

**Chapman Waterproofing Co. v Reliance
Ins. Co.**

2008 NY Slip Op 33229(U)

December 1, 2008

Supreme Court, New York County

Docket Number: 401260/08

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

CHAPMAN WATERPROOFING COMPANY

Petitioner,

-against-

RELIANCE INSURANCE COMPANY
(IN LIQUIDATION)

Respondent.

INDEX NO. 401260/08

MOTION DATE Aug. 21, 2008

MOTION SEQ. NO. 001

MOTION CAL. NO. 7

The following papers, numbered 1 to 7 were read on this motion to dismiss the petition pursuant to CPLR § 404 (a)

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, the respondent's motion pursuant to CPLR § 404 (a) to dismiss the petition for a stay of arbitration as having been timely commenced is decided in accordance with the attached decision, order and judgment decided this same date.

This constitutes the decision and order of the Court.

FILED

DEC 04 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/1/08

O.P. Sherwood

O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
CHAPMAN WATERPROOFING COMPANY,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR
Staying Arbitration of a Certain Proceeding

-against-

RELIANCE INSURANCE COMPANY
(IN LIQUIDATION),

Respondent.
-----X

O. PETER SHERWOOD, J.:

In a proceeding to stay arbitration of a claim for unpaid retrospective premiums alleged to be due under a policy for workers' compensation insurance issued by respondent Reliance Insurance Company (In Liquidation) ("Reliance") to petitioner Chapman Waterproofing Company ("Chapman") on the ground that the claim Reliance seeks to arbitrate is barred by the applicable Statute of Limitations, respondent moves for an order pursuant to CPLR § 404 (a) dismissing the petition on the ground that the claim sought to be arbitrated is timely.

The facts as derived from the motion papers are as follows: Reliance provided workers compensation and employer's liability insurance to Chapman, effective December 15, 1993 to December 15, 1994, and renewed for successive annual periods thereafter until the policy was canceled on December 15, 1997. The policy so issued was governed by a Premium Agreement between Reliance and Chapman, also effective December 15, 1993 ("the Agreement"), through which the parties adopted a retrospective rating plan the terms of which are set forth in the Agreement. Under this plan, Chapman paid an initial premium in addition to periodic additional premiums based upon the insured's actual loss experience and the amounts paid by Reliance to cover such losses. These amounts would be determined by periodic audits and if Reliance determined that a retrospective additional premium was due, such amount was immediately due and payable to Reliance. In the event of cancellation of the policy, the Agreement provided that the retrospective premium would be calculated six months after the cancellation and annually thereafter until both

DECISION AND
ORDER

Index No. 401260/08

FILED
DEC 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

Reliance and Chapman agreed that any subsequent adjustment was final. Reliance contends that as of November 9, 2006, the latest retrospective premium calculation date, Chapman owed it \$214,627.00 for outstanding premiums. Reliance acknowledged a payment from Chapman in the sum of \$60,000.00, received on or about September 29, 2003, but contended that despite its demands for the remaining additional retrospective premiums due Chapman has refused to make any further payments.

By demand dated February 5, 2008, Reliance sought arbitration of its claim for \$214,627.00 in unpaid retrospective premiums. Chapman responded by commencing this special proceeding pursuant to CPLR article 75 for a permanent stay of arbitration, arguing that the claim was barred by the CPLR 213 (2) six-year statute of limitations governing contract claims.¹ Reliance has now moved for an order pursuant to CPLR § 404 (a) dismissing the petition on the ground that the claim sought to be arbitrated is timely.

