

**AXA Mediterranean Holding, S.A. v ING Ins. Intl.,
B.V.**

2011 NY Slip Op 33690(U)

November 29, 2011

Supreme Court, New York County

Docket Number: 652110/10

Judge: Eileen Bransten

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

DECENT: **HON. EILEEN BRANSTEN**

PART 3

Index Number : 652110/2010

AXA MEDITERRANEAN

vs

ING INSURANCE

Sequence Number : 001

DISMISS

INDEX NO. 652110/10

MOTION DATE 8/3/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 11-29-11


HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 3

AXA MEDITERRANEAN HOLDING, S.A.,

Plaintiff,

-against-

ING INSURANCE INTERNATIONAL, B.V.,

Defendant,

INDEX NO. 652110/2010

MOTION DATE: 8/3/11

MOTION SEQ. NO. 001

BRANSTEN, J.:

In this action for breach of contract, plaintiff AXA Mediterranean Holding, S.A. (“AXA”) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to partially dismiss the complaint.

BACKGROUND

Both AXA and defendant ING Insurance International, B.V. (“ING”) are foreign entities that engage in the business of insurance. Each of them is a member of separate large international financial entities, AXA Group and ING Group, respectively.

Stock Purchase Agreement

Pursuant to a stock purchase agreement dated February 12, 2008 (the “Agreement”), AXA acquired from ING a Mexican insurance company, non-party Seguros ING, S.A. de C.V. (the “Insurance Company”), as well as the Insurance Company’s subsidiaries, one of

which is a bond company, non-party ING Fianzas, S.A. (the “Bond Company”) (together, the “Subject Companies”). *See* Complaint, ¶ 17. The transaction closed on July 22, 2008 (the “Closing Date”).

The Agreement provides that it is governed by New York law, and that New York County state courts, or the federal court for the Southern District of New York, have exclusive jurisdiction over disputes pertaining to the Agreement. *See* 01/28/11 Cohen Aff., Ex. 2, Agreement, at 52, § 13.5.

Representations and Warranties

Article II of the Agreement, entitled, “Representations and Warranties of the Principal Stockholder,” contains various representations by ING about the Subject Companies. The representations include, among other things, the Subject Companies’ incorporation status, stock shares, financial statements, sufficiency of reserves, tax compliance and pending litigation. *See id.* at 4-21.

As relevant to this motion, in Article II, section 2.14, entitled “Labor,” ING represents, inter alia, that: (a) “none of the Subject Companies” is a party to any labor or collective bargaining agreement; (b) there is no labor organizing activity involving the Subject Companies; (c) there are no strikes or pending labor disputes; (d) each Subject Company has materially complied with social security and labor laws and that, among other

things, there are no significant claims relating to employment discrimination or compensation. *Id.* at 14-16.¹

Indemnification

Article XI of the Agreement, entitled “Indemnification and Related Matters,” provides, among other things, that ING agrees to indemnify AXA for damages resulting from “any inaccuracy in or breach of any representation or warranty” made in the Agreement. *Id.* at 44, § 11.1 (a) (i). However, ING “shall not be liable for any punitive damages... [unless] payable pursuant to a Third Party Claim.” *Id.* at 45, § 11.1 (a) (5).

Termination and Survival of Representations

Section 13.1 of the Agreement, entitled “Survival of Representations and Warranties,” provides, in relevant part, that, with some enumerated exceptions, “[a]ll representations and warranties contained in this Agreement and all claims with respect thereto shall terminate upon the date that is twelve (12) months after the Closing Date.” *Id.* at 50, § 13.1.

Section 13.1 further provides:

[n]otwithstanding the foregoing, to the extent that a Notice of Claim ... has been delivered on or prior to the date on which a representation or warranty on which such claim is based ceases to survive as specified in this Section 13.1, such representation and warranty shall continue to survive with respect to such

¹ Section 2.14 has three other subsections that are not relevant for the purposes of this motion. *See* Agreement, § 2.14 (e) - (g).

alleged breach of such representation and warranty contained in the Notice of Claim and any alleged breaches of such representation contained in any related Notice of Claim until the final resolution of such alleged breaches pursuant to the terms hereof

Id.

