Sompo Japan Insurance Company of America v Travelers Indemnity Co.
2004 NY Slip Op 30210(U)
July 6, 2004
Supreme Court, New York County
Docket Number:
Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

0118223/2003

SOMPO JAPAN INSURANCE CO.
vs
TRAVELERS INDEMNITY CO.,

SEQ 2

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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Cross-Motion: ☐ Yes ☒ No

FILED

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/6/04

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

SOMPO **JAPAN** INSURANCE COMPANY OF AMERICAN, f/k/a YASUDA FIRE & MARINE INSURANCE ***COMPANY*** OF AMERICA, Individual, **and** as Subrogee of Nissan North America, Inc., and Nissan Motor Acceptance Corporation,

Plaintiff(s),

- against -

TRAVELERS INDEMNITY *CO.*, MOORE & ASSOCIATES and CLUNE, HAYES, & LOPRESTI, P.C.,

Defendant(s).

Index No.: 118223/2003

DECISION/ORDER

In this insurance action, plaintiff Sompo Japan Insurance Company of America, f/k/a Yasuda Fire & Marine Insurance Company of America ("Sompo") seeks damages from defendants allegedly resulting from bad 'faith,malpractice, and negligence in providing a defense for Sompo's insured in an underlying automobile action. Defendants Travelers Indemnity Co. ("Travelers") and Moore & Associates ("Moore") move to dismiss the complaint against them on the grounds that plaintiff's claims are time-barred and fail to state a cause of action.'

The standard of review under CPLR 3211 is well settled:

> The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.' In furtherance of this task, we liberally construe the complaint and accept **as** true the facts alleged in the complaint and any submissions in opposition to the

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'The branch of defendants' motion to dismiss the complaint for improper service has been withdrawn.

dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference.

(511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted].)

The material facts, as alleged in the complaint, are as follows: In an underlying personal injury action ("Marcoux action"), plaintiff Douglas Marcoux alleged that he sustained injuries on May 8, 1999 as a result of an automobile accident with another vehicle that was leased to Alexandra Villalba by Nissan North America, Inc., and Nissan Motor Acceptance Corporation (collectively 'Nissan" or "the Nissan entities"). In that action, plaintiff sued Nissan, Ms. Villalba, and her companion and the driver of the vehicle, Jonathan Bullock, Travelers was Nissan's and Ms. Villalba's primary insurer, with a policy limit of $100,000. Sompo was the first excess insurer of Nissan, with a policy limit of $1 million.[2]

The Marcoux action was commenced on May 12, 1999 in New York Supreme Court. In August 1999, Travelers instructed Moore to represent Ms. Villalba, Mr. Bullock, and Nissan. Moore failed, however, to oppose a motion by Marcoux for entry of a default judgment against defendants. By order of this court (Lowe, J.), dated October 6, 1999, a default judgment as to liability was entered against defendants. On December 29, 1999, Nissan filed a consent to change attorney form, changing its attorneys from Moore to defendant Clune, Hayes & Lopresti, P.C. ("Clune"), also appointed by Travelers. (Complaint, ¶ 61.) The Supreme Court subsequently denied a motion on behalf of defendants for renewal and reargument of their prior motion, which had been denied, to vacate the default judgment. An inquest was held after

[2] Non-party Royal Indemnity Company ("Royal") was Nissan's second excess insurer.

which, by decision and order dated July 20,2000, plaintiff Marcoux was awarded approximately $3,000,000 in damages against defendants. The action was then settled, and a release dated December 8,2000 given by Marcoux to defendants, upon payment to him of $2.4 million ($1 million from Sompo, $100,000 from Travelers, and the remainder from Royal). The instant action was commenced on October 20,2003.

In this action, Sompo pleads seven causes of action arising out of defendants' handling of the Marcoux action: 1. Breach of the duty to exercise good faith, brought against Travelers by Sompo individually; 2. Breach of the duty to exercise good faith, brought against Travelers by Sompo as subrogee of Nissan; 3. Negligence and legal malpractice, brought against Moore by Sompo individually; 4. Breach of fiduciary duty, brought against Moore by Sompo individually; 5. Negligence and legal malpractice, brought against Clune by Sompo individually; 6. Breach of fiduciary duty, brought against Clune by Sompo individually; 7. Bad faith in its representation of Nissan, brought against Travelers and Moore by Sompo individually.

Sompo's Claims Against Moore

Moore contends that Sompo's legal malpractice and negligence claims against it are time-barred because it was replaced as attorney for Nissan in December 1999, and this action was not commenced until more than three years later in October 2003. Sompo opposes the motion, claiming that the complaint alleges a number of acts that constituted malpractice, beginning with Moore's failure to answer the Marcoux complaint or to oppose a motion for a default judgment, and continuing through settlement of the Marcoux action by release given on December 8,2000 from which plaintiff contends the statute of limitations runs.

CPLR 214(6) provides a three year statute of limitations for legal malpractice "regardless

of whether the underlying theory is based in contract or tort." It is well settled that under this statute, "[a]n action to recover damages for legal malpractice accrues when the malpractice is committed." (Shumsky v Eisenstein, 96 NY2d 164, 166 [2001].) Under the "continuous representation doctrine," however, the statute of limitations is tolled on a malpractice claim "until the ongoing representation is completed." (Id. at 167-168 [internal quotation marks and citation omitted].)

Contrary to Sompo's contention, the continuous representation doctrine is not available to it to toll the statute of limitations, as the complaint itself alleges that Nissan replaced Moore as its attorneys in 1999, and the representation was therefore completed in 1999, more than three years before commencement of the action.

Nor may Sompo avoid the bar of the statute of limitations based on its claim that Moore was a "component" of Travelers or that Moore "is part and parcel of Travelers who continued to act ostensibly on behalf of the Nissan Entities until December 2000." (Tenney Aff. In Opp., ¶¶ 15, 22.) This claim is apparently based on Moore's status as in-house counsel for Travelers, as documented by evidence submitted by Sompo on this motion.[3] Even crediting Sompo's assertion that Moore was in-house counsel, Sompo does not allege that Moore supervised, controlled or otherwise played any role in the Marcoux litigation after Moore was substituted by Clune as attorneys for Nissan. Nor does Sompo submit any authority that Moore may be found to have engaged in continuing representation based on its mere status as in-house counsel, after a

[3]Sompo submits a letter on Moore & Associates letterhead, dated August 25, 1999, describing itself as "attorneys employed in the Staff Counsel organization of the Travelers Indemnity Company and its Property Casualty affiliates and subsidiaries." (Tenney Aff. In Opp., Ex. A) This evidence is properly received in opposition to the motion to dismiss for the purpose of supplementing the pleadings. (See Rovello v Orofino Realty Co., 40 NY2d 633 [1976].)

formal substitution and in the absence of any allegation that it had a continuing involvement in the litigation.

Sompo also may not avoid dismissal of the malpractice claim against Moore based on a claimed need for discovery, given the absence of any allegation of Moore's continuing involvement in the Marcoux action after its substitution, and the absence of any showing of at least some "evidentiary basis" "to suggest" that discovery may lead to relevant evidence. (See Harris v Alcan Aluminum Corp., 91 AD2d 830,831 [4th Dept 19821, affd for reasons stated below 58 NY2d 1036[1983]; Boston Safe Deposit & Trust Co. v Hoffman, 177 AD2d 368 [1st Dept 1991].)

Turning to Sompo's claims against Moore for breach of fiduciary duty and bad faith in the defense of the Marcoux action, Moore contends that these claims are also time-barred, and that they fail to state causes of action against Moore due to the lack of an allegation of a contractual relationship or privity between Sompo and Moore.

There is significant authority that a primary insurer owes fiduciary duties to an excess insurer in the defense of an action, and that an excess insurer has a direct cause of action against the primary insurer for breach of such duties. (See Hartford Acc. & Indem. Co. v Michigan Mut. Ins. Co., 93 AD2d 337 [1st Dept 1983], affd 61 NY2d 569 [1984]; Allstate Ins. Co. v American Tr. Ins. Co., 977 F Supp 197 [ED NY 19971.) The parties dispute whether a direct cause of action for breach of fiduciary duty is maintainable by an excess insurer against a law firm hired by the primary insurer to defend the excess insurer.

Even assuming arguendo that such a direct cause of action exists, it is time-barred in the instant action. The claim for breach of fiduciary duty, as pleaded in the complaint, mirrors the

malpractice claim, and is based on the same acts as those constituting the basis for the malpractice claim. Thus, the claim for breach of fiduciary duty is subject to, and barred by, the same statute of limitations as the malpractice claim. (Compare 6645 Owners Corp. v GMO Realty Corp., 306 AD2d 97 [1st Dept 20031, with Akinrosotu v Kellman, 289 AD2d 112 [1st Dept 2001].) In any event, as the breach of fiduciary duty claim seeks money damages only, it is subject to an independent statute of limitations of three years. (See Kaufman v Cohen, 307 AD2d 113 [1st Dept 2003].)

Sompo's final claim against Moore for bad faith in the representation of Nissan is also time-barred. Like the claim for breach of fiduciary duty it is duplicative of the malpractice claim. The malpractice claim alleges that Moore failed to recognize the conflicts of interest between the Nissan entities and Villalba and Bullock (Complaint, ¶ 120), while the bad faith claim alleges that Moore, as in-house counsel for Travelers, subordinated the interests of Nissan to those of Travelers and Villalba. (Complaint, ¶ 195.) The acts on which the claims of conflict and subordination of Nissan's interests are based are the same in both the malpractice and bad faith causes of action. Thus, the bad faith cause of action is subject to the same statute of limitations as the malpractice claim, and is time-barred for the reasons stated in connection with the malpractice claim.

Sompo's Claims Against Travelers

Subrogation Claim

Sompo's second cause of action, brought in its capacity as subrogee of Nissan, alleges that Travelers breached its duty to act in good faith to defend and indemnify the Nissan entities so that they would not be responsible for losses in *excess* of the Travelers policy limits.

(Complaint, ¶ **197.)** Travelers moves to dismiss this claim on the ground that it is subject to CPLR 202, New York's borrowing statute, because the Nissan entities are California corporations, and the claim is time-barred under the two-year California statute of limitations. In opposition, plaintiff contends that because Nissan conducts business in New York, the borrowing statute does not apply, and the claim is subject to the three-year New York statute of limitations under which it is timely.

CPLR 202 provides that "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply." It is settled that "[w]hen a nonresident sues on a cause of action accruing outside **New** York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations." (Global Fin. Corp. **v** Triarc Corp., 93 NY2d 525,528 [1999]; Proforma Partners, LP v Skadden Arps **Slate** Meagher & Flom, 280 AD2d 303 [1st Dept 20011, lv denied 96 NY2d 722.)

In tort cases involving the interpretation of CPLR 202, it has consistently been held that "a cause of action accrues at the time and in the place of the injury." (Global Fin. Corp., *93* NY2d at 529.) "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.' " [illegible] In the case of a corporation, its state of incorporation or principal place of business will ordinarily be found to be the place where the corporation resides. (See id, at 529-530; Brinckerhoff v Jac Holding Corp.,

263 AD2d 352 [1st Dept 19991; Prefabco, Inc. v Olin Corp., 71 AD2d 587 [1st Dept 1979].)

Here, Sompo does not deny that its subrogors, the Nissan entities, were incorporated in California and had their principal place of business in California. Rather, Sompo argues that because the Nissan entities had a place of business in New York State and because the Marcoux action was litigated in New York, the place of injury is New York.

A plaintiff who seeks to come within the exception to CPLR 202 for resident plaintiffs has the burden of proving New York residency. (Weinstein-Korn-Miller, 1 NY Civ Prac ¶ 202.01; Katz v Goodyear Tire & Rubber Co., 737 F2d 238 [2d Cir 1984][applying New York law].) Sompo fails, however, to submit any authority in support of its contention that the Nissan entities' place of residence is New York based on the fact that they did business in New York. On the contrary, the court's own research has located authority that a foreign corporation will not be held a resident for purposes of the borrowing statute based on the mere fact that it is licensed to do business or is doing business in New York. (See American Lumbermens Mut. Cas. Co. of Illinois v Cochrane, 284 AD 884 [1st Dept 19541, affd 309 NY 1017 [1956] [licensure insufficient]; Arneil v Ramsey, 414 F Supp 334 [SD NY 19761 [applying New York law] [doing business insufficient], affd 550 F2d 774 [1977].)

