SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. Justice PART 54

Superintendent of Financial Services -v-

Guaranty Trust.

INDEX NO. 450023/13

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 13-30

Answering Affidavits — Exhibits ____ No(s). 31-45

Replying Affidavits ____ No(s). 46-47, 49

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

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

Dated: 6/10/13

SHIRLEY WERNER KORNREICH J.S.C.

____, J.S.C.

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 54

----------X

THE SUPERINTENDENT OF FINANCIAL SERVICES OF THE STATE OF NEW YORK, as Liquidator of Whiting National Insurance Company,

Index No. 450023/2013

Plaintiff,

DECISION & ORDER

-against-

GUARANTEE INSURANCE COMPANY,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

This action arises out of a reinsurance contract between defendant Guarantee Insurance Company (Guarantee) and an insurance company known as Whiting National Insurance Company (Whiting) which has been in liquidation since 1988. Plaintiff, the Superintendent of Financial Services of the State of New York, is the liquidator for Whiting, acting through the New York Liquidation Bureau (the Bureau). Plaintiff alleges that Guarantee has refused to pay sums owed under the reinsurance agreement and seeks damages. Guarantee moves to dismiss, based on the statute of limitations. Plaintiff opposes. The court grants the motion in part.

I. Background

In 1981, Guarantee and Whiting entered into a Quota Share Reinsurance Agreement, in which Guarantee promised to pay 37.5% of any losses incurred by Whiting in connection with certain policies issued by Whiting while the Agreement was in effect (affirmation of R. James Bradford, April 8, 2013, exhibit 3 [the Agreement], art xvii). The Agreement was cancelled in 1982 (complaint ¶ 7). In 1988, a court order placed Whiting into liquidation, under the

administration of the Bureau (*id.* at ¶ 5).

On August 30, 1994, the Bureau sent Guarantee a bill for losses paid through June 30, 1993, and invited Guarantee to request the claim files in order to carry out the anticipated audit (*id.* at ¶ 9; Bradford affirmation, exhibit 4). On January 17, 1995, Guarantee informed the Bureau that after an audit it had concluded that in fact Whiting *owed* Guarantee $43,703.63, but that it would pay the Bureau $350,000 to commute the Agreement and discharge all present and future claims (Bradford affirmation, exhibit 5). This offer was not accepted, and Guarantee made no payments.

On September 28, 2001, the Bureau sent a list of "gross payments" made since June 1993, together with proposed terms for a commutation (*id.*, exhibit 7). In May 2002, Guarantee offered to commute the Agreement for $425,000, but this offer was not accepted either (*id.*, exhibit 9). The parties continued to correspond regarding claims, offsets and possible commutations, but no deal was ever reached and no money actually changed hands.

Meantime, on January 16, 2007, the Bureau informed Guarantee that as of December 31, 2006, there were no longer any "outstanding reserves due from Guarantee," meaning that it was not anticipated that there would be any more claims for which Guarantee could possibly bear liability (*id.*, exhibit 12). On August 10, 2009, the Bureau sent an email to Guarantee, claiming that the reinsurer owed it a total of $2,191,012.64 for all losses paid in the post-liquidation period, through June 30, 2009 (*id.*, exhibit 16; complaint ¶ 10). After an email exchange and the provision of certain documentation, counsel for Guarantee asked to inspect the claim files, for the first time noting that it was expressly reserving all of its rights (Bradford affirmation, exhibits 17–20). Some months later, by letter dated July 12, 2010, Guarantee denied all liability, stating

that claim files were missing and complaining of the sporadic manner in which the Bureau had pursued Whiting's reinsurance claims over the years (*id.*, exhibit 21). The letter also invoked the statute of limitations (*id.*). This suit followed, plaintiff filing a summons and complaint on January 17, 2013. Prior to answering, defendant filed the instant motion.

II. Standard

On a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty* Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 (2d Dept 2012); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames*, *id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)].

III. Discussion

A breach of contract is governed by a six year statute of limitations (CPLR 213 [2]). Usually, where the claim is for payment of a sum of money, the cause of action accrues when the plaintiff first receives the legal right to demand payment (*Hahn Auto. Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 770–71 [2012]). However, in insurance and reinsurance

contracts, a condition precedent to the insurer's payment obligation is the insured's filing of a claim or giving notice of loss, and the insurer being afforded a reasonable opportunity to investigate or audit the claimed loss (*Cont. Cas. Co. v Stronghold Ins. Co.*, 77 F3d 16, 20 [2d Cir 1995]). Consequently, it has been held that the statute of limitations on an insurance claim does not begin to run until these conditions have been satisfied (*id.* at 19–21; *see Hahn*, 18 NY3d at 772 n 5).

Here, the Bureau presented bills to defendant in 1994 and 2001 (complaint ¶ 9; Bradford affirmation, exhibit 7; plaintiff's brief 13 ["the billing in 2001 sought reimbursement . . . "]). After more than a year, defendant replied by offering to commute the entire contract for a certain amount. At that point (at the latest), all conditions precedent for commencing a suit for Whiting's reinsurance claims had accrued -- Guarantee had been presented with bills and whatever proof it had demanded, and had ample time to review the files. It did not pay Whiting's claims, thereby breaching its contractual obligation. Thus, plaintiff ought to have instituted suit by 2001 (for the 1994 bill) or 2008 (for the 2001 bill). Having failed to do so, it cannot now bring a cause of action for breach of contract for Guarantee's failure to pay its share of Whiting's losses that were reflected on the 1994 and 2001 bills.

