

Vigilant Ins. Co. v MF Global Inc
2022 NY Slip Op 32275(U)
July 12, 2022
Supreme Court, New York County
Docket Number: Index No. 601621/2009
Judge: Melissa Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA CRANE PART 60M

Justice

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VIGILANT INSURANCE COMPANY, UNDERWRITERS
LLOYDS OF LONDON, ST PAUL FIRE & MARINE INS CO,
FIDELITY & DEPOSIT CO MARYLAND, CONTINENTAL
CASUALTY COMPANY, GREAT AMERICAN INSURANCE
CO, AXIS REINSURANCE COMPANY, LIBERTY MUTUAL
INSURANCE CO., NEW HAMPSHIRE INSURANCE
COMPANY,

Plaintiff,

- v -

MF GLOBAL INC, JAMES W. GIDDENS (TRUSTEE),

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 025) 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 674, 675, 679, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 697, 700, 701, 702, 703, 704, 705, 706

were read on this motion to/for MISCELLANEOUS.

Defendant MF Global Finance USA Inc. (MF Global) moves pursuant to CPLR §§ 3212, 5001 and 5011, for an Order granting summary judgment in its favor against Plaintiffs New Hampshire Insurance Company (New Hampshire), Axis Reinsurance Company (Axis) and Liberty Mutual Insurance Company ([Liberty] but collectively “Insurers”) on Defendant’s counterclaim and directing the Clerk of the Court to enter a final judgment against each of the Insurers together with prejudgment interest. The court presumes familiarity with all prior decisions delineating the facts

Earlier this year, the Appellate Division, First Department, reversed a prior order of this court (Friedman J.) and essentially awarded judgment to MF Global, the insured here, holding

that the insurance policies at issue on this motion covered fraudulent trading activity for which MF Global suffered a loss (204 AD3d 141 [March 17, 2022]). Because this case is so old, there is a potential for heavy prejudgment interest. This circumstance has led to the current motion that involves several issues, all of which touch on the calculation of prejudgment interest. Under CPLR 5001(b) prejudgment interest runs from the date the insured becomes obligated to indemnify the insured (see *Warehouse Wines v Travelers*, 711 Fed Appx 654, 658 [2nd Cir 2017]).

1. Accrual Date For Prejudgment Interest

The first issue is the accrual date for the prejudgment interest for at least New Hampshire's primary policy. The insurance companies claim that the time period for prejudgment interest did not begin to accrue, at the earliest, until the insurance companies declined coverage on May 1, 2009. However, MF Global requested coverage initially in February 2008, again in April 2008, and filed proof of loss on **June 6, 2008**. The reason the insurers did not decline coverage until May 1, 2009 is because they took nearly a year for their "investigation."

Contrary to the insurers' position, coverage does not run from denial when they take a year to investigate. What the law says is that the insurance companies must pay within a REASONABLE time period (see Ins. law 3420[d][2]; *Bowers v. Grier*, 185 A.D.3d 998, 1000 (2d Dep't 2020)).

Under the circumstances, a year is not reasonable. As MF Global so aptly states: "the accrual date does not deny the insurers the ability to conduct an investigation, it is just that they cannot do it at the insured's expense." (Reply Br. EDOC. 706, pg 9).

Warehouse Wines, 711 F Appx 652 (2d Cir 2017), is directly on point. In that case, the Court of Appeals for the Second Circuit held the insurance company “[could not] circumvent CPLR 5001(b) by denying coverage while conducting a nearly year-long investigation into [the insured’s] claims and then, once it is adjudicated liable, avoid paying prejudgment interest from the earliest ascertainable date the cause of action existed. To adopt [the insurer’s] position would be to undermine CPLR’ 5001(b)’s purpose to make the aggrieved party whole [internal citations omitted]”

Accordingly, the accrual date for prejudgment interest is July 6, 2008. This is 30 days from the time MF Global filed its proof of loss and over four months from the date MF Global filed its initial claim on February 28, 2008. This four-month period is sufficient time for the insurer’s investigation to be on MF Global’s dime.

The insurance companies try to distinguish *Warehouse Wines* by arguing that the policy in that case required *payment* within 30 days of a proof of claim. This is a distinction without a difference. To rule that prejudgment interest runs from the denial of a claim incentivizes insurance companies to hold off denying coverage for as long as possible. Moreover, the insurance companies have not cited a single case holding that to decline coverage over a year from the notice of claim is reasonable (see *Fireman’s Fund v OneBeacon* 2020 WL 7028906 [SDNY November 30, 2020] [holding 90 days was too long]). Again, to hold otherwise would incentivize insurers to drag their feet during an investigation.