Discussion

A permanent stay of arbitration will be granted when the demand for arbitration is served after the applicable statute of limitations has expired (*see*, CPLR § 7502 [b]). A cause of action for breach of an insurance agreement is based upon a contractual obligation and is subject to a six year statute of limitations (*see*, *Commissioners of the State Ins. Fund v Trio Asbestos Removal Corp.*, 9 AD3d 343 [2d Dept. 2004]; *Commissioners of the State Ins. Fund v SM Transp. Ltd.*, 11 Misc3d 1083 [A] [Sup. Ct. Queens Co. 2006]). Generally, the statute of limitations begins to run when a cause of action accrues (*see*, *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]). A breach of contract action accrues at the time of breach (*id.*). The six years begins to run from the date of the breach regardless of when

¹Petitioner commenced this CPLR article 75 proceeding in Albany County predicated venue upon the location of its office and its claim that respondent was a foreign corporation not authorized to do business in New York. The Supreme Court, Albany County (Joseph C. Teresi, J.) rejected petitioner's argument finding that respondent is authorized to do business in New York and holding that venue of the proceeding in New York County where Reliance resides is more appropriate. Thus, the Court by decision and order dated April 17, 2008, transferred the proceeding from Albany County to New York County. The file was received by the New York County Clerk on or about June 3, 2008.

the damage is suffered or whether the injured party is aware of the wrong (*see, Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d at 403).

The demand for arbitration was served on February 5, 2008. Therefore, Reliance must show that conduct in breach of its contract with Chapman occurred within six years prior thereto, that is from February 5, 2002 forward.

Neither Reliance nor Chapman challenge the applicability of the six-year statute of limitations in this proceeding. They do disagree on when the six-year time period began to run. Chapman asserts that the statute began to run on December 15, 1997, when the policy was canceled. Alternatively, Chapman contends that the statute of limitations clock began running on the date that all claims under the policy were closed and that such date may have been prior to February 5, 2002 in which case Reliance's claim would be time barred. However, Chapman argues that Reliance has exclusive knowledge as to when the last of claims under the policy were closed and, therefore, its motion to dismiss must be denied to permit the parties to engage in discovery on this issue. Chapman avers further that Reliance's claim is barred by the equitable doctrine of laches as the ten-year delay in the commencement of this action served to prejudice Chapman through the loss or destruction of relevant documents and the failing memories of potential witnesses.

Reliance seeks to avoid the bar of the statute of limitations by contending that the periodic retrospective premiums must be considered installments and that each final audit statement of the actual premium due is subject to a new limitations period. On this basis, Reliance contends that its last bill to Chapman, based upon a September 30, 2006 audit which was sent to Chapman on November 9, 2006, triggered the six-year period as of that date, and that the arbitration for that claim commenced on February 5, 2008 (*i.e.*, one year, two months and 27 days after accrual) was, therefore, timely. Alternatively, Reliance argues that: (1) Chapman's partial payment of \$60,000.00 to Reliance on October 3, 2003, revived the debt and started the statute of limitations running anew; and (2) that Chapman's letter to Reliance, dated February 3, 2006, in which its Corporate Safety and Loss Control Director, James Frederick, stated in part "we are prepared to immediately settle and resolve all open claims for premium payments against this policy" triggered the debt-acknowledgment provisions of General Obligations Law § 17-101 and tolled the running of the relevant limitations period.

1. *Installment Payments*

Reliance predicates its argument that each periodic retrospective insurance premium was subject to separate accrual upon a series of cases. In *Commissioners of the State Insurance Fund v Trio Asbestos Removal Corp.* (9 AD3d 343, *supra*), an action to recover unpaid premiums due under a self-renewing workers' compensation policy, the Appellate Division, Second Department held that: "[T]he fact that the amount of the premiums due was estimated, and subject to audit and adjustment, did not serve to extend the statute of limitations to recover unpaid premiums" (*supra* at 345). Nevertheless, the Court found that "[e]ach final audit statement of the actual premium due * * * is subject to a new limitations period for any balance due above the amount of the estimated premium" (*id.* at 345). Thus, as to the adjusted retrospective premium that became due after an audit, the cause of action for breach and the six-year statute of limitations began to run when an invoice was issued for the adjusted premium and the insured failed to pay the adjusted premium pursuant to the terms of the insurance policy (*see also, Commissioners of the State Ins. Fund*, 11 Misc3d 1083 [A], *supra* [{"T]he plaintiff's cause of action accrued when the defendant breached the terms of its policies by failing to pay premiums demanded after audit.}; *Commissioners of State Ins. Fund v Photocircuits Corp.*, 2 Misc3d 300, 309-310 [Sup. Ct., N.Y., Co., 2003], *rev'd on other grounds* 20 AD3d 173 [1st Dept. 2005] [{"T]he amounts defendant owed in premiums or the amount to be returned to defendant was determined annually and was expected to be settled annually after calculations were completed [citation omitted]. Thus, the Statute of Limitations accrued as each premium became due and payable."]).

