

Arch Insurance Co. v Garn

2006 NY Slip Op 30314(U)

March 30, 2006

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

PRESENT: _____
Justice

PART _____

Index Number : 601062/2005

ARCH INS. CO.

vs

GARN, LISA

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 decided

pursuant to attached Deem

FILED
APR 04 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/31/06

HON. MARY ANN GIAPER, JSC

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: IAS PART 36

-----X

ARCH INSURANCE COMPANY,

Plaintiff,

-against-

LISA GARN,

Defendants.

Index No. 601062/05
FILED
APR 04 2006
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NEW YORK

-----X
Marilyn Shafer, J.:

Plaintiff Arch Insurance Company (Arch) moves for partial summary judgment, on its second and fourth causes of action, in an action brought mainly to recover on a personal guarantee executed by defendant Lisa Garn (Garn). Garn cross-moves for an order, pursuant to CPLR 7503 (a), compelling arbitration of the parties' dispute, and, pursuant to CPLR 2201, ordering a stay of the determination of any possible damages in this action until the completion of the arbitration.

I. Facts

Garn is the president and sole shareholder of The Garn Group, Inc. (the Agency), an insurance broker. Arch writes policies of insurance, which are fully reinsured by another insurer.

Non-party The Garn Group, Inc. and Arch's predecessor entered into an agency agreement (the Agency Agreement) (Notice of Motion, Ex. D) in September 2000, under which the Agency agreed

to act as Arch's agent in connection with the sale of Arch's insurance policies. The Agency was to collect the insurance premiums, acting, in that regard, as Arch's agent, holding the insurance proceeds in trust for Arch. The Agency Agreement contains a general arbitration clause.

At the same time as the parties execution of the Agency Agreement, Garn executed an unconditional guarantee to pay all of the Agency's indebtedness, waiving all defenses available to the Agency other than payment of the debt. Notice of Motion, Ex. E. The guarantee contains no arbitration clause.

The present dispute is over premiums, in the sum of \$50,175.25, which Arch claims the Agency has failed to turn over to it.¹ The Agency claims, in rebuttal, that it is entitled to receive profit commissions which have not been accounted for, much less paid, and which would reduce the amount with the Agency owes to Arch.

II. Discussion

Arch seeks partial summary judgment on its second cause of action on the guarantee executed by Garn, and on its fourth cause of action for conversion.

A. Arbitration

Garn maintains that Arch's first line of recourse is to

¹The original sum allegedly due was \$80,175.25. The Agency has made payment to Arch of \$30,000 since the action commenced.

arbitrate the matter with the Agency, and that, in going after her, Arch is making an "end run" around its obligations under the Agency Agreement.

"It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent "evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes"'" *Marek v Alexander Laufer and Son, Inc.*, 257 AD2d 363, 364 (1st Dept 1999), quoting *Matter of Waldron (Goddess)*, 61 NY2d 181, 183-184 (1984); see also *AT & S Transportation, LLC v Odyssey Logistics Technology Corp.*, 22 AD3d 750 (2d Dept 2005). Thus, since the guarantee contains no arbitration clause, Arch cannot be compelled to resolve its dispute with the Agency before suing Garn under her guarantee. The guarantee is a separate contract, under which Arch has a right to proceed. Nor is a stay under CPLR 2201 appropriate, for the same reason.

B. The Guarantee

A plaintiff establishes its prima facie entitlement to judgment on a guarantee by demonstrating the existence of the instrument, and a failure to meet the obligations thereunder. See *Fleet Bank v M & Z Headwear, Inc.*, 308 AD2d 507 (2d Dept 2003). The guarantee in question does not allow Garn to raise any of the Agency's defenses, since she specifically waived them. See *Palm Beach Mortgage Management, LLC v Red Tulip, LLC*, 18 AD3d

379 (1st Dept 2005). Therefore, any offset which might be available to the Agency in the arbitration of Arch's claims is not available to Garn in this action. Arch, having shown that there are no questions of fact as to its right to judgment on the guarantee, is entitled to recover the Agency's debt of \$50,175.25 from Garn, along with any attorney's fees or other costs available to Arch under the Agency Agreement.

