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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART Part 5

Index Number : 600866/2008

FACTORY MUTUAL INS. CO.

vs

MUTUAL MARINE OFFICE INC.

Sequence Number : 002

SUBST/RELIEVE/WITHDRAW COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 30 2008

COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 6/30/08

EILEEN A. RAKOWER 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: PART 5

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FACTORY MUTUAL INSURANCE COMPANY, as successor in interest to Arkwright Mutual Insurance Company (formerly known as Arkwright-Boston Manufacturers Mutual Insurance Company) with respect to certain rights and obligations,

Petitioner,

-against-

MUTUAL MARINE OFFICE, INC. and UTICA MUTUAL INSURANCE COMPANY,

Respondents.

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Index No. 600866/08

DECISION and ORDER

Mot. Seq. 001-008

HON. EILEEN A. RAKOWER:

This motion to stay and cross motion to compel arbitration is in regard to the interests of members of a pool of insurance companies (the pool) and the management agreement entered into by the members with Mutual Marine Office, Inc., f/k/a Mutual Inland Marine Office, Inc., (Mutual) by which Mutual would be the "Managers" of the pool. Both Factory Mutual Insurance Company (Factory) and Utica Mutual Insurance Company (Utica)were members of the pool and "Companies" under the "Restated Management Agreement" (the Agreement) which contained an arbitration clause.

Among the various motions presented to the court are the applications for the court to admit Sergio F. Oehninger, Esq, Walter J. Andrews, Esq., John E. DeLascio, Esq., David R. Hausmann, Esq., Scott M. Seaman, Esq., Glenn A. Clark, Esq., and Khaled J. Klele, Esq., *pro hac vice* to the Bar of this Court, pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law. Preliminarily, the applications for admission are granted for the purpose of appearance and participation in this action.

The Agreement set forth the mechanism by which the Companies wrote policies, premiums were deposited, policies were renewed, commissions were paid, claims were paid, risk was shared, and statements of account were furnished. Additionally, it provided for certain commissions to be paid to Mutual as Manager of the pool. The Agreement also addressed bankruptcy and termination of the Agreement by any of the parties. Among other things, the Agreement provided for arbitration of any questions not specifically covered in it.

Utica and Factory each stopped sharing or pooling of its risk, in 1994 and 1996 respectively, but neither formally terminated the Agreement each had with Mutual. By necessity, there has been a winding down of business already placed, during which time no new premiums were paid into the pool, yet the management of the pool had to continue. Mutual states that during this last twelve to fourteen years, without an overwriting commission or contingent commission based on the profits of the pool, that it was not adequately compensated. Additionally, after consulting industry professionals, Mutual states that this run-off business will continue for anywhere between fifteen and thirty years. Mutual attempted to obtain reimbursement from the Companies for the expenses associated with the run-off business, items it claims are not provided for in the agreement. When those attempts were unsuccessful, pursuant to Article Eleventh of the Agreement, Mutual demanded arbitration, and sent Factory and Utica notice of such demand by letter dated March 4, 2008.

Factory files the instant petition, urging this court to permanently stay the arbitration. Additionally, Factory has filed a complaint in New York Supreme Court, County of New York, alleging breach of contract, anticipatory breach of contract, seeking declaratory relief and specific performance, further alleging breach of fiduciary duties, seeking an accounting, damages and costs and attorneys fees.

Factory argues that the arbitration should be stayed because (1) the dispute does not fall within the scope of the arbitration clause; (2) it did not agree to arbitrate this dispute and it cannot be compelled to arbitrate because this dispute is not clearly and unequivocally encompassed in the Agreement's arbitration clause; (3) what Mutual seeks is truly an attempt to reform the agreement; and (4) an arbitration panel has no authority to rewrite or reform the agreement. It states that Article Ninth addresses Mutual's management obligations after termination when it states that the parties obligations "shall survive such termination and remain in force until performed."

Mutual cross moves to compel arbitration and stay the action filed in the

Supreme Court; or, in the alternative, extend its time to answer Factory's complaint. Mutual argues that the Agreement is "silent as to the handling and arrangements for legacy, long tail business during run-off, and post-termination notice" for an extended period beyond the time that the Companies paid it commissions. It states that "marine insurance community customs and usage requires that Pool participants during run-off and certainly post-termination notice, share all the continuing liabilities of the Pool business, including the Manger's in-house salaries and expenses." Thus, it urges this Court to stay the Factory action in Supreme Court and direct the parties to pursue resolution of this dispute through arbitration.

Utica Mutual Insurance Company (Utica) files papers in opposition to Mutual's cross motion to compel and in support of Factory's petition to stay arbitration. Utica argues that Mutual's compensation is specifically provided for in Articles Seventh and Eighth of the Agreement. Factory and Utica each argue that Mutual received sufficient compensation for managing the fund and it was contemplated by the Agreement that these costs would be absorbed by Mutual. Thus, they argue, this dispute is not subject to arbitration.

A party will not be compelled to arbitrate absent "evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes." (*Matter of Waldron v. Goddess,* 61 NY2d 181[1984]). However, courts play the role of gatekeepers in deciding certain threshold issues before staying or compelling arbitration. (*Merrill Lynch, Pierce, Fenner& Smith v. Benjamin,* 1 AD3d 39 [1st Dept. 2003]). While the question of arbitrability depends upon the terms of the parties' arbitration clause, (*Matter of Board of Education of Watertown City School District v. Watertown Education Association,* 93 NY2d 132 [1999]), both the Federal Arbitration Act and New York public policy strongly favor arbitration. (*Hackett v. Millbank, Tweed, Hadley & McCloy,* 86 NY2d 146 [1995]). Therefore, any ambiguity in an arbitration clause will be construed in favor of arbitration. (*Pricewaterhouse-Coopers LLP v. Rutlen,* 284 AD2d 200 [1st Dept. 2001]).

