Granite State Ins. Co. v Transatlantic Reins. Co.
2014 NY Slip Op 31550(U)
June 18, 2014
Sup Ct, NY County
Docket Number: 652506/2012
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

GRANITE STATE INSURANCE CO., AMERICAN HOME ASSURANCE COMPANY, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Plaintiffs,

DECISION AND ORDER
Motion Sequence No.: 003

Index No. 652506/2012

-against-

TRANSATLANTIC REINSURANCE COMPANY,

Defendant.

----------X

O. PETER SHERWOOD, J.:

This is an action by plaintiffs Granite State Insurance Company ("Granite State"), American Home Assurance Company ("American Home") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively the "AIG Insurers" or "plaintiffs") for a declaratory judgment and money damages arising out of defendant Transatlantic Reinsurance Company's ("TRC" or "defendant") failure to make reinsurance payments to the AIG Insurers in accordance with reinsurance contracts between the AIG Insurers and TRC.

In a Decision and Order, dated December 23, 2013, the court decided plaintiffs' Motion to Dismiss TRC's Defenses Numbered 3, 4, 5, 6, 9, 10, 14, 15, 19 and 24, pursuant to CPLR § 3211 (b) (Decision, NYSECF Doc. No. 46). Plaintiffs argued that these defenses are predicated upon a reinsurance contract between the AIG Insurers and Eaglestone Reinsurance Company, to which TRC is not a party, titled "Amended and Restated Loss Portfolio Transfer Reinsurance Agreement" (the "Eaglestone Agreement" and also referred as the "Eaglestone Treaty"). Defendant argued that the Eaglestone Agreement is part of a larger transaction, and is one of a group of at least eight integrated documents which defendant calls the "Loss Portfolio Transaction" (LPT), and which serve "to transfer to [non-party National Indemnity Company (NICO)] all rights and liabilities associated with AIG's legacy asbestos-related liabilities" (Def. Memo in Opp. to Motion to Dismiss, NYSECF Doc. No. 25, at 4). The various LPT agreements refer to each other, and appear to be part of a single plan to transfer liabilities. The Eaglestone Agreement cannot be read alone. Plaintiffs argued that neither

the terms of the Eaglestone Agreement nor the LPT breach their agreements with the defendant, as they constituted permissible "treaty reinsurance" which, under the parties contract, may be obtained.

The court granted the motion as to a portion of the fourth affirmative defense and as to the ninth affirmative defense. The court, *intra alia*, denied plaintiffs' motion to dismiss: (1) the portions of the third and fourth affirmative defenses that concerned "retention" as well as all of the fifth, fourteenth, and fifteenth affirmative defenses (together, the "Retention Defenses"); and (2) the sixth, tenth, nineteenth, and twenty-fourth affirmative defenses (the "Assignment Defenses"). Plaintiffs' appeal from the Decision is pending. Now, plaintiffs move to renew and reargue those two aspects of the decision.

BACKGROUND

The complaint explains and it is undisputed that:

> A reinsurance contract is an arrangement whereby one insurance company, known as the "ceding company" or the "cedent," obtains insurance from another insurer, known as the "reinsurer," in order to transfer some or all of the insured risk the cedent has assumed. In this case, plaintiffs are cedents, and defendant is the reinsurer. "Facultative reinsurance" applies to a single policy or risk insured by a cedent. Facultative reinsurance is generally memorialized in a written contract known as a facultative certificate.
>
> When reinsurance is written on a "contributing excess" basis, the reinsurer is obligated to pay to the cedent a proportional amount of the cedent's liability to its insured

(Complaint ¶¶ 6-8).

Reinsurance differs from direct insurance in that the reinsurer is not directly obligated to the original insured and a reinsurance indemnity does not arise until the reinsured has paid a claim.

The AIG Insurers sold excess insurance policies that provided insurance coverage to a number of corporate insureds between 1980 through 1985 (the "AIG Policies"). To reduce their risk under the AIG Policies, the AIG Insurers entered into "facultative reinsurance contracts" with TRC, whereby the AIG Insurers shared with TRC a portion of the premium received from the corporate

insureds in exchange for TRC's promise to share a proportionate share of the risk and assume a corresponding portion of the losses incurred under the AIG Policies (the "TRC Certificates").