Notices of Claim

By letter, dated July 17, 2009 (the “First Notice”), AXA wrote to ING claiming that ING had breached a number of representations/warranties in the Agreement, as a result of which AXA allegedly suffered at least \$212.9 million in damages. *See* 01/28/11 Cohen Aff., Ex. 3, the First Notice, at 12. The First Notice alleged, among other things, that ING breached its representation/warranty of compliance with labor and employment law. *Id.* at 10. In particular, the First Notice stated:

ING ... breached Section 2.14 of the Agreement because many of the Subject Companies did not fully comply with all applicable labor and employment laws prior to the Closing Date, resulting in significant post-closing liabilities, including the potential liability from employment-related lawsuits and the cost of settling pending or potential employment-related claims

Id. at 10, § IV. AXA specified that, as a result, ING breached subsection (d) of section 2.14 of the Agreement and that AXA faced at least \$2.1 million in liability/damages. *Id.*

By letter, dated October 6, 2010 (the “Second Notice”), AXA wrote to ING stating that it was providing a notice of proceeding and notice of claim, supplementing the First Notice. *See* 01/28/11 Cohen Aff., Ex. 4. In the Second Notice, AXA alleged that, before the

Closing Date, ING became aware that the Insurance Company's sales agents sought to form a union, and that the Insurance Company filed a lawsuit to nullify the union registration. ING, however, allegedly failed to inform AXA of these developments, thereby breaching the representation in the Agreement that, prior to closing, there was no labor organizing activity and/or litigation. AXA requested that ING indemnify it for legal costs and expenses related to the labor organizing litigation. *See id.* ING refused.

Complaint

AXA alleges in the Complaint that ING: (1) overstated the Bond Company's base operating capital, solvency margin, and sufficiency of a reserve for uncollateralized tax bonds (Complaint, ¶¶ 29-56); (2) failed to ensure that the Insurance Company had adequate reserves for potential liabilities (*id.*, ¶¶ 57-74); (3) failed to disclose the Bond Company's improper tax deductions (*id.*, ¶¶ 75-80); (4) failed to disclose labor and employment law claims (*id.*, ¶¶ 81-82); and (5) failed to disclose labor organizing activity by the insurance sales agents of the Insurance Company. *Id.*, ¶¶ 83-87.

On these facts, AXA pleads three causes of action for: (1) breach of representations and warranties contained in the Agreement (*id.*, ¶¶ 103-114); (2) breach of contract (*id.*, ¶¶ 115-121); and (3) declaratory judgment directing ING to indemnify AXA for contingent liabilities. *Id.*, ¶¶ 122-128. AXA seeks, among other things, punitive damages. *Id.* at 38, ad damnum clause, § F.

ING now moves to dismiss: (1) the claim for breach of representation/warranty as to the absence of unionization activity; (2) the causes of action for breach of contract and declaratory judgment; and (3) the request for punitive damages.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court “assumes the truth of the complaint’s material allegations and whatever can be reasonably inferred therefrom [citation omitted]. The motion should be denied if ‘from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep’t 1992), quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

A motion to dismiss, pursuant to CPLR 3211 (a) (1), “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

Labor Organizing Activity Claim

ING contends that, pursuant to section 13.1 of the Agreement, AXA’s claim for breach of representation and warranty in section 2.14 (b) of the Agreement, regarding labor

organizing, should be dismissed because AXA failed to give ING a requisite notice of claim within 12 months following the Closing Date.²

“[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569(2002); *see also 239 E. 79th Owners Corp. v. Lamb 79 & 2 Corp.*, 30 A.D.3d 167, 168 (1st Dep’t 2006). “In interpreting a contract, the court must read the document as a whole to determine the parties’ purpose and intent, giving a practical interpretation to the language employed so that the parties reasonable expectations are realized.” *Gutierrez v. State of New York*, 58 A.D.3d 805, 807 (2d Dep’t 2009) (internal quotation marks and citation omitted).

Section 2.14 (b) is a representation/warranty that, as of the Closing Date, there was no labor organizing activity involving the Subject Companies.

AXA alleges, in relevant part, that ING breached section 2.14 (b) of the Agreement as follows: (1) in January 2008, certain insurance sales agents of the Insurance Company filed an application in order to register a labor union; (2) after the insurance sales agents’

² ING seeks dismissal of the labor organizing claim as part of the first cause of action for breach of representations and warranties. For reasons stated below, this cause of action is dismissed in its entirety. However, AXA also asserts the labor organizing claim as part of the second cause of action for breach of contract (*see* Complaint, ¶ 119 [d]), to which this discussion pertains.

application was denied, they appealed and, in April 2008, obtained a court ruling in their favor; (3) the Insurance Company, while still owned by ING, received notice of the court ruling; (4) the court ruling is now on appeal before a Mexican federal court. Complaint, ¶ 85. AXA further alleges that, if the union registration is affirmed, the Insurance Company might have to increase compensation payable to the agents and pay additional taxes; and may also be liable for back taxes and benefits. *Id.*, ¶¶ 86-87.