Sompo's further contention that the injury to Nissan should be found to have occurred in New York because the Marcoux action was litigated and the judgment against it was entered here, is also without merit. It is irrelevant that the acts complained of occurred in New York because, as held above, where the injury is economic, the place of injury is where the plaintiff resides rather than where the defendant committed the allegedly wrongful acts. (Green v Doukas, 2001 WL 767049, *6 [SDNY 20011 [applying New York law]; Global Fin. Corp. v

Triarc Corp., 93 NY2d 525, supra.)

The court accordingly concludes that the place of injury was California, the state of incorporation and of the principal place of business of the Nissan entities, and that the California statute of limitations applies. It is undisputed that California provides a two-year statute of limitations for a claim that an insurer breached the implied covenant of good faith and fair dealing. (See Richardson v Allstate Ins. Co., 117 Cal App3d 8, 11 [4*Dist 19811; Ca. Civ Pro § 339[1].) Therefore, even if the date of the breach was December 2000, as urged by plaintiff, the California statute of limitations bars the instant action.[4]

Sompo's Direct Claims

Travelers also moves to dismiss Sampo's direct claims against Travelers. These claims are duplicative, although the first cause of action is denominated one for breach of the duty to exercise good faith in the defense of the Marcoux action, while the seventh is denominated one

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[4]In contrast, Sompo's claim is timely under the New York statute of limitations. Sompo's claim alleging Traveler's breach of the duty to exercise good faith in the defense of Nissan in essence pleads breach of a fiduciary duty. (See Hartford Acc. & Indem. Co. v Michigan Mut. Ins. Co., 93 AD2d 337, affd 61 NY2d 569, supra.) It is therefore subject to New York's three-year statute of limitations. (See CPLR 214[4]; Kaufman v Cohen, 307 AD2d 113, supra.)

Travelers argues that the complaint alleges breach of the duty to exercise good faith as early as June 1999, based on Travelers' failure to ensure that a timely answer was interposed in the Marcoux action on the Nissan entities behalf (see Complaint, ¶¶ 79, 25) and that, in any event, Travelers' breach of such duty could not have ended any later than October 1999 when a default judgment as to liability was entered against defendants. (Ds.'Memo. Of Law In Support, at *26.)*

Construing the complaint liberally as the court is required to do on a motion to dismiss, however, the court finds that the complaint pleads that Travelers breach of the duty to defend Nissan in good faith consisted of a series of acts, commencing with the failure to ensure that Nissan did not fall into default, and continuing with Sompo's having had to settle the action after the inquest "as a direct and proximate result of the Nissan entities having lost all opportunity to defend and settle the Marcoux action on the merits, and due to the bad-faith handling of the defense of the Marcoux action by Travelers." (Complaint, ¶ 92.) As the settlement was effectuated by the release given in December 2000, less than three years before the commencement of this action, the action was brought within the New York limitation period.

for bad faith in defense of the action.

Travelers makes a prima facie showing that at the time of the events at issue, Sompo, then known as Yasuda, was a foreign corporation. In opposition, while Sompo submits evidence that Yasuda had a place of business in New York and was licensed to do business here, it does not make any showing that New **York** was its principal place of business. Sompo thus fails to meet its burden to show that the New **York,** as opposed to California statute of limitations applies. Sompo's direct claims against Travelers are therefore time-barred for the same reasons that its equitable subrogation claim is barred.

It is accordingly hereby ORDERED that the motion of defendants Travelers indemnity Co. **and** Moore & Associates is granted to the extent of dismissing the complaint **as** against said defendants; **and** it is further

ORDERED that the action is severed **as** against the remaining defendant and shall continue; and it is further

ORDERED that the clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
July **6,2004**

MARCY FRIEDMAN, J.S.C.