

**Shipyard Quarters Marina, LLC v New Hampshire
Ins. Co.**

2016 NY Slip Op 30903(U)

May 17, 2016

Supreme Court, New York County

Docket Number: 651854/2015

Judge: Jeffrey K. Oing

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SHIPYARD QUARTERS MARINA, LLC and
MARTIN OLINER,

Plaintiffs,

-against-

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant.

Index No. : 651854/2015

Mtn Seq. No. 001

DECISION AND ORDER

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In this breach of contract action, defendant New Hampshire Insurance Company ("NHIC" or "defendant") moves, pursuant to CPLR 327(a), to dismiss the action on the ground of forum non conveniens.

Factual Background

At the time plaintiffs filed this complaint, plaintiff Shipyard Quarters Marina, LLC ("Shipyard") identified itself as a Massachusetts limited liability company with its principle place of business located in Charlestown, Massachusetts (Klein Affirm., Ex. A [Complaint], ¶ 7). After defendant moved to dismiss, Shipyard joined plaintiff Martin Oliner ("Oliner"), Shipyard's manager, as a party when it amended the complaint on September 10, 2015.

The amended complaint alleges that Oliner is a resident of Nassau County, New York and it also alleges that, although Shipyard is a Massachusetts limited liability company, its management offices have been located in New York since September 2014 or earlier (Lash Affirm., Ex. A [Amended Complaint], ¶ 7).

In this action, Shipyard and Oliner (together, "plaintiffs") seek recovery under three separate insurance policies issued by defendant that allegedly provided coverage for Shipyard Quarters Marina ("Marina"), a marina owned by Shipyard that was located in Charlestown, Massachusetts (Amended Complaint, ¶¶ 11, 12).

The Underlying Massachusetts Action

In August 2013, the Commonwealth of Massachusetts ("Commonwealth") commenced an action in the Massachusetts Superior Court, Suffolk County, entitled Commonwealth of Massachusetts v Shipyard Quarters Marina, LLC; LDA Pier 9 LLC; and Martin Oliner, individually, Civil Action No. 13-2774 (the "Massachusetts action") (Amended Complaint, ¶ 13).

In that action, the Commonwealth alleged that the Marina was in disrepair, that many of the pilings that held the floating dock system were deteriorated, and that the Marina was causing injury and public nuisance to Boston Harbor and the surrounding area. The Commonwealth also alleged that plaintiffs were liable for attempting to wrongfully evict licensees at the Marina and for false and misleading advertising (Id., ¶¶ 18-21).

This Litigation

Plaintiffs allege that they provided NHIC with timely notice of the Massachusetts action and demanded a defense and indemnification (Id., ¶ 23). Plaintiffs also allege that when they first submitted their claim to NHIC the insurance company

disclaimed coverage (Id., ¶ 24). Thereafter, NHIC conditionally agreed to provide coverage pursuant to a reservation of rights letter wherein NHIC acknowledged the "potential for coverage under the policies" and it agreed to reimburse Shipyard and Oliner for the costs of their defense (Id., ¶ 26; Kim Affirm., Ex. C to Ex. J).

Shipyard and Oliner allege that despite the reservation of rights letter NHIC did not fully reimburse plaintiffs for the cost of their defense and that NHIC provided no indemnification (Id., ¶ 27). Plaintiffs also allege that NHIC refused to reimburse them for the costs to repair the Marina even though they were entitled to coverage for such repairs (Id., ¶¶ 34-35).

The Amended Complaint asserts a cause of action for breach of contract on the ground that plaintiffs are entitled to reimbursement for the cost the costs of defense and indemnification in connection with the underlying Massachusetts action, and that they are also entitled to reimbursement for the cost of repairs to the Marina and lost income while the repairs were being made (Id., ¶¶ 42-46).

Contentions

Defendant argues that this action should be dismissed on the ground of forum non conveniens because New York does not have a substantial nexus to plaintiffs' cause of action and because Massachusetts, a more appropriate forum, is available. In that

regard, it argues that the following factors militate in favor of dismissal: 1) at the time of the events that form the basis of this lawsuit, Shipyard was a Massachusetts limited liability company with its principal place of business in Massachusetts; 2) the action seeks insurance coverage related to a lawsuit filed in Massachusetts; 3) the insurance policies concern property located in Massachusetts; 4) the underlying lawsuit involves witnesses and evidence located in Massachusetts and that such testimony and evidence will be dispositive in determining the coverage issues in this lawsuit; and 5) this lawsuit will likely require the application and interpretation of Massachusetts law.

Plaintiffs, however, contend that dismissal on forum non conveniens grounds is not necessary because: a) all of the parties are now located and/or reside in New York, b) the insurance policies were solicited in New York, from a New York broker, issued by a New York insurer, and delivered in New York; c) the documents relating to the Massachusetts action are located in New York or are in the custody and control of New York residents, and d) a majority of plaintiffs' witnesses are located in New York.

Discussion

The doctrine of forum non conveniens, as codified under CPLR 327(a),¹ permits a court to dismiss an action "where it is

¹CPLR 327(a) provides:

determined that the action, though jurisdictionally sound, would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984]). The doctrine rests on considerations of justice, fairness and convenience (Id. at 479). The party seeking to dismiss a complaint on forum non conveniens grounds bears the burden of demonstrating the "relevant private or public interest factors which militate against accepting the litigation" (Stravalle v Land Cargo, Inc., 39 AD3d 735, 736 [2d Dept 2007]). When making the determination regarding dismissal pursuant to CPLR 327(a), a court must weigh and balance a number of factors, including: (1) the burden on New York courts; (2) potential hardship to the parties; (3) the availability of an alternative forum; (4) the parties' residency; (5) the location of the events on which the action is based; (6) whether the law of a foreign jurisdiction is applicable; and (7) the location of potential witnesses and evidence (Islamic Republic of Iran, 62 NY2d at 478-480, supra; Rosenberg v Stikeman Elliott, LLP, 44 AD3d 840, 841 [2d Dept 2007]; Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A., 26 AD3d 286, 287 [1st Dept 2006]).

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

In Avnet, Inc. v Aetna Cas. & Sur. Co. (160 AD2d 463, 464 [1st Dept 1990]), which was an insurance coverage dispute, the Court granted a motion to dismiss on forum non conveniens grounds noting that because of the site-specific nature of the dispute, and witnesses and foreign laws would be relied upon to settle the dispute the mere fact that policies were delivered in New York did not automatically make New York the most convenient forum (see also Marochnik v Pfizer, Inc., 29 Misc 3d 1232[A], 2008 NY Slip Op 52722[U] [Sup Ct, NY County 2008] *6 [witnesses beyond New York's subpoena power significant factor in determining forum non conveniens]).

Moreover, in Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co. (49 AD3d 276, 277 [1st Dept 2008]), the First Department granted dismissal on forum non conveniens grounds in an insurance coverage dispute involving a chemical reactor located in Canada. In that case, the Court considered, inter alia, "the site of the loss, the location of records and files, the number of witnesses in Canada and in locations other than New York" in making its determination that dismissal was warranted.

Here, the complaint requires this Court to determine whether defendant breached its obligations, under the insurance contracts, to defend and indemnify plaintiffs in the underlying Massachusetts action and/or whether it breached its obligation to pay for repairs to the Marina that allegedly became necessary as the result of tides or waves. The allegations in the complaint

regarding defendant's alleged failure to defend and indemnify plaintiffs are inextricably tied to the issues, evidence, and the court's ruling in the underlying Massachusetts action. That action, and by extension, this matter, involve: 1) a Massachusetts limited liability company which was a Massachusetts resident when the relevant policy was issued;² 2) a Marina located in Charlestown, Massachusetts; and 3) experts, witnesses and evidence located in Massachusetts.

Further, and critically important, the events leading up to plaintiffs' claim all occurred in Massachusetts and this coverage action will require review of the facts related to plaintiffs' claims for coverage -- including the condition of the Massachusetts Marina, the cause of the Marina's deterioration, and the rulings in the underlying Massachusetts action. The fact that defendant is a New York corporation and that the policies were delivered in New York does not outweigh these facts (see Century Indem. Co. v Liberty Mut. Ins. Co., 107 AD3d 421, 423-424 [1st Dept 2013]). As such, these factors weigh heavily in favor of dismissal pursuant to CPLR 327(a) -- this coverage dispute must be heard in Massachusetts.

² Dismissal on forum non conveniens grounds will be granted even where plaintiffs are New York residents (see Gozzo v First Am. Tit. Ins. Co., 75 AD3d 953, 954 [3rd Dept 2010] ["a party's New York residency does not preclude dismissal ... where ... there is no substantial nexus between this state and the cause of action"]; Troni v Banco Popolare Di Milano, 129 AD2d 502, 503 [1st Dept 1987]).

Moreover, Massachusetts law will govern the resolution of this dispute because the subject insurance policies were delivered to a Massachusetts insured, they involve property located in Massachusetts, and the claims under the policy involve damage to that Massachusetts property (see Certain Underwriters at Lloyd's, London v Foster Wheeler Corp., 36 AD3d 17, 21-22 [1st Dept 2006], aff'd 9 NY3d 928 [2007] [Generally, a contract of liability insurance is governed by the law of the state that is "the principal location of the insured risk"]; Meritum Corp. v Lawyers Tit. Ins. Co., 88 AD2d 828, 829 [1st Dept 1982], aff'd 57 NY2d 765 [1982] ["(t)he availability of the proof and the witnesses in Florida, the fact that it is the site both of the property and the transaction, and that Florida law is required to be applied, outweigh the slight inconvenience caused to a New York corporation in compelling it to invoke the jurisdiction of the Florida courts"]).

Plaintiffs' reliance on Sweeney v Hertz Corp., 250 AD2d 385 (1st Dept 1998), Aon Risk Servs., Northeast v Cusack, 34 Misc 3d 1234[A] (Sup Ct, NY County 2012) and Hong Leong Fin. Ltd. (Singapore) v Morgan Stanley, 44 Misc 3d 1231[A] (Sup Ct, NY County 2014), aff'd 131 AD3d 418 (1st Dept 2015), for the proposition that New York is the most convenient forum is misplaced. Unlike the facts herein, in all those cases the triggering occurrence and/or material events occurred in New York.

Although plaintiffs correctly note that this action focuses on the scope of the insurance policies that defendant issued, the question of whether plaintiffs' claims fall within the scope of the policies is critical to the resolution of this action. In that regard, the determination of whether defendant is liable under those policies to defend and indemnify plaintiffs and/or pay for repairs to the Marina will require an in-depth analysis of the evidence and testimony in the underlying Massachusetts action, and testimony and evidence regarding Shipyard's actions and/or inactions in maintaining property located in Massachusetts.

Accordingly, it is

ORDERED that defendant's, New Hampshire Insurance Company, motion to dismiss this action on the ground that New York is an inconvenient forum is granted on condition that defendant stipulate to accept service of process and stipulate to waive the defense of statute of limitations in the event that plaintiffs commence this action in Massachusetts; and it is further

ORDERED that within 30 days from service of a copy of this order with notice of entry defendant shall file proof of compliance with the above conditions with the Clerk of the Part and with the County Clerk (Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiffs; and it is further

Index No. 651854/2015
Mtn Seq. No. 001

Page 10 of 10

ORDERED that upon the timely filing of the foregoing the County Clerk is respectfully directed to enter judgment dismissing the action without prejudice; and it is further

ORDERED that in the event of non-compliance counsel are directed to telephone Part 48 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/17/16



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.