UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

-against- **Civ. No. 6: 12-CV-1293 (NAM/TWD)**

EMPLOYERS INSURANCE COMPANY OF WAUSAU and NATIONAL CASUALTY COMPANY,

Defendants.

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APPEARANCES: **OF COUNSEL:**

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NORMAN A. MORDUE, Senior United States District Judge:

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

This case arises out of a dispute under certain reinsurance agreements that plaintiff Utica Mutual Insurance Company ("Utica Mutual") entered into with National Casualty Company ("National Casualty") and Employers Insurance Company of Wausau ("Employers Insurance")

(collectively, "Defendants"). Defendants file this motion to dismiss the complaint under the Fed. R. Civ. P., specifically including Rule 12 (b) (1) and Rule 12 (b) (6). Alternatively, defendants move to stay this action in favor of litigation which was filed by defendants in Marathon County in the State of Wisconsin, an action in which plaintiff has filed a notice of removal to the United States District Court for the Western District of Wisconsin.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants contend that the plaintiff insurer hired the law firm of Hunton & Williams, L.L.P., ("H & W") to represent it in litigation in Pennsylvania against its insured, Morton-Norwich Products, Inc. ("Morton-Norwich"). During this litigation, Utica Mutual and its reinsurers (including defendants) shared a common interest, with H&W representing the entirety of that interest. When Utica Mutual billed its reinsurers for that litigation and the resulting claims, it recognized this common interest, requiring defendants to enter into a confidentiality agreement, confirming that the information that Utica Mutual and H&W were providing to defendants was subject to the joint defense privilege. Defendants allege that the information that Utica Mutual chose to provide failed to answer the questions raised by the billings, leaving defendants unable to confirm the appropriateness of the billings for which Utica Mutual was seeking payment. As a result of this billing impasse or dispute, Utica Mutual demanded arbitration by letter dated May 24, 2012.

The arbitration demand was issued by H&W, the same firm that had been representing the interests of defendants in the underlying litigation. Defendants each named its own party-appointed arbitrator (as the arbitration agreements required), and each asked H&W to withdraw from its representation of Utica Mutual because such representation was substantially

related to the very same matter in which H&W represented its interests. In fact, defendants contend that as part of the arbitration, Utica Mutual will be seeking payment of H&W's bills from the underlying litigation wherein it represented all of the herein parties' joint interests. H&W declined to step down.

National Casualty operates its business principally in Wisconsin and thereafter filed a complaint in state court in Wisconsin on July 26, 2012, seeking the disqualification of H&W so that the arbitration could proceed and the billing dispute between the parties could be resolved.[1] In response to National Casualty's filing of litigation in Wisconsin, Utica Mutual filed the present action. Utica Mutual then filed a Notice of Removal in the Wisconsin state court matter in an attempt to have it removed to federal court as well as a motion to dismiss the Wisconsin litigation altogether.

Defendants seek dismissal of the present complaint on the grounds that it does not establish that this Court has subject matter jurisdiction, and that the allegations therein fail to state a claim upon which relief can be granted. Upon dismissal of this action, defendants argue that the Wisconsin litigation can proceed as it should, finally resolving the issue of disqualification and "freeing the parties to proceed to arbitration as they all wish to do." As an alternative to dismissal of Utica Mutual's complaint, defendants request that this Court stay the current

[1] Employers Insurance chose not to proceed to litigation, knowing that the litigation commenced by National Casualty would address and resolve the very same concerns that it had about H&W's representation adverse to Employers Insurance. In the present proceeding, Utica Mutual has chosen to name Employers Insurance as a defendant. Defendants argue that the matters involve the same reinsurance contracts, the same underlying claims, and the same questions regarding the disqualification of H&W. Defendants contend that Utica Mutual can easily join Employers Insurance as a party to the Wisconsin proceeding if it wishes to litigate against both parties on these identical issues.

proceeding while the Wisconsin litigation goes forward.

Plaintiff opposes defendants' motion. Plaintiff asserts that the arbitration agreement between the parties required them to each appoint an arbitrator for the arbitration proceeding and then the appointed arbitrators were required to appoint a third arbitrator (an "umpire"). The arbitration agreement also specified that the arbitration hearings would take place in Utica, New York or any such place as may be agreed. Plaintiff asserts that defendant National Casualty filed the litigation in Wisconsin state court to avoid appointing an umpire and proceeding with the arbitration in Utica as required by the agreement. Plaintiff contends there was never an attorney-client relationship between National Casualty and H & W, even if Utica Mutual and National Casualty had a "common interest" in maintaining the confidentiality of certain information in connection with the action in Pennsylvania against Utica Mutual's insured, Morton-Norwich. Because plaintiff asserts that there is no basis for disqualifying its counsel H & W from representing Utica Mutual in the arbitration, Utica Mutual contends that National Mutual's claims against it in the Wisconsin litigation must be dismissed. As a further matter, Utica Mutual argues that the Wisconsin federal court has no personal jurisdiction over Utica Mutual.

Utica Mutual claims that it filed the present action in this district because, *inter alia*: 1) the arbitration agreements provide that any disputes between the parties are to be resolved in New York; 2) the Wisconsin federal court lacks personal jurisdiction over Utica Mutual; 3) the complaint in the Wisconsin litigation fails to state a claim for which relief can be granted; and 4) there is no dispute that New York has personal jurisdiction over all three parties – Utica Mutual, National Casualty, and Employers Insurance. In this action, Utica Mutual seeks: 1) a declaration that its counsel should not be disqualified and the arbitration should proceed without

further delay or obstruction; and 2) an order that National Casualty and Employers Insurance follow – and not impede or obstruct – the arbitration agreement's requirement to appoint an umpire or, alternatively, that an order should be issued appointing an umpire.

In opposition to defendants' motion to dismiss, Utica Mutual contends that: 1) the motion is untimely; 2) it has sufficiently plead subject matter jurisdiction herein; and 3) it has sufficiently alleged a claim under Section 5 of the Federal Arbitration Act ("FAA"). As a further matter, Utica Mutual asserts that a stay of this action is unwarranted because the present action is not duplicative of the Wisconsin litigation. However, plaintiff argues that even if the actions are duplicative, legal and factual circumstances support giving priority to the New York federal action.

III. DISCUSSION

A. Applicable Legal Standard

On a Fed. R. Civ. P. 12 (b) (2) motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of showing that the court has jurisdiction over the defendant. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003); *see also, Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005); *Distefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). "Where, as here, a court relies on pleadings and affidavits, rather than conducting a 'full-blown evidentiary hearing,' the plaintiff need only make a *prima facie* showing that the court possesses personal jurisdiction over the defendant." *Distefano*, 286 F.3d at 84; *see also, Grand River Enters.*, 425 F.3d at 165; *Whitaker v. American Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001); *Bank Brussels Lambert*, 171 F.3d at 784; *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181,

184 (2d Cir. 1998); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997); *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 196-97 (2d Cir. 1990). " '[W]here the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor....' " *Whitaker*, 261 F.3d at 208 (quoting *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993)); *see, e.g., Distefano*, 286 F.3d at 84; *PDK Labs*, 103 F.3d at 1108; *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985).

B. Timeliness of Motion to Dismiss

At the outset, the court addresses plaintiff's contention that the present motion to dismiss filed by defendants is untimely. Fed. R. Civ. P. 12 (a) (1) (A) (i) provides that a responsive pleading must be served "within 21 days after being served with the summons and complaint." Review of service documents attached to plaintiff's response papers indicates that defendants were served pursuant to N.Y. Ins. Law § 1212 (McKinney 2006) with the summons and complaint on August 30, 2012. *See Montefiore Med. Ctr. v. Auto One Ins. Co.*, 871 N.Y.S.2d 285, 286 (N.Y. App. Div. 2008) (Service upon the defendant is effectuated upon "delivery of the summons and complaint upon the Assistant Deputy Superintendent and Chief of Insurance" pursuant to N.Y. Ins. Law §1212 (citing cases)). According to the Court's docket, defendants' responsive pleadings were required to be filed by September 20, 2012. The present motion to dismiss was filed in lieu of an answer by defendants on September 24, 2012.

As stated, under Rule 12 (a), a defendant ordinarily must serve an answer "within 21 days after being served with the summons and complaint." Fed. R. Civ. P. 12 (a) (1) (A). By contrast, no provision of Rule 12 explicitly mentions a time limit for making a motion to dismiss. "Some

courts have concluded, not unreasonably, that the timing rules for filing an answer under Rule 12(a) must also apply to motions to dismiss under Rule 12 (b)." *Luv N' Care, Ltd. v. Babelito, S.A.*, 306 F.Supp.2d 468, 472 (S.D.N.Y. 2004). This interpretation finds support in Rule 12 (b) itself, which states that a motion to dismiss " shall be made before pleading if a further pleading is permitted." Fed. R. Civ. P. 12 (b) (emphasis added). *See id.* "In other words, if a defendant must make a motion to dismiss before the answer, the defendant arguably must file such a motion, at the very latest, before an answer would otherwise be due." *Id.* (citing *Totalplan Corp. of America v. Lure Camera, Ltd.*, 613 F.Supp.451, 455 (W.D.N.Y. 1985).

