 A.D.3d 266 (1st Dept. 2006) *aff’d* 9 N.Y.3d 836 (2007).

In support of Mt. Hawley’s allegation in its complaint that ACI is a successor in interest to Hollywood, Mt. Hawley refers to certain business articles and other documents in which ACI is referred to as “owner” of Hollywood. In his affidavit, Penn avers that ACI is not successor in interest to Hollywood. In any event, pursuant to the clear language of the AP Agreement, Hollywood agreed to retain all liabilities (with the exception of certain Assumed Liabilities not relevant here) incurred on or before June 22, 2007. Mt. Hawley alleges that subject occurrences took place during the first two policy periods -- in the time span of 2004-2006 – and as such, pursuant to the AP Agreement, Hollywood retained those liabilities. Therefore, regardless of whether ACI is successor in interest to Hollywood, ACI can not be liable for Hollywood’s debts.

In accordance with the foregoing, it is

ORDERED that defendant ACI Capital’s motion to dismiss the complaint insofar as asserted against it is granted and the action is severed and shall continue as to the remaining defendants.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 16, 2011

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK’S OFFICE

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.C.