Energy Conservation Group, LLC v Applied Underwriters, Inc.
2018 NY Slip Op 33436(U)
November 14, 2018
Supreme Court, Queens County
Docket Number: 710762 2015
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

x

THE ENERGY CONSERVATION GROUP, LLC, SKAGGS-WALSH, INC., 1509 HEMPSTEAD TPKE CORP., COLLEGE POINT TERMINAL, INC., SKAGGS-WALSH ELECTRICAL, INC. and ALLISON A. HEANEY,

Plaintiff(s)

-against-

APPLIED UNDERWRITERS, INC., APPLIED RISK SERVICES, INC., APPLIED RISK SERVICES OF NEW YORK, INC., NORTH AMERICAN CASUALTY COMPANY, CONTINENTAL INDEMNITY COMPANY, APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., and CAPACITY GROUP OF NY, LLC.

Defendant(s)

x

Index Number 710762 2015

Motion Date August 21, 2018

Motion Cal. Number 47

Motion Seq. No. 22

The following papers numbered 1 to 8 read on this motion by the Applied defendants for an Order pursuant to CPLR §3025(b) permitting them to serve a third amended verified answer asserting conditional counterclaims, and on this cross-motion by the plaintiffs for an order pursuant to CPLR §2215 and 22 NYCRR 202.21(e) vacating the corrected note of issue and certificate of readiness filed by the Applied defendants.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits- Exhibits	2
Answering Affidavits - Exhibits	3
Memoranda of Law	4-8

Upon the foregoing papers it is ordered that the motion by the Applied defendants for

an Order pursuant to CPLR §3025(b) permitting them to serve a third amended verified answer asserting conditional counterclaims is granted. The Applied defendants shall serve their third amended answer with a copy of this Order and notice of its entry, within twenty (20) days of entry of this Order. The cross-motion by the plaintiffs is granted.

This action arose from a dispute between the plaintiffs and the defendants concerning a balance totaling $1,663,655 as of December 8, 2015, allegedly owed by the former pursuant to Reinsurance Participation Agreements (RPA's). According to the defendants, pursuant to a 2010 RPA, the plaintiffs "participated in risk sharing in their own worker's compensation coverage for a three year term starting on October 1, 2010 and effective through October 1, 2013." On October 1, 2013, the plaintiffs and Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA) signed a new RPA for an additional three year term running from October 1, 2013 through October 1, 2016.

Applied Underwriters, Inc. (AUI), a Nebraska corporation, and its affiliates, Applied Risk Services, Inc., Applied Risk Services of New York, Inc., North American Casualty Company, Continental Indemnity Company (CNI), and AUCRA (collectively "the Applied defendants"), are six of the seven defendants in this action. AUI is a financial services company.

CNI issued Worker's Compensation policies to the plaintiffs, and the insurer alleges that it issued the policies on forms and at rates approved by the New York State Department of Financial Services. Pursuant to a reinsurance pooling agreement, The California Insurance Company (CIC), a subsidiary of AUI, reinsured five annual Worker's Compensation policies issued by CNI to the plaintiffs for the period of October 1, 2010 to October 1, 2015. In turn, CIC reinsured its reinsurance (a process known as "retroceding") with AUCRA pursuant to a reinsurance agreement.

The plaintiffs, New York companies that provide home heating oil delivery and related services, allege that the Applied defendants participated in an illegal scheme to offer reinsurance and to illegally collect insurance premiums without a license to do business in New York. The Applied defendants also allegedly did not file a RPA and related documents with New York State regulators, and the documents allegedly attempt to illegally transfer all risks back to the plaintiffs in violation of New York law.

The plaintiffs seek a judgment declaring that the RPA's are illegal, but that CNI insurance policies issued thereunder are lawful and in effect. The plaintiffs also seek, *inter alia,* the return of all monies paid to the defendants pursuant to the RPA's, and punitive damages, etc.

The plaintiffs began this action by the filing of a summons with notice on October 15, 2015, and they filed an amended summons and a complaint on October 19, 2015. On November 3, 2015, the attorney for the Applied defendants sent to the attorney for the plaintiffs a demand for arbitration filed by AUCRA calling for arbitration in Queens County, New York. On or about December 8, 2015, AUCRA served an amended demand for arbitration concerning the 2010 RPA only, because the 2013 RPA has no arbitration clause.

On December 10, 2015, the plaintiffs submitted a motion (sequence number "3") for an Order, *inter alia,* staying arbitration. By a decision and order (one paper) dated March 15, 2016 and entered on March 22, 2016, this Court, *inter alia,* granted the branch of the motion which was for a stay of arbitration. The Order is now on appeal. On October 31, 2017, the Applied defendants submitted a motion (sequence number "16") for an Order dismissing the instant action on the ground that a forum selection clause required that the dispute be heard in the Courts of the State of Nebraska. By a decision and Order filed on March 19, 2018, this Court denied the motion. The Applied defendants appealed again.

The Applied defendants filed a note of issue on June 22, 2018.

Applied Risk Services of New York, Inc, AUCRA, AUI, and CIC (collectively the Applied counterclaim plaintiffs) now seek to interpose counterclaims that would be determined in this court only if the Appellate Division affirms the orders of this court staying arbitration and keeping jurisdiction. The Applied counterclaim plaintiffs seeks: (1) a judgment awarding damages to them for breach of the RPA's; (2) a judgment awarding damages to them for breach of the CNI policies and (3) a judgment declaring that the RPA's are valid, enforceable contracts.

In their previous answers the Applied defendants stated that if the "Court declines to find that this dispute *** is subject to arbitration and/or litigation exclusively in Nebraska Courts *** Applied defendants hereby reserve their right to assert any and all counterclaims against the Plaintiffs." Moreover, the plaintiffs have been aware of the debts that are the subject of the counterclaims since they first received statements of amounts due under the RPAs in May, 2015.

CPLR §3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just" (*see, Holchendler v. We Transport, Inc.*, 292 AD2d 568 2002]). As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant (*see, Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]; *Holchendler v. We Transport, Inc., supra).* "Prejudice in this context means that the nonmoving party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (*Dumesnil v. Proctor and Schwartz Inc.*, 199 AD2d 869, 870 [1993]).

In the case at bar, the amendment of the answer is warranted for several reasons. First, the Applied defendants' extended delay in moving to amend their answer required them to offer a reasonable excuse for the delay *(see, Jablonski v. Cty. of Erie*, 286 AD2d 927 [2001]), a requirement that they met by showing that they have been waiting for determinations to be made in other forums. While an earlier interposition of the counterclaims would have been much preferable, their excuse, coupled with other factors, is sufficiently, though barely, plausible. Second, tardiness does not bar the amendment of a pleading unless it resulted in significant prejudice to the other side (*BAC Home Loans Servicing, L.P. v. Jackson*, 159 AD3d 861 [2018]; *U.S. Bank, Nat. Ass'n v. Sharif*, 89 AD3d 723 [2011]). In the case at bar, the plaintiffs have been aware of the debts allegedly due to the Applied defendants for years, and the assertion of the counterclaims now should not take them by surprise, especially because of the reservation of rights in previous answers. Third, the claims asserted by the plaintiffs and the claims asserted by the Applied defendants share at least some issues in common, and judicial economy would be served by determining all of the claims in one action (*see, Rothstein v. Milleridge Inn, Inc.*, 251 AD2d 154, 155 [1998] [" To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together"]). In this complex dispute, the interest of judicial economy is the heaviest factor in allowing the amendent sought by the Applied defendants. Fourth, the assertion of the counterclaims should not unduly delay the trial of this action, since the parties have not concluded discovery, and the extensive discovery already conducted would be relevant to the common issues raised by the parties. The plaintiffs did not persuade the court on this motion that sweeping additional discovery would be necessary. Moreover, in the case at bar, the need, if any, for additional discovery does not amount to prejudice sufficient to justify denial of an amendment, (*See, Jacobson v. Croman*, 107 AD3d 644 [2013]). Fifth, a party seeking to amend his pleading has the burden of establishing that the proposed amendment has merit (*see, Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, 27 AD3d 323 [2006]). But, the Court should not examine the merits or legal sufficiency of the proposed amendment beyond determining whether the amendment is palpably insufficient or patently devoid of merit on its face (*see, Vista Properties, LLC v. Rockland Ear, Nose & Throat Associates, P.C.* 60 AD3d 846 [2009]; *Rosicki, Rosicki and Associates, P.C. v. Cochems*, 59 AD3d 512 [2009]). The proposed counterclaims of the Applied defendants are not patently without merit.

Turning to the plaintiffs' cross-motion, 22 NYCRR §202.21 provides in relevant part: "(e) Vacating note of issue. Within twenty (20) days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect " (*see, Malester v. Rampil*, 118 AD3d 855 [2014]; *Kent Realty, LLC v. Danica Grp., LLC*, 102 AD3d 927 [2013).

Because the plaintiffs moved within the time prescribed for doing so and clearly demonstrated that discovery had not been concluded when the Applied defendants filed their note of issue, the vacatur of the note of issue and certificate of readiness is warranted (*see*, *Malester v. Rampil*, *supra*; *Kent Realty, LLC v. Danica Grp., LLC*, *supra*; *Jacobs v. Johnston*, 97 AD3d 538). The papers submitted on this motion clearly demonstrate that there are numerous discovery disputes between the parties which have yet to be resolved.

Dated: NOV 14 2018

J.S.C.

FILED
NOV 20 2018
COUNTY CLERK
QUEENS COUNTY