Review of the terms of the policy at issue here makes clear that each retrospective adjustment by Reliance was a demand for payment which became immediately due and payable. A cause of action for breach of the insurance agreement occurred when Reliance demanded payment and payment was refused. Thus, contrary to Chapman's contention, the statute of limitations did not accrue when the policy was terminated, but rather began to run on the date each retrospective adjusted premium became due after the final audit. What is difficult to reconcile upon this record is whether the invoices contained in the record, the earliest of which is dated August 2, 2002, are for amounts past due and owing or are based upon adjustments made after an audit and for amounts above the estimated premiums. Resolution of this issue is critical in determining whether Reliance's

claim is time barred. Although Reliance states that its claim for arbitration to recover the sum of \$214,627.00 is based upon its latest retrospective premium calculation dated November 9, 2006, that statement may not have been only for newly accrued premiums but also for retrospective premiums that remained due and owing. So much of this statement as represents retrospective premiums which were calculated based on audits of actual loss and became due after February 5, 2002 would be timely. Accordingly, the Court has an insufficient basis upon which to either grant or deny the petition for a permanent stay of arbitration on this issue. If this were the only basis upon which Reliance predicated its contention that its demand was timely, an evidentiary hearing would be required to determine the factual issue as to the date that each retrospective additional premium sought to be recovered became due and payable (*see, Matter of DiSunno Architecture v Sheppard*, 18 AD3d 751, 752 [2d Dept. 2005]). However, as the following discussion will reveal, an alternative basis exists for finding the claim for retrospective premiums timely.

2. Partial Payments

Reliance argues in the alternative that Chapman's partial payment of \$60,000.00 to Reliance on September 29, 2003, started the statute of limitations running anew.

It is well settled that part payment of a debt may revive the statute of limitations and begin the running of the statute anew if the creditor demonstrates that the payment was for a portion of an admitted debt and "made under circumstances amounting to an absolute and unqualified acknowledgment by the debtor, so that a promise to pay the balance may be inferred, and indicate an intent that it shall be so taken by the creditor" (*Scott v Palmer*, 246 App Div 379 [3d Dept. 1936], *aff'd* 273 NY 471 [1936]; *see, Lew Morris Demolition Co. v Board of Educ. Of the City of New York*, 40 NY2d 516, 521 [1976]; *Flynn v Flynn*, 175 AD2d 51 [1st Dept. 1991, *lv denied* 78 NY2d 863 [1991]; *Commissioners of the State Ins. Fund v Warner*, 156 AD2d 131 [1st Dept. 1989]).

Here, there is no dispute that Chapman made the payment of \$60,000.00 and that Reliance received the payment on or about October 3, 2008. Chapman contends that such payment was intended to be full settlement of the debt. The copy of this check annexed to the attorney's affirmation in support of the respondent's motion contains no notations that this payment was intended to be final. Conversely, there is no indication on the face of the check that this was a partial

payment of a larger debt. Other evidence in the record with respect to this payment is a copy of a letter from Reliance to Chapman, dated October 28, 2003, annexed to the supporting affirmation which reads as follows:

Thank you for your First payment of \$60,000.00 on check 026506. I would like to address some of the issues surrounding the release letter you inquired about. First of all we would require the second payment of \$60,000.00, and a third payment of 68,000.00 respectively. Once payments are received a new retro billing will be made updating your payments. This should bring your balance to zero barring any claims that are still open. Upon completing this protocol, I will submit your request to our underwriting department for consideration. The underwriting department has the final determination of this request. I just wanted you to be aware of what is expected.