In opposition, plaintiff argues that Guarantee's offers to commute the contract were not rejections of the Bureau's claims, maintaining that "[t]here was no unequivocal statement or act on the part of Guarantee . . . that indicated that Guarantee's . . . commutation offer was a denial of liability or its final position" (plaintiff's brief 16). However, a contractual payment obligation is not breached solely by repudiation, but also (or primarily) by the simple failure to pay on time (*see Continental Casualty*, 77 F3d at 21 [holding that insured's losses "were not due and payable

until a reasonable period of time elapsed after it gave notice of them. Accordingly, [the insured's] causes of action accrued then (or when the reinsurers refused to pay, *if earlier*)"] [emphasis supplied]). Even where a statute *prohibits* the obligor from paying a claim prior to an audit, a failure to audit does not delay accrual of the breach of contract claim forever; rather, "there [comes] a time when the claimant should [view] his claim to have been constructively rejected, thus giving rise to a cause of action " (*Memphis Constr, Inc. v Village of Moravia*, 59 AD2d 646, 646 [4th Dept 1977] [*citing City of New York v State of New York*, 40 NY2d 659, 668 (1976)]). Once all the conditions precedent to Guarantee's payment obligations had been fulfilled, the Bureau could have stated a cause of action against the reinsurer for not paying. This is all the more true where the record on this motion shows that Guarantee *did* in fact audit both of the Bureau's bills, but nevertheless did not pay the amounts demanded. Plaintiff did not sue then and is barred from doing so now.

That the Bureau and defendant intermittently attempted to negotiate terms for a commutation of the Agreement does not matter. A commutation is nothing more than a settlement of all claims, past and future, that could arise under an insurance agreement, for a single lump sum payment. "It is well-established law in New York that the mere fact that settlement negotiations have been ongoing between parties is insufficient to estop a party from asserting the Statute of Limitations" (*Dailey v Mazel Stores*, 309 AD2d 661, 663 [1st Dept 2003] [*quoting Kiernan v Long Is. R.R.*, 209 AD2d 588, 589 (2d Dept 1994)]). Plaintiff's attempts to cast the 1994 and 2001 billings as "interim bills" pending the exhaustion of Whiting's reserves also fails (transcript, April 24, 2013, at 9). It is no doubt true that, given that Whiting was in liquidation and that the Agreement only covered a finite number of policies, the parties must

have known that there would be an eventual limit to possible reinsurance claims. But the Agreement does not appear to contemplate that Guarantee would fulfill its obligations through a single, global payment, even if Whiting went into liquidation (*see* Agreement, arts x & xv). In the absence of an actual written modification of the original treaty, the court will not infer from the parties' sporadic commutation negotiations that they had agreed that there would be no payment until all the underlying claims had been settled.

In sum, plaintiff cannot assert a cause of action for Guarantee's refusal to pay for losses that were accounted for in the 1994 and 2001 billings. Nonetheless, the case is not dismisses since there could be losses set forth in the 2009 statement which were never previously presented to Guarantee. The court notes that while it holds here that the statute of limitations on plaintiff's breach of contract claim did not begin to run until a reasonable time after the Bureau presented Guarantee with its bills, this does not mean that a failure to timely *make* the 2009 demand in the first place would not serve as a bar to the claims that survive (*Continental Casualty*, 77 F3d at 21 [insured cannot unreasonably delay reporting losses to reinsurer]). "To hold otherwise would allow [plaintiff] to extend the statute of limitations indefinitely by simply failing to make a demand" (*Hahn*, 18 NY3d at 771 [*citing Town of Brookhaven v MIC Prop. & Cas. Ins. Corp.*, 245 AD2d 365 (2d Dept 1997)]). However, as the record on this motion does not reflect when Whiting's losses were actually incurred, the court does not reach this issue. Accordingly it is

ORDERED that the motion of defendant Guarantee Insurance Company to dismiss the complaint of plaintiff, the Superintendent of Financial Services of the State of New York, as Liquidator of Whiting National Insurance Company, is granted to the extent of dismissing any claims based on losses reported by the New York Liquidation Bureau in its letters to defendant

dated August 30, 1994 and September 28, 2001, and is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a compliance conference on June 25, 2013 at 10:00 a.m., in Room 228 of the courthouse located at 60 Centre Street, New York, NY.

Dated: June 10, 2013

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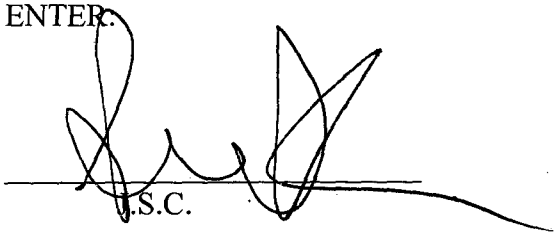

J.S.C.