2. Effect Of The Settlements From The Settling Insurers That Exceed The Limits Of Those Policies

The next issue is what effect the monies from settlements with the settling insurers have on the total amount upon which prejudgment interest should run. It is undisputed that those insurance companies who have settled with MF Global paid above their policy limits to

settle. MF Global contends that this extra amount above limits was to pay for attorney's fees and interest and therefore the non-settling insurers should not receive the benefit of those amounts. The insurance companies ask for a reduction of liability by way of a credit for amounts above limits the settling insurers paid to settle MF Global's claims.

The operative language in the insurance policies is at § 6.7 of the primary policy (See EDOC 642) There is no dispute that the excess policies follow form to the primary policy and therefore incorporate the terms of the primary policy.

Section 6.7 states:

“In determining the amount collectable under this bond for any *loss*, deductions shall be made in respect of any property. . . received **from any source whatsoever**, including payments and receipts of principal, **interest**, dividends, commissions and the like, whenever received, in connection with any matter from which an indemnifiable *loss* has arisen.” (emphasis added)

Here, we have clear policy language that allows for a set off “**from any source whatsoever**” and includes receipt of payments for “any property” including “*interest*.” Accordingly, application of the plain terms of § 6.7 of the Primary Bond requires subtraction of all sums above limits recovered from the settling insurers as they qualify as “any source whatsoever” regardless of whether these payments are for interest. Thus, any amount MF Global would recover must be reduced by \$17,020,287.00 even if that amount was from the settling insurers payment of interest or attorney's fees.

MF Global cannot circumvent this policy language. MF Global claims § 6.7 was meant to apply to third parties, like the active wrongdoer Dooly, and does not apply to insurance companies. This interpretation flies in the face of the clear policy language stating that the set off can derive from “from any source whatsoever.”

MF Global cites *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154, 172 (2d Cir. 2001), but that case is not relevant. In that case, the parties agreed that the appropriate starting point for the analysis was a *pro rata* allocation method. It has nothing to do with policy language requiring a set off “from any source whatsoever.” Again, MF Global’s arguments cannot circumvent the clear policy language that allows for a set off from any source whatsoever and includes payments for “any property,” including interest.

3. Liberty’s Excess Policy

There is a separate issue about when the prejudgment interest runs with respect to Liberty because of unique language the Liberty policy contains (see EDOC 647). Liberty’s Policy states “**this Policy only provides coverage when the Underlying Limit of Liability is exhausted by reason of the insurers of the Underlying Policies paying or being held liable to pay.**” Thus, the Liberty policy is not triggered until the underlying insurers pay or are held liable to pay.

MF Global claims that Liberty failed to raise exhaustion to disclaim coverage and therefore has waived an exhaustion argument. This is plainly incorrect. First, Liberty sent a broad reservation of rights letter when it declined coverage (EDOC 36, 654). Then, it asserted exhaustion in its 8th affirmative defense that states:

“MF Global cannot recover under the Liberty Mutual Bond to the extent MF Global has not incurred an otherwise recoverable loss in the amount of any and all Bonds and/or insurance policies underlying Liberty Mutual’s Bond and such other Bonds have been exhausted by the actual payment of covered loss.” (EDOC 36 pg. 10).

This affirmative defense is sufficient to contemplate the situation here where the insurers have been held liable to pay or have settled.

More important, the Appellate Division, First Department carved out Liberty when it dismissed all affirmative defenses in the case **EXCEPT FOR LIBERTY’S 8TH**

AFFIRMATIVE DEFENSE and remanded issues with respect to that defense back to the trial court (See 204 AD3d 141, 157 [March 17, 2022]). Why would the Appellate Division have carved out Liberty's eighth affirmative defense, if Liberty had already waived exhaustion?

Thus, by its plain language the Liberty policy only attaches when one of two circumstances occur: (1) the underlying insurers pay or (2) are held liable to pay. It is important to note that MF Global has not argued for the purpose of this motion that the settlements with the other insurers constitute payment of the underlying policies. Rather, MFG has staked its entire position on looking back all the way to the time it paid the loss in 2008. Therefore, the court is left to analyze circumstance 2, in which the underlying insurers are "held liable" to pay.

The parties do not dispute that the insurers were held liable to pay on March 17, 2022 when the Appellate Division, First Department, reversed this court and held certain insurers to be liable for the underlying loss. Thus, for the purpose of calculating Liberty's obligation to pay prejudgment interest, the interest runs from March 17, 2022. To hold otherwise would eviscerate the language in the Liberty policy. There is case law directly on point. In *JP Morgan Securities v Vigilant Insurance Company*, 203 AD3d 541 (1st Dep't March 17, 2022) the Appellate Division, First Department held, (coincidentally on the same day as the appellate decision in this case) on nearly identical policy language, that the insurance company had no duty to pay prejudgment interest because their coverage obligation did not begin until "Actual payment by the underlying insurer" which had not happened.

Although, as a policy matter, it might seem unfair for Liberty to be able to piggyback on the breach by the underlying insurers to avoid a long period of prejudgment interest, that is exactly what Liberty's policy allows it to do. (See *TIAA Cref v Illinois National Ins Co.*, 2017 WL 5187860 at *8 [Del Superior Court October 23, 2017]).

At oral argument, MF Global made the argument for the first time that, once the insurers were held liable on March 17, 2022, CPLR 5001 requires prejudgment interest from the time of breach which, as this case is ancient, was a long time ago. The problem with this argument, aside from it being new, is that it is at odds with the policy language and the *JP Morgan* case supra.

Therefore, in accordance with the policy language in the Liberty policy, prejudgment interest for Liberty runs from the time the underlying insurers were held liable to pay. It is not disputed that date is March 17, 2022, when the Appellate Division reversed this court and entered judgment against the remaining insurers in this case.

4. New Hampshire's 4th Excess Bond

New Hampshire's excess bond differs from the Liberty bond in that it provides that exhaustion occurs when the **Insured (as opposed to merely the insurance companies)** pays the total amount of the underlying limits. Specifically, New Hampshire's fourth excess bond states that New Hampshire's obligation to pay attaches "only after the Underlying Insurers **and/or the Insureds** . . . shall have paid the full amount of the total underlying limits." (see EDOC 647, pg 2 section III). Thus, unlike the Liberty policy that only discusses underlying insurers, the New Hampshire policy specifically allows for the possibility of trigger when the insured pays the underlying loss. That is exactly what occurred in this case. The insured, MF Global, paid the underlying loss immediately, way back in February 2008. Therefore, as discussed supra, the New Hampshire excess bond triggered 30 days from proof of claim, or July 6, 2009.

Given this language, naturally, New Hampshire did everything possible to distance itself from its own excess policy. First, it claimed that the New Hampshire excess policy is identical

to the Liberty policy because New Hampshire signed onto the Liberty policy. This conclusion is incorrect.

First, as just explained, the New Hampshire fourth excess bond is **NOT** identical to the Liberty policy and it is the language of New Hampshire's own policy that controls (see *Insituform Technologies inc v Am Hoe Assur Co* 566 F.3d 274, **278-79** [1st Cir 2009]). In addition, when signing the Liberty Bond, New Hampshire specifically referenced the number of its own bond, **which is 64739** (see EDOC 646 Endorsement 1). That bond with that exact number, is attached at edoc 647. As explained above, that bond specifically triggers coverage when the insured pays. To suggest that EDOC 647 (which is policy no. 64739) is not the proper policy, when it is the very policy listed in the Liberty's Endorsement 1 is, frankly, misleading.

Counsel for New Hampshire also suggested on the record that he needs discovery about presumably the applicability of his client's own excess policy no 64739 (Tr. Pg 82). There is no need for discovery because nothing is ambiguous. The policy clearly triggers when the INSURED pays the underlying amounts. What would we have discovery on in this 14-year old case where the Note of Issue was filed in 2017?

In any event, at this late stage, even if the issue were not waived, to the extent there is a discrepancy between the Liberty Bond and New Hampshire's own document, it would be construed against the drafter which is New Hampshire (*see Zurich Am. Ins Co., v Wausau Bros. Ins*, 206 FSupp3d 818,826 [SDNY 2016]; *Sincoff v. Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 391 (1962); *NYSIF v Everest Nat'l Ins. Co.*, 125 AD3d 536 [1st Dep't 2015]).

Even more desperate is New Hampshire's argument that the language: "only after the Underlying Insurers **and/or the Insureds** . . . shall have paid the full amount of the total underlying limits" from section III, applies only to claims made against the Insured, while MF

Global's loss here is a first party loss. This argument appears nowhere in New Hampshire's motion papers and was asserted for the first time at oral argument (see transcript pgs 85-94). That may be because, if you trace the excess policy back to the primary policy the excess follows form to (also written by New Hampshire), it is clear that primary policy is NOT a claims made policy.

Tracing back, New Hampshire's excess policy (EDOC 647) states in the definition section (section II) that "Claim" is defined the same way as in the "Followed Policy." The "Followed Policy" from the declarations page is identified as New Hampshire's primary policy bearing policy number 64738. However, there is no definition for "Claim" in primary policy 64738. This is because primary policy 64738 does not appear to be a claims made type of policy. Rather, primary policy 64738 states that it covers loss for "any wrongful action committed by any employee, or any theft, fraudulent or malicious act committed by any other person." This is not claims made language, yet counsel argues policy number 64739 which follows form to 64738 somehow is a claims made policy.

In addition, New Hampshire already tried to escape its obligations at the motion to dismiss phase and lost on this issue (see 108 Ad3d 463, 466 ["Contrary to plaintiffs' view, the payment to the CME is not a third-party loss for which MF Global is liable, but rather a direct loss to MF Global under the bonds"]).

Moreover, on March 17, 2022, the Appellate Division, First Department already held New Hampshire's excess policy must respond to the underlying loss and dismissed all of New Hampshire's affirmative defenses. Thus, the Appellate Division, First Department has already TWICE determined that New Hampshire's excess policy should cover MF Global's direct

loss. New Hampshire's renewed argument as it relates to prejudgment interest contradicts these holdings.¹

Further, New Hampshire's attempt to characterize its excess policy as a claims made policy flies in the face of the excess policy's language that expressly states "in no event shall this policy provide coverage BROADER than that provided by the Followed Policy" (EDOC 647 § 1 [b]) As the primary policy, as just explained, is not a claims made policy, then neither can the excess policy be a claims made policy because that would be broader than the coverage the "Followed Policy" offers.

Rather, contrary to New Hampshire's position, section IV of the excess policy entitled "underlying limits" only describes the insured's obligation to maintain underlying limits. It does not relieve New Hampshire of the obligation to pay prejudgment interest from the date it should have covered the loss, i.e., a reasonable time after the date the insured paid. That date is July 6, 2008 (see *supra*, see also *Quellos Group LLC v Federal Ins Co.*, 177 Wash App. 620, 638-39 [Wash Ct. App. 2013] [court differentiated between AISLIC policy that allowed the insured to pay off the underlying limits in order to trigger coverage on an excess level compared to other excess policies that allowed exhaustion only after the primary insurer paid the policy limit and applied all policy language as written]).

a. AXIS

Unlike New Hampshire, there is nothing in the record like to suggest that Axis did anything other than sign onto the Liberty excess policy. Therefore, Axis has the benefit of the

¹ New Hampshire's excess policy does employ "claims made" language: "The coverage of this policy is limited generally to liability for only those claims that are first made against the insureds during the policy period" but, as stated above, the First Department has already ruled this policy must respond to the underlying loss.

language in the Liberty policy and its excess policy is not triggered until the insurers are “held liable” which is undisputedly March 17, 2022.

5. Effect of the Bankruptcy Stay

The insurers want a carve out from the accrual of interest for the 870 days this case was stayed in state court because of plaintiff’s bankruptcy. The parties throw the blame for the delay at each other. Blame is irrelevant. There is simply no provision for culling out the accrual of prejudgment interest for delay once a party recovers.

Friedman v Eisenstein, 263 AD2d 367 (1st Dep’t 1999) is directly on point:

“By statute, in an action for breach of contract, ‘[i]nterest’ shall be recovered’ and ‘shall be computed from the earliest ascertainable date the cause of action existed’ the statute making no provision for any delay in the action attributable to the plaintiff.”

Given the existence of Appellate Division, First Department authority directly on point, the out-of-state cases defendants cite are therefore irrelevant. CPLR 5001, the applicable statute, simply does not have a provision for delay like the statutes in other states do. Moreover, to start nit picking about which side caused delay at any particular juncture over the course of a 14-year case is unworkable.

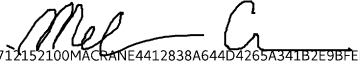
Accordingly, it is

Ordered that the motion of MF Global for an entry of judgment with prejudgment interest is granted in part; and it is further

Ordered that MF Global is directed to prepare a proposed judgment within 20 days from the efiled date of this decision and order that comports with the parameters the court has set forth herein; and it is further

Ordered that there shall be no further motion practice whatsoever without prior conference with the court; and it is further

Ordered that the clerk is directed to mark this case disposed (finally).


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<u>7/12/2022</u> DATE		<u>MELISSA CRANE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE