

Bonzy, Inc. v Intact Ins. Co.

2012 NY Slip Op 30062(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 105239/2011

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT.

Hon. Doris Ling-Cohan

PART 36

Index Number : 105239/2011

BONZY, INC.

vs

INTACT INSURANCE COMPANY

Sequence Number : 001

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

— TURNOVER PROCEEDING

Th:

turnover proceeding

No:

No(s). 1, 2, 3

Answering Affidavits — Exhibits _____

No(s). 6

Replying Affidavits _____

No(s). 7, 8

Cross motion

4, 5

Upon the foregoing papers, it is ordered that this ~~motion is~~ *turnover proceeding*
is dismissed in accordance with the
attached memorandum decision;

The petition is denied & cross-motion granted.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/9/12

[Signature], J.S.C.

JUDGE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----X
BONZY, INC.,

Petitioner,

Index No.: 105239/11

- against -

INTACT INSURANCE COMPANY p/k/a ING
INSURANCE COMPANY OF CANADA,

Motion Seq. No.: 001

Respondent,

UNFILED JUDGMENT

CAN-MED LINES (USA), INC.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Judgment Debtor
-----X

Doris Ling-Cohan, J.:

In this turnover proceeding, petitioner, Bonzy Inc. (Bonzy), petitions the court, pursuant to CPLR 5225 and 5227, for a judgment directing respondent, Intact Insurance Co. (Intact), s/h/a Intact Insurance Company p/k/a ING Insurance Company of Canada (ING Insurance), to pay petitioner \$474,935.00 in the principal policy amount (together with accrued interest, costs, poundage fees and disbursements), with respect to a judgment for \$1,188,838.16, entered in favor of petitioner and against judgment debtor, Can-Med Lines (USA), Inc. (Can-Med), in the Supreme Court of the State of New York on February 3, 2009. Petitioner bases its turnover proceeding on the ground that respondent is in possession of property of the judgment debtor, or is indebted to the judgment debtor. Intact cross-moves, pursuant to CPLR 404 (a) and 406, for an order dismissing the petition.

This petition and motion raise whether there is jurisdiction over respondent, a foreign corporation, and whether discovery on such issue is warranted. For the reasons set forth below, the petition is denied and the cross motion to dismiss is granted.

Background

At all times relevant herein, petitioner, a New Jersey corporation, was engaged in business as an importer, exporter and wholesale distributor and vendor of consumer products. Its principal place of business was located at 58 Orchard Street, New York, New York.

Can-Med, a corporation based in Sterling, Virginia, is a fully bonded non-vessel-operating common carrier approved by the Federal Maritime Commission Bond Number: 16722N, as defined in the US Marine Act Marine Policy of 1984. According to petitioner, Can-Med regularly and systematically does business in the State of New York, or transacted business within or without New York, from which the cause of action arose, and has derived substantial income from interstate commerce.

Can-Med, in the course of its business, requested that ING Insurance issue a certificate of insurance covering Bonzy's shipment of cargo containing 56,674 pieces of quartz analog watches (the Cargo). ING Insurance issued a certificate of marine insurance covering Bonzy's shipment, on August 7, 2003, for \$474,935.00, under claim number 8402965, policy number 84-1014762 and certificate number 1107396 (the Policy). Can-Med was to provide its customers, the shippers, with a shared space in a container, or to take possession of a full container and arrange for the shipment of cargo to the destination requested by the customer.

The Cargo, valued at \$464,760, was to be shipped to "DONTO D.O.O Beogard", located in Belgrade, Serbia. Bonzy delivered the Cargo to Can-Med on August 5, 2003, and loaded it into container, CLHU8745748, which was confirmed by nonparty SGS North America Inc., an

independent insurance company.¹

Can-Med delivered the Cargo to Hapag-Lloyd, a maritime shipping line company, which accepted the Cargo for maritime shipment. The Cargo was never delivered to Bonzy's customers, Bonzy did not receive any payment, and Can-Med failed to account to petitioner for the Cargo. The total value of the shipments which Can-Med failed to pay petitioner had an alleged value of \$799,884.

On July 1, 2005, petitioner filed an action against Can-Med, *Bonzy Inc. v Can-Med Lines (USA) Inc., et al.*, index No. 602385/05 (underlying action). Petitioner filed a motion for judgment in the amount of \$799,844, plus interest. On December 20, 2006, the Honorable Judge Lowe granted the motion on default against Can-Med. On February 3, 2009, the Clerk of the Court entered judgment in favor of Bonzy against Can-Med in the amount of \$1,188,838.16 (the Judgment).

Thereafter, Bonzy commenced a turnover proceeding against another primary insurer, nonparty XL Specialty, that issued a bond covering the Cargo, who in March 2010 agreed to pay \$75,000 to petitioner. This amount was due to the limit of the bond issued by XL Specialty. The remaining balance of the Judgment is \$1,113,838.16 with interest.

According to petitioner, ING Insurance also insured the Cargo under the Policy, and Intact, as the successor company to ING Insurance, is liable for the portion of Bonzy's unsatisfied Judgment under the Policy. Petitioner claims it is entitled to receive indemnification from Intact in the principal amount of \$474,935.00 for the Judgment against Can-Med for damages arising

¹ In September 2003, Bonzy also delivered fashion handbags, valued at \$335,124, to Can-Med, which had been loaded in container HLXU2254705. The instant matter only concerns the value of the watches.

from its transportation-related activities.

Intact opposes the motion, claiming that this court lacks jurisdiction over Intact and ING Insurance. In or around February 2009, Intact purchased the Canadian book business of ING Canada from nonparty, ING Groep, a financial and insurance holding company headquartered in the Netherlands. Intact claims that neither company has ever: (1) been registered to do business in New York, nor licensed by the New York State Department of Insurance to issue policies in New York; (2) had an office or a general agent in the New York; or (3) had a parent-subsiidiary relationship with any corporation located in the State of New York.

With respect to the Policy at issue herein, Intact claims that ING Canada issued an open marine cargo, policy no. 841014762 (Can-Med policy), to Can-Med Maritime Inc. effective September 4, 2002. Can-Med was located in Montreal, Quebec. According to respondent, the Can-Med policy was a first-party cargo policy, which insured goods in transit against various marine and transit risks; it was not a third-party liability policy and, thus, did not insure Can-Med from any liability it may have incurred to third parties, for loss or damage to shipments. Under the Can-Med policy, Can-Med and its affiliates were permitted to declare shipments they might be transporting on behalf of their customers. At the request of the broker, ING Canada issued a certificate of insurance, no. 1107396, to petitioner, who advised its location as being in Ridgefield, New Jersey (Bonzy Petition, Ex. 1). The certificate made petitioner an additional insured under the Can-Med policy with respect to the specific shipment described in the certificate, i.e., the Cargo (*id.*). The shipment was first being shipped from West Broadway, NJ to Belgrade, Yugoslavia (*id.*). Any claims payable under the certificate were to be made by ING Canada, at its offices in Toronto (*id.*).

6]

Discussion

Where, as here, respondent moves to dismiss the complaint asserting that the court lacks personal jurisdiction over it, the petitioner bears the burden of proof (*Copp v Ramirez*, 62 AD3d 23 [1st Dept 2009]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 407 [2d Dept 2005], citing *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000] [other citation omitted]). However, "the plaintiff[] need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant . . . [in order to make] a sufficient start to warrant further discovery on the issue of personal jurisdiction over it" (*Ying Jun Chen*, 19 AD3d at 408 [internal quotation marks and citation omitted]). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff (*Brandt*, 273 AD2d at 430).

A foreign corporation is subject to the jurisdiction of New York courts if it is engaged in such continuous and systematic course of "doing business" here as to warrant a finding of its presence in this jurisdiction (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990] [citations omitted]; see also *Frummer v Hilton Hotels Intl.*, 19 NY2d 533, cert denied 389 US 923 [1967]; see also *Bryant v Finnish Natl. Airline*, 15 NY2d 426 [1965] [other citations omitted]). Whether a corporation may be deemed to be present by virtue of its doing business in the jurisdiction depends on the application of a number of factors (*Landoil*, 77 NY2d at 33, citing *Bryant*, 15 NY2d at 432), including: (1) the existence of an office in New York; (2) the solicitation of business in the state; (3) the presence of bank accounts and other property in the state; and (4) the presence of employees of the foreign defendant in the state (*Frummer*, 19 NY2d at 537).

