

<b>Travelers Cas. &amp; Sur. Co. v Vale Can. Ltd.</b>
2022 NY Slip Op 31526(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 654028/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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TRAVELERS CASUALTY & SURETY COMPANY, INDEX NO. 654028/2021
Plaintiff, 10/05/2021, 10/05/2021, 09/14/2021, 10/08/2021, 09/22/2021, 10/14/2021, 10/29/2021, 10/25/2021, 11/03/2021
- v - MOTION DATE
VALE CANADA LIMITED, AIU INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., CGU INTERNATIONAL INSURANCE PLC, F/K/A COMMERCIAL UNION ASSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, FIREMANS FUND INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INSURANCE COMPANY OF NORTH AMERICA, CERTAIN UNDERWRITERS AT LLOYDS, LONDON, ZURICH ASSURANCE LTD. F/K/A MIDLAND ASSURANCE LTD., SOMPO JAPAN NIPPONKOA INSURANCE, INC. F/K/A NIPPON F&M, ALLSTATE NORTHBROOK INDEMNITY COMPANY, F/K/A NORTHBROOK INDEMNITY COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA F/K/A ROYAL INSURANCE COMPANY OF CANADA, JOHN DOE INSURERS 1-10, MOTION SEQ. NO. 003 004 005 006 007 008 011 014 015

DECISION + ORDER ON MOTION

Defendant. -----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 211, 258, 259

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM

The following e-filed documents, listed by NYSCEF document number (Motion 004) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 212, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 372, 373, 374, 375, 376

were read on this motion to/for DISMISS

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Motion No. 003 004 005 006 007 008 011 014 015

The following e-filed documents, listed by NYSCEF document number (Motion 005) 103, 104, 105, 106, 107, 108, 109, 110, 111, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 293, 342, 347

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 237, 294, 337

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 119, 120, 121, 122, 123, 124, 125, 126, 299, 300, 301, 341, 348

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 289, 295

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 290, 291, 292, 343, 351, 354, 355, 357, 359, 360

were read on this motion to/for \_\_\_\_\_ DISMISS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 285, 286, 287, 316, 317, 318, 319, 320, 321, 322, 327, 328, 329, 330, 331, 332, 333, 335, 336, 339, 344

were read on this motion to/for \_\_\_\_\_ MISCELLANEOUS \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 296, 297, 323, 324, 325, 338, 345, 346, 349

were read on this motion to/for \_\_\_\_\_ MISCELLANEOUS \_\_\_\_\_.

Upon the foregoing documents and for the reasons set forth on the record (5.10.22), (i) Vale Canada Limited’s (**Vale**) motions to dismiss the complaint (Mtn. Seq. 004) and cross-claims (Mtn. Seq. No. 005, 006, 007, 008) against them are denied; (ii) Royal & Sun Alliance Insurance Company of America’s (**Royal**) motion to dismiss the complaint (Mtn. Seq. No. 003) is denied; (iii) AIU Insurance Co., American Home Assurance Co., Granite State Insurance Co., Insurance Co. of the State of Pennsylvania, and National Union Fire Co. of Pittsburgh’s (collectively, the **AIG Insurers**) motion to dismiss the complaint (Mtn. Seq. No. 011) is granted without

prejudice; and (iv) Vale's motions to strike certain affidavits (Mtn. Seq. No. 014 & 015) are denied.

1. Dismissal based on *forum non conveniens* pursuant to CPLR §§ 327 and 3211(a)(4) is not appropriate (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]). Simply put, the movants have failed to sustain their burden in displacing the Plaintiff's choice of forum. As this Court has previously discussed, the critical issue is whether based on the totality of the circumstances New York is an inconvenient forum and whether another forum is available which best serves the ends of justice (*Atlantic Mut. Ins. Co. v. Cadillac Fairview US, Inc.*, 125 AD.2d 181, 184 [1st Dept 1986]). This is a dispute involving insurance policies procured in New York, underwritten in New York, issued in New York, delivered to Inco Limited's New York Office (which is the address identified on almost every single policy at issue [NYSCEF Doc. No. 155]), where notice of claims were to be provided in New York and whether coverage exists under those policies. The Canada court in the later filed actions dismissed the claims against North River because it is not subject to jurisdiction in Canada. Wausau also specifically negotiated to exclude Canada risks such that to make them litigate there is particularly inappropriate. Thus, it can not be said that Canada presents the more comprehensive actions. The Commercial Division in New York regularly adjudicates insurance coverage disputes where the events underlying the coverage issue occurred elsewhere, and this Court is often called to interpret foreign law. Indeed, this is part of this Court's jurisdictional mandate. Stated differently, the burden on the Court is small. Given the proximity between Canada and New York, it simply can not be said that the burden on the Defendants is significant.

