

Ghose v CNA Reins. Co. Ltd.

2007 NY Slip Op 32706(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0108121/2004

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: _____

PART 56

Justice

Udayan B. Ghose

INDEX NO.

10812/04

MOTION DATE

5/16/07

MOTION SEQ. NO.

007

MOTION CAL. NO.

CNA Reinsurance

- v -

The following papers, numbered 1 to _____ were read on 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

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

FILED

AUG 30 2007

NEW YORK

CLERK'S OFFICE

Dated: 8/20/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
UDAYAN D. GHOSE,

Plaintiff,

-against-

CNA REINSURANCE COMPANY LIMITED
n/k/a CX REINSURANCE COMPANY LIMITED,
EAGLE STAR REINSURANCE COMPANY
LIMITED n/k/a G.E. FRANKONA REINSURANCE
LTD., GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION PLC n/k/a AVIVA
PLC, ROYAL AND SUN ALLIANCE PLC, CERTAIN
UNDERWRITERS AT LLOYD'S EVIDENCED BY
CONTRACT NO. ENCDOPR98, CERTAIN
UNDERWRITERS AT LLOYD'S EVIDENCED BY
CONTRACT NO. ENCDOX598, INTERNATIONAL
INSURANCE COMPANY OF HANNOVER LTD, and
ENCON UNDERWRITING,

Index No. 108121/04

FILED

AUG 30 2007

NEW YORK

Defendants.
-----X

RICHARD B. LOWE, III, J.:

Plaintiff Udayan D. Ghose moves (seq. no. 007), pursuant to CPLR 3124 and 3126, to compel document production and responses to interrogatories.¹ Specifically, plaintiff seeks: (1) underwriting manuals and guidelines; (2) claims handling manuals; and (3) documents concerning whether defendants sold finite reinsurance.

BACKGROUND

The relevant facts are set forth in detail in the court's prior decisions and orders dated March 30, 2005 and January 26, 2006. To summarize, plaintiff is the former Chairman of the

¹Although plaintiff moves to compel answers to interrogatories, plaintiff has not argued that defendants should be required to answer any interrogatory.

Board of Directors of New Cap Reinsurance Corporation Holdings Limited (New Cap Re), a corporation engaged in the business of selling international reinsurance contracts.

Defendant Encon Underwriting (Encon), as insurance manager², issued a directors' and officers' liability insurance policy to New Cap Re, which was underwritten by defendants CNA Reinsurance Company n/k/a CX Reinsurance Company Limited, Eagle Star Reinsurance Company Limited n/k/a G.E. Frankona Reinsurance Ltd., General Accident Fire and Life Assurance Corporation PLC n/k/a Aviva PLC, Royal and Sun Alliance PLC, certain underwriters at Lloyd's evidenced by contract no. ENCDOPR98, certain underwriters at Lloyd's evidenced by contract no. ENCDOX598, and International Insurance Company of Hannover Ltd.

Plaintiff alleges that, shortly after New Cap Re made a convertible notes offering pursuant to a prospectus dated November 18, 1998, the company learned that it had suffered greater losses that year than it had anticipated. New Cap Re and its subsidiaries were placed into liquidation, and New Cap Re's officers and directors, including plaintiff, were named as defendants in an action in Australia concerning the convertible notes offering.

After plaintiff informed defendants of circumstances giving rise to claims, defendants sent plaintiff two letters dated March 31, 2004 and July 6, 2004 stating that they were rescinding the policy based upon New Cap Re's material misrepresentation to its lender, Dresdner Bank Aktiengesellschaft (Dresdner). According to defendants, in 1998, New Cap Re submitted a financial statement to Dresdner, which failed to disclose that it had purchased a finite reinsurance contract – also known in the industry as a stop-loss or smoothing cover. The purchase of finite

²Encon was dismissed from the action in the court's decision and order dated January 26, 2006.

reinsurance had the effect of inflating the company's balance sheet, which, as a result, showed that it was in compliance with a minimum net worth covenant with Dresdner. Defendants took the position that they would not have renewed the policy in 1998 if they had known of the misrepresentation.

Plaintiff commenced this action seeking, inter alia, a declaration that he is entitled to indemnification under the policy and damages for defendants' breach of the insurance contract.

The instant motion involves requests for documents dated February 25, 2005 and April 25, 2005. Plaintiff's requests for documents dated February 25, 2005 demanded, among other things:

3. All underwriting manuals and guidelines from 1996 through the present, and all other documents concerning policies and procedures that informed [defendants'] underwriting decisions, including policies and procedures governing the types of information [defendants review] to evaluate risk.
5. All claims files relating to claims by officers and directors of [New Cap Re], including Plaintiff Ghose.
6. All claims handling manuals and guidelines from 1998 through the present.

(Tsan Affirm., Exh. 7).

In response, defendants objected on the grounds that they were overly broad, unduly burdensome, and sought privileged information or information not reasonably calculated to lead to the discovery of admissible evidence (Tsan Affirm., Exh. 8). Defendants further stated that they were not aware of any underwriting manuals or claims handling manuals or guidelines. Thereafter, on May 10, 2005, defendants produced documents consisting of the policy, New Cap Re's initial application, New Cap Re's renewal application, and certain correspondence. On August 5, 2005, defendants produced the two letters to plaintiff rescinding the policy and

correspondence between counsel for Encon and plaintiff's Australian and New York counsel.

By so-ordered stipulation dated October 26, 2006, the parties agreed, among other things, that each defendant would serve a response to plaintiff's requests for documents by November 30, 2006. On that date, defendants objected on the same grounds as in their initial responses. Defendants' response stated that all "discoverable" documents had been produced, and referenced all documents submitted as exhibits in prior motions.