Reliance also submits as an exhibit to the reply affirmation of its attorney a copy of what it characterizes as its "collection file status notes". The notes for the relevant dates are as follows:

9/8/03 - Chapman has agreed to pay in 3 month installs of 60,000 until paid off Walter Packard is to fax us an agreement

9/15 - Called to ask where faxed agreement for 3 pays @ 60,000 is LVM

9/18 - Mr. Packard promised first 60,000 first week of October

10/2/03 - Received first install of 60,000 on retro of 188,000.00 due on Chapman ck 026056

10/22 - Spoke with Mr. Packard at length about a release stating that once paid we will discuss that possibility subject to underwriting approval.

Review of these documents suggests that the parties were engaged in on-going discussions about the amount of retrospective premiums Chapman owed Reliance. Viewed in this context, while Chapman may not have agreed that the amount sought was accurate, it clearly acknowledged through its payment that it owed a debt to Reliance. What is more difficult to reconcile from these documents is whether Chapman had agreed to make further payments on the debt. That gap in the

proof is remedied by a letter dated February 3, 2006, from James Frederick, Chapman's Director of Corporate Safety & Loss Control, to Reliance, stating as follows: "We recognize Reliance has been seeking payments of past due invoices for Retro Adjustments made under the afore-mentioned policy, and we would like to resolve this matter with Reliance as quickly as possible * * * We would ask that Reliance assist us with clarification of a few minor issues, and upon doing so, we will promptly make final settlement on outstanding balances due to Reliance * * * As I have indicated, we are prepared to immediately settle and resolve all open claims for premium payment against this policy, and ask that Reliance work with us to answer our few remaining concerns." Considering this letter together with the other evidence, it would appear that Chapman's partial payment was made under circumstances that met the standard so that the statute of limitations began to run anew. Since the demand for arbitration was made within six years of the partial payment, the proceeding was timely commenced.

3. General Obligations Law § 17-101

The question remains whether the February 3, 2006, letter sufficed to renew the statute of limitations as to the debt owed under General Obligations Law § 17-101. General Obligations Law § 17-101 states, in pertinent part, as follows:

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules . . .

In order for the writing to constitute an acknowledgment, it "must recognize an existing debt and must contain nothing inconsistent with an intention to pay it" (*Lew Morris Demolition Co. v Board of Education of the City of New York*, 40 NY2d *supra* at 520-521). At bar, the subject letter explicitly acknowledges that amounts owed to Reliance remained outstanding. Other references made to settling the outstanding open claims are entirely consistent with an intention to pay an existing debt. Contrary to Chapman's contention, the fact that the letter questions the amount of the debt and does not make reference to a sum certain does not render Chapman's acknowledgment conditional. Accordingly, Chapman's letter constituted an "acknowledgment or promise" within the

meaning of General Obligations Law § 17-101 that restarted the statute of limitations (*see, City of New York v North River Hous. Development Fund Corp.*, 12 AD3d 294, 296 [1st Dept. 2004]; *Atlantic Natl. Trust v Silver*, 9 AD3d 321 [1st Dept. 2004]; *Banco Do Brasil v State of Antigua & Barbuda*, 268 AD2d 75, 77-78 [1st Dept. 2000]).

4. Laches

Lastly, Chapman argues that Reliance’s claim is barred by the equitable doctrine of laches. “[L]aches is not mere delay, but considerable delay resulting in a change of position, intervention of equities, loss of evidence, or other disadvantages” (*Galarraga v City of New York*, 54 AD3d 308, 310 [2d Dept. 2008]). This has not been demonstrated in the instant matter. As Reliance observes, it did not sit on its rights during the period after the insurance policy at issue was terminated, but rather was actively engaged in efforts to obtain payment of the outstanding premiums during the intervening years.

Conclusion

Based upon the foregoing discussion, it is hereby

ORDERED, that respondent’s motion to dismiss the petition is granted; and it is further

ORDERED, that the respondent’s demand for arbitration is hereby deemed to have been filed timely within the applicable statute of limitations; and it is further

ORDERED, that the petition is dismissed .

This constitutes the decision, order and judgment of the court.

DATED: 12/1/08 . . .

FILED
DEC 04 2008
COUNTY CLERK'S OFFICE
NEW YORK
ENTER,
O. Peter Sherwood
J.S.C.
O. PETER SHERWOOD
J.S.C.