

**Axa Mediterranean Holdings, S.A. v Ing Ins. Intl.,
B.V.**

2013 NY Slip Op 33060(U)

March 5, 2013

Sup Ct, New York County

Docket Number: 652110/2010

Judge: Eileen Bransten

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

PRESENT: Hon. Eileen Bransten PART 3

-----X
AXA MEDITERRANEAN HOLDINGS, S.A.,

Plaintiff,

-against-

Index No.: 652110/10
Motion Date: 8/13/12
Motion Seq. No.: 004

ING INSURANCE INTERNATIONAL, B.V.,

Defendant.
-----X

The following papers, numbered 1 to 3, were read on this motion to compel.

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

This motion is decided in accordance with the accompanying memorandum decision.

Dated: March 5 2013


Hon. Eileen Bransten, J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMITORDER/JUDG.

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

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

-----X
AXA MEDITERRANEAN HOLDING, S.A.,

Plaintiff,

-against-

ING INSURANCE INTERNATIONAL, B.V.,

Defendant.

-----X
BRANSTEN, J.

Index No. 652110/2010
Motion Date: 8/13/12
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Plaintiff AXA Mediterranean Holding, S.A. (“AXA”) moves to compel non-party Mancera S.C., the Mexican affiliate of Ernst & Young (“Mancera”) to produce certain documents pertaining to Mancera’s work as Defendant ING Insurance International, B.V.’s (“ING”) auditor. Mancera opposes.

I. BACKGROUND

The facts of this matter have been discussed extensively in previous decisions of this Court. Thus, only details necessary to this motion are referenced herein.¹

A. The Stock Purchase Agreement

This case arises from a dispute concerning a stock purchase agreement (the “SPA”) entered into by the parties on February 12, 2008. The SPA provided for the sale of several Mexican companies owned by ING (the “Subject Companies”) to AXA.

¹ Unless otherwise noted, all facts are drawn from this Court’s Memorandum Decision on Motion Sequence Number 003 dated July 25, 2012.

Mancera performed year-end audits for the Subject Companies from 2001-2007. The parties agreed in the SPA that ING would engage Mancera to prepare the pro-forma financial statements for the Subject Companies prior to the Sale. The sale of the Subject Companies closed on July 22, 2008.

On November 26, 2010, AXA filed the complaint in the underlying action, which alleges that ING had breached the SPA and caused AXA damages in excess of \$219.9 million.

B. The Discovery Stipulation

On May 27, 2011, the parties entered into a stipulation with Mancera regarding Mancera's document production in this case (the "Stipulation"), which the Court so-ordered on June 30, 2011. (Affirmation of Richard A. Martin in Support of Opposition to Motion to Compel ("Martin Aff."), Ex. 9 (the "Stipulation").)

The Stipulation provides, in relevant part, that Mancera "agrees . . . to accept service of discovery requests served by either party in this Action pursuant to the New York Civil Practice Law and Rules ("CPLR"), without either party having to proceed under the Hague Convention . . . or any other means of service on Mancera." Stipulation, p. 1. The Stipulation further states that "[t]he exclusive mechanism for obtaining information in any way relating to this action or its subject matter from Mancera is through formal disclosure requests under the CPLR." *Id.* at p. 2.

However, Mancera reserved its right to:

object to any discovery request served by either party, either under New York State law or Mexican law, including Mexican audit standards and code of ethics, except that Mancera shall not on the grounds of service, jurisdiction for the limited purpose of effectuating this agreement, or duty of confidentiality to either party in the Action.

Id. at p. 1.

In exchange for Mancera accepting service of discovery requests pursuant to the CPLR, the parties waived the right to assert any claim against Mancera that the “production by [Mancera] of any materials responsive to a discovery request served pursuant to this Stipulation and Order constitutes a violation of any purported confidentiality agreement or obligation between Mancera and either party to the Action.” *Id.* at p. 2.

C. AXA’s Document Requests

On July 12, 2011, AXA served Mancera with a subpoena (the “Subpoena”) demanding twenty-eight categories of documents, including:

all documents concerning any engagements of [Mancera] by the Subject Companies or ING in connection with any audit or review of any Subject Companies . . . [a]ll documents concerning the financial condition of any of the Subject Companies, . . . [a]ll documents concerning any audits, reviews, assessments, due diligence or special engagements concerning any of the Subject Companies

from “January 1, 2001 through the present.” (Affirmation of Jeffrey M. Eilender in Support of Motion to Compel (“Eilender Aff.”), Ex. 1 (the “Subpoena”), pp. 8-11.

In response to AXA’s subpoena, on November 18, 2011, Mancera provided approximately 60,000 pages of documents related to its audits of the Subject Companies in

2007, the year preceding their sale to AXA. (Martin Aff., ¶ 22). Mancera refused to produce any additional documents on the grounds that it was not required to do so under Mexican law.

AXA now moves to compel Mancera to produce the remainder of the documents requested in the Subpoena.

II. ANALYSIS

A. Purpose of the Stipulation

AXA argues that the Stipulation, on its face, shows that Mancera consented to this court's jurisdiction for the purposes of carrying out document discovery, and that Mancera agreed to follow New York's discovery rules as set forth in the CPLR.

Mancera claims that it made no such concession in the Stipulation, and instead consented to New York jurisdiction solely for the purpose of service, not discovery. Mancera further asserts that it only agreed to accept service pursuant to the CPLR, and in no way relenquished its right to object to either party's discovery demands on the basis of Mexican law.

"A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *IDT Corp. v. Tyco Group, S.A.R.L.*, 13 N.Y.3d 209, 214 (2009) (internal quotation marks omitted).

The Stipulation's plain language reflects that Mancera agreed only to "accept service of discovery requests served . . . pursuant to the [CPLR]." Stipulation, p. 1. This language does not in any way imply that Mancera consented to New York jurisdiction for any purpose other than the adjudication of disputes regarding service. Nor does the Stipulation state that Mancera consents to limit its right to object to discovery requests to objections under New York law. Instead, Mancera explicitly reserved its rights to object to "any discovery requests served by either party, either under New York State Law or Mexican Law except that Mancera shall not on the grounds of service, jurisdiction for the limited purpose of effectuating this agreement, or duty of confidentiality to either party in the Action." *Id.* The clear purpose of the Stipulation, as expressed within the document itself, is to provide for the method of service upon Mancera of discovery requests, and, more specifically, to exempt the parties from the necessity of serving discovery requests under the Hague Convention.

AXA contends that this reading of the Stipulation "would render that agreement meaningless." (Plaintiff's Memorandum of Law in Support of Motion to Compel ("Pl. Memo"), p. 13.). Namely, AXA argues that it gains nothing from the Stipulation because AXA would be no more likely to obtain discovery materials from Mancera after executing the Stipulation than prior to its signing.

While Mancera's reading of the Stipulation may not guarantee AXA access to the documents it requests from Mancera, the Stipulation does provide the benefit of exempting AXA from service pursuant to the Convention on the Service Abroad of Judicial and

Extrajudicial Documents in Civil or Commercial Matters (the “Hague Convention”). AXA does not dispute that Hague Convention service is a time-consuming, expensive process that AXA need not undertake thanks to the Stipulation. Consequently, even if the Stipulation does not require Mancera to follow New York’s discovery rules, it is not without benefit to AXA, and certainly not without meaning.

B. Jurisdiction to Enforce Subpoena

AXA asserts that, when Mancera consented to receive service of document requests pursuant to the CPLR, it also consented to submit to New York jurisdiction and to comply with New York procedure in responding to AXA’s discovery demands.

Mancera contends that the Court lacks personal jurisdiction over it, and, therefore, cannot compel Mancera to produce documents.

It is undisputed that Mancera “is a professional services firm . . . organized under the laws of Mexico.” (Affidavit of Tarsicio Guevara Paulin (“Guevara Aff.”), ¶ 5.) Mancera is only authorized to perform services in Mexico. *Id.* It is similarly uncontested that Mancera “has never performed any work in New York, either in connection with the audits at issue here or any other engagements.” *Id.*

AXA points to no authority supporting the proposition that a non-party foreign national, who consents to personal jurisdiction for the limited purpose of accepting service, thereby also automatically submits to the court’s jurisdiction for the purposes of discovery. Furthermore, AXA’s argument that “[i]n New York . . . New York’s procedural law governs discovery disputes arising out of demands or subpoenas issues to foreign nationals,” (Pl.

Memo, p. 2.), presupposes personal jurisdiction. While AXA's position may hold true when jurisdiction is present, the same rule cannot apply to a non-party over whom the court lacks personal jurisdiction.

AXA does not dispute Mancera's claim that it is not subject to jurisdiction in New York beyond the terms of the Stipulation. Nor has AXA shown that Mancera has any New York contacts that would submit it to jurisdiction in New York. *See* CPLR § 302; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Consequently, the court lacks jurisdiction over Mancera, and therefore lacks the authority to compel Mancera to comply with AXA's subpoena.

C. Waiver

AXA next contends that Mancera waived any objections it might have had to AXA's subpoena by producing some of the documents demanded therein. To the extent that AXA's waiver argument could be construed as implying that Mancera waived jurisdictional objections to discovery by voluntarily producing a limited number of documents to AXA, the argument fails. A party does not waive a jurisdictional objection solely by participating in discovery. *Calloway v. Nat'l Serv. Indus., Inc.*, 93 A.D.2d 734, 735, *aff'd* 60 N.Y.2d 906 (1st Dep't 1983) (holding that "by simply defending on the merits and seeking discovery, [defendant did] not expressly or impliedly waive its jurisdictional objection.")

The remainder of the issues AXA raises in support of its motion presuppose this Court's jurisdiction over Mancera for the purposes of discovery. As previously explained,

the court lacks jurisdiction over Mancera; consequently, the court need not address the remainder of AXA's arguments.

III. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that AXA Mediterranean Holding, S.A.'s motion to compel the production of documents by non-party Mancera, S.C., is denied.

Dated: New York, New York
March 5, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.