UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENECA INSURANCE COMPANY, INC.,

Plaintiff,

-v-

EVEREST REINSURANCE COMPANY,

Defendant.

11 Civ. 7846 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiff Seneca Insurance Company, Inc. ("Seneca") filed this action for breach of contract against its reinsurer, Defendant Everest Reinsurance Company ("Everest Re") on November 3, 2011 after Everest Re denied coverage to Seneca in connection with an adverse verdict in an employment suit against the Kentucky Lottery Corporation ("KLC"), to whom Seneca provided coverage. (ECF No. 1.)

Prior to this case being transferred to the undersigned on August 2, 2013, the parties each moved for summary judgment and filed their motions and supporting papers under seal with permission from the Court. (ECF Nos. 14-15, 18, 21, 22.) On August 12 and 22, 2013, this Court ordered the parties to re-file these briefs and supporting materials, respectively, in redacted form on the public docket (see ECF Nos. 23, 30), and the parties have since complied. (See ECF Nos. 24-29, 31-37.)

For the reasons set forth below, the Court finds that Everest Re has not breached the reinsurance policy by denying of coverage to Seneca for the KLC

employment litigation judgments. Even assuming that Seneca prevails on all of its other arguments, the loss resulting from these judgments (which, per the reinsurance policy, does not include the interest on the prior judgments) does not reach the $5 million attachment point necessary to trigger Everest Re's obligation to pay any losses or other expenses. As a result, Everest Re's motion for summary judgment is GRANTED, Seneca's motion for summary judgment is DENIED, and this action is dismissed.

I. FACTS

The parties have submitted largely overlapping sets of materials in support of and in opposition to these motions. Seneca submitted an initial statement pursuant to Local Civil Rule 56.1 ("SOF") (ECF No. 31) and a response to Everest Re's Local Civil Rule 56.1 statement ("SSOF") (ECF No. 32), as well as two declarations from Barry G. Saretsky with continuously lettered exhibits ("Saretsky Decl.") (ECF Nos. 33, 35). Everest Re submitted its own statement pursuant to Local Civil Rule 56.1 ("RSOF") (ECF No. 34) as well as two affirmations from David L. Pitchford with continuously numbered exhibits ("Pitchford Aff.") (ECF Nos. 36-37). The parties are in agreement as to the key documents and the majority of material facts, and disagreement as to wording and immaterial facts. The following facts are undisputed unless otherwise noted.

A. The Relevant Insurance Policies

Seneca issued a Directors & Officers insurance policy, Policy DOL 31 000 27 (the "Policy"), to KLC that provided coverage for, inter alia, claims involving

wrongful employment practices and punitive damages. (SOF ¶ 1.) The Policy provided for a $10 million limit of liability (inclusive of defense costs), with an effective date of November 1, 1997 and for a three-year term. (SOF ¶ 1; Saretsky Decl. Ex. F at SIC 003132.)

The Policy provides coverage for all "Loss" on account of a covered claim, subject to the limits of liability for the period in which the claim occurs. (Saretsky Decl. Ex. F at SIC 003133-003134.) Loss is defined as "the total amount which [KLC] become[s] legally obligated to pay on account of each Claim and for all Claims in the Coverage Section Period and, if elected, the Extended Reporting Period made against them for Wrongful Acts for which coverage applies, including, but not limited to damages, judgments, settlements, and Defense Costs." (Id. Ex. F at SIC 003155.) "Defense Costs" are then defined as "that part of Loss consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees . . .) and expenses (other than any amounts incurred in defense of any Claim where any other insurer has a duty to defend) consented to by [Seneca] and incurred in defending or investigating Claims." (Id. Ex. F at SIC 003142-003143.)