As noted, *supra*, section 13.1 of the Agreement provides for termination of representations and warranties and the related claims 12 months after the Closing Date, unless a notice of claim is delivered prior to that date. In the First Notice, which ING concedes was timely, AXA claimed, in relevant part, that ING breached section 2.14 for failure to comply with applicable labor and employment laws, resulting in claims for pre-closing violations amounting to over \$2 million. 01/28/11 Cohen Aff., Ex. 3, the First Notice, at 10, § IV. AXA specified that ING thus breached section 2.14 (d) of the Agreement. *Id.*

The First Notice did not mention section 2.14 (b) or contain any reference to the unionization claim. It is only the Second Notice that alleged that ING was aware of the unionization activity prior to closing, but failed to inform AXA thereof. The Second Notice was given over a year after the 12-month notice period had expired. Clearly, AXA failed to inform ING of the unionization claim within 12 months following the Closing Date.

AXA argues that, by referencing section 2.14 generally in the First Notice, it asserted breaches of every representation and warranty contained in that section, including that pertaining to unionization. However, the Agreement expressly provides that in order for a representation or warranty to survive beyond the 12-month limit, a proper notice of claim must be given. *See* Agreement, § 13.1; *see also Greenfield*, 98 N.Y.2d at 569 (clear and unambiguous contractual provision must be enforced).

Section 13.1, by referencing section 11.2, provides that a party seeking indemnification needs to notify the indemnitor of its “claim and, when known, the facts constituting the basis for such claim.” Agreement, §§ 13.1, 11.2. AXA gave a proper, timely notice with respect to violations of labor and employment laws, a breach of representation in section 2.14 (d) of the Agreement,³ but not with respect to labor organizing activity, a breach of representation in section 2.14 (b) of the Agreement.⁴ *See Greenfield*, 98 N.Y.2d at 569.

Similarly, AXA’s argument that ING’s actual knowledge of the unionization, prior to closing, obviated the need for notice, runs contrary to the express requirement in section

³ Section 2.14 (d), in relevant part, provides: “each Subject Company has materially complied with ... applicable social security and labor [l]aws ... [and] there are no audits, complaints, charges or claims ... pending ... in connection with the employment ... of any individual, including any claim relating to employment discrimination, equal pay, ... [and] compensation”

⁴ Section 2.14 (b), in relevant part, provides: “no employee ... is represented by any labor organization. There is no organizing activity involving any of the Subject Companies pending or, to the knowledge of the Subject Companies, threatened by any labor organization or group of employees of any of the Subject Companies.”

13.1 of the Agreement that a notice of claim needs to be provided in order for a particular representation/warranty to survive. *See id.*

AXA also contends that ING is equitably estopped from asserting a lack of notice defense. AXA argues that ING was aware of labor organizing activity, misrepresented that fact to AXA, and, as a result, induced AXA to act to its detriment.

“A plaintiff seeking to apply the doctrine of equitable estoppel must establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit.” *Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548, 552 (2006) (internal quotation marks and citation omitted). AXA has failed to show how ING, subsequent to closing, prevented AXA from learning about labor organizing within the Insurance Company, from providing a valid notice of claim, or from commencing a legal action. To the contrary, it appears that AXA, as it has been involved in an ongoing litigation with respect to the union registration, found out about the unionization activity relatively quickly after the closing. *See, e.g., Maria del Pilar Tortolero Damy Aff.*, ¶ 19. Accordingly, AXA’s equal estoppel argument is unavailing.

Finally, AXA maintains that if the union registration is ultimately approved, AXA may be liable for, among other items, back employment taxes. AXA points to section 13.1 which excludes certain representations from the 12-month limitation period, including that “the representations and warranties in Section 2.9 (Taxes) shall survive until the expiration

of all statutes of limitations applicable to the matters covered by such representations and warranties.” Agreement, § 13.1 (ii).

Section 2.9 is a representation that the Subject Companies have paid appropriate taxes and filed tax returns. The Agreement defines “Tax” or “Taxes” as including employment, withholding and payroll taxes, and governmental fees and penalties required under Mexican tax law, for the period ending September 30, 2007. *See* Agreement, at A-10; A-2 “Covered Tax.” AXA is correct that its potential claim for back employment taxes would not be barred under section 13.1. Additionally, at an oral argument, ING appears to have agreed with AXA’s position on this issue. *See* 06/30/2011 Oral Arg. Tr., at 46.