C. Conversion

Pursuant to New York Insurance Law § 2120 (a):

[e]very insurance agent and every insurance broker acting as such in this state shall be responsible in a fiduciary capacity for all funds received or collected as insurance agent or insurance broker, and shall not without the express consent of his or its principal, mingle any such funds with his or its own funds or with funds held by him or it in any other capacity.

See also *Matter of Leterman v Pink*, 249 App Div 164, 169 (1st Dept 1936), *affd sub nom Matter of Ebenstein v Pink*, 275 NY 613 (1937). Therefore, the Agency is Arch's fiduciary, responsible for all premiums it collected on behalf of Arch.

Case law also establishes that Garn may be responsible for Arch's alleged conversion of the trust funds, as the Agency's president and sole shareholder, if she had notice of the conversion of premiums by the Agency. "A director is chargeable with knowledge of the general condition, progress and financial situation of a corporation" (*id.*), including "corporate affairs that he might have learned by the exercise of reasonable care and

diligence." *Id.* Such a director "is responsible for the failure of the corporation to account properly for insurance premiums collected or received by it, *where he knows or should have known of that fact* [emphasis in original][internal quotation marks and citation omitted]." *Ambassador Insurance Company v Cohen*, 80 AD2d 627, 628 (2d Dept 1981). "Individual officers, in failing to exercise due care in accounting for premiums, breach a trust owed to an insurance carrier, and may be held personally accountable." *Marine Office-Appleton & Cox Corp. v Van Wagner*, 83 AD2d 800, 800-801 (1st Dept 1981).

A cause of action for conversion must state "'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" *Vigilant Insurance Company of America v Housing Authority of City of El Paso, Texas*, 87 NY2d 36, 44 (1995), quoting *Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 (1927). Because, pursuant to New York Insurance Law § 2120, the Agency holds the premiums in trust for Arch, it can be found liable in conversion for its refusal to turn over the proceeds to Arch. *Matter of Leterman v Pink*, 249 App Div 164, *supra*. It is undisputed that Garn, as principal, is aware that the premiums are being withheld from Arch. Under the general understanding that "[c]orporate officers ... may be personally liable for trust funds otherwise wrongfully diverted by their corporation, provided that they knowingly

participated in that diversion by the corporation" (*Edgewater Construction Co., Inc. v 81 & 3 of Watertown, Inc.*, 1 AD3d 1054, 1057 [4th Dept 2003][discussing trust funds in context of Lien Law]), Garn is liable for the Agency's failure to turn over the funds to Arch, that is, for the Agency's conversion of the funds.

This not to say that Garn is necessarily liable in conversion for the entire amount of the premiums. Arch's claim against Garn for conversion is not based on, or covered by, the guarantee. Conversion is a common-law cause of action, unrestricted by the contractual constraints of the guarantee. Therefore, Garn is entitled to allege any setoffs or claims which may serve to reduce the amount of monies allegedly converted. Therefore, summary judgment is granted to Arch on its fourth cause of action only as to liability.

Accordingly, it is

ORDERED that partial summary judgment is granted to plaintiff Arch Insurance Company on its second cause of action, in the sum of \$50,175.25, with costs and disbursements to plaintiff as taxed by the Clerk of the Court, and is granted solely as to liability on Arch Insurance Company's fourth cause of action; and it is further

ORDERED that defendant Lisa Garn's cross motion is denied; and it is further

ORDERED that the issue of the amount of attorney's fees and

costs to which Arch Insurance Company is entitled under the guarantee is severed and refered to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion for attorney's fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/30/06

ENTER:



J.S.C.

HON. BARILYN SHERIDAN JSC

FILED
APR 04 2006
COUNTY CLERK'S OFFICE
NEW YORK