

**Life Receivables Trust v Goshawk Syndicate 102 at
Lloyd's**

2008 NY Slip Op 32626(U)

September 19, 2008

Supreme Court, New York County

Docket Number: 0601244/2008

Judge: Charles E. Ramos

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

PRESENT: Charles E. Ramos
Justice

PART 53M

Life Receivables Trust

INDEX NO. 601244/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Hoshawk Syndicate 102
at Lloyd's

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with
accompanying Memorandum Decision.

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/19/08

[Signature]
HON. CHARLES E. RAMOS 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 REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
LIFE RECEIVABLES TRUST,

Plaintiff,

-against-

Index No.
601244/08

GOSHAWK SYNDICATE 102 at LLOYD'S,
Defendant.
-----X

Charles Edward Ramos, J.S.C.:

Motion sequence number 001 and 002 are consolidated for
disposition.

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

In motion sequence 001, plaintiff Life Receivables Trust (LRT) moves to stay the arbitration before the American Arbitration Association's (AAA) International Center for Dispute Resolution (ICDR) arising out of a rescission agreement¹ (Rescission Arbitration) pursuant to 9 USC § 1 of the Federal Arbitration Act (FAA), and to enjoin the arbitration before the ICDR, entitled the Wang Arbitration.²

In motion sequence 002, defendant Goshawk Syndicate 102 at Lloyd's (Syndicate 102) moves to join non-party Life Settlement Corporation d/b/a Peachtree Life Settlements pursuant to CPLR

¹ This arbitration is entitled Goshawk Dedicated Ltd., as the sole Member of Syndicate 102 at Lloyd's for the 2000 Underwriting Year of Account, and Kite Dedicated Ltd., f/k/a Goshawk Dedicated (No. 2) Ltd., as the sole Member of Syndicate 102 at Lloyd's for the 2001-2003 Underwriting Years of Account v. Life Receivables Trust, and Life Settlement Corporation, d/b/a Peachtree Life Settlements.

² This arbitration is entitled Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's. There is an additional arbitration proceeding involving the parties, referred to in their papers as the Omnibus Arbitration.

1001.

Background³

LRT is a special purpose business trust that owns a portfolio of life insurance policies originally purchased by non-party Peachtree, a life settlement provider. As the owner and beneficiary of the policies, LRT funds payment of the premiums and becomes entitled to the insurance proceeds when the policies mature.

A life settlement provider may purchase insurance policies and sell them to investors. Contingency cost insurance (CCI) is used as a financial guarantee against the risk that the seller of the life insurance policy will live beyond a specified period.

Beginning in 2000, Syndicate 102 issued CCI agreements to LRT, pursuant to which it charged and collected nearly \$8 million to hedge LRT's risk that a life insured might live beyond the specified life expectancy. Non-party Peachtree was the servicer and originator under the CCI agreements. LRT alleges that Syndicate 102 has not paid a single claim to date under the CCI agreements.

The CCI agreements contain identical arbitration provisions in section 30 (Arbitration Agreement), that state,

1. All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Association Rules.

³ The facts set forth herein are taken from the pleadings, or the Affidavit of Dale Christensen, Esq., unless otherwise noted.

3. The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein (emphasis added).

The CCI agreements additionally contain identical provisions entitled "Recourse," (Recourse Provision) that state that Syndicate 102's obligation to pay is absolute, and not subject to any set-off or counterclaim.

Further, the Recourse Provision requires Peachtree to indemnify Syndicate 102 against any losses as to which Syndicate 102 make payment to LRT, if the losses result from breach by Peachtree of certain representations and warranties.

In September 2005, LRT commenced the Wang Arbitration to recover damages under certain CCI agreement for two claims denied by Syndicate 102 in July 2005.

In March 2008, defendant Syndicate 102 commenced the Rescission Arbitration against both LRT and Peachtree, seeking to rescind its obligations under the CCI agreements to which LRT and Syndicate 102 are parties, based on alleged fraudulent life expectancies that Peachtree supplied for a number of life insured (Smoak Affidavit, Exhibit 1).

When Syndicate 102 sought an order from the AAA directing the parties to name arbitrators, LRT filed a federal action seeking to stay both the arbitrations, which was dismissed for lack of subject matter jurisdiction. Thereafter, LRT commenced this action.

Discussion

LRT seeks a stay of the Arbitrations on the ground that the U.S. Supreme Court's recent decision in *Hall Street Assocs. L.L.C. v Mattel, Inc.* (128 US 1396 [2008]) renders the parties' Arbitration Agreement a nullity, because it expands the scope of judicial review of arbitration awards beyond the grounds explicitly set forth in the FAA.

Moreover, LRT contends that Syndicate 102's obligation to pay its claims are absolute, and that the Recourse Provision in the CCI agreements precludes Syndicate 102 from asserting any defense to coverage against LRT or any of its beneficiaries. LRT argues that Syndicate 102's sole and exclusive remedy involving losses relating to wrongdoing on the part of Peachtree is against Peachtree only, under the Recourse Provision.

In opposition, Syndicate 102 and Peachtree assert that in the Arbitration Agreement, the parties unequivocally agreed that arbitrators, and not the Court, would determine issues of arbitrability, and that the issues decided by the Supreme Court in *Hall Street Assocs.* (128 US 1396) are inapplicable to this action. This Court agrees, and for the reasons set forth below, the motion to stay arbitration is denied.

The Federal Arbitration Act (FAA) applies to the determination of whether the parties made a valid agreement to arbitrate their disputes, because the CCI agreements affect interstate commerce (*Gerling Global Reinsurance Corp. v Home Ins. Co.*, 302 AD2d 118, 124 [1st Dept 2002], *lv denied* 302 AD2d 118

[2003]).

The plain and expansive language employed in section 30 of the Arbitration Agreement unequivocally establishes that the parties agreed to arbitrate their disputes arising out of the CCI agreements, by use of the phrase "all disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the [AAA]" (*Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc.*, 252 F3d 218, 226 [2d Cir], cert denied 534 US 1020 [2001] [terms such as "any dispute, "relating to" and "arising under" indicate a broad arbitration clause])).

Moreover, the Arbitration Agreement incorporates by reference all of the AAA rules. Under Article 15.1 of the IDPR rules of the AAA, arbitrators, not the court, decide the "existence, scope, or validity" of an arbitration agreement (IDRP Article 15.1).

Where, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation constitutes clear and unmistakable evidence that arbitrability is to be decided by the arbitrators (*Contec Corp. v Remote Solution Co. Ltd.*, 398 F 3d 205, 208 [2d Cir. 2005])).

LRT challenges the scope of the Arbitration Agreement, and contends that the dispute over payment of claims is not subject to arbitration because of the Recourse Provision. Additionally, LRT challenges the validity of the Arbitration Agreement itself,

relying upon Supreme Court's decision in *Hall Street Assocs. L.L.C.* (128 US 1396). However, the scope and validity of the Arbitration Agreement is for the arbitrators to determine.

In any event, at issue in *Hall Street Assocs.* (128 US 1396) was whether the grounds set forth in the FAA for either vacating, modifying or correcting an arbitration award constitute the exclusive grounds for the vacatur or modification of an award.⁴

The issue arose in the context of a lower court's vacating of an arbitration award based upon a provision contained in the underlying arbitration agreement that permitted the parties to vacate or modify the award if the arbitrator's conclusions of law were erroneous (*id.* at 1398). This ground for vacating or modifying an arbitration award is not explicitly set forth in FAA §§ 9-11. The Supreme Court concluded that the grounds set forth in the FAA for vacating or modifying an arbitration award constitute the exclusive grounds for vacatur and modification, and that parties cannot, by contract, expand upon these grounds (*id.* at 1405). Ultimately, the Supreme Court remanded the case for determination of issues independent of the grounds for

⁴ The FAA, in 9 USC §§ 10-12, enumerates limited grounds on which a court may vacate, modify or correct an arbitral award.

In the Arbitration Agreement, the parties contracted to expand the scope of judicial review of arbitration awards beyond the grounds explicitly set forth in the FAA.

Section 30 of the Arbitration Agreement states that, "The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein."

judicial enforcement of arbitration awards (*id.* at 1399).

There is no basis to conclude that the holding in *Hall Street Assocs.* (128 US 1396) mandates the invalidation of the parties' agreement to arbitrate by this Court, simply because the Arbitration Agreement contains a provision expanding the availability of judicial review of an award beyond those exclusive grounds set forth in the FAA. Undoubtedly, such an application of *Hall Street Assocs.* (*id.*) would conflict with the strong federal policy favoring arbitration that seeks to "place arbitration agreements on equal footing with all other contracts" (*Hall Street Assocs.*, 128 US at 1402). Additionally, it is not a basis upon which to stay arbitration (*see generally Kyocera Corp. v Prudential-Bache Trade Services, Inc.*, 341 F 3d 987 [9th Cir 2003], *cert dismissed* 540 US 1098 [2004]).

Nonetheless, the issue that arises is whether the holding in *Hall Street Assocs.* requires severability of that portion of the Arbitration Agreement that runs afoul of the FAA.⁵

The issue of whether an agreement's provisions are severable is ordinarily a question of the parties' intent for the Court to determine (*Atlantic Mut. Ins. Co. v. Balfour MacaLaine Intl. Ltd.*, 85 F 3d 68, 81 [2nd Cir 1996]). However, determining the severability of an expanded judicial review clause in the context of arbitration agreements subject to the FAA has not been addressed by a New York court subsequent to *Hall Street Assocs.* .

⁵ The Supreme Court chose not to address the issue of severability, because it was not a basis for certiorari (*Hall Street Assocs.*, 128 US at 1405, fn 6).

In light of the parties' explicit agreement that the existence, scope, or validity of the Arbitration Agreement is to be determined by the arbitrators, and the strong federal policy favoring arbitration that dictates that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration (*Hall Street Assocs.*, 128 US at 1402; *Bank Julius Baer & Co. v Waxfield Ltd.*, 424 F3d 278, 281 [2d Cir 2005]), the severability of the expanded judicial review clause is for the arbitrators to determine. In any event, severability prior to an application to confirm, vacate or modify an arbitration award is premature. Therefore, LRT's motion to stay arbitration is denied.

Finally, Syndicate 102's motion to join Peachtree as a necessary party is granted without opposition (June 25, 2008 Transcript, 41:3-12).

Accordingly, it is

ORDERED that plaintiff's Life Receivables Trust's motion to stay arbitration is denied; and it is further

ORDERED that defendant's motion to join non-party Life Settlement Corporation d/b/a Peachtree Life Settlements is granted.

Dated: September 19, 2008

ENTER

J.S.C.

HON. CHARLES E. RAMOS

FILED
 SEP 30 2008
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