Accordingly, AXA claim for breach of representation and warranty of section 2.14 of the Agreement as it relates to the unionization/labor organizing activity is dismissed, with the exception of a potential claim for back employment taxes.

Punitive Damages

ING next argues that AXA’s request for punitive damages should be dismissed. ING contends that punitive damages are not available in connection with breach of contract claims.

In general, “[p]unitive damages are not recoverable for an ordinary breach of contract.” *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 613 (1994); *see also Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 867 (1st

Dep't 2009). "However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally." *Rocanova*, 83 N.Y.2d at 613 (internal quotation marks and citation omitted).

The Agreement provides that ING "shall not be liable for any punitive damages or exemplary damages, other than any such damages payable pursuant to a Third Party Claim." Agreement, § 11.1 (a) (5). However, the Agreement also provides that "[n]one of the limitations contained in this Section 11.1 (a) shall apply to any claim involving an allegation of fraud or intentional or willful misconduct by ... ING or the Subject Companies prior to the Closing" (the "Exclusion Clause") *Id.* at 47.

AXA alleges that ING engaged in willful misconduct when it represented and warranted in sections 2.6 and 2.17 of the Agreement that the Bond Company's financial statements were accurate, that its collateral and reserves were sufficient, and that the Insurance Company's financial statements were in compliance with accepted actuarial/accounting standards and applicable laws, when, in fact, this was not the case. *See* Complaint, ¶¶ 35-40, 61-64, 71-73.

On this basis, AXA contends that, pursuant to the Exclusion Clause (Agreement, at 47), the contractual limitation on punitive damages (*id.*, § 11.1 [a] [5]) does not apply. Even

if it is correct, AXA has failed to demonstrate that ING engaged in fraud “evincing a high degree of moral turpitude[,]” “demonstrating wanton dishonesty as to imply a criminal indifference to civil obligations,” or that ING’s conduct was “aimed at the public generally.” *Rocanova*, 83 N.Y.2d at 613.

AXA argues that ING’s conduct affected the general public because the transaction involved an acquisition of insurance and bond companies. Insurance and bond companies are subject to strict Mexican legislative and administrative regulations aimed at protecting the general public against insufficient reserves and insolvency of such companies. *See Yves Hayaux-Du-Tilly Laborde Aff.*, ¶¶ 7-15.

AXA’s argument is unpersuasive. This action involves an acquisition of certain companies by one large corporation from another. Both parties are sophisticated and well-represented. Indisputably, prior to closing, AXA was given ample opportunity to conduct due diligence, with access to ING’s records, in order to verify the accuracy of ING’s representations and warranties. The fact that the acquired companies are subject to strict governmental regulation is irrelevant. This action is about a private breach of contract, and not about vindication of a public right. Accordingly, the request for punitive damages is dismissed. *Rocanova*, 83 NY..2d at 613.

Duplicative Causes of Action

ING seeks dismissal of the cause of action for breach of contract and declaratory judgment, because they: (1) allege the same misconduct; (2) are based on the same

contractual provisions; and (3) seek the same remedies as the cause of action for breach of representations and warranties.

“Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy.” *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99 (1st Dep’t 2009). As AXA points out, some of its alleged losses may not be presently ascertainable. A declaration as to ING’s liability for these future losses, stemming from the breach of representations/warranties in the Agreement, may be appropriate. Hence, the request for declaratory judgment is not dismissed.

As to the other two causes of action, AXA’s claim that ING breached certain representations/warranties is, in essence, a claim for breach of contract. *See, e.g., CBS Inc. v. Ziff-Davis Publ. Co.*, 75 N.Y.2d 496, 503 (1990). “The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, ... [t]he right to indemnification depends only on establishing that the warranty was breached.” *Id.* at 503-504. The causes of action for breach of representations/warranties and for breach of contract are repetitive. The breach of contract cause of action includes the breach of representations/warranties. *Id.* Accordingly, the cause of action for breach of representations and warranties is dismissed.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion for partial dismissal is granted to the extent that:

- (1) the first cause of action for breach of representations and warranties is dismissed;
- (2) as part of the cause of action for breach of contract, the claim regarding unionization/labor organizing is dismissed, with the exception of the sub-claim for back employment taxes;
- (3) the request for punitive damages is dismissed;

and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: New York, New York
November 29, 2011

ENTER



Hon. Eileen Bransten, J.S.C