Amazing Home Care Servs. v Applied Underwriters Captive Risk Assur. Co., Inc.
2019 NY Slip Op 33013(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 650789/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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INDEX NO. 650789/2018

AMAZING HOME CARE SERVICES, BORO PARK OPERATING COMPANY, LLC, et al.,

MOTION DATE 06/05/2018, 07/25/2018

Plaintiffs,

MOTION SEQ. NO. 001, 002

- v -

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., APPLIED UNDERWRITERS, INC., APPLIED RISK SERVICES, INC., APPLIED RISK SERVICES OF NEW YORK, INC., CONTINENTAL INDEMNITY COMPANY, ILLINOIS INSURANCE COMPANY, CALIFORNIA INSURANCE COMPANY, ARS INSURANCE AGENCY, HUB INTERNATIONAL NORTHEAST LIMITED, OXFORD COVERAGE, INC., JOSEPH SCHWARTZ,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 59, 60, 68, 69, 70, 71, 77

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss is granted in part and denied in part; defendants' request to stay is denied; and plaintiffs' cross-motion to serve a Second Amended Complaint is granted.

Introduction

In this action the plaintiffs, some forty New York ("NY") nursing homes and/or similar entities, allege that several "interdependent" insurance companies (the "Insurers") sold them Worker's Compensation ("WC") insurance policies (the "Policies") tied in with a so-called Reinsurance Participation Agreement (the "RPA") (collectively, the "Agreements") that, considered together, are illegal because some of the Insurers are unlicensed, because NY State has not approved the rates or the forms, and because the Agreements are long-term and include severe cancellation and/or non-renewal penalties. Plaintiffs also allege that the Insurers misrepresented the Agreements, including by claiming that they are legal in NY State even though they are not; by claiming that plaintiffs had to agree to all parts of the program or not have any WC insurance, which was not true; and by claiming that the RPA is insurance, when it is actually an investment,

but an investment that pay no benefits. Plaintiffs have also sued their insurance broker (the "Broker"), the Broker's principal ("Schwartz"), and an alleged successor in interest to the Broker ("HUB") (which withdrew its motion, sequence 003, to dismiss) (collectively, the "Broker defendants") for negligence and malpractice for recommending that plaintiffs purchase defendants' products, including the RPA.

NY State law requires all employers to obtain WC insurance. The New York State Department of Financial Services ("DFS"), the New York Compensation Insurance Rating Board ("NYCIRB"), and NY Insurance Law §§ 2313 and 2347 strictly regulate such insurance, particularly the forms and rates. According to the Proposed Second Amended Complaint:

> Applied Underwriters Captive Risk Assurance Company ("AUCRA"), the Defendant [that] is putatively a party to the RPA Insurance Policy, is an unregistered, unauthorized foreign entity that is purposefully availing itself of the New York market while using its affiliates to evade DFS regulation. [P]ayments made in furtherance of the RPA Insurance Policy are made to an in-state affiliate of AUCRA in an effort to avoid DFS taking notice.

The complaint also claims that defendants are undercapitalized and will collapse.

According to plaintiffs, all non-broker defendants are part of one enterprise engaged in one illegal scheme that ensnared plaintiffs. AUCRA "does the business of insurance in New York by, inter alia, allowing its name to be used on the Workers' Compensation Program Proposal & Rate Quotation ("Proposal") given to companies in New York, allowing [the Insurers] to claim that they are 'a member of Berkshire Hathaway Inc.,' and receiving premiums through [the Insurers] fully-owned and controlled shell companies, purportedly in the form of reinsurance premiums."

Plaintiffs claim they signed the subject RPA on or about February 20, 2015; that defendants began overbilling shortly thereafter; and that by the summer of 2018 plaintiffs had already paid the Insurers approximately $24,350,000.00 in WC premiums and other related charges.

The (proposed) Second Complaint's Causes of Action

Plaintiffs' proposed Second Amended Complaint consists of 274 paragraphs spread over 56 pages (233 pages if you include all the attachments).

Plaintiffs' first, third, and fourth causes of action, pursuant to CPLR 3001, against the Insurers (as are all causes of action through and including the fifteenth), asks this Court to declare that the RPA violates NY Insurance Law, is illegal, against public policy and, therefore, is void; and that defendants are obligated to refund "no less than fifteen million dollars ($15,000,000.00), together with a disgorgement of all profits and damages, including punitive damages, in an amount to be determined by a jury."

Plaintiffs' second cause of action seeks reformation of the RPA.

Plaintiffs' fifth cause of action seeks rescission and damages.

Plaintiffs' sixth cause of action seeks damages for common law fraud.

Plaintiffs' seventh cause of action is for breach of fiduciary duty and negligent misrepresentation.

Plaintiffs' eighth cause of action is also for breach of fiduciary duty.

Plaintiffs' ninth cause of action seeks treble damages for the Insurers' alleged violations of NY's anti-trust Donnelly Act and NY General Business Law § 340.

Plaintiffs' tenth cause of action seeks damages for alleged false advertising and Deceptive Trade Practices under Insurance Law Sections 1102(a) and 2122(a) and General Business Law § 350.

Plaintiffs' eleventh cause of action, pursuant to an alleged private right of action pursuant to NY Insurance Law Section 4226, seeks disgorgement for misrepresentations.

Plaintiffs' twelfth cause of action, pursuant to NY Insurance Law § 2119(a), seeks restitution, for false advertising and deceptive trade practices.

Plaintiffs' thirteenth cause of action seeks restitution because of the Insurers alleged breach of fiduciary duties.

Plaintiffs' fourteenth cause of action seeks to impose a constructive trust.

Plaintiffs' fifteenth cause of action seeks a refund, based on fraud.

Plaintiffs' sixteenth cause of action seeks an accounting from all defendants.

Plaintiffs' seventeenth cause of action seeks monetary damages from the Broker defendants for negligent misrepresentation.

Plaintiffs' eighteenth cause of action seeks damages from the Broker defendants for negligence and malpractice.

Brief Procedural History

Plaintiffs served their original complaint. Defendants moved to dismiss. Plaintiffs served their First Amended Complaint. Defendants withdrew their motion to dismiss the original complaint and now move to dismiss the First Amended Complaint. Plaintiffs oppose the motion and now move for permission to serve a Second Amended Complaint.

Discussion

The Insurers essentially argue that plaintiffs' claims against AUCRA must be dismissed because of a forum selection clause in the RPA designating Omaha, Nebraska as the place for any litigation between plaintiffs and AUCRA; that if plaintiffs' claims against AUCRA are

dismissed, then all claims against the remaining Insurers must be dismissed because AUCRA is a necessary party to any such claims; that the Agreements themselves demonstrate that they are legal and proper; and that the RPA is not insurance but, rather, is an investment vehicle, "risk financing solution" and the "risk financing component of the Program."

Personal Jurisdiction over the Insurers

NY Insurance Law § 1101(b)(1) provides that "any of the following acts in this state . . . by any person, [etc.] shall constitute . . . doing business in the state within the meaning of section three hundred two of the civil practice law and rules: . . . (c) collecting any premium, membership fee, assessment or other consideration for any policy or contract of insurance . . . ." In addition, CPLR 302(a)(1) permits this Court to exercise jurisdiction "over any non-domiciliary who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state."

Forum Selection Clause

Faced with the same or similar forum selection clauses in RPAs, NY courts of coordinate jurisdiction (to each other and to this Court) appear to have reached opposite conclusions, one in Orange County enforcing the clause, one in Queens County refusing to do so. In the Queens case, The Energy Conservation Group, LLC v Applied Underwriters, Inc., 2018 NY Slip Op 30782(U), 2018 WL 2084161, at *2 (Sup Ct, Queens County Mar. 19, 2018), Justice Marguerite A. Grays of the Commercial Division refused to enforce the RPA's forum selection clause because "enforcement . . . would be unreasonable and unjust." The Agreements have their center of gravity in New York, and although NY Courts generally enforce forum selection clauses, the instant ones requiring appearances in Nebraska are onerous.

At this stage this Court has an open mind as to whether the RPA is "permeated with fraud," which would vitiate the forum selection clauses therein, but disclosure and trial may reveal that to be the case. Also, this Court is not blind to the fact that various federal and state (particularly California, Vermont and Wisconsin) courts (and the more so certain state regulators) around the country have taken a rather jaundiced view of RPAs.

Interestingly, on November 19, 2018, the District Court of Douglas County, Nebraska dismissed a case by AUCRA against our plaintiffs for failing to pay more than $26,000,000.00 allegedly due under the Agreements. That Court found that the forum selection clause is unenforceable, and that the Nebraska court lacked personal jurisdiction over the defendants/instant plaintiffs in that action. The Court noted that Nebraska is an inconvenient forum for our plaintiffs and that Constitutional due process would be violated if the instant plaintiffs would be forced to litigate in Nebraska. That decision is not, per se, binding on this Court, and is arguably distinguishable but worth considering.

Necessary Party?

AUCRA claims that because the case as against it must be dismissed due to the forum selection clause, the entire case must be dismissed because AUCRA is a necessary party. This Court notes in passing (and in dicta), that a dismissal as against AUCRA would simply limit the relief plaintiffs could obtain if they prevailed, but it would not block their many claims against the many other defendants.

Insurance or Investment?

Not surprisingly, among the many disclaimers plaintiffs signed was at least one to the effect that they realized that the RPA was an investment vehicle, not an insurance policy. However, what matters, under NY law, is not what plaintiffs were willing to sign, but the substance of the RPA, which this Court finds is at least arguably, for purposes of a motion addressed to a pleading, part and parcel of an insurance "program" (to use the Insurers' term of art), an insurance "product," and, ultimately, part of an insurance policy. Last year, the Supreme Court of Nebraska, relying in part on case law from the Southern District of NY, held that RPAs impact the underlying WC policies and are not separate agreements or investments. Citizens of Humanity, LLC v Applied Underwriters Captive Risk Assur. Co., Inc., 299 Neb. 545, 549, 909 N.W.2d 614, 620 (2018), cert. denied sub nom. Applied Underwriters, Inc. v Citizens of Humanity, No. 18-174, 2018 WL 3773240 (U.S. Oct. 1, 2018). The instant RPA is neither a "guaranteed cost policy" nor a "Retrospective Rating Plan ("RRP") policy (essentially, a high-low agreement with premiums set retrospectively), but nonetheless, it is an integral part of the subject insurance.

Pleading Fraud

The Insurers correctly note that pleadings should specify which particular parties allegedly committed which particular acts. However, the instant case is not like some garden-variety tort claim, where one particular person was driving the allegedly offending motor vehicle. Plaintiffs' case essentially alleges a combination, a conspiracy, put together to evade NY Insurance Law and to defraud. Who did what will have to be fleshed out through bills of particulars, in disclosure, or at trial (if the case cannot be settled).

Private Right of Action

The Insurers argue that plaintiffs' claims are mostly based on Insurance Law Article 23, and that Article 23 does not create private rights of action. Once again, this is a matter of some dispute. In National Convention Servs., L.L.C. v Applied Underwriters Captive Risk Assur. Co., Inc. 2017 WL 945189, at *15 (SDNY), a case against AUCRA, Judge Koeltl found that "plaintiffs have an implied right of action to seek rescissory damages under [NY Insurance Law] §§ 2314 and 2339," in part because private enforcement of said sections "undoubtedly promotes the legislative purpose." Judge Koeltl also considered whether the plaintiff is a member of the class for whose particular benefit the statute was enacted and whether creation of such a right would be consistent with the legislative scheme. This Court declines to dismiss on this basis at this time.

General Business Law Claims

Defendants are correct that GBL § 350 only applies to consumer-oriented false advertising, hardly the case here. Thus, plaintiffs' § 350 claim is subject to dismissal.

Insurance Law Section 4226

Defendants are correct that Insurance Law § 4226 does not apply to WC Insurance. Thus, plaintiffs' eleventh cause of action is subject to dismissal.

Alleged Tying of the Policies and the RPA

The Insurers argue that plaintiffs' seventeenth cause of action, which alleges that the Insurers violated the Donnelly Act by tying the Policies (the tying product) and the RPA (the tied

product), must be dismissed because to state such a claim a plaintiff must allege facts plausibly showing, inter alia, that the seller used coercion to force buyers to purchase the tied product; the seller has market power in the tying product market; and anticompetitive impact in the tied product market. This Court finds that the complaint, liberally interpreted, alleges these facts.

Conclusion

Defendants' requests to dismiss or, alternatively, for a stay are hereby granted solely to the extent of dismissing plaintiffs' Insurance Law § 4226 claims and General Business Law § 350 claims, and defendants' other requests for relief are denied. Plaintiff's request to serve and file its proposed Second Amended Complaint is hereby granted, and the proposed Second Amended Complaint is hereby deemed served and filed, and defendants shall have until 30 days from the date hereof to interpose an answer.

The parties are directed to appear for a preliminary conference on November 19, 2019 at 10:00 a.m. at 60 Centre Street, Courtroom 418, New York, New York.

10/4/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE