

**Alberta & Orient Glycol Co. Ltd. v Factory
Mut. Ins. Co.**

2007 NY Slip Op 31000(U)

April 24, 2007

Supreme Court, New York County

Docket Number: 0603150/2005

Judge: Richard B. Lowe

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PRESENT: John J. ...
Justice

PART 54

Index Number : 603150/2005
ALBERTA & ORIENT GLYCOL CO.,
vs
FACTORY MUTUAL INS. CO.
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE 1/29/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits 7
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
MAY 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/24/07

HON. JOHN J. ...
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

-----X
ALBERTA & ORIENT GLYCOL COMPANY LTD.,

Plaintiff,

-against-

Index No. 603150/05

FACTORY MUTUAL INSURANCE COMPANY,
FACTORY MUTUAL INSURANCE COMPANY CAB,
FM GLOBAL, AMERICAN HOME ASSURANCE
COMPANY, AMERICAN HOME ASSURANCE
COMPANY CAB, ALLIANZ INSURANCE COMPANY
OF CANADA, ALLIANZ GLOBAL RISKS US
INSURANCE COMPANY (f/k/a ALLIANCE
INSURANCE COMPANY), ZURICH NORTH
AMERICA, ZURICH AMERICAN INSURANCE
COMPANY, ZURICH INSURANCE COMPANY
CAB, GREAT LAKES REINSURANCE (UK) PLC,
COMMONWEALTH INSURANCE COMPANY - US
BRANCH, COMMONWEALTH INSURANCE
COMPANY; ACE INA INSURANCE; ACE
AMERICAN INSURANCE COMPANY,

Defendants.
-----X

Hon. Richard B. Lowe, III:

This action involves a dispute between plaintiff Alberta & Orient Glycol Company Limited, a Canadian company, and several Canadian and other foreign insurance companies, including one New York company that issued its policy through its Canadian branch, regarding a property damage claim to a chemical reactor located at plaintiff's Canadian facility. The defendants are various insurance companies who provided seven quota share policies covering plaintiff's reactor for the period November 15, 2002 through November 15, 2003. Plaintiff claims that certain cracking events, allegedly occurring during the policy period, resulted in physical damage to the reactor. Plaintiff submitted a claim for physical damage and business

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NEW YORK
COUNTY CLERK'S OFFICE

interruption losses for those alleged damages. According to the complaint, plaintiff asserts that it has suffered losses with respect to repairs to the reactor in the amount of approximately \$18,000,000, as well as business interruption losses in the amount of \$22,700,000. After an extensive investigation at the Canadian facility, the insurers, through their Canadian adjuster, denied the claim on the grounds that a faulty workmanship exclusion was applicable, and that the loss occurred prior to the inception of the policies.

Defendants Factory Mutual Insurance Company (Factory Mutual), Factory Mutual Insurance Company CAB (Factory Mutual CAB), FM Global, American Home Assurance Company (American Home), American Home Assurance Company CAB (American Home CAB), Allianz Insurance Company of Canada (Allianz), Allianz Global Risks US Insurance Company (f/k/a Alliance Insurance Company) (Allianz Global), Zurich North America, Zurich American Insurance Company (Zurich American), Zurich Insurance Company CAB (Zurich CAB), Great Lakes Reinsurance (UK) Plc (Great Lakes), Commonwealth Insurance Company - US Branch (Commonwealth US), Commonwealth Insurance Company (Commonwealth); ACE INA Insurance (ACE INA) and ACE American Insurance Company (ACE) now move for an order, pursuant to CPLR 3211 (a) (8), dismissing the complaint on the ground that this court lacks personal jurisdiction over defendants Allianz, Great Lakes, Commonwealth, ACE INA, Factory Mutual CAB, FM Global, American Home CAB, Zurich North America and Zurich CAB.

Defendants also move: (1) pursuant to CPLR 3211 (a) (8), for an order dismissing the complaint as against Allianz, Great Lakes, Commonwealth, ACE INA, Factory Mutual CAB, FM Global, American Home CAB, Zurich North America and Zurich CAB on the ground that

these defendants were not properly served with process; (2) pursuant to CPLR 3211 (a) (7), dismissing the complaint as against Factory Mutual CAB, FM Global, American Home CAB, Zurich North America, Zurich CAB and Allianz on the ground that these defendants have no independent corporate entity status; (3) dismissing the complaint as against Zurich American, Commonwealth US and ACE on the ground that these defendants were not involved in the issuance of insurance to plaintiff; (4) pursuant to CPLR 3211 (a) (2), dismissing this action on the ground that this court lacks subject matter jurisdiction.

Defendants also alternatively move, pursuant to CPLR 327, for an order dismissing this action based upon the doctrine of forum non conveniens.

For the reasons set forth below, the branches of the motion based on personal jurisdiction and the doctrine of forum non convenience are granted, the remaining branches of the motion are denied, and the complaint is dismissed.

FACTS

In 2001, plaintiff retained the services of Willis Global Property & Casualty (Willis Global) in Houston, Texas, to act as its agent in procuring insurance coverage for plaintiff's facility located in Prentiss, Alberta, Canada (the Premises). Ultimately, defendants Factory Mutual (located in Rhode Island), Allianz (located in Canada), Zurich Insurance Company (located in Canada), Great Lakes (located in England), Commonwealth (located in Canada), American Home (located in Canada), and ACE INA (located in Canada) (collectively, the Insurers), issued seven all-risk insurance policies to plaintiff, each with different percentages of risk, and under separate policy numbers (collectively, the Policy). Combined, the Policy provided coverage in the amount of \$300,000,000 for loss and damage to the Premises, with

effective dates of November 15, 2001 through November 15, 2002.

The policies were issued out of Canada, England, and Rhode Island. All of the policies were issued by Canadian companies, except for Factory Mutual's policy, which was issued from Factory Mutual's Johnston, Rhode Island location, and Great Lakes' policy, which was issued out of London, England. The only insured premises under the Policy is plaintiff's Alberta, Canada location.

In October 2002, Raymond Blackton and Irene Settino, international brokers employed by Willis Risk Solutions (Willis), located in New York, New York, and acting on behalf of plaintiff, contacted various insurers regarding the renewal of insurance coverage for the Premises. In October 2002, Luci Winters of Willis Limited, located in England, contacted Munich-American Risk Partners GmbH (Munich) in Munich, Germany, regarding Great Lakes' interest in renewing insurance coverage for the Premises.

Communications, negotiations and discussions relating to the placement and issuance of renewal insurance for the Premises were conducted by and between Willis and: Brian Mazick of Factory Mutual in Massachusetts; Paul Kelly of Starr Technical Risk Agency (Starr Tech) in New York on behalf of American Home in Canada; Susan Bishop of Allianz Global in Texas, on behalf of Allianz in Canada; Debbie Landes of Zurich American in Texas, on behalf of Zurich; Olive Johnston of Commonwealth in Canada; and Carlo Petosa of ACE INA in Canada (see Aff. of Andrew C. Jacobson, Esq., ¶¶ 29-80). With regard to Great Lakes, all communications, negotiations and discussions were conducted by and between Willis Limited in England and Munich in Germany (see id., ¶ 61).

Coverage was ultimately renewed by the Insurers, with effective dates of

November 15, 2002 through November 15, 2003.

In 1997, plaintiff discovered cracking in its Ethylene Oxide Reactor, known as E-6101 (the Reactor), located at the Premises (Aff. of Bob Moore Aff., ¶ 6¹). Further cracking was discovered in December 2001, September 2002, and July 2003 (*id.*, ¶¶ 10-12). During the July 2003 inspection, plaintiff discovered massive cracking to the nozzles and welds of the Reactor. Plaintiff concluded that a majority of the welded seams needed to be repaired (*id.*, ¶ 12). Consequently, on September 24, 2003, plaintiff provided notice of loss to the Insurers (*id.*, ¶¶ 13, 46).

Following discovery of the cracking, plaintiff retained the services of Hitachi Zosen Mechanical Corporation, located in Japan, Union Carbide, located in West Virginia, and Dow Chemical Company (Dow) located in Michigan, to determine the cause of the cracking. In January 2005, plaintiff retained MEGlobal, located in Canada, to perform a cause investigation report. Plaintiff's experts ultimately concluded that the Reactor was experiencing stress corrosion cracking as a result of highly stressed welds being exposed to a boiler feedwater environment (*id.*, ¶¶ 14-28).

After notice of the loss was reported, the Insurers retained Hoogensen Metallurgical Engineering Ltd., currently known as Bodycote International plc, located in Canada, S 7 B Engineers and Constructors, located in Texas, and StarCon International, Inc., located in Tennessee, to investigate the cause of the cracking. The Insurers' experts agreed that stress corrosion cracking in a high-water temperature environment caused the failure of the

¹ Moore, the Senior Vice President and Loss Adjuster of Bateman Chapman, located in Canada, handled the adjustment of plaintiff's claim.

Reactor, but determined that the stress corrosion cracking was a result of the manufacturer's failure to perform post weld heat treatment to assure reliability (id., ¶¶ 29-45). The Insurers' experts also concluded that the stress corrosion cracking occurred due to the improper design and fabrication techniques used in the vessels' construction, and that the process of stress corrosion cracking began to occur when the Reactor first went into service (id., ¶ 49).

On October 3, 2003, Lloyd Kortbeek, of Matthews Daniel International (Canada) Ltd. (Matthews Daniel), sent a letter to plaintiff, c/o Dow, on behalf of the Insurers, reserving the Insurers' rights with respect to the claim (id., ¶ 47; Exh H).

Following completion of the repairs, plaintiff advised the Insurers that its claim would include the cost of repairing the welds in the amount of CAD \$18,584,160, together with a business interruption loss in the amount of CAD \$37,297,796 (id., ¶ 48).

On July 16, 2004, after a thorough investigation, Matthews Daniel, on behalf of the Insurers, issued a letter to plaintiff denying coverage under the Policy for both the physical damage and business interruption elements of the claim (id., ¶ 50; Exh I). The Insurers denied coverage on the ground that, because the damage manifested itself as corrosion, and was caused by faulty design and/or faulty workmanship, the damages were excluded by the Policy (id., ¶ 52). The Insurers also denied coverage on the ground that the damage to the Reactor occurred prior to the inception date of the Policy (id., ¶ 53).

On December 7, 2004, a meeting was held in Canada to address the technical finding of the parties' investigations (id., ¶ 57). On April 18, 2005, CTC Services of Canada, on behalf of the Insurers, issued a second denial letter to plaintiff, reiterating the initial denial of coverage (id., ¶ 58; Exh K). In July 2005, a second meeting was held in Canada to further

discuss the loss (*id.*, ¶ 60). On August 12, 2005, Moore, of Bateman Chapman in Canada, sent another letter to plaintiff on behalf of the Insurers, again reiterating their denial of coverage (*id.*, ¶ 61; Exh M).

On September 2, 2005, plaintiff filed this lawsuit, alleging breach of contract against six of the seven insurers that issued the Policy. Plaintiff failed to name Zurich Insurance Company as a defendant.

After plaintiff filed this action, the Insurers filed suit in the Court of Queen's Bench of Alberta, Judicial District of Edmonton, seeking a declaration by the Canadian court that the Policy does not provide coverage for plaintiff's loss. In December 2005, the Writ and Statement of Claim were served on plaintiff in Prentiss, Alberta, Canada.

DISCUSSION

I. PERSONAL JURISDICTION

In support of their motion to dismiss the complaint, defendants assert that this action must be dismissed as against Allianz, Great Lakes, Commonwealth and ACE INA, on the ground that this court does not have personal jurisdiction over them pursuant to either CPLR 301, or CPLR 302 (a) (1). Defendants also assert that this court does not have personal jurisdiction over Factory Mutual CAB, FM Global, American Home CAB, Zurich North America and Zurich CAB, because these defendants are not corporate entities, and do not exist.

“A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of ‘doing business’ here that a finding of its ‘presence’ in this jurisdiction is warranted” (Landoil Resources Corp. v Alexander & Alexander Servs., Inc., 77 NY2d 28, 33 [1990] [citations omitted]; see also Laufer v Ostrow, 55

NY2d 305 [1982]; McGowan v Smith, 52 NY2d 268 [1981]). The test is whether “the aggregate of the corporation’s activities in the State [is] such that [the corporation] may be said to be ‘present’ in the State ‘not occasionally or casually, but with a fair measure of permanence and continuity’” (Laufer v Ostrow, 55 NY2d at 310 [citation omitted]).

The traditional indicia that courts rely upon in deciding whether a foreign corporation is “doing business” in New York include: “the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state” (Hoffritz for Cutlery, Inc. v Amajac, Ltd., 763 F2d 55, 58 [2d Cir 1985]; accord Mende v Milestone Tech., Inc., 269 F Supp 2d 246 [SD NY 2003]; Frummer v Hilton Hotels Intl., Inc., 19 NY2d 533 [1967]; Southern Industries of Clover, Ltd. v Tex-Cellence, Inc., 7 Misc 3d 1007(A) [Sup Ct, Bronx County 2005]).

As the party seeking to assert personal jurisdiction, plaintiff bears the burden of proof on this issue (Ying Jun Chen v Lei Shi, 19 AD3d 407 [2d Dept 2005]; O’Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199 [1st Dept 2003]).

In this case, the court finds that there is no CPLR 301 jurisdiction with respect to defendants Allianz, Great Lakes, Commonwealth and ACE INA. Plaintiff has failed to present any evidence of the above factors with respect to these defendants. Instead, as set forth below, defendants have presented uncontroverted evidence that none of them are authorized to do business in New York, or have any offices, employees or property in New York.

Allianz, Commonwealth and ACE INA are Canadian insurance companies organized under the laws of Canada with their principle place of business in Canada (Aff. of

Susan Bishop, Allianz Global's Executive Underwriter, ¶ 3; Aff. of Olive Johnston, Commonwealth's Underwriter, ¶ 3; Aff. of Carlo Petosa, ACE INA's Underwriter, ¶ 3). Great Lakes is a foreign insurance company with its principle office located in London, England (Aff. of Jonathan Farmiloe, Great Lakes' Account Handler, ¶ 4). Defendants Great Lakes, Commonwealth and ACE INA Canada are foreign corporations that are not authorized to do business in New York, are not authorized by the insurance commissioner of the State of New York to do business in New York, do not have an office or place of business in New York, and have not appointed an agent to accept service of process in New York. Furthermore, these companies do not have telephones or facsimiles, or own or lease any real property in New York (Farmiloe Aff., ¶ 14; Johnson Aff., ¶ 15; see Jacobson Aff., ¶ 87).

Although plaintiff claims that because Commonwealth and Great Lakes are eligible to write excess lines insurance in New York, they are subject to jurisdiction under CPLR 301, they are incorrect. While plaintiff cites numerous excess lines requirements (see 11 NYCRR 27.0, et seq.) none of these provisions subject an excess line insurer to general jurisdiction in New York. Moreover, the policies issued by Commonwealth and Great Lakes were not issued pursuant to 11 NYCRR 27.0, et seq. Thus, this statute has no applicability to this action.

Accordingly, this court lacks personal jurisdiction over Allianz, Commonwealth, ACE INA and Great Lakes pursuant to CPLR 301 (see Southern Industries of Clover, Ltd. v Tex-Cellence, Inc., 7 Misc 3d 1007(A), at * 6 ["to the extent that defendant does not physically conduct business within the state, does not own property in New York, does not have a bank account in New York, or otherwise solicit business in New York, it is clear that he is not present

in New York nor doing business in this state so as to warrant jurisdiction pursuant to CPLR § 301").

Plaintiff has also failed to demonstrate that this court has personal jurisdiction over Allianz, Commonwealth, ACE INA and Great Lakes under CPLR 302 (a) (1).

Pursuant to CPLR 302 (a) (1), New York's long-arm statute, New York courts can exercise personal jurisdiction over any non-domiciliary who, in person or through his agent, transacts any business within the state, or contracts anywhere to supply goods or services in the state. Thus, a defendant is subject to personal jurisdiction under CPLR 302 (a) (1) if it "transacts any business within the state" and the cause of action "arises out of" that transaction (PDK Labs, Inc. v Friedlander, 103 F3d 1105, 1109 [2d Cir 1997]). A claim "arises out" of a party's transaction of business if it is "sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business" (*id.* [quotations marks and citation omitted]).

In construing CPLR 302 (a) (1), courts look at whether the defendant was "engaged in some purposeful activity in this state in connection with the matter in suit," in light of the "totality of the defendant's activities within the forum" (Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc., 15 NY2d 443, 457 & n 5, cert denied sub nom. Estwing Mfg. Co. v. Singer, 382 US 905 [1965]; McGowan v Smith, 52 NY2d 268, supra; First Natl. Bank and Trust Co. v Wilson, 171 AD2d 616 [1st Dept 1991]). This test is hardly a precise one, but "what must be shown is that the defendant had some business contacts within this State and that the cause of action sued upon arose out of those business contacts" (Lancaster v Colonial Motor Freight Line, Inc., 177 AD2d 152, 158 [1st Dept 1992]).

A claim "arises out" of a party's transaction of business if it is "sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business" (PDK Labs, Inc. v Friedlander, 103 F3d at 1109 [quotation marks and citation omitted]), that is, if an "articulable nexus" exists between the claim and the transaction (Credit Lyonnais Sec. (USA), Inc. v Alcantara, 183 F3d 151, 153 [2d Cir 1999] [citation omitted], and the defendant has "purposefully availed [it]self of the privilege of conducting activities within New York and thereby invoc[ed] the benefits and protections of its laws" (Fort Knox Music Inc. v Baptiste, 203 F3d 193, 196 [2d Cir 2000] [quotation marks and citation omitted]).

Applying the above-cited principles, and crediting the non-conclusory allegations advanced by plaintiff (Brandt v Toraby, 273 AD2d 429 [2d Dept 2000]), it is apparent that defendants' minimal contacts with New York are not sufficient to constitute the purposeful activity required for long-arm jurisdiction pursuant to CPLR 302 (a) (1). In 2002, Raymond Blackton and Irene Settino of Willis in New York, acting on behalf of plaintiff, contacted various Insurers regarding the renewal of insurance coverage for plaintiff's Canadian facility. The uncontroverted evidence submitted by both plaintiff and defendants establishes that Allianz, Commonwealth and ACE INA's only involvement with New York was contact by mail, facsimile or phone with Blackton regarding the renewal of the Policy (Blackton Aff., ¶¶ 2, 5-9; Bishop Aff., ¶¶ 7, 10-11; Johnston Aff., ¶¶ 7, 10-11; Petosa Aff., ¶¶ 7, 10-11). Great Lakes did not even communicate with Blackton in New York regarding the renewal of the Policy; rather, Great Lakes communicated with Luci Winters of Willis, Limited in London (Farmiloe Aff., ¶ 7). Moreover, Willis did not issue the final policies to plaintiff from New York. Rather, the final policies were issued to plaintiff by each of the actual Insurers from their Canadian offices

(Jacobson Aff., ¶ 7).

Interstate negotiations by telephone, facsimile or mail are insufficient to impose personal jurisdiction in New York upon a non-resident defendant (Glassman v Hyder, 23 NY2d 354 [1968]; Edelman v Taittinger, S.A., 298 AD2d 301 [1st Dept 2002]; Professional Personnel Mgt. Corp. v Southwest Medical Assocs., Inc., 216 AD2d 958 [4th Dept 1995]; Concrete Pipe & Prods. Corp. v Modern Bldg. Materials, Inc., 213 AD2d 1023 [4th Dept 1995]; Success Marketing Elecs., Inc. v Titan Sec., Inc., 204 AD2d 711 [2^d Dept 1994]).

Plaintiff also alleges that defendants have transacted business in New York because they received premium payments from Willis, located in New York, for the Policy (Complaint, ¶ 3 [“the defendant Insurers accepted premium payments for the coverage from Willis in New York”]; Blackton Aff., ¶ 8 [the Insurers all sent their bills to Willis in New York]; Aff. of Pedro Rodriguez, Jr., ¶¶ 3-4 [on the Insurers’ behalf, Willis compiled the separate bills into a single bill that was sent to Dow in Midland, Michigan for payment, and Dow sent the premium payments to Willis, which forwarded them to each Insurer]).

An agreement to send payments to New York, without more, does not constitute “transacting business” under CPLR 302 (a) (1) (Ljungkvist v Rainey Kelly Campbell Roalfe/Young & Rubicam, Ltd., 2001 WL 1254839 [SD NY 2001]; see e.g. Roper Starch Worldwide v Reymer & Assocs., Inc., 2 F Supp 2d 470, 475 [SD NY 1998] [“merely sending payment to New York is not sufficient to establish personal jurisdiction over a defendant under § 302 (a) (1)”]; Burrows Paper Corp. v R.G. Engineering, 363 F Supp 2d 379, 386 [ND NY 2005] [citation and quotation marks omitted] [“the mailing of billing statements to ... New York, standing alone, does not convey jurisdiction”]). Although here, defendants received payments

from New York rather than sending payments to New York, because a payment to New York is not sufficient to constitute transacting business, this court finds that the mere act of receiving a payment from New York also does not constitute transacting business (see id.).

Accordingly, “[s]ince [plaintiff’s] cause of action did not arise out of [defendants’] activities within the State, jurisdiction may not be predicated upon” CPLR 302 (a) (2) (Sheldon Estates v Perkins Pancake House, 48 AD2d 936, 937 [2d Dept 1975]).

Plaintiff cites Town of Hempstead v Certain Underwriters at Lloyd’s of London (148 AD2d 527 [2d Dept 1989]); Rung v United States Fidelity and Guar. Co. (139 AD2d 914 [4th Dept 1988]); Zacharakis v Bunker Hill Mut. Ins. Co. (281 App Div 487, appeal granted 281 App Div 1019 [1st Dept 1953]); People by Abrams v British & American Cas. Co. (133 Misc 2d 352 [Sup Ct, NY County 1986]); and Neurologic Servs., P.C. v State-Wide Ins. Co. (183 Misc 2d 343 [Civ Ct, Queens County 1999]) in support of its assertion that long-arm jurisdiction exists because each defendant negotiated the placement of the policy with Willis, and issued bills to and collected premiums from Willis in New York. These cases, however, are completely inapposite, as each involved the placement of insurance policies with insureds who were New York residents. Here, in contrast, plaintiff is a Canadian insured.

Accordingly, the complaint must be dismissed as against Allianz, Commonwealth, ACE-INA, and Great Lakes for lack of personal jurisdiction.

This court also lacks personal jurisdiction over FM Global and Zurich North America. Defendants present evidence that FM Global and Zurich North America are trade names, and not corporate entities, and were not authorized to issue insurance in New York. Although plaintiff alleges in the complaint that FM Global is corporation domiciled in the state

of Rhode Island (see Complaint, ¶ 6), Brian Mazick, who is responsible for underwriting at Factory Mutual, avers that FM Global is “a trade name, and does not have any independent corporate entity status” (Mazick Aff., ¶ 4). Likewise, although plaintiff alleges that Zurich North America is a corporation domiciled in New York, with a principle place of business in Illinois, Bob Haller, Zurich Global Energy’s Vice President of Underwriting, avers that Zurich North America is “a trade name, and does not have any independent corporate entity status” (Haller Aff., ¶ 4).

Defendants also allege that, although Factory Mutual CAB, American Home CAB and Zurich CAB were all named in the caption, they do not exist as entities, and are not authorized to issue insurance in the state of New York. In opposition to the motion, plaintiff fails to present any evidence that any of these five entities actually exist.

Accordingly, the complaint must also be dismissed as against FM Global, Zurich North America, Factory Mutual CAB, American Home CAB and Zurich CAB.

Although defendants also conclusorily contend that this court does not have subject matter jurisdiction because this action lacks any nexus with New York, they fail to address the appropriate legal standards for dismissal. Accordingly, this branch of the motion is denied.

II. FORUM NON CONVENIENS

Although defendants do not contest jurisdiction with respect to American Home, Zurich American, Factory Mutual, Allianz Global, Commonwealth US, and ACE, this court finds that this action must, nevertheless, be dismissed against all defendants on the basis of forum non conveniens, because all of the relevant documents and witnesses with respect to the

transactions at issue in plaintiff's causes of action are located in Canada.

It is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin v Mieth, 35 NY2d 414, 418 [1974]). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984], cert denied 469 US 1108 [1985]). The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice (see Piper Aircraft Co. v Reyno, 454 US 235 [1981]; Capitol Currency Exch., N.V. v National Westminster Bank PLC, 155 F3d 603 [2d Cir 1998], cert denied 526 US 1067 [1999]). If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (see id.).

New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the ground of forum non conveniens (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra). The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation (id.; Highgate Pictures, Inc. v De Paul, 153 AD2d 126 [1st Dept 1990]). Although not every factor is necessarily articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of

documents; the location of a majority of the witnesses; and the burden on New York courts (see Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153 [1st Dept 1996]; Evdokias v Oppenheimer, 123 AD2d 598 [2d Dept 1986]). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; see also In re New York City Asbestos Litigation, 239 AD2d 303 [1st Dept 1997]).

The present action must be dismissed on the ground of forum non conveniens, because the number and weight of the relevant factors in the action center in Canada, and not in New York. The subject matter of this action relates to a dispute between plaintiff, a Canadian company, and the Insurers – three Canadian insurance companies, one English insurance company, one Canadian branch of a Swiss insurance company, one Canadian branch of a New York insurance company, and one Rhode Island insurance company. Most of the policies were issued out of the Insurers' offices in Canada. The dispute involves a loss suffered by a Canadian company at its Canadian facility. The witnesses, experts and documents relating to the Policy are located outside of New York (see Preliminary Witness List [attached to Def Reply Aff. as Exh A]), and all of the investigation and adjustment activities occurred in Canada (Jacobson Aff., ¶ 113). Consequently, this dispute would be more properly adjudicated in the Court of Queen's Bench of Alberta, Judicial District of Edmonton where a similar action is pending. Where, as here, the action is almost entirely concerned with the events, institution and law of a foreign nation, "the action cannot be said to have a 'substantial nexus' with New York," and must be dismissed (Tetra Finance (HK) Ltd. v Patry, 115 AD2d 408, 410 [1st Dept 1985], appeal

withdrawn 67 NY2d 758 [1986] [quotation marks and citation omitted]; see also Chawafaty v Chase Manhattan Bank, N.A., 288 AD2d 58, 58 [1st Dept 2001], lv denied 98 NY2d 607 [2002] [“(t)his action lacks a substantial connection to New York and would be burdensome to its courts”]).

For example, in IFS Intl., Inc. v SLM Software, Inc. (224 AD2d 810 [3d Dept 1996]), the plaintiff, a New York corporation doing business in Canada, brought suit in New York against a Canadian corporation for breach of contract and fraud relating to a written contract. The defendant subsequently filed suit in Ontario on the same contract. Based on all the facts, the Appellate Division affirmed the motion to dismiss the New York suit, even though it was filed before the Canadian action.

In particular, the Court noted that the defendant was a Canadian corporation with no business, offices or property in New York, the contract was executed and finalized in Canada, Canadian law applied, and the pending Ontario action involved the same parties arising out of the same issues. The Court concluded that the plaintiff would not be unduly prejudiced by the dismissal of the action “because a forum in Ontario is currently available and poised to address the matter” (*id.* at 810; see Hbouss v Bank of Montreal (23 AD3d 152 [1st Dept 2005]) [forum non conveniens dismissal affirmed in action concerning a dispute arising out of a credit agreement negotiated in Canada between Canadian companies where action was subject to Canadian federal law, the alleged wrongful actions all took place in Canada, and the plaintiff had already availed themselves of the Canadian courts in a matter related to the same dispute]; see also Gonzalez v Lebensversicherung AG, 304 AD2d 427 [1st Dept 2003], lv denied 1 NY3d 506 [2004] [New York was not a convenient forum for litigation involving a contract entered into in

Spain, and entities, persons and events predominantly situated there]; Hingis v Tacchini, 303 AD2d 275 [1st Dept], ly denied 100 NY2d 506 [2003] [balance of relevant factors weighed against New York court's retaining action involving endorsement contract, where contract was neither negotiated nor signed in New York, contract provided that Italian law would apply, and similar action was pending in Milan]; Tilleke & Gibbins Intl., Ltd. v Baker & McKenzie, 302 AD2d 328 [1st Dept 2003] [in view of substantial nexus between the action and Thailand, where plaintiff and defendant's Thai affiliate and most of the material witnesses were situated, and where contracts at issue, governed by Thai law, were entered into, dismissal on ground of forum non conveniens was proper]; World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, supra [in action involving letters of credit issued by a New York bank, dismissal was warranted where parties were foreign residents, the locus of the breach was foreign, there was a pending action in Italy, and foreign law would apply]).

Likewise, here, the totality of facts and circumstances dictate that this policy dispute between a Canadian plaintiff and its insurers would be better adjudicated in the Canadian courts.

Situs of the Transaction and Residency of the Parties

The fact that the "transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction" weighs strongly in favor of dismissal on the ground of forum non conveniens (Islamic Republic of Iran v Pahlavi, 62 NY2d at 479; see also World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, supra).

The situs of the transaction points to Canada as being the most convenient forum, as a majority of the insurance policies in question were issued from defendants' offices in

Canada, the loss occurred at plaintiff's Canadian facility, and the investigation of the loss occurred in Canada.

Moreover, the residency of the parties also strongly favors dismissal. Plaintiff and defendants Commonwealth and ACE INA are Canadian corporations with their principle places of business in Canada. Additionally, Allianz is a Canadian corporation with its principle place of business in Canada. Furthermore, Factory Mutual, Zurich and American Home are insurance companies authorized pursuant to the Insurance Companies Act of Canada to carry on business throughout Canada, and are licensed pursuant to the Insurance Act of Alberta to carry on business in the province of Alberta. Thus, plaintiff would not be inconvenienced by litigating in Canada, its home country. Further, although a court might generally give some deference to a plaintiff's choice of forum, such deference is significantly diminished where, as here, the plaintiff is a foreign corporation (see e.g. Dragon Capital Partners L.P. v Merrill Lynch Capital Services Inc., 949 F Supp 1123 [SD NY 1997]).

Adequate Alternative Forum

New York courts consider the existence of an alternative forum to be "a most important factor" for a forum non conveniens dismissal (Islamic Republic of Iran v Pahlavi, supra, 62 NY2d at 481). An alternative forum is considered adequate if the defendants are amenable to service of process there, it permits litigation of the subject matter of the dispute, and provides a satisfactory remedy (see Bank of Credit and Commerce Intl. (OVERSEAS) Ltd. v State Bank of Pakistan, 273 F3d 241 [2d Cir 2001]).

Plaintiff has an available and adequate forum in which to address its claims – the Court of Queen's Bench of Alberta, Judicial District of Edmonton, where a similar action has

been filed by the Insurers (the Canadian Action). In the Canadian Action, plaintiff can address the allegations contained in the New York action through an answer, affirmative defense and/or counterclaim. Furthermore, United States courts have consistently found that Canadian courts afford litigants the same fundamental procedures and remedies as are available in American courts (see e.g. VictoriaTea.com, Inc. v Cott Beverages, Canada, 239 F Supp 2d 377, 384 [SD NY 2003] [in action involving breach of contract and torts claims, the court noted that courts “have consistently recognized Canada as an adequate forum for adjudication of the types of claims at issue”]).

Location of Witnesses and Relevant Documents

Courts have long taken into account the severity of the burden on defendants in being forced to defend themselves in New York when determining a forum non conveniens motion (see Union Bancaire Privee v Nasser, 300 AD2d 49 [1st Dept 2002] [doctrine of forum non conveniens warranted that parties’ contractual suit be litigated in Brazil, where the witnesses, records and transactions at issue were predominantly situated]; see also Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra [dismissing case where, among other factors, defendant could not defend against the claim in any realistic way because of the location and documents, which were not subject to the mandate of the New York court]; Zelouf v Republic Natl. Bank of New York, 225 AD2d 419 [1st Dept 1996] [upholding trial court’s dismissal where relevant witnesses and documents were located in London]).

This is a dispute between plaintiff, a Canadian company, and multiple insurance companies, most of them Canadian. The focus of the parties’ dispute relates to an alleged loss at plaintiff’s Canadian facility. Witnesses, experts and documents relating to the Policy are located

outside of New York (see Jacobson Aff., ¶ 113). At least 20 lay witnesses are located in Canada (see Preliminary Witness List). Several of the expert witnesses are located in Canada, and almost all of the documents relating to the loss are located in Canada (see Jacobson Aff., ¶ 113). All investigation and adjustment of the loss was performed by a Canadian adjuster in Canada – Bob Moore of Bateman Chapman. The remaining witnesses are located throughout Canada and the United States; however, none of the witnesses are located in New York (see id.). Defendants assert that they anticipate in excess of 40 witness examinations before trial, of both party and non-party witnesses, all of which will take place outside New York (see id.).

Although plaintiff argues that “initially,” all testimony and documents relating to this action will be limited to the Policy, the court rejects this argument. The key witnesses and documents related to the loss and its investigation are located in Canada because the loss occurred in Canada, and the adjustment of the claim was conducted by a Canadian adjuster in Canada. The Reactor was also assembled in Canada. Indeed, plaintiff admits that “witnesses related to damage to and repair of the reactor” are located in Canada (PI Mem. at 19, n 14). Thus, if this action were not dismissed, defendants would be required to produce Canadian witnesses and documents in New York.

Furthermore, a New York court would be unable to compel any non-party Canadian witnesses, including former employees, to appear should the case proceed to trial (see VictoriaTea.com, Inc. v Cott Beverages, Canada, 239 F Supp 2d at 384 [“Any non-party witnesses who chose not to be deposed or to appear voluntarily at trial would be beyond the reach of the Court’s compulsory authority”]). Thus, “[to] fix the place of trial at a point where litigants cannot compel personal attendance [of witnesses] and may be forced to try their cases on

deposition, is to create a condition not satisfactory to court, jury or most litigants” (*id.* [citation and quotation marks omitted]).

Plaintiff also argues that the fact that the Reactor is located in Canada is immaterial to the resolution of this case. This argument makes no sense. This is a dispute regarding property damage which occurred to the Reactor, located at plaintiff’s Canadian facility. Essentially, the issue is whether the damage to the Reactor is covered under certain insurance policies issued to plaintiff. Thus, most of the necessary discovery will involve factual issues with a nexus in Canada. Numerous fact witness depositions will be needed from witnesses who are or were employed at the Canadian facility. Furthermore, documents related to the loss are located at the Canadian facility. Additionally, the handling of the insurance claim occurred in the Canadian offices of most of the defendants. Thus, the documents and witnesses on behalf of most of the defendants are located in Canada.

All of these facts support forum non conveniens dismissal (see Finance & Trading Ltd. v Rhodia S.A., 28 AD3d 346, 347 [1st Dept], *lv denied* 7 NY3d 706 [2006] [dismissal favored where “(t)he majority of the relevant documents and witnesses would be French”]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 295 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006] [dismissal granted where documents were “in French or Vietnamese,” and where “the majority of the witnesses (were) in France or Vietnam”]; Braspetro Oil Serv. Co. v UK Guaranty & Bonding Corp., Ltd., 18 AD3d 291, 291 [1st Dept 2005] [favoring dismissal where most documents and witnesses were “located in Brazil and Singapore”]; Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d at 178 [same holding where “(t)he complete written record of th(e) transaction (was) located in India, as (were) all documents and correspondence”, and “(a)ny

witness with personal knowledge of the (transaction) is located overseas”]).

Burden on the New York Courts

“[O]ne factor which weighs in favor of dismissal on forum non conveniens grounds is the applicability of foreign law” (Phat Tan Nguyen v Banque Indosuez, 19 AD3d at 294; accord Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d at 178 [(t)he applicability of foreign law is an important consideration in determining a forum non conveniens motion” and weighs against retention of the action]). For this reason, New York courts commonly dismiss actions that may require interpretation of foreign law (see e.g. Islamic Republic of Iran v Pahlavi, 62 NY2d at 480 [“likely applicability of Iranian law” supports dismissal on forum non conveniens grounds]; PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp., 25 AD3d 470, 471 [1st Dept 2006] [dismissal favored where “resolution of plaintiffs’ claims would involve consideration of Indonesian law”]; Tilleke & Gibbins Int'l., Ltd. v Baker & McKenzie, 302 AD2d 328, supra [holding that action involving Thai evidence and applying Thai law would be inordinate burden upon a New York court]).

Here, the claim will likely be governed by Canadian law, thus further favoring dismissal. Canadian law requires that Alberta law applies to a contract of insurance issued to a citizen of Alberta (see Jacobson Aff., ¶ 114). The Insurance Act RSA 2000 c.I-3, section 12 (1) (id., Exh 12), provides that:

A contract of insurance is deemed to have been made in Alberta if

- (a) it insures a person who is domiciled a resident in Alberta when the contract is made, or
- (b) a subject matter of the contract is property that is or will be located in Alberta.

In its complaint, plaintiff alleges that it is “a corporation organized under the laws of Alberta, Canada, with its principal place of business in Alberta” (Complaint, ¶ 2). Furthermore, the subject matter of this dispute, plaintiff’s facility, is located in Alberta, Canada. Therefore, Canadian law will apply, making Canadian courts more suitable to hear this case.

The pending action in Canada also supports the conclusion that this case should be dismissed. It makes little sense to have a New York court interpret Canadian law when a Canadian court is doing so in a similar case in Canada. Moreover, it is contrary to public interest and judicial efficiency to have two cases involving the same parties and issues tried in two separate forums. Indeed, with two pending actions, the risk of inconsistent rulings exists, a powerful factor favoring dismissal (see e.g. World Point Trading PTE, Ltd. v Credito Italiano, supra, 225 AD2d at 161 [finding failure to dismiss an abuse of discretion where simultaneous action pending before Italian court presented the “attendant risk that conflicting rulings might be issued by courts of two jurisdictions”]; MLC (Bermuda) Ltd. v Credit Suisse First Boston Corp., 46 F Supp 2d 249, 254 [SD NY 1999] [“Where a single court is capable of fairly and competently adjudicating an entire controversy, there is little reason to divide the task between two courts”]).

Plaintiff also asserts that this action should take priority over the Canadian Action because it was filed first. However, it makes no difference that this action was filed before the Canadian Action (see White Light Productions, Inc. v On The Scene Productions, Inc., 231 AD2d 90, 98 [1st Dept 1997] [“the race to the courthouse should not be determinative, [rather,] the case should be heard by the forum with the most reason to hear the case”]).

Finally, only one of the parties to this action is a New York company – American

Home. However, American Home's policy was issued through American Home's Canadian branch, and that single New York contact is insufficient to permit this court to retain jurisdiction. Thus, a Canadian court would be better suited to hear this case.

Upon balancing the appropriate factors, defendants have sustained their burden of showing that the end of justice and the convenience of the parties will be best served if this action is heard in Canada. Accordingly, defendants' motion for dismissal on the ground of forum non conveniens is granted. In light of this determination, defendants' alternative motions for dismissal on the grounds of improper service of process and failure to state a claim are denied as moot.

The court has considered the remaining claims, and finds them to be without merit.


Accordingly, it is

ORDERED that the motion to is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 24, 2007

ENTER:


HON. RICHARD S. LORY
J.S.C.

FILED
MAY 01 2007
NEW YORK
COUNTY CLERK'S OFFICE