

**AIU Insurance Co. v American International Aviation
Agency, Inc.**

2006 NY Slip Op 30056(U)

January 31, 2006

Supreme Court, New York County

Docket Number: 0600260/0260

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

AIU Insurance

INDEX NO. 600260/06

MOTION DATE 5/8/06

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

American International

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 7/31/06

Alex Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
AIU INSURANCE COMPANY, AMERICAN HOME
ASSURANCE COMPANY, AMERICAN INTERNATIONAL
PACIFIC INSURANCE COMPANY, AMERICAN
INTERNATIONAL SOUTH INSURANCE COMPANY,
AMERICAN INTERNATIONAL SPECIALTY LINES
INSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE
COMPANY OF PENNSYLVANIA, COMMERCE AND
INDUSTRY INSURANCE COMPANY, GRANITE STATE
INSURANCE COMPANY, ILLINOIS NATIONAL
INSURANCE CO., NATIONAL UNION FIRE INSURANCE
COMPANY OF LOUISIANA, NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PA., NEW
HAMPSHIRE INSURANCE COMPANY, and THE
INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA,

Plaintiffs,

-against-

Index № 600260/06

AMERICAN INTERNATIONAL AVIATION
AGENCY, INC.,

Defendant.

-----X
HERMAN CAHN, J.:

On January 27, 2006, plaintiffs commenced this action for declaratory and injunctive relief against their long-time managing general agent, defendant American International Aviation Agency, Inc. (AIAA). On January 29, 2006, plaintiffs moved, by order to show cause, for a temporary restraining order and a preliminary injunction enjoining AIAA from marketing, servicing, underwriting, or participating in activities in connection with the management and servicing of plaintiffs' aviation insurance business, including refraining from making any further representations, express or implied, to others, that AIAA represents, or is authorized to act on behalf of, the plaintiff insurance companies. Following oral argument on February 2, 2006, this

court granted plaintiffs' motion for an injunction. AIAA asserts that it has complied fully with the court's order and has ceased holding itself out as plaintiffs' general managing agent as of that date.

AIAA now moves to stay the action, and pursuant to the Amended Demand for Arbitration, compelling arbitration in New York, New York, and, if necessary, for the appointment of an arbitrator. The basis of AIAA's motion is the arbitration clause set forth in the Aviation Management Agreement (also referred to by the parties as the MGA Agreement), which provides, at "ninth paragraph":

[t]his Agreement is made in good faith and should there arise from any unforeseen cause, difference of opinion or of interpretation of this Agreement which cannot be amicably settled between [plaintiffs] and AIAA, it is then understood and agreed that such difference shall be submitted for arbitration to three disinterested officers of fire or casualty insurance offices, one of them chosen by [plaintiffs], one by AIAA, and the third by the two so chosen, and a decision of the majority of the three shall in each case be final. The arbitrators shall be required to decide the matters submitted to them upon the customs and usages of the business and in a spirit of equity rather than of technicalities or of legal requirements. Each party shall pay for the expense of its own arbitrator and a pro rata portion of the expense for the third arbitrator.

The language is unambiguous and shows the intent of the parties to submit controversies to the arbitral forum. Moreover, following the decision of the Supreme Court in Buckeye Check Cashing, Inc. v Cardegna, (___ US ___, 126 S Ct 1204 [2006]), which was issued on February 21, 2006, plaintiffs consented to defendant's demand to arbitrate all issues contained in the complaint, and all issues raised by AIAA in its March 21, 2006 Amended Demand for Arbitration (Amended Demand), except for one.

Plaintiffs assert that among AIAA's responsibilities as managing agent, was AIAA's authority and obligation to collect premiums on policies issued by the various plaintiff insurers.

Plaintiffs allege that, at the time they terminated AIAA, it was holding approximately \$80 million in trust for the various plaintiff insurers. Plaintiffs do not consent to arbitrate issues regarding these funds (the commissions and premiums) to which AIAA makes reference in paragraph 5.1 (c) of the Amended Demand. In paragraph 5.1 (c), AIAA makes a specific demand for an award:

declaring that AIAA is only required to transmit to the AIG Insurers, their affiliates and agents amounts held in AIAA's premium trust account in accordance with the express terms of the MGA Agreements and the parties' course of dealing pursuant thereto, that is, AIAA is only required to transmit net amounts (i.e., amounts after deduction of, among other things, losses paid, commissions due and payable, claims settled and paid) held in AIAA's premium trust account to the AIG Insurers within "one hundred and twenty (120) days after the close of each quarter."

Plaintiffs strenuously object to this demand, and the issues surrounding the return of the commissions and premiums became key aspects of a separate action, commenced by plaintiffs against AIAA, on February 16, 2002, in the Superior Court of Fulton County, Georgia, under index number 2006CV112715 (the Georgia Action).

In the Georgia Action, plaintiffs seek to compel AIAA to return approximately \$16 million¹ in premium payments which AIAA placed into a "premium trust account," at Sun Trust Bank in Georgia, (account number 8801670236). According to plaintiffs, they chose the Georgia venue because AIAA has its principle place of business there; the premium funds held by AIAA are in the Georgia bank; AIAA is subject to Georgia laws with respect to its fiduciary obligations regarding the trust accounts; and because many of the relevant witnesses and documents are located there. Furthermore, plaintiffs object to submitting to the New York

¹ Plaintiffs initially sought the return of \$80 million. After AIAA remitted \$64 million, plaintiffs filed an amended complaint in the Georgia Action seeking the balance, or \$16 million.

arbitral forum this issue along with the balance of the parties' dispute on the grounds that: (1) the commissions and premiums claim is not arbitrable under Georgia law; (2) there is a pending motion to stay the action and to compel arbitration before the Georgia court which should be resolved by the Georgia court; and (3) well-established comity principles prevent this court from "wresting control of that issue from the Georgia court."

Plaintiffs assert that, under Georgia law, it is impermissible for AIAA to make unauthorized post-termination deductions for commissions from a premium trust account maintained in the state, and they rely on Georgia statutes, including O.C.G.A. § 33-23-35 (b), which provides as follows.

All funds representing premiums received or return premiums due the insured by any agent or subagent shall be accounted for in the licensee's fiduciary capacity, shall not be commingled with the licensee's personal funds, and shall be promptly accounted for and paid to the insurer, insured, or agent as entitled to such funds. Nothing contained in this Code section shall be deemed to require any agent or subagent to maintain a separate bank deposit for the funds of each principal, if the funds so held for each principal are reasonably ascertainable from the books of account and records of the agent or subagent.

Furthermore, O.C.G.A. § 33-23-35 (c) provides, in relevant part, that "[a]ny violation of this Code section shall constitute grounds or cause for action by the Commissioner Any willful violation of this Code section shall constitute a misdemeanor unless such amounts involved exceed \$500.00, whereby such violation shall constitute a felony."

In reliance on Georgia law, plaintiffs seek the immediate return of the commissions and premiums, and at this juncture, they demand redress for this aspect of their dispute via the Georgia courts. In response to commencement of the Georgia Action, AIAA filed an answer and a motion to stay litigation in that action in favor of arbitration (Oral Argument, May 8, 2006,

counsel for defendant, at 7, lines 1 - 4).

With respect to the issue of comity, plaintiffs stress that the rule of comity forbids New York courts from enjoining an action in a sister state “unless it is clearly shown that the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking an injunction or if its purpose was to evade the law of the domicile of the parties” (Chayes v Chayes, 180 AD2d 566 [1st Dept 1992] [internal quotation marks and citation omitted]), and that none of these circumstances are present here. AIAA concedes that neither venue nor jurisdiction in the Georgia court over the commissions and premiums held in the Sun Trust Bank is improper. Further, this court’s examination of the motion papers and supporting documents fails to reveal evidence that the Georgia Action was brought in bad faith, motivated by fraud or an intent to harass AIAA, or for the purpose of evading the laws of the State of New York. However, AIAA correctly argues that comity is not at issue because the commissions and premiums dispute must be sent to arbitration along with the balance of the claims pending in New York because it falls within the broad arbitration clause contained in the Aviation Management Agreement.

The plain language of the arbitration clause mandates arbitration for resolution of the disputes which might arise between the parties. Not only are the issues surrounding the Sun Trust Bank premium trust account intertwined with the remaining aspects of the parties’ dispute, but plaintiffs’ rationale for litigating the commissions and premiums issue in a separate action, does not support an exemption from the mandate to arbitrate “any unforeseen cause, difference of opinion or of interpretation of this Agreement which cannot be amicably settled between [plaintiffs] and AIAA” (Aviation Management Agreement, para. 9).

It is well settled that “a party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503 (a) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement” (Matter of Curtis, Mallet-Prevost, Colt & Mosle, LLP v Garza-Morales, 308 AD2d 261, 264 [1st Dept 2003] [internal citations omitted] [see also H.M. Hamilton & Co., Inc., v American Home Assur. Co., 15 NY2d 595 [1964]; Matter of S.M. Wolff Co. v Tulkoff, 9 NY2d 356, 361-362 [1961]). Furthermore,

[i]f the action brought in violation of an agreement to arbitrate is brought outside New York, it will of course be beyond the power of a New York court to affect it with a simple stay. In that instance, as long as New York is the place agreed on for arbitration, the court can issue an outright injunction enjoining the violating party - the party in the foreign action- from proceeding with it. This recognizes that a refusal to grant such an injunction would enable a party to avoid the agreement to arbitrate through the simple expedient of bringing an action elsewhere.

(Siegel, NY Prac § 592, at 1000 [3d ed]).

Plaintiffs, apparently, do not dispute that issues arising under the Aviation Management Agreement are to be arbitrated in New York, New York. Accordingly, pending a final adjudication of this action, plaintiffs are enjoined and prohibited from prosecuting or taking any further action to prosecute the Georgia Action, or from taking any action or proceeding involving the same or related issues which are the subject of the instant action. The arbitrators are to be designated in accordance with the Aviation Management Agreement, and the parties are to advise this court of their selection within ten days of service of a copy of this decision and the order to be entered on plaintiff’s counsel.

Finally, to the extent possible, this court recommends that the designated arbitrators give


priority to resolving the issues surrounding the disputed \$16 million, including the manner in which the funds should be distributed, and to issue an interim order to that effect.

This constitutes the decision of the court.

Settle Order on three days' notice in accordance with the above memorandum decision.

Dated: July 31, 2006

ENTER:



J.S.C.