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

PRESENT: _____ Justice PART 56

AIU Insurance Company

- v -

Certain Underwriters

INDEX NO. 602434/07

MOTION DATE 2/4/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/30/08

HON. RICHARD B. LOWE, III 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

----------X

AIU INSURANCE COMPANY,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES

Defendants.

Index No. 602924/07

Hon. Richard B. Lowe, III:

Plaintiff AIU Insurance Company (AIU) moves for an order striking the answers of defendants Certain Underwriters at Lloyd's, London ("Underwriters"), St. Paul Travelers Insurance Company Ltd. and Certain London Market Insurance Companies (collectively, the "London Market Reinsurers" or "defendants") and compelling the London Market Reinsurers to post pre-judgment security in the amount of $7,560,892 in accordance with New York Insurance Law § 1213(c)(1).

Background

In September 2007, AIU, an insurance company domiciled and incorporated in the State of New York, filed an Amended Complaint seeking approximately $12 million in reinsurance proceeds that it alleges the London Market Reinsurers, all foreign or alien reinsurers, owes in accordance with four reinsurance agreements (the "Reinsurance Agreements"). It also alleges that it is entitled to recover future funds which will become due and owing under the Reinsurance Agreements. The defendants have filed three answers in response to the complaint which raise a

variety of defenses.

AIU alleges the London Market Reinsurers, because they are foreign reinsurers, must post pre-hearing security pursuant to New York Insurance Law § 1213(c)(1). Because the defendants failed to do so, AIU urges this court to strike the answers interposed by the defendants. New York Insurance Law § 1213(c)(1) reads:

> [B]efore any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in the state.

In response, the defendants argue they fall within the parameters of two exceptions to the statute. Section 2113 (e) reads:

> [t]his section shall not apply to any proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effectuated in accordance with subsection (b) or (c) of section two thousand one hundred seventeen of this chapter . . . where such contract designates the superintendent or his successors in office the insurer's true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of such contract.

Section 2117(b) provides that:

> any insurance broker licensed under subparagraph (B) of paragraph one

> of subsection (b) of section two thousand one hundred four of this article may negotiate a contract of insurance, or place insurance, in an insurer not authorized to do business in this state, as follows:
>
> (1) a contract of reinsurance of risks produced by such broker; . . .

Defendants state that from 1978 to 1982, AIU insured non-party Foster Wheeler Company ("Foster Wheeler"), issuing four umbrella policies. The defendant Certain Underwriters at Lloyd's London submits the affidavit of its present attorney which states the umbrella policies were placed by a licensed New York insurance broker, Johnson & Higgins (J&H). (Grace Aff ¶ 7.) AIU and the London Market Reinsurers allegedly then entered into the reinsurance contracts placed through J&H, the same New York broker, but using the services of Willis, Faber & Dumas Ltd ("Willis"), a London Broker. (Grace Aff ¶ 9.) The three facultative reinsurance agreements reinsured the four umbrella policies that AIU issued to its underlying assured Foster Wheeler. (Grace Aff ¶ 8.) Therefore, according to defendants, because the reinsurance contracts were placed through J&H, a New York broker, the defendants do not need to post an undertaking pursuant to New York Insurance Law §1213(c)(1). Furthermore, according to defendants, the reinsurance contracts allegedly contain a provision providing for service upon the Superintendent of Insurance for the State of New York and therefore the provision does not apply for this additional reason.

Discussion

"New York Insurance Law § 1213 was enacted to accomplish two separate goals: (i) to subject unauthorized insurers to personal jurisdiction in New York; and (ii) to ensure that sufficient funds would be available to satisfy any judgment rendered in an action against an unauthorized insurer." (*Travelers Ins Co. v Underwriting Members of Lloyds* (Index No.

60024/95-001[NY Supreme Ct, Apr. 5, 1996].) The statute advances these goals by "requiring a foreign carrier to post a bond at the outset of a proceeding, the statute seeks to assure that foreign carrier's fund will be available in this State to satisfy any potential judgment against it from the proceeding (*Levin v Intercontinental Cas. Ins. Co.*, 95 NY2d 523, 527 [2000].)

Within the opposition papers, the defendants attach the relevant reinsurance contracts in order to establish they were placed through J&H and to establish there is a provision in the contracts allowing for service upon the New York Secretary of State. The agreements are drafted on the letterhead of Willis Faber & Dumas ("Willis"), a London broker who is not licensed to do business in New York. The cover notes to the agreements are addressed to J&H advising the entity that Willis effected the reinsurance contracts (Grace Aff, Ex E). Allegedly, Willis was a sub-agent of J&H who procured the reinsurance (Tr 4/1/08 16:5-6). The defendants argue that the evidence shows Willis was notifying J&H it had procured the reinsurance and is therefore sufficient to establish J&H was a New York based broker who placed the reinsurance contracts.

"The burden of proving eligibility for an exemption to the statute is on the party seeking the exemption." (*Signal Capital Corp. v Eastern Marine Mgmt, Inc.*, 899 F.Supp. 1167, 1169 [SDNY 1995]). With respect to the statute at issue, the exemptions should be construed strictly to ensure its purpose is not frustrated (*See Signal*, 899 F.Supp at 1171.)

The defendants have failed to submit sufficient proof to this court's satisfaction that J&H was the broker of the reinsurance policies.[1] The cover notes submitted by defendants seem to

[1] The court notes the London Market Insurers attempted to submit a sur-reply addressing plaintiff's brief where it regards the defendants' lack of evidence in support of its arguments (Tr. 1/1/08 13:2-6). However the arguments regarding exceptions to the statute were never

show that Willis procured the contracts. Indeed they state, "We [Willis] hereby certify that we have effected the following Contract of Reinsurance." (See Maniatis Aff., Exs, A, B, & C.) Because the cover notes are addressed to J&H, defendant argues it has established J&H was actually the broker of the insurance and Willis was its subagent. While this may be true, the defendants have not established this unequivocally and leave doubt in the court's mind. The defendant's ask this court to make an interpretation of the agreements which is found no where in the cover notes.

To support their interpretation of the cover notes, the defendants notably fail to provide an affidavit from J&H whereby they affirm that they did, in fact, broker the relevant reinsurance contracts. Rather, in support, the defendants submit the affidavits of counsel of record who attest to transactions which occurred approximately twenty five years earlier. However, testimony of counsel is not probative, especially where counsel has no personal knowledge of the proffered allegations. (*See Marinelli v Shifrin*, 260 AD2d 227, 229 [1st Dept 1999].)

Furthermore, even if Willis was the subagent of J&H, courts have held that if a New York broker is not the sole broker involved and foreign brokers were responsible for placing the operative reinsurance agreements, then the § 1213(e) statutory exemption will not apply (*See Travelers Ins. Co. v Underwriting Members of Lloyds*, Index No. 60024/95-001[J. Shainswit], at 9-10 [NY Supreme Ct Apr.5, 1996]; aff'd 240 AD2d 278 [1st Dept 1997].). The court in *Travelers* made this finding because to hold otherwise would frustrate the policy behind the

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mentioned in the plaintiff's moving papers. However, it was the defendants, in opposition to the motion, who raised for the first time the exceptions to the statute and should have then put forth any relevant evidence. Because the issue of the exceptions was not raised for the first time in the plaintiff's reply papers, submission of the sur-reply was not appropriate.

statute by permitting one to evade the pre answer security requirement "just because a particular broker that was affiliated with the transaction at issue was licensed in New York. (*Id* at 15.) The result would then frustrate the statute's underlying policy which is to "assure that [a] foreign carrier's fund will be available in this State to satisfy any potential judgment against it from the proceeding."(*Levin v Intercontinental Cas. Ins. Co.*, 95 NY2d 523, 527 [2000].)

Defendants also argue that a "Service of Suit" clause in the agreements designates the Superintendent for service and therefore the § 1213(3) exception applies. The Reinsurance Agreements indicate, without any elaboration the following conditions:

> CONDITIONS:
>
> Service of Suit Clause
>
> * * *
>
> Claims Control Clause as agreed.

*(See D*oran Aff., Ex A at 3.)

The defendants, through the affidavit of current counsel, submit a separate copy of the pro forma wording of a Service of Suit clause used by Willis from 1952 through 1986 (Grace Aff Ex F). The clause which designates service upon the Superintendent of Insurance is not contained within the Reinsurance Agreements, but the defendants attempt to incorporate the language into the agreement in order to exercise the statutory exception. Other than the affidavit of present counsel, the defendants submit the affidavit of a claims adjuster with St. Paul Travelers Special Services Ltd.[2] who was retained twenty five years after the reinsurance policies were issued to

[2] St. Paul Travelers Special Services Ltd. is now known as Traverlers Special Services Ltd.

aver to the language of the service of suit clause. Again, these are individuals without first hand knowledge of the contract at issue, and there is no other evidence before this court which establishes this was, in fact, the agreement between the parties. Therefore, the defendants have failed to establish that the particular "service of suit" language supplied by the Defendants actually supplements the "Service of Suit" condition appearing in the Reinsurance Agreements.

The defendants also ask this court to not require posting of security because it is an established insurance company with a strong financial status, however no such exception exists and the court does not accept the responsibility of ascertaining the insurers' financial viability. Furthermore, the court notes the defendants have failed to provide certification from the Superintendent of Insurance of the State of New York certifying the adequacy of their funds.(*See NY Insurance Law* § 1213(c)(1)(A)).

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that defendants post security pursuant to New York Insurance Law §1213(c)(1) in the amount of $7,560,892.00 within ten days of service of a copy of this order with notice of entry or the answer in the matter shall be stricken.

This shall constitute the Order and Decision of the Court.

Dated: April 30, 2008

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.