Employers Ins. Co. of Wausau v Dominion Ins. Receivable LLC
2023 NY Slip Op 32097(U)
June 21, 2023
Supreme Court, New York County
Docket Number: Index No. 653628/2022
Judge: Margaret Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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EMPLOYERS INSURANCE COMPANY OF WAUSAU

Petitioner,

- v -

DOMINION INSURANCE RECEIVABLE LLC,

Respondent.

INDEX NO. 653628/2022

MOTION DATE 10/03/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 25, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - DECLARATORY

This petition involves the arbitrability of a dispute between the parties over reinsurance receivables. Employers Insurance Company of Wausau (Petitioner) petitions the court pursuant to CPLR 7503 (c) for an order to stay the arbitration initiated by Dominion Insurance Receivable LLC (Respondent) and to declare that the dispute is subject to this court's exclusive jurisdiction. Petitioner also seeks declaratory judgment as to the merits and the statute of limitations. Respondent opposes the petition and cross-moves to compel Petitioner to arbitrate.

Background

During the 1970s, Petitioner and non-party Dominion Insurance Company (Dominion) entered into retrocessional reinsurance agreements under which Petitioner agreed to reinsure Dominion for certain risks that Dominion had assumed (NYSCEF # 1 – Petition, ¶ 12; NYSCEF # 6 – the Retrocessional Agreements). Then, in August of 1986, this court placed Dominion in liquidation and appointed a liquidator to take possession of Dominion's property (NYSCEF # 7 – Order of Liquidation at 3). Petitioner indicates that it submitted a claim to the Liquidator, identifying amounts Dominion owed it (NYSCEF # 1, ¶'s 19-20; NYSCEF # 8 – 1999 Proof of Claim). Petitioner notes that the Liquidator petitioned this court to approve certain creditors' claims against Dominion's estate, including Petitioner's claims (NYSCEF # 1, ¶ 21). Petitioner explains that the Liquidator netted out amounts Petitioner owed Dominion to calculate the gross amount of Petitioner's claims (*id.*, ¶ 23). This court approved the Liquidator's petition on January 22, 2001 (*id.*, ¶ 25).

Meanwhile, in July of 2002, the Liquidator and Respondent entered into an agreement by which the Liquidator assigned certain claims due to Dominion to Respondent in exchange for $3.55 million (*id.*, ¶ 27; NYSCEF # 12 – the Assignment Agreement). In October of 2002, this court approved the Assignment Agreement upon the Liquidator's petition (NYSCEF # 1, ¶'s 33-36; NYSCEF # 14 – Court Order No. 60). The Assignment Agreement defined the claims assigned to Respondent to mean "all reinsurance recoverables due to Dominion which have not been collected as of March 31, 2001 and which are listed on Schedule A attached hereto" (NYSCEF # 12 at 1).

It is undisputed that Petitioner was not listed on that schedule (NYSCEF # 40 at 17; NYSCEF # 43, ¶ 5). The substance of the underlying dispute between the parties is Respondent's allegation that Petitioner should have been on that schedule and therefore owes Respondent nearly $1.5 million (NYSCEF # 40 at 17). Respondent avers that the omission is due to the Liquidator's oversight and Petitioner's misrepresentations, which improperly resulted in Petitioner appearing to be a net creditor instead of a net debtor (NYSCEF # 40 at 17-18; NYSCEF # 44, ¶'s 3-12). Conversely, Petitioner maintains that its omission from the schedule "was entirely consistent with the allowance and offset decisions made by the Liquidator and approved by" this court (NYSCEF # 43, ¶ 18).

The Retrocessional Agreements mandated that "irreconcilable difference of opinion . . . as to the interpretation of this Agreement . . . shall be submitted to arbitration" (NYSCEF # 6, Articles 17). Respondent asserts that, although it was not originally party to such agreements, it "succeeded to the rights of [Dominion] by operation of the assignment" (NYSCEF # 40 at 7). Petitioner disagrees that such rights were assigned (NYSCEF # 43, ¶ 5). Petitioner notes that the Assignment Agreement conditioned its effectiveness on this court, *inter alia*, ratifying the agreement and providing that this court "shall retain exclusive jurisdiction with respect to future matters involving the collection of Recoverables by the Assignee [Respondent] from any reinsurer" (*id.*, ¶ 25 citing NYSCEF # 12 at 5, § F). Acknowledging that the court did not provide for such exclusive jurisdiction in its order approving the Assignment Agreement, Petitioner nonetheless posits that this court has exclusive jurisdiction (NYSCEF # 43 at 12, n 3).

On April 13, 2022, Respondent sent an arbitration demand to Petitioner, seeking award for the amounts allegedly owed to Dominion under the Retrocessional Agreements (NYSCEF # 1, ¶'s 37-38 citing NYSCEF # 15). On May 22, 2022, Petitioner replied by a letter, in which it, among other things, "fully reserves and non-waives all of its rights with respect to the claims made and relief sought by [Respondent] through its demand" (NYSCEF # 1, ¶'s 41-43 citing NYSCEF # 14). On June 10, 2022, Petitioner sent another letter, repeating the above reservation and noting that Respondent's "arbitration demand involves a number of separate reinsurance contracts; each with its own arbitration agreement. It is not clear whether [Respondent's] demand envisions a separate arbitration for each reinsurance contract or a consolidated proceeding including all of the identified

reinsurance contracts. . . . If [Respondent's] intention is for a single proceeding, then we believe the appropriate course is for the parties to enter into a mutually acceptable consolidation agreement. Our proposal for such an agreement is attached" (NYSCEF # 17 at 2).

In the same letter, Petitioner requested Respondent provide proof of qualifications of the arbitrator appointed by Respondent (*id.*). Additionally, Petitioner informed Respondent that subject to its reservations concerning the issue of consolidation it "provisionally appointed . . . its party-appointed arbitrator" (NYSCEF # 17 at 2). The arbitration clauses in the Retrocessional Agreements provide for each side to appoint one arbitrator, and the two arbitrators to then select an additional arbiter to serve as umpire (NYSCEF # 6 at Articles 17). Petitioner notes that its deadline for arbitrator appointment had almost been reached, so it "avoided application of the arbitration clauses' allowing [Respondent] to appoint an arbitrator for [Petitioner] by provisionally appointing an arbitrator, subject to a full reservation and non-waiver of its rights" (NYSCEF # 1, ¶ 44).

The parties exchanged letters as to the merits of the receivables dispute through August 2022, at which time Petitioner "discovered the provision of the Assignment Agreement conditioning its effectiveness upon the Court retaining exclusive jurisdiction" (*id.*, ¶'s 46-52). On September 2, 2022, Petitioner notified Respondent of this understanding and sought Respondent's withdrawal of the arbitration demand (*id.*, ¶ 53). Respondent did not withdraw the demand, but it did agree on September 8, 2022 to stay arbitration pending the final resolution of Respondent's then-forthcoming petition, which agreement the parties reduced to a signed writing dated September 12, 2023 (*id.*, ¶'s 56-57; NYSCEF # 22 – Standstill Agreement). On October 3, 2022, Petitioner filed the present petition, which, in addition to seeking to stay the arbitration proceeding, also seeks declaratory relief that Respondent has no entitlement to any of the receivables, including because of the statute of limitations (NYSCEF # 1, ¶'s 78-95). Respondent filed a cross-motion to compel arbitration.

In support of its cross-motion, Respondent argues that arbitration of this dispute is mandated by the Retrocessional Agreements, that the issue of proper forum should be resolved in arbitration, and that the Assignment Agreement's exclusive jurisdiction provision is inapplicable as Petitioner is not a party to that agreement.[1] Respondent also contends that Petitioner waived its right to object to arbitration by appointing an arbitrator and by drafting an agreement for consolidation of arbitration setting forth proposed rules for the arbitration (NYSCEF # 39 – Draft Consolidation Agreement). As to Petitioner's final counts for declaratory relief, Respondent disagrees on the merits and, as to the statute of

[1] Respondent also states: "at first instance, it is the province of the arbitrators to determine whether the treaties or Assignment Agreement takes precedence in the determination of the proper forum" (NYSCEF # 40 at 9).

limitations argument, posits that this defense was both waived and is properly to be decided in arbitration.

Petitioner counters that, including on account of the exclusive jurisdiction language in the Assignment Agreement, this court should determine the existence and enforceability of an agreement to arbitrate, which Petitioner asserts is lacking. Petitioner posits that it timely brought the present action and denies that it waived its rights to object to arbitration or alternatively it contends that it withdrew any waiver. Petitioner adds that an arbitration panel would have no authority over the prior decisions of the Liquidator. And as for the statute of limitations, Petitioner posits that that is sufficient grounds to dismiss Respondent's claim with prejudice.

In reply, Respondent "agrees, in principle, to the finality of the decisions of the liquidator" except to the extent of Petitioner's fraud or misrepresentations,[2] which Respondent asserts occurred as to offsetting of debits and credits to create the Assignment Agreement's Schedule A (NYSCEF # 44, ¶ 3). Respondent rejects Petitioner's assertion that it reserved the right to contest arbitration, stating that the "reservation was limited to 'claims made and relief' sought, i.e., damages" (*id.*, ¶ 16). And Respondent reiterates Petitioner's participation in arbitration, denies any withdrawal of Petitioner's waiver, and echoes its assertion that the statute of limitations is inapplicable.

Discussion

"[P]arties to a commercial transaction will generally not be compelled to arbitrate in the absence of an express, unequivocal agreement to that effect. . . nevertheless, a party otherwise entitled to a judicial determination of the arbitrability of a dispute may waive that right by actively participating in the arbitration without seeking a stay pursuant to CPLR 7503 (b) or otherwise preserving their right to have the issue of arbitrability judicially determined" (*Smullyan v SIBJET S.A.*, 201 AD2d 335, 335-36 [1st Dept 1994]; *see also* CPLR 7503 (b) [providing that "a party who has not participated in the arbitration . . . may apply to stay arbitration on the ground that a valid agreement was not made"]; *Matter of Kidder, Peabody & Co. Inc. v Marvin*, 161 Misc 2d 12, 16 [Sup Ct 1994] [collecting cases]).

Petitioner's application to stay the arbitration is denied and Respondent's cross-motion to compel arbitration is granted. The court need not determine whether a valid agreement to arbitrate here exists because of Petitioner's participation in the arbitrator selection process (*In re N. Riv. Ins. Co.*, 291 AD2d 230, 233 [1st Dept 2002] ["participation in the arbitration, i.e., by selecting an arbitrator, waives any objection that there was no agreement to arbitrate as a ground for vacating an award"]). Petitioner fails to explain why its string citation of

[2] On this point, Petitioner writes a letter requesting oral argument or the right to submit a sur-reply, contending that Respondent improperly raises the fraud argument for the first time in reply (NYSCEF # 48). Respondent responds to deny the charge and to argue that Petitioner's letter should be ignored (NYSCEF # 49).

cases going to general principles of waiver all outside the context of arbitration, apply to contravene the well settled law as to participation (NYSCEF # 43, ¶'s 38, 40). Against Petitioner's argument – that even if there were a waiver, it "withdrew that waiver when it filed this action" – there are countless cases compelling arbitration where the requisite level of participation has already occurred, not to mention the clear statutory text of CPLR 7503 (b) (NYSCEF # 43, ¶ 40).

Petitioner's argument that its "provisional" selection of an arbitrator did not reach the level of participation that would trigger a waiver is without merit (NYSCEF # 43 at 19 n 4). Petitioner's selection in its June 10, 2022 letter was only provisional as to Respondent's agreement regarding consolidating arbitration under the Retrocessional Agreements into one arbitration proceeding (NYSCEF # 17 at 2). And Petitioner shared along with its June letter its proposal for a proposed consolidation agreement, which itself states that Petitioner "appointed . . . its party-appointed arbitrator on June 10, 2022" (NYSCEF # 39, § 4). These actions of Petitioner are inconsistent with its present claims that it did not participate in arbitration (*compare Trafelet v Cipolla & Co., LLC*, 62 Misc 3d 1205(A) [Sup Ct 2019], *affd*, 190 AD3d 573 [1st Dept 2021] ["as long as a party's actions are consistent with the right to litigate arbitrability, there is no waiver"] [citation omitted]).

Petitioner cites no case law to support the argument that waiver can be avoided by framing its actions as being simply "to protect its interests" from the anticipated claim that it had failed timely to appoint its arbitrator (NYSCEF # 43 at 19, n 4; *compare* NYSCEF # 19 at 3 – Petitioner's Letter of July 21, 2022 [in response to Respondent's offer to extend arbitrator selection deadline, Petitioner wrote: ". . . we appreciate [Respondent's] proposal to extend the deadline for the appointment of [Petitioner's] arbitrator to July 31, 2022, but [Petitioner] appointed . . . its arbitrator via its letter of June 10, 2022. Thus, the appointment extension isn't needed"]). At any rate, Petitioner's characterization of its appointment is inconsistent with its June letter indicating that if there is no prompt resolution "the party-appointed arbitrators can proceed with umpire selection after the qualification and consolidation issues are addressed" (NYSCEF # 17 at 2).

Petitioner argues that any claim that it participated "is illusory where the arbitrators never discussed appointment of, let alone selected, an umpire." This argument is without merit. Petitioner's reliance on *Trafelet* misses the point because that court expressly held that selecting the arbitrator is one of the actions that constitute participation (NYSCEF # 43 at 19, n 4, citing 62 Misc 3d 1205(A) at *6). (*see ROM Reins. Mgt. Co., Inc. v Cont. Ins. Co., Inc.*, 128 AD3d 570 [1st Dept 2015] [finding that as petitioners participated in the arbitrator selection process, they waived their ability to have the court determine the statute of limitation issue]).

Petitioner's reliance on its May 2022 letter stating that it "fully reserves and non-waives all of its rights with respect to the claims made and relief sought by DIR through its demand" is unavailing (NYSCEF # 43, ¶ 37). Petitioner's reservation as

to the merits of the claim therein did not mention its present objection to arbitration being the proper forum. Petitioner is mistaken in suggesting that "[i]t is difficult to imagine a clearer expression of an intent not to waive and expressly preserve [Petitioner's] rights and objections to the demand" (NYSCEF # 43, ¶ 39). Rather, it is easy to imagine a reservation of rights explicitly disputing the arbitrability of the dispute and expressing the intention to seek a stay.

Petitioner fails to identify where Respondent allegedly raised a CPLR 7503 (c) timeliness objection to this petition (NYSCEF # 43, ¶ 33). In any event, Respondent accepts that this petition is timely given the lack in the arbitration demand to include the statutory language (NYSCEF # 44, ¶ 14). Made timely by the failure of the one seeking arbitration to include the statutory language, an objection that is without merit is still unavailing, however (*see e.g. Morfopoulos v Lundquist*, 191 AD2d 197, 198 [1st Dept 1993] ["waiver" due to participating in arbitration "is not affected by the defect in respondent's demand for arbitration in not stating, as required by CPLR 7503 (c), that a failure to apply for a stay within twenty days would preclude an objection that a valid agreement to arbitrate was not made"]).

Given this finding, it follows that this court denies Petitioner's petition for declaratory judgment regarding the Assignment Agreement's exclusive jurisdiction clause. Petitioner baldly argues that a forum selection clause can support a stay of arbitration even after a movant's participation in such arbitration. Petitioner relies on case law holding that liquidators cannot be compelled to arbitrate (NYSCEF # 43, ¶ 24). The liquidator case is inapplicable to this action where the Liquidator is not party to the arbitration (*see e.g. B.D. Cooke & Partners Ltd. v Certain Underwriters at Lloyd's, London*, 606 F Supp 2d 420, 425 [SDNY 2009] [noting the distinction between liquidators and private parties, finding that the "inability to compel [a] liquidator to arbitrate . . . does not imply an inability to compel" the plaintiff therein to arbitrate]). Petitioner's explanation that the arbitration is eschewed in matters relating to the liquidation of insurance companies involves the interests of "creditors, policyholders, stockholders and the public" is inapposite (NYSCEF # 43, ¶ 24; *see B.D. Cooke* at 425 [as "the liquidator is different," plaintiff "not acting as a fiduciary or protecting the interests of the public" may be compelled to arbitrate]).

It also follows that Petitioner's request for declaratory relief respecting the applicability of the statute of limitations and the merits of Respondent's claim for receivables are questions reserved for the arbitration proceeding. Where a petitioner participates in the arbitration selection process, they are "precluded from seeking a stay on statute of limitations grounds. . . . Although petitioners have waived their ability to have the courts determine the statute of limitations issue, the issue may be determined by the arbitrators" (*ROM Reins. Mgt.*, 128 AD3d at 570). And "having found that the disputes are arbitrable, 'the court's inquiry is ended' " (*In re Wiederspiel (Carstens)*, 36 AD3d 971, 974 [3d Dept 2007] quoting *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]; *Matter of Nationwide* at 95 ["The ultimate disposition of the merits is of

course reserved for the arbitrators and the courts are expressly prohibited from considering 'whether the claim with respect to which arbitration is sought is tenable, or otherwise pass[ing] upon the merits of the dispute' "] [quoting CPLR 7501]). Because, to render this decision, the court need not consider the merits, or otherwise reach the argument that Petitioner asserts that Respondent improperly raises for the first time in reply, the court denies Petitioner's request for a sur-reply (NYSCEF # 48).

Conclusion

In light of the foregoing, it is

ORDERED that the petition of petitioner Employer Insurance Company of Wausau seeking to stay the arbitration initiated by respondent Dominion Insurance Receivable LLC is denied; and it is further

ORDERED that the petition of Petitioner seeking various declaratory judgments is denied; and it is further

ORDERED that Respondent's cross-motion to compel the arbitration initiated by the demand for arbitration of April 13, 2022 is granted and Petitioner and Respondent shall proceed with such arbitration; and it is further

ORDERED that the special proceeding in this action is hereby stayed pursuant to CPLR 7503 (a) pending completion of the arbitration; and it is further

ORDERED that the parties advise this court of any order in the arbitration affecting this case as well as when the arbitration is completed or if this dispute is otherwise resolved.

06/21/2023
DATE

MARGARET CHAN, J.S.C.

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