On December 15, 1997, Everest Re issued a reinsurance policy to Seneca, Facultative Reinsurance Certificate No. RFC701660 (the "Reinsurance Certificate"), which Seneca and Everest Re had previously negotiated and agreed upon in the preceding months at the same time that Seneca was negotiating the Policy with KLC. (SOF ¶¶ 2-3.) The Reinsurance Certificate provided reinsurance coverage to Seneca for losses under the Policy up to a $5 million limit of liability, in excess of a

$5 million "self-insured retention" by Seneca, and was effective as of November 1, 1997 with an expiration of February 1, 2001. (SOF ¶ 3; RSOF ¶ 3; Saretsky Decl. Ex. J at EV 000001-000002.)

The Reinsurance Certificate states that "the liability of [Everest Re] . . . shall follow that of [Seneca] and, except as otherwise provided by this Certificate, shall be subject in all respects to all the terms and conditions of [the Policy] except such as may purport to create a direct obligation of [Everest Re] to the original insured or anyone other than [Seneca]." (Saretsky Decl. Ex. J at EV 000002 ("Condition 1").) The Reinsurance Certificate also states that "[p]rompt notice shall be given by [Seneca] to [Everest Re] of any occurrence or accident which, without regard to liability, appears likely to involve this reinsurance and while [Everest Re] does not undertake to investigate or defend claims or suits it shall nevertheless have the right and be given the opportunity to associate with [Seneca] and its representative at [Everest Re's] own expense in the defense and control of any claim, suit or proceeding which may involve this reinsurance with the full cooperation of [Seneca]." (Id. ("Condition 3").)

Conditions 4 and 5 of the Reinsurance Certificate make clear that Everest Re is obligated to make two kinds of payments under certain circumstances—"loss" payments, and payments other than for "loss."[1] Condition 4 states that "[a]ll claims covered by this reinsurance, when settled by [Seneca], shall be binding on [Everest Re] which shall be bound to pay its proportion of such settlements." (Id.) Condition

[1] This phrase is not found in the Reinsurance Certificate; rather, it is used by the Court in order to describe a category of payments which are not, by the terms of the Reinsurance Certificate, loss payments.

4 then states, in relevant part, that, "[i]n addition, [Everest Re] shall pay its proportion of expense (other than company salaries and office expenses) incurred by [Seneca] in the investigation and settlement of claims or suits . . . (a) in the ratio that [Everest Re's] loss payment bears to [Seneca's] gross loss payment. . . ." (Id.) Condition 4 also states that Everest Re will "pay its proportion of court costs and interest on any judgment or award, such proportion to be on the same basis as set forth in (a) . . . , provided [Everest Re] has given prior consent to such trial proceedings." (Id.) Finally, Condition 5 states in relevant part that "[Everest Re's] agreement to promptly pay its proportion of loss and expense incurred by [Seneca] is predicated upon receipt by it of a satisfactory proof of such loss and expense from [Seneca]." (Id.)

B. The Hill Litigation

On September 1, 1999, KLC furnished Seneca with notice of a potential claim against KLC by two former employees, Robert Hill and Kimberly Hill (the "Hills"), whom KLC had discharged from employment the previous day. (SOF ¶ 4.) Seneca acknowledged receipt of the notice on September 16, 1999. (Id. ¶ 4; Saretsky Decl. Ex. L.) On August 1, 2000, the Hills commenced a lawsuit against KLC. (SOF ¶ 5.) According to the Hills' complaint, KLC terminated their employment in retaliation for Kimberly Hill's refusal to give false testimony on behalf of KLC at another discharged employee's unemployment compensation hearing. (Id. ¶ 5.) Among other relief, the Hills sought compensatory and punitive damages. (Id. ¶ 5.) In their Third Amended Complaint, filed on November 16, 2002, the Hills added

claims of retaliatory discharge in violation of the Kentucky civil rights statute, common law wrongful discharge, libel and slander, and violations of Kentucky wage statutes and regulations. (Id. ¶ 5; Saretsky Decl. Exs M-N.)

On December 18, 2002, a jury found in favor of the Hills and granted them a combined total of $4,352,316 in damages, $2 million of which constituted punitive damages on the basis that the Hills were treated with "oppression or malice." (SOF ¶ 8; RSOF ¶ 8) On December 23, 2002, Seneca provided Everest Re with notice of the Hill lawsuit and the jury verdict. (SOF ¶ 9.) In a January 22, 2003 letter, Everest Re acknowledged receipt of the notice and reserved its rights "to raise additional questions or issues in the future and invoke its contractual right to examine and inspect any Seneca records relating to this reinsurance or claims in connection herewith." (Saretsky Decl. Ex. T at 2.)

For reasons unimportant to the issue before this Court, the Hills' case continued. Appeals were pursued and another trial occurred. On August 26, 2004, before the second trial of the Hills' claims, Everest Re received an update from Seneca which stated that the Hills had made a settlement demand of $4.352 million, the amount of the verdict in the first trial. (SOF ¶ 10.) On September 7, 2004, Seneca advised Everest Re that the jury in the second trial returned an award of $120,000 in lost wages to Kimberly Hill, an award of $132,500 in lost wages to Robert Hill, and dismissed the Hills' defamation claim and demand for punitive damages. (Id.) On September 8, 2006, the Kentucky Court of Appeals affirmed the

judgment entered on the verdict in the second trial. (Id. ¶ 11.) But, again, as with Jarndyce v. Jarndyce, the case continued still.

On April 22, 2010, the Kentucky Supreme Court reinstated the first jury verdict and remanded the case to the trial court. (Id. ¶¶ 11-12.) On December 20, 2010, the Kentucky trial court issued final judgments in favor of the Hills in the aggregate amount of $6,783,097.18 (damages plus, by then, a lot of accrued interest). (Id. ¶ 12.) Respecting Kimberly Hill, the court entered judgment of $1,697,966.00 on the jury's verdict—with interest, $2,646,129.42. (Saretsky Decl. Ex. AA at SIC 008025.) Respecting Robert Hill, the court entered judgment of $2,654,450 on the jury's verdict—with interest, $4,136,967.76. (Id. Ex. AA at SIC 008024.) In describing these interest calculations, each judgment states the following: "[T]his Judgment shall bear interest at a rate of 6% from the date of original entry, May 12, 2003. After seven years and 232 days (December 20, 2010), the amount of interest, compounded annually, is [$2,646,129.42 for Kimberly Hill and $4,136,967.76 for Robert Hill]." (Id. Ex. AA at SIC 008024-008025.) Each judgment also specified that this "amount will increase [$419.67 for Kimberly Hill and $656.11 for Robert Hill] per day every day after December 20, 2010 that it is not paid." (Id. Ex. AA at SIC 008024-008025.) Each judgment provides that the Hills "shall recover any costs in this action and any attorney fees in this action pursuant to KRS 344.450." (Id. Ex. AA at SIC 008024-008025.)

All appeals and trials exhausted, the Hill legal proceedings concluded.

C. Seneca's Cash Call and Everest Re's Denial of Coverage

On December 22, 2010, Seneca, as primary insurer to KLC submitted a $1,949,675.97 cash call to Everest Re, its reinsurer, related to the Hills' judgments. (SOF ¶ 13.) The documentation Seneca provided included a proof of loss, reinsurance worksheet, and wire transfer instructions. (Id.) In a separate email communication on December 22, 2010, Seneca informed Everest Re that Seneca intended to issue payment to the Hills on January 5, 2011 and thus requested the funds from Everest Re by January 3, 2011. (Id.; Saretsky Decl. Ex. Y at SIC 004483.)

On January 4, 2011, Everest Re advised Seneca that its legal department was still reviewing all coverage issues involved with Seneca's reinsurance claim and, as part of that process, asked Seneca to provide a copy of, among other documents, any coverage analysis performed by Seneca regarding the allegations in the Hills' suit. (SOF ¶ 14.) Seneca provided the requested documents and stated that no coverage analysis had been prepared. (Id.) Later in the day on January 4, 2011, Everest Re advised Seneca that it would be "unable to provide Seneca with a commitment" and that it was "still investigating and considering its obligations, if any, under the terms of the applicable facultative reinsurance certificate in light of Seneca's late, post-judgment notice and failure to comply with the consent provision contained in the facultative certificate." (Id.; Saretsky Decl. Ex. Y at SIC 004494.) Everest Re also noted that "Seneca has indicated its intent to pay punitive damages, that have been awarded based on findings of intentional conduct by the

Kentucky Lottery Corporation," and that Everest Re "intends to complete its investigation shortly and will provide its response to Seneca in due course." (SOF ¶ 14; Saretsky Decl. Ex. Y at SIC 004494.) On January 5, 2011, KLC's counsel delivered to the Hills' attorney Seneca's checks totaling $6,800,309.66[2] in satisfaction of the final judgments. (SOF ¶ 15; SSOF ¶ 24.)

Everest Re and Seneca's communications continued. In a letter to Everest Re dated January 20, 2011, Seneca stated that no basis existed for Everest Re to deny coverage for the claims asserted by the Hills against KLC. (SOF ¶ 16.) On March 16, 2011, Everest Re responded that it was denying coverage under the Reinsurance Certificate for three reasons: (1) the inclusion of an award of punitive damages for intentional conduct which are not insurable under Kentucky law; (2) late notice of the Hills' suit by Seneca to Everest Re; and (3) lack of prior consent by Everest Re to the Hills' trial proceedings. (SOF ¶ 17; Saretsky Decl. Ex. FF at SIC 002034-002035.) With respect to the punitive damages award and prior consent arguments, Everest Re noted that each of these issues bring the "total incurred below the retention of the facultative certificate"—in other words, that the loss was below the $5 million attachment point for Everest Re's coverage. (Saretsky Decl. Ex. FF at SIC 002034-002035.) Seneca sent Everest Re an additional letter on July 12, 2011 setting forth the reasons why Seneca asserted entitlement to reinsurance coverage, and urged Everest Re to reconsider. (SOF ¶ 18.)

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[2] The difference between the amount of the December 20, 2010 final judgments and the amount paid to the Hills on January 5, 2011 by Seneca—$17,212.48—represents the interest that accrued between those dates as set forth in the judgments. (See Saretsky Decl. Ex. AA at SIC 008024-008025; SSOF ¶ 24.)

On July 28, 2011, the Kentucky trial court resolved the final issue remaining in the Hills' lawsuit, granting the Hills $561,182.80 in attorney fees. (Id. ¶ 19.) Seneca paid those fees on August 8, 2011, and requested indemnification from Everest Re for those fees as well as an additional $1,727.00 in adjusting expenses. (Id.; Saretsky Decl. Ex. II.) On August 25, 2011, Everest Re responded that it disagreed with Seneca's positions set forth in the July 12, 2011 letter and maintained its positions set forth in its March 16, 2011 letter denying coverage. (SOF ¶ 20; Saretsky Decl. Ex. JJ.) Several months later, on February 16, 2012, Seneca submitted an additional proof of loss to Everest Re for $28,441.21 in adjusting expenses. (RSOF ¶ 28; Pitchford Aff. Ex. 20.) The parties dispute the total amount of adjusting expenses that Seneca reported to Everest Re: Everest Re states that this amount is $594,268.21 while Seneca states that this amount is $598,189.76. (See RSOF ¶ 29; SSOF ¶ 29.) This dispute is immaterial for purposes of resolving the instant motions.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment may not be granted unless the movant shows, based on admissible evidence in the record placed before the court, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making a determination on summary judgment, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing

all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Price v. Cushman & Wakefield, Inc., 808 F. Supp. 2d 670, 685 (S.D.N.Y. 2011); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (citations omitted); see also Price, 808 F. Supp. 2d at 685 ("In seeking to show that there is a genuine issue of material fact for trial, the non-moving party cannot rely on mere allegations, denials, conjectures or conclusory statements, but must present affirmative and specific evidence showing that there is a genuine issue for trial.").

Only disputes relating to material facts—i.e., "facts that might affect the outcome of the suit under the governing law"—will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

III. DISCUSSION

This case boils down to whether the interest amounts included in the December 20, 2010 judgments—combined, $2,430,781.18—are properly considered "loss" or "interest on a judgment" under the Reinsurance Certificate. If the former, the Court must then consider the other arguments offered by the parties, including the insurability of punitive damages for intentional conduct under Kentucky law, whether attorneys fees are properly considered "loss" or "court costs," the sufficiency of notice and consent to the Hills litigation, and the applicability of the "follow the forms" doctrine.

If the latter, even assuming resolution of these other arguments in Seneca's favor, the loss reflected in the December 20, 2010 judgments for purposes of the Reinsurance Certificate is $4,913,498.80,[3] falling just short of the $5 million loss that triggers Everest Re's obligations to pay loss and other expenses. As a matter of law, there is no genuine issue of material fact as to whether the more than $2.4 million in interest that was included in the December 20, 2010 judgments is "interest on a judgment" within the meaning of Condition 4 of the Reinsurance Certificate—it is. Accordingly, the loss resulting from the Hills litigation does not reach the $5 million trigger point for Everest Re's obligations under the Reinsurance Certificate, and summary judgment for Everest Re is appropriate.

Condition 1 of the Reinsurance Certificate makes clear that Everest Re's liability "shall follow that of [Seneca] and, except as otherwise provided by this

[3] The Court arrives at this calculation by adding the reinstated jury verdict amounts ($1,697,866.00 for Kimberly Hill and $2,654,450.00 for Robert Hill) to the attorneys fees ordered by the court on July 28, 2011 ($561,182.80).

Certificate . . . ." (Saretsky Decl. Ex. J at EV 000002) (emphasis added). Though the definition of loss in the Policy is broad—"the total amount which [the KLC] become[s] legally obligated to pay . . . including, but not limited to damages, judgments, settlements, and Defense Costs (Id. Ex. F at SIC 003155)—Conditions 4 and 5, when read together, provide for loss payments and, separately, a series of payments other than for loss.[4] (Id. Ex. J at EV 000002.)

The Court finds that, under the Reinsurance Certificate, payments other than for loss include expense, court costs, and interest on any judgment or award. According to Condition 4, Everest Re "shall pay its proportion of expense (other than company salaries and office expenses) incurred by [Seneca] in the investigation and settlement of claims or suits . . . ." (Id.) In addition to these so-called "investigation expenses," Condition 4 also requires Everest Re to pay "court costs and interest on any judgment or award." (Id. (emphasis added).) The proportion of each of these types of payments for which Everest Re is responsible is determined by the ratio of Everest Re's loss payment to Seneca's gross loss payment. (Id.; Seneca Reply at 27, ECF No. 26 ("Because Everest Re provided reinsurance on an excess of loss basis ($5 million excess of $5 million), the rule for determining Everest Re's proportion of Loss relating to expense (defense costs), court costs and interest on a judgment is stated in subparagraph (a).").) Thus, under Condition 4, Everest Re's obligation to make any of these types of payments cannot be calculated

[4] Though Condition 4 is discussed in greater detail infra, Condition 5 also supports the conclusion that loss and expense are separate categories of payment under the Reinsurance Certificate because it describes "[Everest Re's] agreement to promptly pay its proportion of loss and expense incurred by [Seneca] . . . ." (Saretsky Decl. Ex. J at EV 000002 (emphasis added).)

until its obligation to make a loss payment—a loss above its $5 million attachment point—is first determined. If Everest Re has no obligation to make a loss payment, it has no obligation to make any of the other payments that are not loss under the Reinsurance Certificate. The plain meaning of the Reinsurance Certificate is that loss does not include, inter alia, interest on any judgment or award, as the ratio of Everest Re's loss to Seneca's gross loss is itself required to determine Everest Re's proportionate payment of, inter alia, interest on any judgment or award.

Seneca does not argue that "interest on any judgment or award" is part of "loss" under the Reinsurance Certificate; rather, it argues that the interest included in the December 20, 2010 judgments was not interest on any judgment but instead "prejudgment interest." (Seneca Reply at 29-31.) This argument lacks merit.

First, the judgments state clearly that they "bear interest at a rate of 6% from the date of original entry, May 12, 2003," and the final amounts that each lists are calculated by compounding this interest rate annually for seven years and 232 days (up to December 20, 2010). (Saretsky Decl. Ex. AA at SIC 008024-008025.) Second, the Kentucky Supreme Court's December 16, 2010 decision in Hill v. Kentucky Lottery Corporation makes clear that the interest amounts in the judgments were included pursuant to Kentucky Revised Statute ("KRS") 360.040. Hill v. Ky. Lottery Corp., 327 S.W.3d 412, 427-28 (Ky. 2010). KRS 360.040, entitled "Interest on Judgment," provides that "[a] judgment shall bear twelve percent (12%)[5] interest compounded annually from its date," KRS 360.040, and is described

[5] In Hill, the Kentucky Supreme Court held that "the trial court complied with KRS 360.040, and that he did not abuse his discretion in fixing the rate of interest on the judgment at 6%." Id. at 428.

by Kentucky courts as "the state's post-judgment interest statute." Emberton v. GMRI, Inc., 299 S.W.3d 565, 581 (Ky. 2010). KRS 360.040 does not apply to prejudgment interest, which is what Seneca argues the interest included in the December 20, 2010 judgments constituted. See Fields v. Fields, 58 S.W.3d 464, 467 (Ky. 2001). Seneca's argument that, in substance, because the May 12, 2003 judgments were ultimately vacated the December 20, 2010 judgments could not bear interest "on" the prior judgments (see Seneca Reply at 29-30) is also contradicted by Kentucky law. See Elpers v. Johnson, 386 S.W.2d 267, 268 (Ky. 1965); Stephens v. Stephens, 190 S.W.2d 327, 327 (Ky. 1945).

Finally, the Court is not persuaded by Seneca's argument that Everest Re waived this so-called "attachment point defense" by failing to raise it with specificity in its correspondence with Seneca denying coverage. (See Seneca Reply at 25-26.) As early as January 4, 2011, Everest Re stated in correspondence with Seneca that it was "unable to provide Seneca with a commitment" and that it was "still investigating and considering its obligations, if any, under the terms of the applicable facultative reinsurance certificate . . . ." (Saretsky Decl. Ex. Y at SIC 004494.) On March 16, 2011, Everest Re also raised the possibility that two of its other arguments, concerning the insurability of punitive damages for intentional conduct under Kentucky law and lack of prior consent to the Hill trial proceedings, "brings the bring the total incurred below the retention of the facultative certificate." (Saretsky Decl. Ex. FF at SIC 002034-002035.) These references clearly indicate that Everest Re was considering whether its obligation to make any

loss payments or other payments under the Reinsurance Certificate had been triggered by the December 20, 2010 judgments.

Further, as Everest Re notes, the argument that the attachment point for Everest Re's reinsurance coverage had not been reached is not a "defense" in the traditional sense like a late notice defense or partial payment of a claim—the kinds of waiver at issue in the cases cited by Seneca (see Seneca Reply at 25-26)—it is the outer boundary of coverage provided by the policy. See Simpson v. Phoenix Mut. Life Ins. Co., 30 A.D.2d 265, 268 (N.Y. App. Div. 1968) (holding "it is settled law that waiver . . . may not be invoked to create insurance coverage where none exists under the policy as written") (citing cases and other authority).

IV. CONCLUSION

For the reasons set forth above, Everest Re's motion for summary judgment is GRANTED and Seneca's motion for summary judgment is DENIED. The Clerk of Court is hereby directed to close the motions at ECF Nos. 24 and 27, and to terminate this action.

SO ORDERED.

Dated: New York, New York
October 16, 2013

KATHERINE B. FORREST
United States District Judge