Additionally, the Plaintiff asserts and the Defendants do not dispute that the discovery

rules are different in New York than in Canada. For completeness, the Court notes that it is not clear that Canada law will govern this dispute or that there is a conflict as to the coverage issues such that a choice of law analysis is appropriate. Dismissal pursuant to CPLR 3211(a)(4) is also not appropriate because this is the first filed action and there simply is no record of gamesmanship by the Plaintiff here. In fact, if anything to the extent that the notice of claim did not include certain subsidiaries, and that now the Defendants argue that the later filed Canadian actions are more comprehensive, the Defendants appear to be engaging in gamesmanship, not the Plaintiffs, as this issue is easily remedied by filing an amended complaint if and when appropriate.

2. Royal & Sun Alliance Company of Canada's (**Royal**) motion to dismiss based on *forum non conveniens* is also denied. Royal also fails to meet its burden in displacing the Plaintiff's chosen forum. The Plaintiff alleges that these policies were also brokered and underwritten in New York. Royal does not submit adequate documentary evidence to suggest otherwise or to support a different outcome.
3. Vale's motions to dismiss cross-claims asserted against it also must be denied. United States Fire Insurance Company (**US Fire**), North River Insurance Company (**North River**), General Reinsurance Corp. (**Gen. Re.**) and Employer's Insurance Co. of Wausau (**Wausau**) were all located in New York when the policies were issued and there is no hardship to the defendants in having to litigate here. Having issued the policies in New York, they should have reasonably foreseen having to defend an action here arising out of these policies.

4. The case must be dismissed without prejudice as against the AIG Insurers. There simply is no case or controversy against them at this time. It does not matter that if the Court were to determine that coverage is owed, there might be contribution by and among the insurers including those who have settled with Vale. As of today, Vale does not seek coverage from the AIG Insurers. It settled with them and any claim for contribution would accrue only when if this Court were to determine that coverage exists. On the record before the Court, it can not be said that dismissal with prejudice is appropriate. The simple fact that the AIG Insurers settled with Value does not necessarily preclude a claim for contribution by the Plaintiff. The AIG Insurers can not whisk away any potential future exposure based on this fact alone. As they have correctly pointed out, the claim for potential contribution is premature and the record is not fully developed on this point (*Allergan Finance, LLC v Pfizer Inc.*, 188 AD3d 402, 404 [1st Dept 2020]).
  
5. Vale's motions to strike affidavits are denied. Simply put, the affiants do not need to have been personally involved in negotiating or effectuating the policies at issue in order for them to have personal knowledge of the relevant facts and circumstances such that the Court may consider them (*Certain Underwriters at Lloyd's London v Bioenergy Dev. Group, LLC*, 189 AD3d 573, 574-575 [1st Dept 2020]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414 [1st Dept 2009]).

Accordingly, it is

ORDERED that Vale's motions to (i) dismiss the complaint (Mtn. Seq. No. 004), (ii) dismiss the cross-claims (Mtn. Seq. No. 005, 006, 007, 008), and (iii) strike certain evidentiary submissions (Mtn. Seq. No. 014, 015) are denied; and it is further

ORDERED that Royal's motion to dismiss the complaint (Mtn. Seq. No. 003) is denied; and it is further

ORDERED that the AIG Insurers' motion to dismiss the complaint (Mtn. Seq. No. 011) is granted, and the complaint is dismissed as to the AIG Insurers without prejudice; and it is further

ORDERED that Vale order a copy of the transcript (5.10.22) and upload same to NYSCEF; and it is further

ORDERED that the defendants file answers on or before June 27, 2022; and it is further

ORDERED that the parties serve document demands on or before July 8, 2022; and it is further

ORDERED that the parties serve responses to document demands on or before July 25, 2022; and it is further

ORDERED that the parties complete document production on or before October 28, 2022 is further

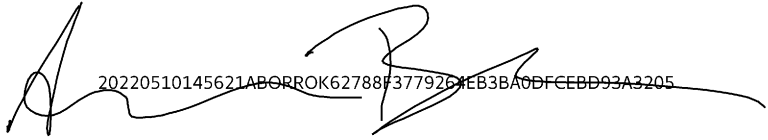
ORDERED that the parties complete depositions on or before December 15, 2022; and it is further

ORDERED that the parties complete fact discovery on or before October 30, 2022; and it is further

ORDERED that the parties complete expert discovery on or before February 28, 2023; and it is further

ORDERED that the parties file Note of Issue on or before March 15, 2023, with dispositive motions to be filed within 45 days of the date the Note of Issue is filed; and it is further

ORDERED that the parties appear for a status conference on July 12, 2022 with the parties to provide an ESI protocol.



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5/10/2022  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE