11/13/12

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMERISURE MUTUAL INSURANCE COMPANY, and AMERISURE INSURANCE COMPANY,	)	
Plaintiffs,	)	**No. 10 L 012665**
v.	)	**Calendar Y**
GLOBAL REINSURANCE CORPORATION OF AMERICA, f/k/a GERLING GLOBAL REINSURANCE COMPANY OF AMERICA,	)	**Judge Ronald Bartkowicz**
Defendant.	)	

ORDER

Plaintiffs Amerisure Mutual Insurance Company and Amerisure Insurance Company (collectively "Amerisure") filed suit against Defendant Global Reinsurance Corporation of America f/k/a Gerling Global Reinsurance Company of America ("Global") alleging that Global committed an unreasonable and vexatious delay in processing its reinsurance claim. In its one count complaint, Amerisure seeks an award of attorney's fees pursuant to 215 ILCS 5/155.

The present matter before the Court is in regards to this Court's previous Order directing both parties to submit supplemental briefs for a choice of law determination of "most significant contacts." To clarify, in its last Order, the Court stated in its analysis that there was not sufficient information to determine which state had the most significant contacts and invited the parties to submit supplemental briefs. The Court then inadvertently indicated that Defendant's Motion to Dismiss was denied, when in fact it was entered and continued. The parties then subsequently submitted supplemental briefs and therefore, the Court will make a determination on Defendant's 2-615 Motion to Dismiss. Accordingly, after a review, the Court finds that New York, as opposed to Illinois, has the most significant contacts. Therefore, New York law applies and the complaint is dismissed pursuant to 735 ILCS 5/2-615.

Background

The dispute between Amerisure and Global has been ongoing for years. Initially, the parties entered into a particular 'Umbrella Quota Share Reinsurance Agreement' in July 2001. That reinsurance policy concerned Amerisure insuring certain plumbing work performed on a

property located in Florida. Subsequent to the plumbing company making a claim, Amerisure filed a claim with Global and another reinsurer.

After Global disputed the underlying claim made by Amerisure, the parties entered into arbitration. By the agreement of the parties, the arbitration panel was held in Illinois and applied Illinois law. That panel determined that Global must pay Amerisure the underlying claim as well as attorneys' fees.

Amerisure filed an Application to Confirm Arbitration Award in the Circuit Court of Cook County. That Court confirmed the award as well as the attorneys' fees. Global appealed, and in *Amerisure Mutual Insurance Company v. Global Reinsurance Company of America*, the First District held that the arbitration panel exceeded its authority in awarding attorneys' fees and that the Circuit Court erred in confirming those fees. 399 Ill. App. 3d 610 (1st Dist. 2010). As a result, the Court vacated the attorneys' fees. *Id.*

Following the District Court's decision, Amerisure filed the instant complaint seeking an award of attorney's fees pursuant to 215 ILCS 5/155.

ANALYSIS

The matter to be decided is whether Illinois or New York law applies to the present dispute. Amerisure contends that Illinois has the "most significant contacts" with the dispute, that Illinois law applies, and that even if New York law applies, it can still recover attorneys' fees. Conversely, Global contends that Illinois does not have the "most significant contacts" with the dispute, that either New York or Michigan law applies, and that absent the application of Illinois law, Amerisure cannot recover attorneys' fees.

If an insurance policy has a definitive choice of law provision, then it clearly applies to the dispute. However, in the absence of such a provision, the general choice of law rules of the forum state clearly controls. *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 243 Ill. App. 3d 471, 485 (1st Dist. 1993).

Subject to constitutional limitations, the forum court applies the choice-of-law rules of its own state. Restatement (Second) of Conflict of Laws § 5, Comments a, b, at 9 (1971). Choice-of-law analysis begins by isolating the issue and defining the conflict. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155 (2007). A choice-of-law determination is required only when a difference in law will make a difference in the outcome. *Id.* at 156.

If the relevant laws of the two states yield essentially the same result regarding the issue in question, so that application of either law will produce the same result, there is no need to apply a choice-of-law analysis. *Wreglesworth v. Arctco, Inc.*, 316 Ill. App. 3d 1023, 1028 (2000). In the absence of a conflict in the relevant laws of the two states, the law of the forum state applies. That means that if a case is brought in Illinois, then Illinois law applies. *Gleim v. Roberts*, 2009 Ill. App. LEXIS 813 (1st Dist. Sept. 1, 2009).

