SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

----------X

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Plaintiff,

DECISION/ORDER
Index No. 651152/2014

-against-

JORGENSEN & COMPANY, GREENWICH INSURANCE COMPANY, RISK AVOIDANCE MANAGERS, INC.,

Defendants.

----------X

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendants Jorgensen & Company ("Jorgensen") and Greenwich Insurance Company ("Greenwich") move to dismiss the complaint insofar as asserted against them, or in the alternative, to compel arbitration and stay the remainder of the action (motion sequence 001). Defendant Risk Avoidance Managers, Inc. ("RAM") moves to dismiss the complaint insofar as asserted against it (motion sequence 002).

Plaintiff New York Marine and General Insurance Company ("New York Marine") commenced this action in or about April 2014. Pursuant to a program management agreement dated March 24, 2004 ("agreement"), Jorgensen was a managing general insurance agent for New York Marine. Jorgensen underwrote and issued accountant's professional liability insurance policies under the CPAGold program through New York Marine. Jorgensen was authorized to "issue, execute, countersign or

have countersigned...all binders, policies, certificates, endorsements, reinstatements and evidence of insurance on forms" and was also responsible for collecting premiums and servicing the professional liability policies issued under the CPAGold program. As such, accounting firms or their insurance brokers could obtain professional liability policies under the CPAGold program without directly transacting business with New York Marine.

On May 2, 2011, Jorgensen terminated its relationship with New York Marine, and moved the CPAGold program to Greenwich, an issuing company of XL Insurance America.

New York Marine had issued Accountants & Consultants Professional Liability Insurance policy number CG107497 to non-party Dwight Darby & Company, P.A. ("Darby") for the policy period October 1, 2010 to October 1, 2011, with limits of liability of $1,000,000 for each claim and in the aggregate (the "New York Marine Policy"). The New York Marine Policy was underwritten and issued through Jorgensen. RAM was Darby's insurance broker. The policy provided, in relevant part,

> "We will pay on your behalf all sums in excess of the applicable Deductible amount stated in the Declarations that you become legally obligated to pay as Damages and associated Defense Expenses resulting from a Claim first made against you during the Policy Period, or Extended Reporting Period, if applicable, as a result of a Covered Act committed by you, provided that:
>
> 1.1.1 you report the Claim in writing to us as soon as practicable, but in no event later than sixty (60) days after expiration or termination of this Policy as permitted by Clause 6.1 of this policy, or during an Optional Extended Reporting Period, if applicable; and
>
> 1.1.2. the Covered Act was committed on or after the Retroactive Date and before the end of the Policy Period; and

1.1.3 prior to the inception date of this policy you did not have a basis to foresee that such Covered Act might reasonably be expected to give rise to a Claim, unless such Claim became known to you after the issue of your first . . . Policy by us as described in the Declarations Page and that has been continuously renewed by us."

With regard to extended reporting periods, the policy provided, in relevant part,

"Without any additional premium being required you shall have sixty (60) days . . . in the event of non-renewal, after the date upon which the Policy Period ends, to report any Claim first made against you during this sixty (60) day period.
This Automatic Extended Reporting Period shall terminate, and you shall not be entitled to any such Automatic Extended Reporting Period, in the event that this insurance is replaced with the same or similar insurance issued by us or any other professional liability insurer, whether or not the terms, limits or deductibles are identical to those provided under this Policy. * * *

This Automatic Extended Reporting Period shall be included within the Extended Reporting Periods described in 6.2, 6.3 or 6.4, if such is purchased.

6.2 Optional Extended Reporting Period * * *
We will issue an Optional Extended Reporting Period endorsement only if:
6.2.1 you request it within sixty (60) days of the end of the
Policy Period;
6.2.2 you have paid all premiums for this Policy at the time you request an Optional Extended Reporting Period Endorsement; and
6.2.3 you promptly pay when due the additional premium for the endorsement

During the Optional Extended Reporting Period, coverage under this Policy applies as excess over any valid and collectible insurance available under policies in force after such Optional Extended Reporting Period starts."

Greenwich issued Florida Accountants & Consultants Professional Liability Insurance Policy number CPH9793543 to Darby for the policy period October 1, 2011 to October 1, 2012 with limits of liability of $1,000,000 for each claim and in the aggregate (the "Greenwich Policy"). The Greenwich policy was underwritten and issued through Jorgensen.

Darby had previously performed accounting services for The Tampa Banking Company ("TBC"). On November 10, 2011, Darby met with TBC to discuss an alleged error in its preparation of TBC's tax returns from 1995 to 2009 (the "TBC Claim"). On November 11, 2011, RAM, on behalf of Darby, submitted a Claim/Incident Notification Form to Greenwich pertaining to the TBC Claim. According to the allegations of the complaint, the claim notice submitted to Greenwich identified an approximate demand amount of $500,000 and described the allegations made as "failure to report an income tax deduction for dividends paid to the Company's Employee Stock Ownership Plan for the years 1995 through 2006." By letter dated November 14, 2011, TBC formally demanded compensation from Darby in the amount of $703,450 plus interest arising from Darby's alleged errors in TBC's federal and state income tax returns. On November 16, 2011, Greenwich confirmed receipt of the notice of claim and noted that "a claim handler will be assigned to handle this claim and will contact you shortly."

According to the allegations of the complaint, on November 12, 2011, Jorgensen had e-mailed RAM's president C. Michael Halfast ("Halfast") indicating that he believed that the claim information it had received via the notice to Greenwich was insufficient to satisfy the Greenwich Policy's notice conditions. In the November 12 email, Jorgensen asked RAM whether Darby had knowledge of the TBC claim at the time it had applied for coverage with Greenwich, and further provided "it may be wise to report this to ProSight [i.e. NY Marine] under the 60 day mini-tail but they will require a much more detail[ed] analysis. Was the insured involved in discussions about this matter BEFORE

switching insurers?" The "60 day mini-tail" mentioned by Jorgensen refers to the clause in the New York Marine policy that states,

> "without any additional premium being required, you shall have sixty (60) days . . . in the event of non-renewal, after the date upon which the Policy Period ends, to report any Claim first made against you during this sixty (60) day period."

Halfast responded that he had not yet been able to review the documents but that he knew that Darby "just recently learned of this issue. So, it will not fall under the 60 day free tail with [New York Marine]." Jorgensen replied, "it seems a little short a window for such a potentially large claim. You may wish to investigate and counsel the firm to buy an ERP as this will qualify as an automatic nonrenewal by [Greenwich]." In other words, Jorgensen suggested that the claim might not be covered by Greenwich, because it came about so soon after the Greenwich policy period began, and suggested that RAM look into the option of purchasing an ERP (Extended Reporting Period coverage) from New York Marine, which would extend the time within which a claim may be made and reported, beyond the policy's expiration date.

According to the allegations of the complaint, on November 16, 2011, the same day that Greenwich acknowledged receipt of notice of the TBC claim, Jorgensen, on its own initiative, e-mailed the New York Marine claims department the claim/incident notification form submitted by RAM to Greenwich. Jorgensen also informed Halfast that, in its opinion, Darby should purchase ERP coverage under the New York Marine Policy, as reflected in an e-mail from Halfast to Darby dated November 16, 2011, which states:

> According to Mr. Jorgensen, [New York Marine's] new owners, ProSight Specialty Insurance, which is a portfolio company of Goldman Sachs, has been denying coverage on any claims reported on the 60 day mini-tail. He noted that they are relying on the second sentence which reads like the 60 day mini-tail is nullified upon the procurement of a replacement policy. Accordingly, if the firm buys a one-year Optional ERP, the mini-tail issue evaporates and the carrier would have to cover any claim reported within the one year ERP.

By letter dated November 16, 2011, New York Marine acknowledged receipt of the notice of claim and disclaimed coverage for the TBC Claim on the basis that the claim was reported after the expiration of the New York Marine Policy on October 1, 2011 and replacement coverage had been placed with Greenwich.

Darby then completed two new claim/incident notification forms: the first, submitted under the automatic 60 day "mini-tail" under the New York Marine policy, and the second, premised on a potential purchase of a 5 year ERP to the New York Marine policy. According to the complaint, coverage under the "60 day mini-tail" automatic extended reporting period would not have been obtainable because Darby had already procured replacement coverage from Greenwich at the time the claim was made and reported. Jorgensen convinced Darby that the best recourse would be to cancel the existing Greenwich policy (even though Greenwich had accepted and begun processing the claim), purchase a new Greenwich policy with no prior acts coverage to ensure that the new Greenwich policy would not afford coverage for the TBC claim, and then purchase the five year ERP coverage under the New York Marine policy, and submit the second option claim form to New York Marine.

In reliance on Jorgensen's representations, Darby then purchased ERP coverage on the New York Marine Policy and stopped pursuing its claim for coverage under the Greenwich Policy, as stated in a November 17, 2011 email from Halfast to Jorgensen,

> "I will forward you a formal NYMAGIC Claim/Incident Notification Form once I hear from the firm [i.e., Darby] as to what length of ERP they are going to purchase. In the meantime, please find the "demand letter" from the insured's client. I assume we don't need to send this along to XL/Greenwich at this time...unless you want them to have it so that they can confirm that they would be invoking their right to deny the claim based upon the fact that [the] firm had a reasonable basis to believe that a claim could result from their error.

The complaint asserts that the email "suggests that Darby would withdraw the claim made under the Greenwich policy in reliance upon Jorgensen's assertion that Greenwich may deny the claim on the purported basis that Darby had prior knowledge of acts that could give rise to the TBC claim prior to the inception of the Greenwich policy." However, New York Marine alleges that Jorgensen and RAM had no factual or legal basis to assert that coverage would not lie under the Greenwich Policy. In fact, Greenwich had already acknowledged receipt of the TBC claim, assigned a claim number and requested additional information from Darby.

On November 22, 2011, Halfast emailed Darby about his conversations with Jorgensen, stating

> "In speaking with Rickard Jorgensen, CPAGold's Program Director, he noted that the purchase of the NYMAGIC [New York Marine] ERP and pull back of the XL [Greenwich] Policy to a "retro inception" policy is necessary to (a) avoid a fight over who's going to cover the claim, (b) preserve prior acts coverage and provide an opportunity to regain them in 5 years, (c) avoid the potential for XL [Greenwich] to rescind coverage due to fraud in the application and (d) minimize the impact of the claim on future policy premiums. Rickard and I want you to know that this is being done to protect the firm and assure that the claims falls where it belongs, on the NYMAGIC policy. I want to emphasize that Rickard has

> not informed NYMAGIC about the initial binding of the XL policy and subsequent pull back to a 'retro inception' policy. That is privy information and does not need to be disclosed by him to NYMAGIC. We are sure that the Claims Representative will be asking you about the new policy's coverage. You can simply respond noting that you purchased a policy without any prior acts due to the claim. . . ."

On November 22, 2011, RAM completed a CPA Gold "Request to Cancel Policy Form" to request cancellation of the Greenwich policy, which stated "cancelled due to change in underwriting conditions" and sent it to Jorgensen to be processed. According to the allegations of the complaint, the Greenwich policy was cancelled retroactively. On November 23, 2011, Darby purchased the 5 year ERP from New York Marine for $18,000.

By letter dated April 30, 2012, New York Marine informed Greenwich that Greenwich had an obligation to defend and indemnify Darby with respect to the TBC claim. The letter further noted that New York Marine would provide coverage solely on an excess basis under the ERP coverage. Greenwich responded, informing New York Marine that Darby had cancelled its policy with Greenwich and that therefore, New York Marine would be obligated to defend and indemnify Darby. Greenwich refused to provide coverage for Darby. As a result of Greenwich's refusal to defend and indemnify Darby, New York Marine agreed to do so, under a reservation of rights, and ultimately defended and settled the TBC claim.

New York Marine asserted causes of action for (1) breach of contract against Jorgensen, (2) fraud against Jorgensen and RAM, (3) breach of fiduciary duty against Jorgensen, (4) breach of implied covenant of good faith and fair dealing against

Jorgensen, (5) tortious interference with prospective economic advantage/contractual relations against Jorgensen and RAM, (6) breach of General Business Law 349 against Jorgensen and RAM, (7) negligence against Jorgensen, (8) injunctive relief from Jorgensen, (9) quantum meruit/unjust enrichment against Jorgensen and Greenwich, (10) equitable indemnity against Greenwich, and (11) declaratory relief against Greenwich. It also asserted claims as subrogee of Darby for fraud and breach of General Business Law 349 against Jorgensen and RAM, and for breach of fiduciary duty and negligence against RAM.

New York Marine's claims all stemmed from its allegation that Jorgensen advised Darby to retroactively cancel its policy with Greenwich, the insurer that had already begun an investigation into coverage for the TBC claim, and instead, pursue coverage for its TBC claim by purchasing the ERP coverage with New York Marine, for the purpose of advancing Jorgensen's own self-interest in developing a good business relationship with Greenwich and preventing Greenwich from having to pay out on the TBC claim. These wrongful acts caused New York Marine to expend significant sums in the defense and settlement of the TBC claim.

Jorgensen and Greenwich now move to dismiss the complaint insofar as asserted against them, or in the alternative, to compel arbitration and stay the remainder of the action. RAM moves to dismiss the complaint insofar as asserted against it.

Discussion

Jorgensen and Greenwich's Motion

Jorgensen first argues that the claims asserted against it must be arbitrated based on the clear and unambiguous provision to arbitrate as provided in the agreement:

> "As a condition precedent to any right of action hereunder, any dispute or difference between the company and the program administrator relating to the interpretation or performance of this agreement, including its formation or validity, or any transaction under this agreement, whether arising before or after termination, shall be submitted to binding arbitration, with the exception of matters requiring resolution by way of injunctive relief."

Jorgensen further maintains that any non-arbitrable claims should be stayed pending the outcome of the arbitration. In opposition, New York Marine argues that although the agreement does contain an arbitration provision, this action primarily sounds in fraud and intentional misconduct, which were not contemplated by the parties in entering into the agreement, and thus fall beyond the scope of the arbitration provision. Further, the arbitration provision excludes claims for injunctive relief. Given that most of the claims would not be subject to arbitration, in the interest of judicial economy, it would be most efficient to litigate all claims in this forum.

Pursuant to CPLR 7503(a), a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Here, the agreement sets forth a "clear and unequivocal agreement to arbitrate" any dispute that arises over the interpretation or performance of the agreement, or any transaction under the agreement, whether arising before or after termination. *Gerling Global Reins. Corp. v. Home Ins. Co.*, 302 A.D.2d 118 (1st Dept. 2002). None of the claims asserted against Jorgensen would have arisen

but for the existence of the agreement between New York Marine and Jorgensen and the dispute here clearly arose over a transaction pursuant to the agreement. Therefore, the claims asserted against Jorgensen must be sent to arbitration.

The only cause of action specifically excluded by the arbitration clause is the one in which New York Marine seeks injunctive relief "to prevent further harm to [its] business interests" because "Jorgensen's wrongful conduct alleged herein has resulted and will continue to result in irreparable injury to New York Marine." New York Marine seeks injunctive relief by way of disgorgement of any commissions obtained by Jorgensen as a result of its unfair or deceptive acts in connection with the Darby account, and an order enjoining Jorgensen from taking any further action on any New York Marine policies without New York Marine's express, written consent.

To state a claim for injunctive relief, the plaintiff generally must show a probability of ultimate success on the merits, the prospect of irreparable injury in the event that injunctive relief is denied, and that the balancing of equities tips in its favor. *Wall Street Garage Parking Corp. v. New York Stock Exchange*, 10 A.D.3d 223 (1st Dept. 2004).

Here, New York Marine has not pled a cognizable cause of action for injunctive relief. First, it failed to allege how disgorgement of commissions earned by Jorgensen would remedy or prevent any alleged imminent and irreparable harm, and in any event, disgorgement of commissions is not a type of "injunctive relief," rather it is essentially a claim for unjust enrichment, which has already been alleged and is subject to arbitration. Second, Jorgensen may not take any future action on any CPAGold policies issued by

New York Marine without New York Marine's knowledge and consent, so an injunction here would not be appropriate or necessary. As such, the cause of action seeking injunctive relief from Jorgensen is dismissed.

With regard to the subrogation claims asserted against Jorgensen, the "doctrine of subrogation allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." *Spectra Audio Research, Inc. v. Chon*, 62 A.D.3d 561, 563 (1st Dept. 2009). Here, the policy issued by New York Marine to Darby was for professional liability insurance. New York Marine became subrogated only to Darby's rights against third-party wrongdoers responsible for the TBC loss. *See Dezer Props. II, LLC v. Kaye Ins. Assoc., Inc.*, 38 A.D.3d 213 (1st Dept. 2007). Thus, New York Marine may only recover under the doctrine of subrogation here if it blamed Jorgensen for Darby's alleged negligent preparation of TBC's tax returns. No allegation has been made here concerning this issue. The causes of action in the complaint set forth by New York Marine as subrogee of Darby are based upon a misunderstanding and misuse of the subrogation doctrine and are dismissed.

With regard to the branch of the motion seeking dismissal or a stay of the claims asserted against Greenwich, Greenwich is a party to this action but it is not a signatory to the arbitration agreement. However, "where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" *Cohen v. Ark Asset Holdings, Inc.*, 268

A.D.2d 285, 286 (1st Dept. 2000). Here, the principal issues in this case are subject to arbitration, and those issues are intertwined with and related to the claims asserted against Greenwich. Specifically, the claims asserted against Greenwich center on the issues of (1) whether the policy Darby purchased from Greenwich was actually put into effect, being that no direct evidence has been presented as to whether Darby issued a check to Greenwich for the policy and whether any such check was deposited; and (2) whether, if in fact the policy was put into effect, Greenwich was entitled to retroactively cancel the policy, after it had already begun an investigation into a claim made under that policy. By first arbitrating the issues between New York Marine and Jorgensen, the interests of judicial economy will be served, and potentially inconsistent results may well be avoided. *See County Glass & Metal Installers, Inc. v. Pavarini McGovern, LLC*, 65 A.D.3d 940 (1st Dept. 2009); *Estate of Jerry Castellone v. JP Morgan Chase Bank*, N.A., 60 A.D.3d 621 (2nd Dept. 2009). Therefore, the claims asserted against Greenwich shall be stayed pending the outcome of the arbitration of the claims asserted against Jorgensen.

In sum, the claim seeking injunctive relief and the subrogation claims asserted against Jorgensen are dismissed, the remaining claims asserted against Jorgensen shall proceed to arbitration, and the claims asserted against Greenwich are stayed pending the outcome of arbitration.

RAM's Motion

New York Marine maintains that RAM is subject to the long arm jurisdiction of the court under CPLR 302(a)(3)(ii) because "(1) RAM committed tortious acts outside of New York; (2) New York Marine's causes of action arise from those tortious acts; (3)

RAM's tortious acts caused injury within New York; (4) RAM expected or should reasonably have expected the act to have consequences in New York; and (5) RAM derives substantial revenue from interstate commerce."[1]

Specifically, it contends that (1) the claims arise out of conduct, communications and misrepresentations between Jorgensen, RAM and Darby, with the deliberate and wrongful intention of manipulating coverage for an underlying claim to the detriment of New York Marine by way of its payment of the TBC claim; (2) the causes of action alleged arise from the wrongful acts committed; (3) although the conduct, communications and misrepresentations were not sent directly into New York, New York Marine relied on them in New York by disbursing the funds, i.e. RAM's fraudulent conduct resulted in a loss by a New York company, which was required to disburse funds from a bank account located in New York to pay a claim that should have been paid by Greenwich; (4) by brokering a policy with a New York based company, RAM should have reasonably expected that its actions could have harmful consequences in New York; and (5) RAM derives revenue from soliciting, negotiating and selling insurance on behalf of clients from carriers across state borders, outside of Florida and it directly profited from the purchase of the ERP from New York Marine by way of commission.

New York Marine further maintains that conferring jurisdiction over RAM would not violate due process because RAM has minimum contacts with New York and has purposefully availed itself of the privilege of conducting business in New York by

---

[1] New York Marine initially argued that personal jurisdiction was conferred over RAM because RAM transacted business within the state of New York, but seems to have abandoned that argument.

brokering policies with New York insurers. In addition, New York has a substantial interest in adjudicating this case as it involves the defrauding of a New York entity.

RAM contends that the court lacks long arm jurisdiction over it under CPLR 302(a)(3)(ii). RAM maintains that the alleged financial loss in New York by a New York company is insufficient to confer jurisdiction. RAM argues that the "situs of the injury" here is not New York because all of the critical events associated with the causes of action occurred in Florida or New Jersey and RAM never had any contact with New York. Further, exercising personal jurisdiction would not comport with due process because RAM has no minimum contacts with New York and has not purposefully availed itself of the privilege of conducting business in New York.

Pursuant to CPLR 302(a)(3)(ii), a New York court has long arm jurisdiction over non-domiciliaries when (1) the defendant committed a tortious act outside the State; (2) the cause of action arises from that act; (3) the act caused injury to a person or property within the State; (4) the defendant expected or should reasonably have expected the act to have consequences in the State; and (5) the defendant derives substantial revenue from interstate or international commerce. *Penguin Group (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295 (2011). If these five elements are met, a court must then assess whether a finding of personal jurisdiction satisfies federal due process. *Id.*

In the context of a commercial tort, where the damage is solely economic, the situs of the commercial injury is where the original events associated with the action or dispute took place, not where any financial loss or damages occurred. *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 A.D.3d 470 (1st Dept. 2011); *Deutsche Bank AG v. Vik,* 2015 N.Y.

Slip. Op. 30163(U) (Sup. Ct. N.Y. Co., January 30, 2015). Here, RAM is a Florida based company, with a Florida based client, Darby. RAM communicated with Jorgensen and obtained the insurance policies for Darby through Jorgensen, a New Jersey based entity. RAM has no offices or employees in New York, owns no property or bank accounts in New York and exclusively provides services to its Florida based clients from its only office in Florida. All of its alleged conduct took place in Florida and was directed to either Darby in Florida or Jorgensen in New Jersey. None of the communications, conduct or alleged misrepresentations related to New York. The fact that New York Marine is a New York based company, and lost money from its New York bank account by paying out on the TBC claim allegedly as a result of RAM's misconduct, is insufficient to have jurisdiction conferred onto RAM. Therefore, the claims asserted against RAM are dismissed for lack of personal jurisdiction.

In accordance with the foregoing, it is hereby

ORDERED that defendants Jorgensen & Company and Greenwich Insurance Company's motion to dismiss the complaint insofar as asserted against them, or in the alternative, to compel arbitration and stay the remainder of the action is granted to the extent that (1) the injunctive relief claim and all subrogation claims asserted against Jorgensen & Company are dismissed; (2) arbitration is compelled on all remaining claims asserted against Jorgensen & Company; and (3) the claims asserted against Greenwich Insurance company are stayed pending the outcome of the arbitration; and it is further

ORDERED that defendant Risk Avoidance Managers, Inc.'s motion to dismiss the complaint insofar as asserted against it is granted and the complaint insofar as asserted against it is dismissed.

This constitutes the decision and order of the court.

Dated: April 4, 2016
New York, NY

J.S.C.
HON. SALIANN SCARPULLA