Here, Gerry McKinney, an underwriter at Intact and a former claims adjuster and

underwriter with ING Canada, avers that neither Intact nor ING Canada: (1) has ever been registered to do business in New York; (2) has ever been licensed by the New York State Insurance Department to issue policies in the State of New York; (3) has ever maintained an office in New York; (4) has ever had a parent subsidiary relationship with any corporation located in the State of New York; and (5) has ever issued policies to any insureds located in New York (McKinney Aff., ¶¶ 5 - 7) (*see Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co.*, 49 AD3d 276, 277 [1st Dept 2008]).

CPLR 302 (a) (1) extends jurisdiction of the New York courts to a nonresident who purposely avails himself of the privilege of conducting activities within New York and thereby invokes the benefits and protections under its laws (*see Corporate Campaign v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274 [1st Dept 1999]). Specifically, CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ..., who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state... ." However, "the long-arm authority conferred by [CPLR 302] does not extend to nondomiciliaries who merely ship goods into the State without ever crossing its borders" (*McGowan v Smith*, 52 NY2d 268, 271 [1981]). There must be "some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts" (*id.*).

Respondent contends that ING Canada did and Intact currently does issue insurance policies through independent brokers in Canada to insureds located in Canada (*id.*, ¶ 7). Further, it claims that the Can-Med policy was issued through Agence Maritime Brien, Russo Inc., an insurance broker unaffiliated with ING Canada, located in Quebec and that the issue of the

8] certificate of insurance was made without any connection to New York (*id.*, ¶¶ 8, 10).

Petitioner counters with two articles which state that “ING Insurance Company of Canada will become Intact Insurance Company and will operate under the Intact Insurance brand name” (Reply Aff., Ex. A), and argues that “respondent’s attempt to circumvent liability by stating that neither Intact nor ING were ever registered to licensed to do business in New York, and thereby, New York courts lack jurisdiction over respondents must fail .. [as it] is a factual argument that cannot be decided at such an early state of litigation” (Reply Aff., ¶ 8).

Petitioner’s claim that ING Direct of Canada’s status as a subsidiary of ING Groep, a financial institution of Dutch origin offering branchless direct banking with operations world-wide, is sufficient to determine whether jurisdiction exists over respondents, is tenuous at best, as it fails to identify the existence of a New York subsidiary or parent of Intact that may confer jurisdiction over Intact. Moreover, such blanket and conclusory statements cannot be said to be tangible evidence which demonstrate a “sufficient start” to warrant further discovery (*see Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]; *Granat v Bochner*, 268 AD2d 365 [1st Dept 2000]; *CRT Invs., Ltd. v Merkin*, 29 Misc 3d 1218 [A], 2010 NY Slip Op 51868 [U] [Sup Ct, NY County 2010], *affd* 85 AD3d 470 [1st Dept 2011]). While petitioner relies on news articles to argue for discovery, none of the submitted news articles or other exhibits indicate activities in New York.

Moreover, petitioner’s claim that jurisdiction over respondent stems from the judgment that was entered against Can-Med is illusory. First, the judgment was entered on default, Can-Med never having appeared in the underlying action. Second, despite petitioner’s contention, venue of an action does not override the jurisdictional requirements over the parties.

Based on the foregoing, petitioner failed to make a "sufficient start" in demonstrating that jurisdiction over respondent may be warranted (*see Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]). As such, further discovery on the issue is not warranted (*id.*; *see also Turbel v Societe Generale*, 276 AD2d 446 [1st Dept 2000]), and the petition is dismissed.

Conclusion

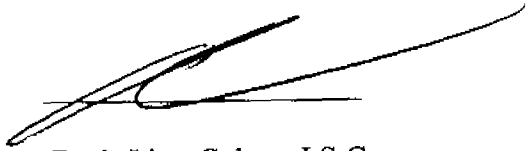
Accordingly, it is

ORDERED that the cross motion of respondent to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed with costs and disbursements to respondent; and it is further

ORDERED that within 30 days of entry of this order, respondent shall serve a copy upon petitioner, with notice of entry.

Dated: 1/9/12



Doris Ling-Cohan, J.S.C.

J:\Turnover Proceeding\Bonzy lisa trocchio.wpd

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).