Millennium Holdings LLC v Certain Underwriters at Lloyd's, London
2022 NY Slip Op 31445(U)
May 3, 2022
Supreme Court, New York County
Docket Number: Index No. 600920/2008
Judge: Jennifer Schecter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JENNIFER SCHECTER **PART** 54

Justice

----------X

MILLENNIUM HOLDINGS LLC, and THE NORTHERN ASSURANCE COMPANY OF AMERICA,

Plaintiffs,

and

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES,

Intervenor Plaintiffs,

- v -

PPG ARCHITECTURAL FINISHES, INC., f/k/a AKZO NOBEL PAINTS LLC f/k/a THE GLIDDEN COMPANY,

Defendants.

----------X

INDEX NO. 600920/2008

DECISION AFTER TRIAL

The evidence establishes that intervenor plaintiffs Certain Underwriters at Lloyd's, London and Certain London Market Companies (the Insurers) are entitled to indemnification from defendant PPG Architectural Finishes, Inc. (PPG) based on contractual subrogation. PPG's indemnity obligation is clear and the extrinsic evidence does not persuade the court that the parties agreed indemnification would only be net of Millennium's insurance.

The subject insurance policies have express subrogation clauses, allowing the Insurers to step into Millennium's shoes. The primary questions for trial were whether (1) PPG's indemnification obligations were limited to amounts not covered by Millennium's insurance and (2) there was a waiver of the Insurers' subrogation rights. There was no convincing evidence of any indemnification limitation or of a waiver of subrogation.

The Appellate Division has twice confirmed that the parties' agreement is ambiguous (176 AD3d 423 [1st Dept 2019] ["We previously held that the amended purchase agreement (APA) is ambiguous as to whether plaintiff and defendant intended that plaintiff would maximize its insurance recoveries before seeking indemnification from defendant and remanded to Supreme Court for consideration of extrinsic evidence on the matter"], citing 146 AD3d 539, 546 [1st Dept 2017]). The language of the indemnification provision (§ 9.3) itself unambiguously provides Millennium with indemnification from PPG without

OTHER ORDER – NON-MOTION

regard to any insurance recovery. The issue, however, is when read in the context of the APA as a whole--in conjunction with the parties' Lead Litigation Agreement (Dkt. 301 [the LLA]) in which they agreed "to use their best efforts in seeking to maximize any insurance recoveries" (*id.* at 239-40) and in conjunction with extrinsic evidence, most notably, the Side Letter's provision requiring Hanson to provide PPG with the benefits of its insurance (*see id.* at 157-58)--whether the Insurers are precluded from obtaining indemnification from PPG as Millennium's subrogees for amounts they paid Millennium.

The Side Letter

The Side Letter does not resolve the ambiguity in PPG's favor.

On a blank slate--without the controlling holdings of the New York Court of Appeals (regarding anti-subrogation) and the Ohio Supreme Court (regarding the Side Letter and PPG's lack of coverage)--there would have been a more powerful argument that it makes no sense that the Insurers could be indemnified by PPG, a non-tortfeasor, for the very risk that they insured. That, however, is difficult to square with the determinations that PPG could not invoke anti-subrogation because it was not an insured or a party intended to be covered by the insurance policies in some other way that would allow it to invoke the doctrine and that PPG did not obtain coverage and has no insurance rights under the Side Letter. Indeed, it is difficult to reconcile the adjudicated fact that PPG was never intended to obtain the benefits of Millennium's insurance coverage with PPG's contention that Millennium in fact agreed to give it the benefit of any insurance policy.

Nothing convinces the court that although the contracting parties failed to agree that PPG would have rights to Millennium's insurance in the Side Letter, that same Side Letter nonetheless evidences their intent to effectively provide PPG with coverage by limiting its indemnification obligation or by precluding the Insurers from availing themselves of their contractual subrogation rights. After all, if Hanson could not act on behalf of or bind Millennium with the Side Letter (since Hanson did not have any rights in the policies and thus could not bind Millennium to confer its coverage rights onto PPG), then how can that same Side Letter--that was not signed by and is not binding on Millennium--be deemed probative of Millennium's intent? If Millennium had the intent and the obligation to confer the benefits of its insurance, it would have been made a party to the Side Letter and its responsibility to do so would have been explicit. The court is convinced that if there really was an actual agreement in 1986 that PPG would get the benefits of Millennium's insurance, the very-contract-experienced parties would have made that important agreement clear. They did not. Conflating Hanson's intent with Millennium's would ignore the determination of the Ohio Supreme Court. PPG asks this court to divine too much from the Side Letter and give it significance that is inconsistent with the holdings of the highest courts of two states. The court will not do so.

