

**HBC US Holdings LLC v Endurance Am. Specialty
Ins. Co.**

2023 NY Slip Op 33364(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 650484/2023

Judge: J. Machelles Sweeting

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

HBC US HOLDINGS LLC

Petitioner,

- v -

ENDURANCE AMERICAN SPECIALTY INSURANCE
COMPANY,

Respondent.

-----X

INDEX NO. 650484/2023

MOTION DATE 02/07/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

In the underlying proceeding, petitioner HBC US Holdings LLC (“petitioner”) seeks for the court to appoint a neutral Umpire to resolve the business interruption claim and dispute between petitioner and respondent Endurance American Specialty Insurance Company (“Specialty”).

Pending now before the court is a motion in which respondent Specialty seeks to dismiss this proceeding for insufficient service, pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a)(8) and 403(b).

Arguments Made by the Parties

Specialty argues that petitioner’s original petition (NYSCEF Doc. Nos. 1 and 2) (the “original petition”) is defective as against ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, because petitioner erroneously identified the respondent as “Endurance American

Insurance Company.” Petitioner then filed and served an amended petition (NYSCEF Doc. No. 13) (the “amended petition”) that properly identified Specialty as the respondent, but such service was faulty because the amended petition was not timely served. Specialty further argues that petitioner also failed to file with the court proof of proper service, as required by Insurance Law 1213. Therefore, Specialty argues, this proceeding must be dismissed for lack of service, because neither the original petition nor the amended petition were properly served on Specialty.

In opposition, petitioner argues, first, that service of the original petition was effectuated through the Superintendent of the Department of Financial Services (“DFS”), and it was DFS, a governmental entity, that mistakenly named “Endurance American Insurance Company” as the respondent. Petitioner argues, second, that even if DFS named the incorrect respondent, DFS forwarded the original petition to Specialty, which means Specialty actually received timely notice that this proceeding had been commenced. Petitioner argues, third, that the requirements set forth in Insurance Law 1213 were overridden by the “Service of Suit Endorsement” contained in the insurance policy issued by Specialty. Petitioner argues, fourth, that in any event, any defect related to the original petition was cured by the amended petition, which was timely filed before Specialty served any Answer regarding the original petition, and that such amended petition was not served via DFS, but was directly served on Specialty’s office. Petitioner argues, fifth, that even if the court were to find that service was not properly effectuated, the court should extend the time for service pursuant to CPLR 306-b.

Petitioner and Specialty also disagree as to the date on which the amended petition was personally served on Specialty’s office. Petitioner submitted an Affidavit of Service (NYSCEF Doc. No. 24) and a sworn Affidavit (NYSCEF Doc. No. 32) from professional process server Jacqueline Villanueva that states that she effectuated service on February 15, 2023. In contrast,

Specialty submitted a sworn Affidavit (NYSCEF Doc. No. 28) from Specialty employee Genise Bryant, that states that the service of process actually took place on February 22, 2023 (not February 15, 2023).

Conclusions of Law

Upon consideration of the full record in this case, Specialty's application to dismiss this proceeding is denied.

First, the Appellate Division, First Department has repeatedly held:

[t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues . . .

38 Holding Corp. v. New York, 179 A.D.2d 486 (App. Div. 1st Dept. 1992); *See also* Gluck v. McDonough, 139 A.D.3d 628 (2016) (referencing that “strong public policy favors resolving cases on the merits”) and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (2010) (“Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits”). Here, Specialty does not dispute the substantive issue in the underlying petition, namely that there is a valid insurance policy in place, and a dispute exists that requires court intervention for the appointment of an Umpire for an arbitration. Further, Specialty has actively participated towards the resolution of the underlying petition, including, *inter alia*, participating in a conference with the undersigned on September 26, 2023, and filing letters to the court (NYSCEF Doc. Nos. 37, 39) setting forth the names of proposed neutrals.

Second, there is no prejudice to Specialty if the court were to move forward with this proceeding, as it is undisputed that Specialty has actual notice of this proceeding, and there are no issues regarding statutes of limitations or other deadlines that would prevent petitioner from simply

filing again. Specialty itself argues that petitioner has the option to “file a separate proceeding under a new index number.”

Finally, while Specialty challenges the date of service in this case, the documents submitted by petitioner’s process server were time and date stamped by a computer and notarized by a notary public the following day (on February 16, 2023). To the extent that there exists a dispute as to the date of service and not service itself, dismissal on this ground is denied.¹


Conclusion

For the reasons stated above, it is hereby:

ORDERED that Specialty’s motion to dismiss is **DENIED**; and it is further

ORDERED that Specialty is deemed to have actual notice of this proceeding; and it is further

ORDERED that pursuant to the conference held before the undersigned on September 26, 2023, the parties shall exchange by October 6, 2023 the names of proposed neutrals and submit to the court by 5:00 p.m. on October 11, 2023 an agreed upon name, or the reasons for objecting to the same.

<p>9/27/2023</p> <hr/> <p>DATE</p>		 <hr/> <p>J. MACHELLE SWEETING, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<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

¹ This court notes that neither party has requested a traverse hearing which, under these circumstances, would not benefit either party but, rather, cause delay.