The Arbitration Clause of the Agreement, Article Eleventh, states:

> It is understood that all questions not specifically covered in this Agreement shall be settled in accordance with the customs and usages established in the marine insurance community in the City of New York. In the event of any differences of opinion arising, unless such differences can be mutually resolved, it is hereby agreed that the

> matter shall be referred to arbitrators familiar with marine insurance. Any Company or Companies, on the one hand, and The Managers, on the other hand, each shall select one arbitrator and the two arbitrators so chosen shall select a third. If either the Company or Companies, on the one hand, or The Managers, on the other hand, shall fail to appoint an arbitrator within twenty (20) days after the party desiring arbitration has appointed its arbitrator and given notice in writing to the other of such appointment and the matter proposed to be arbitrated, then the person acting at that time as President of the American Institute of Marine Underwriters, at the request of the party giving such notice, shall appoint a second arbitrator. If the two arbitrators, however chosen, shall be unable to agree upon a third arbitrator within twenty (20) days after the appointment of the second arbitrator, then at the request of either of the two arbitrators such third arbitrator shall be named by the person at that time acting as President of the American Institute of Marine Underwriters. Said board so appointed shall hear and decide the matter or matters in dispute. The decision of said arbitrators or a majority of them shall be final and conclusive upon the parties hereto with respect to all matters referred to the arbitrators for decision.

Article Seventh addresses each Company's obligation to pay its share of taxes, license fees, survey fees, loss and salvage expenses and legal fees "paid to third parties not salaried employees of The Managers."

Article Eighth addresses compensation to Mutual as the Managers. It states what percentage of the Companies' gross premiums and profits shall be paid to Mutual as commission for managing the pool for each policy year, along with the manner for calculating each year's profits and deficits.

Article Ninth addresses the prospect of the termination of a Company's participation in the pool, "by any Company as to itself or by The Managers as to any Company." Paragraph 3 states:

> Upon termination of this Agreement by any Company or as to any Company for any reason, neither The Managers nor such Company shall have any claim upon the other for loss of prospective profits or commissions, nor for damages of any kind arising therefrom and all obligations which by nature would be performed subsequent to

termination shall survive such termination and remain in force until performed.

Article Ninth, paragraph 4 contemplates that a Company has terminated its relationship with the pool and the remaining parties "will accept pro rata their percentage of the participation subscribed by the Company so terminated." It further anticipates that any Company so terminated will either be replaced or the remaining Companies will agree to assume, pro rata, the proportion of all unexpired risks of the company so terminated.

In its March 4, 2008 letter, Mutual states that, through arbitration, it seeks a declaration of its right to terminate the Agreement as of December 31, 2009, and that it is entitled to contribution from Factory and Utica in connection with its expenses as Manager. The letter further states that if an arbitrator holds that Mutual does not have the right to terminate its relationship with Factory and Mutual, it still seeks a declaration that it is entitled to contribution from them for its past and continuing expenses. Finally, the letter states that it will seek to arbitrate possible reformation of the Agreement to effectuate the above stated relief.

Utica and Factory both criticize Mutual for seeking arbitration here after it sought litigation of a separate compensation issue that it had with Utica. (See, *Mutual Marine Office, Inc. And New York Marine and General Insurance Company v. Utica Mutual Insurance Company,* Index # 606057/01). There, Mutual argued that the arbitration clause in the Agreement was "restrictive" and "limited" while Utica argued for arbitration of the dispute. Now, both Utica and Factory argue here that the arbitration clause is limited by the fact that the Agreement specifically addresses the subject of their dispute with Mutual.

To support this contention, Factory and Utica cite to the Articles of the Agreement summarized above. However, a careful reading of those Articles shows that Article Seventh relates to taxes, license fees, survey fees, loss and salvage expenses and legal fees. Article Eighth does not specifically address Mutual's continuing expenses after the Companies stop paying it commissions and Article Ninth refers to claims for "loss of prospective profits or commissions" and "damages of any kind arising therefrom."

Mutual does not seek payment of any of the monies specifically referred to in the Agreement. Instead, it seeks monies not specifically designated in the Agreement,

as to which there cannot be mutual resolution and is, therefore, the type of question that Article Eleventh of the Agreement states "shall be referred to arbitrators familiar with marine insurance." The court notes that if Mutual actually seeks reformation of the Agreement before the arbitrators, the question of the application's timeliness may arise, but is now premature. Wherefore, it is hereby

ORDERED that the application for the court to admit Sergio F. Oehninger, Esq. , *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit Walter J. Andrews, Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit John E. DeLascio , Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit David R. Hausmann, Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit Scott M. Seaman, Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit Glenn A. Clark, Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the application for the court to admit Khaled J. Klele, Esq., *pro hac vice*, to the Bar of this Court pursuant to Section 520.11 of the Rules of the

Court of Appeals for the Admission of Attorneys and Counselors at Law is granted for the purpose of appearance and participation in this action; and it is further

ORDERED that the motion to permanently stay the arbitration is denied; and it is further

ORDERED that the cross motion to compel the arbitration and stay the action in Supreme Court is granted.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: June 30, 2008

EILEEN A. RAKOWER, J.S.C