Over time, payments were made to various entities insured by the AIG Policies, and, in turn, TRC was invoiced for its share in accordance with the terms of the TRC Certificates (whether this was done by the AIG Insurers, their agent, or another entity which stepped into AIG Insurers' shoes pursuant to the LPT, is disputed). TRC paid amounts invoiced and due under the TRC Certificates for a period of time, but stopped making payments in or about March, 2012, after a change in TRC's ownership.

THE PRESENT ACTION

On July 19, 2012, the AIG Insurers commenced this action by filing a summons and complaint alleging causes of action for breach of certain of the TRC Certificates and seeking declaratory judgments as to their respective rights under such certificates, as well as money damages, together with interest, costs, and fees incurred in the action.

On August 10, 2012, TRC served an answer in which it admitted many of the allegations of the complaint, but referred the court to the TRC Certificates for their contents. TRC also alleged that it paid the AIG Insurers for loss and loss expense under the TRC Certificates to the extent it owed such payments and denied the allegations with respect to the claims for breach of specific TRC Certificates.

TRC also interposed twenty-four (24) defenses, including: plaintiffs did not maintain required retention of risk; the LPT comprised an impermissible assignment under the terms of the TRC Certificates; and the implementation of the de-risking strategy comprised a wrongful attempt to assign the TRC Certificates that was void and/or voidable. TRC also asserted a variety of counterclaims, none of which are at issue in this motion.

In Motion Sequence Number 001, the AIG Insurers moved to dismiss TRC's third, fourth, fifth, sixth, ninth, tenth, fourteenth, fifteenth, nineteenth, and twenty-fourth affirmative defenses. In a Decision and Order dated December 23, 2013, this court granted the motion in part. Now, the AIG Insurers have moved to reargue and renew the motion to dismiss the Retention Defenses and the Assignment Defenses.

A. Retention Defenses

The Retention Defenses hinge on paragraph two of each of the TRC reinsurance contracts (the "Certificates"), which states:

> The Company warrants that it shall retain for its own account, subject to treaty reinsurance only, if any, the amount specified on the face of this Certificate

(TRC Certificates, attached as Exhibits 2, 3, and 4 to the Caprice Affidavit, which is attached as Exhibit E to the Dempster Aff., NYSECF Doc. No. 59, at ¶2). Defendant argues that the retention term of each TRC Certificate was breached when the AIG Insurers obtained additional reinsurance on asbestos liabilities covered by that certificate (which defendant also calls "de-risking"). The parties disagree on the nature of the additional reinsurance. The plaintiffs claim that the reinsurance is treaty insurance, and so was permissible pursuant to the TRC Certificates. Defendant claims that the LPT is an unusual type of reinsurance, a "loss portfolio transfer," which "retroactively transfers from one insurer to another a portfolio of existing losses". Defendant notes that the underlying insurance policies issued by AIG Insurers had already resulted in claims (Def. Mem. in Opp. to Pl. Mtn. to Dismiss, NYSECF Doc. No. 25 at 5.).

In the December Decision, the court noted that, in addition to the dispositive lack of complete, signed, copies of various LPT agreements, "the court cannot overlook that treaty reinsurance, as defined by the highest court of this State, is obtained **in advance** of actual coverage." Accordingly, the court denied plaintiffs' motion to dismiss the retention-related affirmative defenses (Decision at 8).

Plaintiffs now argue that the court misinterpreted the law, and that it was incorrect to hold that the LPT could not be treaty insurance because it was not solely prospective. Plaintiffs also submit executed copies of various agreements related to the LPT, in repair of the earlier deficiency.

B. Assignment Defenses

Defendant had also asserted a defense based on an alleged breach of the Certificates' restriction that "[a]ssignment of this Certificate shall not be valid except with the written consent of Reinsurer" (Certificates, ¶ 11). Defendant claimed that the LPT created unauthorized assignments. Plaintiffs argued that the LPT did not qualify as an assignment, as not all of the interests were transferred. The court denied the motion to dismiss the assignment defenses, as the plaintiffs had

failed to provide copies of the fully executed contracts. Now, plaintiffs provide the signed LPT agreements and ask the court for leave to renew the motion. Plaintiffs also seek to reargue, claiming the court failed to consider extrinsic evidence of the assignment.

DISCUSSION

A. Standards

1. Leave to Reargue

The standards for reargument are well settled. Motions for reargument must be based on facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group,* 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). Reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro,* 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola,* 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

2. Leave to Renew

A motion for leave to renew must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221 [e] [2]), as well as "reasonable justification" for not offering these facts previously (CPLR § 2221 [e] [3]; *CLP Leasing Co. v Nessen,* 27 AD3d 291, 292 [1st Dept 2006]). Although upon a motion for renewal seeking consideration of previously available but unsubmitted evidence, the movant is generally required to proffer a reasonable excuse for its failure to submit such evidence (*see, Burgos v City of New York,* 294 AD2d 177 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corp.*, 281 AD2d 252 [1st Dept 2001]), the First Department has held that courts have discretion to relax this requirement and to grant the motion in the interest of justice (*see B.B.Y. Diamonds Corp. v Five Star Designs, Inc.*, 6AD3d 263, 264 [1st Dept 2004]; *Trinidad v Lantiqua,* 2 AD3d 163 [1st Dept 2003]; *Mejia v Nanni,* 307 AD2d 870 [1st Dept 2003]). "Nevertheless, '[a] motion for leave to renew is not a second

chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Allstate Ins. Co. v Liberty Mut. Ins. Co.*, 58 AD3d 727, 728 [2d Dept 2009], quoting *Elder v Elder*, 21 AD3d 1055 [2d Dept 2005]).

3. Motion to Dismiss Defenses

On a motion to dismiss affirmative defenses, "the plaintiff bears the burden of demonstrating that [such] defenses are without merit as a matter of law. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 [1st Dept 2011] [internal citations omitted]). A defense should not be stricken where there are questions of fact requiring a trial (*see id; see also Atlas Feather Corp. v Pine Top Ins. Co.*, 128 AD2d 578, 579 [1st Dept 1987].

Interpretation of reinsurance agreements is subject to the same rules of law as any other contract. "[I]n interpreting reinsurance agreements . . . the intention of the parties should control. To discern the parties' intentions, the court should construe the agreements so as to give full meaning and effect to the material provisions" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004][internal citations omitted]).

B. Motion to Renew and Reargue

Plaintiffs seek leave to renew the motion to dismiss the retention and assignment defenses based on the provision of the LPT agreements, and to reargue the motion based on their contentions that the court (1) overlooked arguments raised by the parties; (2) determined issues *sua sponte* without factual or legal support; and (3) misapplied precedent to the undisputed facts at issue (Pl. Mem., NYSECF Doc. No. 60, at 1).

1. Motion to Renew

As discussed above, a motion for leave to renew must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221 [e] [2]). Although the movant is generally required to proffer a reasonable excuse for its failure to submit such evidence, a motion to renew can be granted in the exercise of the court's discretion. Here, plaintiffs have provided the executed LPT agreements which were missing from papers

submitted on the original Motion to Dismiss. Plaintiffs have provided no excuse for the failure to provide them earlier.

Plaintiffs claim that no excuse for their failure to provide this material is necessary, as the court *sua sponte* raised the issue of whether an insurance treaty in general must be (and specifically, whether the LPT was) obtained in advance of actual coverage. Therefore, according to the plaintiffs, the court is required to consider these documents (Pl. Reply, NYSECF Doc. No. 68, at 3, *citing In re Bevona*, 204 A.D.2d 136, 138 [1st Dept 1994]["where the additional facts presented relate to an issue "which had not previously been raised by the parties but, rather, had been raised *sua sponte* by the court in its memorandum ... it [is] error for the court not to consider these additional facts"]. The claim is baseless because, unlike *In re Bevona*, which involved *facts* raised by that court *sua sponte*, plaintiffs' argument is directed at the *law* on which this court relied. It is true that the parties did not cite *Matter of Midland Ins. Co.*, 79 NY2d 253 (1992), decided a quarter century ago and followed by courts to this day. Moreover, the issue of whether the LPT provided treaty insurance for the purposes of the Certificates was argued at length (*see* Def. Opp. to Motion to Dismiss Certain Defenses, NYSECF Doc. No. 25, at 15-20). Defendant TRC had also specifically argued that "treaty reinsurance is prospective in nature" (*id* at 16). Accordingly, additional materials provided may be considered only in the courts' discretion (*see Nassau Co. v Metro. Transp. Auth.*, 99 AD3d 617, 618 [1st Dept 2012]).

As for the assignment argument, if the court were to use its discretion and decide to consider the signed LPT agreements, it would note that the agreements do indeed include an upper limit to the reinsurance coverage as specified in the Amended and Restated Loss Portfolio Transfer Reinsurance Agreement between AIG Insurers (among others) and Eaglestone Reinsurance Co. (attached as Exhibit B to the Aiudi Affirmation, NYSECF Doc. No. 58 at ¶2.2). This might indicate that the LPT agreements do not constitute an assignment, as an assignment must transfer the "entire interest in the thing assigned" (NYJUR ASSIGN § 34). Defendant has alleged, however, that the assignment affirmative defense should stand, because the cap in the LPT agreements ($5 billion) is illusory, and could not possibly be reached. Thus, the LPT is, effectively, a transfer of all of the Plaintiffs' interest in the relevant policies.

As discussed above, this is a motion to dismiss affirmative defenses, and plaintiffs bear the burden of showing that the affirmative defenses are without merit as a matter of law. The defendant is entitled to all reasonable inferences at this stage (*see Krantz v Garmise*, 13 AD2d 426 [1st Dept 1961]; *Tennant v Manhattan Skyline Mgt. Corp.*, 2012 NY Misc LEXIS 5091*3 [NY Sup Ct, NY County, Oct. 23, 2012]). Plaintiffs did not provide documentation showing that the cap in the LPT agreements could be exceeded. Having failed to refute defendant's assertion that the LPT may have transferred all of the relevant interests and thus constitutes an impermissible assignment, the portion of the motion to dismiss the assignment defenses would be denied.

2. Motion to Reargue

a. The Retention Defenses

Plaintiffs also move to reargue, claiming the court decided the earlier motion based on issues raised *sua sponte* and misapplied precedent. As discussed above, the status of the LPT was argued and the court is not required to entertain reargument. In any event, the court may consider the newly submitted LPT agreements in its discretion.

In the Decision, the court wrote:

> Nevertheless, the court cannot overlook that treaty reinsurance, as defined by the highest court of this State, is obtained **in advance** of actual coverage. *See Matter of Midland Ins. Co.*, 79 NY2d at 258; *see also Unigard Sec. Ins. Co., Inc.*, 79 NY2d at 579, n 1. Therefore, even if plaintiffs were to proffer properly executed documents that provide for a transfer of all US asbestos-based losses to another entity, such transfer could not be treaty reinsurance. For this reason, that part of plaintiffs' motion that seeks to dismiss: (1) that portion of the third and fourth affirmative defenses as concerns retention, as well as (2) the entirety of defendant's fifth, fourteenth, and fifteenth affirmative defenses, are denied

(Decision at 8). Plaintiffs argue it was an error to hold the LPT could not be treaty insurance because it provided reinsurance solely to existing insurance coverage. Plaintiffs maintain that since the LPT is not facultative reinsurance, it must be treaty reinsurance, and thus the transfers were permissible (Pl. Mem. at 7-8). Plaintiffs also argue that the LPT's retrospective coverage does not prohibit it from being considered treaty insurance and that the LPT was, in fact, obtained "in advance of actual coverage" because the reinsurance contract was obtained in advance of the coverage provided by the reinsurance contract (*id* at 11-12).

While the parties have not provided a case discussing whether a reinsurance contract which covers solely pre-existing underlying insurance policies may be considered treaty insurance, the nature of treaty insurance has been repeatedly defined by the New York courts. As noted in the earlier Decision, the Court of Appeals has explained that "[a] reinsurance contract is one by which a reinsurer agrees to indemnify a primary insurer for losses it pays to its policyholders. Such contracts are of two general types. Treaty insurance is obtained in advance of actual coverage and may cover any risk the primary insurer covers . . . . A facultative reinsurance contract is one obtained to cover a particular risk" (*Matter of Midland Ins. Co.,* 79 N.Y.2d at 258). A few months after it decided *Midland Ins. Co.*, the Court of Appeals repeated that "treaty reinsurance. . . is obtained in advance of actual coverage and may cover any risk the primary insurer covers" (*Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 579 n.1 [1992]; 19 Couch, Insurance 2d §80:3 [1983]). The Second Circuit, applying New York law, has defined treaty reinsurance similarly, explaining that it "involves an ongoing agreement between two insurance companies binding one in advance to cede and the other to accept certain reinsurance business pursuant to its provisions" (*Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela* 991 F.2d 42, 45 [2d Cir 1993], quoting *Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Co.*, 75 NY2d 295, 301 [1990]; *see also Christiana Gen'l Ins. Corp. v Great American Ins. Co.*, 979 F2d 268, 271 [2d Cir 1992] [same]; *Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 74 [1st Dept 2009][same]; *Granite State Ins. Co. v Clearwater Ins. Co.*, 2014 US Dist LEXIS 44573*3-4 [SDNY March 31, 2014][same]).

Plaintiffs assert, in a footnote, that the LPT was provided in advance of coverage, since "[t]he relevant "coverage" is the coverage provided by the reinsurance contract, not the coverage provided by the underlying insurance that is being reinsured," apparently arguing that the LPT was in advance of coverage because the agreements were entered into before they were in effect (Pl. Mem. at 11, n 21). Plaintiffs cite to a statement in *Midland Ins. Co.,* that a "contract is formed when the primary insurer 'cedes' part of the premiums for its policies and the losses on those policies to the reinsurer" (Pl. Mem. at 11, n 21, *citing Midland Ins. Co.* 79 N.Y.2d at 258). The statement does not support plaintiff's position.

While plaintiffs argue that if the LPT is not facultative reinsurance, it must be treaty reinsurance, the LPT does not satisfy the definition of treaty insurance as specified by the Court of Appeals. Accordingly, even if the court were to grant reargument in exercise of its discretion and allowed plaintiffs to repair the deficiency in the original motion, plaintiffs have failed to meet their burden of showing that the retention defenses are without merit as a matter of law. Accordingly, the motion to reargue is denied as the documentary evidence presented by the plaintiffs is insufficient to change the outcome of the underlying motion to dismiss.

b. The Assignment Defenses

Defendant has also articulated defenses arguing that plaintiffs breached their obligations under the TRC Certificates by assigning their remaining interests in the Certificates (the Assignment Defenses). Plaintiffs seek leave to reargue as to these defenses on the ground that the court failed to recognize that the plaintiffs' whole interest in the TRC Certificates was not transferred. Specifically, plaintiffs argue that the court overlooked "TRC's own admission that the AIG Insurers' "whole interest" in the facultative certificates was not transferred" as well as the affidavit of Ms. Caprice, who flatly stated, albeit in conclusory fashion, that "the AIG Insurers have not assigned the TRC Certificates" (Pl. Memo in Support at 3; Caprice Aff. In Support of Pl. Motions . . ., NYSECF Doc. No. 9, at ¶3). Neither of these statements would be sufficient to dismiss the TRC's assignment defenses, as Ms. Caprice's affidavit provides only a self-serving conclusory statement, and even TRC's position that the AIG Insurers have transferred their "only remaining interest in many, if not most, of the Certificates" (Def. Opp. at 24), would not be fatal to the defense as a whole. While it might not apply to every Certificate, the defense could still apply to some, and so should not be dismissed. Accordingly, while this argument was not specifically addressed in the earlier Decision, it changes nothing.

Accordingly, the motion for leave to renew and reargue is DENIED.

This constitutes the decision and order of the court.

DATED: June 18, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.