If the application of one law produces an outcome different from the application of another, then an Illinois court will apply the "most significant contacts" test. *Costello v. Liberty Mut. Fire. Ins. Co.*, 376 Ill. App. 3d 235, 240-241 (1st Dist. 2007). Pursuant to this test, insurance policies are "governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to the contract, the place of performance, or other place bearing a rational relationship to the general contract." *Id.* quoting *Westchester Fire Ins. Co. v. G Heileman Brewing Co., Inc.*, 321 Ill. App. 3d 622, 629 (1st Dist. 2001). The factors considered under this approach should be "evaluated in light of the relevant policies of the forum and other interested States and those States' interest in the issue." *Diamond State Ins. Co.*, 243 Ill. App. 3d at 486.

Applying these principles to the present dispute, it is first necessary to determine whether the policy between Amerisure and Global contains a choice of law provision. If it does, then that provision clearly controls. However, if not, the Court must then move into a conflict analysis. If the Court determines that there is a conflict in outcomes between Illinois and New York law, it must then move on to a "most significant contacts" analysis. Finally, after determining which state has the "most significant contacts," the Court will apply that forum's law to the present dispute.

To begin, Article 24 of the Treaty is the only provision that touches upon any choice of law matter. Amerisure contends that this provision is a general choice of law provision that applies to not only arbitration, but related litigation as well. Additionally, Amerisure asserts that Global has repeatedly and continuously abided by this provision and agreed that Illinois law governs their contract.

This Court finds Amerisure's argument unpersuasive. The language of the policy clearly is limited to arbitration proceedings and Global's reliance on Illinois law has only been in response to those proceedings. There is not another provision that particularly addresses choice of law related to litigation matters. Furthermore, the First District's holding that the arbitration panel exceeded its authority is evidence that the provision is limited to arbitration proceedings.

As a result, the Court finds no valid general choice of law provision in the policy between Amerisure and Global. Therefore, without a choice of law provision, the choice of law rules for the forum state, Illinois, control.

Now, the Court must engage in a conflict of outcomes analysis. The Court will first look at the outcome produced by applying Illinois law, then New York law. If the same outcome would result from either forum's law, then the Court will apply Illinois law. However, if a different outcome would result from the application of New York law, the Court will engage in a "most significant contacts" test.

Beginning with Illinois law, Amerisure seeks attorney's fees pursuant to 215 ILCS 5/155. At relevant part, Section 155 provides:

> In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable

> thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts.

215 ILCS 5/155(1)

This statutory basis for recovery of attorneys' fees presents a factual question to be determined by the trial court; the trial court's determination will not be disturbed on review unless an abuse of discretion is demonstrated in the record. *Dark v. United States Fidelity & Guaranty Co.*, 175 Ill. App. 3d 26, 32 (1st Dist. 1988). A trial court must consider the totality of the circumstances, including the "insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of her or his property." *American States Ins. Co. v. CFM Const. Co.*, 398 Ill App. 3d 994, 1003 (2d Dist. 2010). However, an insurer will not be held liable under section 155 merely because it litigated and lost the issue of insurance coverage. *Id.*

Here, looking at the totality of the circumstances, and assuming the facts within the complaint as true and most favorably to Amerisure, Global's conduct could be characterized as unreasonable and vexatious. Amerisure was forced to arbitrate, litigate and engage in multiple years of proceedings. Global's conduct from the time Amerisure made the initial claim to the present embodies the type of attitude that section 155 provides a remedy.

Therefore, for the purpose of a conflict analysis, if Amerisure's allegations were proved as true, application of Illinois law would provide for an award of attorneys' fees. Reaching this conclusion does not lead to the ultimate conclusion that Amerisure will recover in this suit. It must be established that New York law would similarly allow for some basis of recovery for attorneys' fees for Illinois law to apply.

Looking to New York law, generally "attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule, or written agreement of the parties." *Flemming v.Barnwell Nursing Home and Health Facilities, Inc.*, 15 N.Y.3d 375, 379, 938 N.E.2d 937, 938 (2010). Applied to the present dispute, Amerisure is unable to avail itself of any of these three exceptions.

First, Amerisure does not cite to, nor can this Court find, any comparable statute providing for a private right of action against insurers that allows for an award of attorneys' fees for bad faith conduct. New York law simply does not have an equivalent statutory exception to the American Rule that Illinois has in its insurance code. Next, Amerisure does not cite to, nor can this Court find, any relevant court rule that would explicitly allow for the recovery of attorneys' fees for bad faith conduct in the present context. Finally, Amerisure does not assert, nor does the Treaty contain any provision, which expressly provides for an award of attorneys' fees. Without such a provision, there can be no inference that the parties agreed to an award for attorneys' fees.

Amerisure cites to various federal court decisions awarding attorneys' fees in regards to bad faith conduct. While these cases do establish a bad faith exception, the exception was applied in the context of federal law, not New York law. Indeed, a New York District Court stated that under New York law "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy." *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 2003 WL 22144316, at *5 (S.D.N.Y. Sept. 17, 2003) aff'd, 434 F.3d 165 (2d Cir. 2006); *See also Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21, 389 N.E.2d 1080, 1084 (1979) ("It is the rule in New York that such a recovery may not be had in an affirmative action brought by an assured to settle its rights."). Accordingly, the Court finds that there is no basis upon which Amerisure could recover under New York law.

It is apparent then that application of one state's law produces an outcome that conflicts with the other state's law. As a result, it is necessary to apply the "most significant contacts" test as established in *Costello* to determine which law to apply. In determining which state has the "most significant contacts," insurance policies are "governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to the contract, the place of performance, or other place bearing a rational relationship to the general contract." *Costello*, 376 Ill. App. 3d at 240-241 quoting *Westchester Fire*, 321 Ill. App. 3d at 629.

Initially, it is important to note that Illinois courts do not merely "count contacts." *Townsend*, 227 Ill. 2d at 168. Rather, courts will analyze the significance of each contact in light of the interest being advanced by that particular factor. *Id.* In cases where the subject matter of the insurance contract is located in several states, that factor will be given less weight. *Westchester Fire*, 321 Ill. App. 3d at 629.

Here, Amerisure is a Michigan based company and Global is a New York based company. The insurance policy entered into by the parties was delivered to Amerisure in Michigan. The last act was in either New York or Michigan. The place of performance would also be either Michigan or New York. The subject matter of the insurance policy was located in Florida. The first five factors outlined in *Costello* clearly do not support the application of Illinois law. These factors could reasonably be viewed as somewhat insignificant as the conduct in question here did not explicitly regard the policy, but rather Global's conduct throughout settling the claim, arbitrating, and litigating.

Nevertheless, Global's alleged conduct in relation to Illinois does not establish a significant contact. The contacts it had with Illinois were only because arbitration was conducted in Illinois and because Amerisure had an Illinois attorney. A majority of Global's alleged conduct originated from New York and was directed either at Amerisure in Michigan or its attorney in Chicago. The mere fact that a party has counsel located in a particular state does not establish that an opposing party has significant contacts with that state when the opposing party sends and receives correspondence to that state.

Similarly, the mere fact that the parties agreed to arbitrate in Illinois and apply Illinois law to the arbitration does not establish such a significant contact so as to supplant New York law. Illinois had no relation to the dispute prior to the establishment of the arbitration panel.

The panel could have been formed in any other state, but was formed here for the parties' convenience. That the arbitration panel applied Illinois law is only incidental to the fact that it was held here.

While Illinois has an interest in discouraging unreasonable and vexatious conduct by insurers and protecting insureds, the Court cannot apply Illinois law because it is more favorable when significant contacts are lacking. With no significant contacts to Illinois, this suit must be adjudicated under New York Law.

Therefore, as established above, New York law provides no avenue of recovering attorneys' fees and Amerisure's complaint must be dismissed.

THEREFORE, IT IS HEREBY ORDERED:

1. Defendant's, Global Reinsurance Company of America, section 2-615 Motion to Dismiss is granted.
2. Plaintiffs', Amerisure Mutual Insurance Company and Amerisure Insurance Company, complaint is dismissed.

Judge Ronald F. Bartkowicz
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