The LLA

Similarly, the LLA does not convince the court that the parties agreed PPG's indemnification obligation would be limited by amounts Millennium recovered from insurance. PPG was never contractually entitled to the insurance and nowhere did the parties provide that PPG's responsibility to indemnify Millennium during the years it was obligated to do so would be limited to amounts for which Millennium did not have insurance. The LLA's provision that the "Litigating Parties . . . agree to use their best efforts in seeking to maximize any and all insurance recoveries, under the Insurance Policies, including the presentation of claims and requests for payment of defense and indemnity expenses on each other's behalf" (LLA § 2[b] [emphasis added]), read in its context, does not limit the parties' existing indemnity obligations to amounts net of insurance or limit subrogation. The language appears in a provision that makes clear that if PPG paid or became liable for amounts it contended were the responsibility of Millennium "pursuant to an indemnification or any other obligation," then Millennium had to assign its "choses in action for insurance coverage . . . for those defense costs." The LLA further makes clear that it is "without prejudice to the ultimate question of the responsibility, pursuant to an indemnification obligation or any other obligation" (LLA § 3 [emphasis added]).

Other Evidence

There is no other persuasive extrinsic evidence that weighs in favor of interpreting § 9.3 in a manner other than its plain meaning or that supports interpreting the obligation to use best efforts to maximize insurance recovery as an agreement by the parties to limit their indemnification obligations or to waive the Insurers' subrogation rights. In fact, after 1986 the parties consistently made clear that their commitments were not intended to bear on their indemnification agreement. For instance, the Lockitski Letter, like the LLA, also contains the qualifier that it is "without any prejudice to either party's position relating to indemnification" (Dkt. 293 [emphasis added]). Moreover, the no-third-party-beneficiary provision does not defeat the Insurers' ability to seek indemnification based on their status as subrogees since they stand in Millennium's shoes with respect to contractual indemnification.

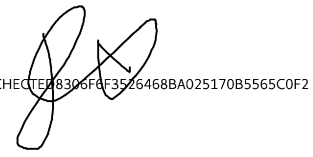
The Insurers, of course, have no greater rights than Millennium and thus must act consistently with Millennium's obligations. To be sure, by seeking indemnification from PPG, the Insurers are not vitiating a promise to maximize the benefits of Millennium's insurance that would inure to PPG's benefit since PPG has no interest in or rights to Millennium's insurance coverage. That was the whole point of the Ohio Supreme Court's decision, which the New York Court of Appeals confirmed is *res judicata*. All the Insurers have done is avail themselves of Millennium's explicit indemnification rights from PPG under their policies' express subrogation clause.

Conclusion

Equitable considerations--the anti-subrogation rule and the claim for equitable subrogation--are no longer part of this case. Precluding the Insurers from recovering on this record would effectively be transmogrifying into the APA the anti-subrogation and coverage arguments on which PPG lost without any compelling evidentiary basis for doing so. The issues here are legal ones based on the parties' contracts. Whether the bargains they struck are fair is of no moment (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). In the end, PPG's interpretation is less persuasive based on the lack of credible evidence that the parties actually intended § 9.3 to be understood differently than its plain meaning—which is that it is merely the flip side of Millennium's indemnity obligations under section 9.1(c). These sophisticated parties could easily have made clear that indemnification under § 9.3 was to be more limited such that it was only to be net of any available insurance. They did not. Had they explicitly done so in any other agreement or if the parties' course of conduct or other extrinsic evidence revealed such an intent the court may have reached a contrary conclusion (*see China Privatization Fund (Del.), L.P. v Galaxy Entertainment Group Ltd.*, 187 AD3d 596 [1st Dept 2020]). But since the court is not persuaded that any of that evidence is actually indicative of the parties' intent, the only persuasive evidence the court is left with are the words they deliberately used in their agreement. After all, "the best evidence of what parties to a written agreement intend is what they say in their writing" (*Greenfield,* 98 NY2d at 569; *see Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 [1st Dept 2015] ["This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople"]). The court finds that the parties' agreement means what it says. PPG, therefore, is liable to the Insurers in the amount of $8,076,000 (*see* Dkt. 369 at 4).

PPG's other arguments are unavailing.

Accordingly, it is ORDERED that the Clerk is directed to enter judgment in favor of the Insurers and against PPG in the amount of $8,076,000 plus 9% statutory pre-judgment interest from January 21, 2021 to the date judgment is entered.



DATE: 5/3/2022 **JENNIFER SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**