In another so-ordered stipulation, dated January 4, 2007, defendants agreed to provide an affidavit from Encon stating that it had produced all documents responsive to plaintiff's February 2005 document request.

Plaintiff's requests for documents dated April 25, 2005 read as follows:

State whether [defendants have] ever sold or offered finite reinsurance, finite cover, smoothing cover, rollover coverage, time and distance policies, or any other type of reinsurance or product that involves the transfer of a known loss, and attach all documents concerning [defendants'] sale or offer to sell a product of this type.

(Tsan Affirm., Exh. 18).

Defendants objected on the grounds that the requests were overly broad, unduly burdensome, vague and ambiguous, sought information protected by the attorney-client privilege and work product, and information not reasonably designed to lead to the discovery of admissible evidence (Tsan Affirm., Exh. 19).

By so-ordered stipulation dated October 20, 2005, defendants agreed to produce for the years 1998 through 1999 "marketing and advertising material pertaining to the issuance of stop-loss/smoothing cover and any letters offering such coverage."

On January 31, 2006, defendants served a supplemental response, in which they stated

that each defendant did not issue, or upon a diligent search could not locate, any marketing or advertising material or letters offering stop loss coverage for the years 1998 through 1999.

DISCUSSION

CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The words “material and necessary” are construed liberally to require disclosure of any facts bearing on the controversy which assist by sharpening the issues and reducing delay and prolixity (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). “The test is one of usefulness and reason” (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000], quoting *Allen*, 21 NY2d at 406). Pre-trial disclosure extends not only to admissible evidence but also to testimony or documents which may lead to the disclosure of admissible evidence (*see Matter of New York County DES Litig.*, 171 AD2d 119, 123 [1st Dept 1991]).

An insurer may avoid an insurance contract if the insured made a material false statement of fact as an inducement to making the contract (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 39 [1st Dept 2005]; *see also* Insurance Law § 3105). “[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented” (*Schirmer v Penkert*, 41 AD3d 688, 690 [2d Dept 2007], quoting *Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713, 714 [2d Dept 2001]). Rescission is an available remedy even if the material misrepresentation was innocent or unintentional (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 436 [3d Dept 2003]).

Plaintiff seeks defendants’ underwriting manuals and guidelines from 1996 through the

present, as detailed in Item No. 3 of plaintiff's February 25, 2005 document requests. Plaintiff argues that such documents are necessary to disprove defendants' defense of rescission.

Defendants state that, on May 10, 2005, they produced Encon's underwriting file pertaining to the renewal of the policy, and argue that their underwriting manuals are irrelevant, since Encon was responsible for underwriting the policy. At the oral argument on May 16, 2007, counsel for defendants represented that there were no underwriting manuals (5/16/07 Tr., at 10, 12-13).

An insurer can establish materiality by submitting documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the policy if the correct information had been disclosed in the insurance application (*Bleecker St. Health & Beauty Aids., Inc. v Granite State Ins. Co.*, 38 AD3d 231, 232 [1st Dept 2007]; *Parmar v Hermitage Ins. Co.*, 21 AD3d 538, 540 [2d Dept 2005]; *Shapiro v Allstate Life Ins. Co. of N.Y.*, 202 AD2d 659, 660 [2d Dept 1994]). Defendants claim that they would not have renewed the policy if they had known of New Cap Re's misrepresentation to Dresdner. Therefore, plaintiff is entitled to defendants' underwriting manuals and guidelines on the issue of materiality, as set forth in plaintiff's February 2005 document requests (*see Wittner v IDS Ins. Co. of N.Y.*, 96 AD2d 1053 [2d Dept 1983] [granting plaintiff's motion to compel production of documentation to evaluate question of materiality]). If such documents do not exist, defendants are directed to provide an affidavit of good faith search by an individual with personal knowledge of the search, within 30 days of the date of this order (*see Equities Holding Corp. v Kiam*, 97 AD2d 719, 720 [1st Dept 1983]).

As stated in Item Nos. 5 and 6 of plaintiff's February 25, 2005 document requests, plaintiff seeks defendants' claims-handling documents and guidelines and other documents

concerning the handling and rejection of plaintiff's claim. Defendants claim that all non-privileged claims file documents pertaining to plaintiff have been produced, and have provided a privilege log with respect to the remaining allegedly privileged documents (*see* Tsan Affirm., Exh. 13). The latter documents are the subject of an application before a special master. Pursuant to a so-ordered stipulation dated June 21, 2007, the parties were directed to contact the special master in early July to schedule an in camera review of privileged documents. Neither party has addressed the outcome of that review. Accordingly, the court need not address this request while the application is pending before the special master.

Finally, as set forth in plaintiff's April 25, 2005 document requests, he also seeks documents concerning whether defendants ever sold finite reinsurance. Plaintiff has failed to show that such documents are "material and necessary" (*see Ilas v Nihagen & Co.*, 303 AD2d 298 [1st Dept 2003]). Here, defendants claim that New Cap Re's failure to disclose the fact that it had purchased finite reinsurance warranted rescission of the policy.

Plaintiff's request for prospective relief striking defendants' rescission defense is a drastic sanction not warranted under these circumstances (CPLR 3126; *Bomzer v Parke-Davis*, 41 AD3d 522 [2d Dept 2007]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (seq. no. 007) by plaintiff Udayan D. Ghose to compel discovery is granted to the extent that defendants are directed to produce the underwriting manuals and guidelines as described in Item No. 3 of plaintiff's requests for documents dated February 25, 2005, or an affidavit of good faith search by an individual with personal knowledge

of the search, within 30 days of the date of this order, and is otherwise denied.

Dated: August 20, 2007

ENTER:



J.S.C.

[Faint, illegible text]

FILED
AUG 30 2007
NEW YORK
COUNTY CLERK'S OFFICE