The court in Luv N' Care disagreed with this premise, instead concurring with a leading treatise that this view "is premised on an overly strict interpretation of Rule 12(a) and Rule 12(h)(1)." *Luv N' Care*, 306 F.Supp.2d at 472 (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1391, at 754 (2d ed. 1990)). As Wright and Miller explain:

> The former provision [Rule 12(a)] only deals with when the pleading must be served and is silent on the question of waiver. The latter provision [Rule 12(h)] does not call for the assertion of the defense within the time provided in Rule 12(a) for serving a responsive pleading; it merely dictates waiver if the defense is not made by motion or included in the responsive pleading, presumably whenever it may happen to be served.

WRIGHT & MILLER, supra, § 1391, at 754. Subscribing to this latter interpretation, courts in this Circuit have held that such motions "must be raised in a reasonably timely fashion or [be deemed] waived." *Fed. Home Loan Mortg. Corp. v. Dutch Lane Assocs.*, 775 F.Supp. 133, 136 (S.D.N.Y.); *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985). The question for this Court, therefore, is whether, considering the circumstances of this case, defendants' motion was

made in a reasonably timely fashion. On the specific facts of the case, given the delay of only four days and in the absence of any demonstrated prejudice to plaintiff, the Court concludes that it was. As a further matter, the Court notes that in addition to asserting that the complaint fails to state a claim upon which relief may be granted, the motion also

asserting a lack of subject matter jurisdiction under Rule 12(b) (1). Motions asserting lack of subject matter jurisdiction may be brought at any time. *See* Fed. R. Civ. P. 12 (h) (3); *see also Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 979 (2d Cir. 1975). Thus, the Court finds that defendants' motion is timely and will be considered on its merits.

C. Subject Matter Jurisdiction

Plaintiff Utica Mutual asserts that the basis for this Court's subject matter jurisdiction is diversity pursuant to 28 U.S.C. § 1332 because it and both defendant reinsurance companies are citizens of different states. Because federal courts are courts of limited jurisdiction, "[d]iversity must be alleged with detail and certainty." *Simmons v. Rosenberg*, 572 F.Supp. 823, 825 (E.D.N.Y. 1983). *See also Leveraged Leasing Admin. Corp. v. Pacificorp Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996) (confirming that allegations of diversity must be "distinctly and positively averred"); *John Birch Soc'y v. Nat'l Broad. Co.*, 377 F.2d 194, 199 (2d Cir. 1967) (affirming dismissal of complaint when the jurisdictional allegations failed to adequately establish diversity).

Defendants argue that Utica Mutual's allegations regarding diversity jurisdiction are based solely on "information and belief" and that such allegations are legally insufficient to provide the detail and certainty necessary for this Court to exercise its subject matter jurisdiction. However, defendants do not notably dispute the **factual accuracy** of plaintiff's allegations concerning the

parties' citizenship. *See Aleph Towers, LLC v. Ambit Texas, LLC*, 2013 WL 4517278 (E.D.N.Y. Aug 13, 2013). Thus, the Court accepts these allegations as true and finds that the complaint alleges diversity of citizenship with respect to the parties. Based thereupon, defendants' arguments concerning lack of subject matter jurisdiction fail must fail.

D. Failure to State a Claim

Defendants contend that when a dispute is subject to arbitration, the Federal Arbitration Act ("FAA") favors resolution by arbitrators, not courts. According to defendants, authority under the FAA is limited to a situation where one party is actually "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate." 9 U.S.C. § 4.3. Defendants contend that absent an unequivocal refusal to arbitrate, the courts have no authority to intervene under the FAA:

> [A]n action to compel arbitration under the Federal Arbitration Act accrues only when the respondent unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise unambiguously manifesting an intention not to arbitrate the subject matter of the dispute.

PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1066 (3d Cir. 1995); *see also Carrington Capital Mgmt., LLC v. Spring Inv. Serv., Inc.*, 347 Fed. Appx. 628, 631 (2d Cir. 2009) (affirming dismissal of motion to compel arbitration because inability to agree on mutual location did not arise to "refusal to arbitrate" required under the FAA). Defendants claims that all parties herein -Utica, National Casualty, and Wausau- stand ready to arbitrate the underlying disputes as soon as the disqualification issue is resolved. Thus defendant argues there is no current justiciable controversy under the FAA, and the complaint should be dismissed.

Plaintiff counters that defendants' argument about Section 4 is irrelevant for the simple reason that Utica Mutual is not seeking relief under Section 4 of the FAA. Indeed, it is clear from

the complaint that Utica Mutual's claims are based on Section 5 of the FAA. Specifically, Utica Mutual asks the Court to "order [National Casualty and Employers Insurance] to follow – and to not impede or obstruct – the methodology provided in the Agreements to appoint an Umpire and to allow the arbitration to proceed." Alternatively, Utica Mutual asks the Court "to appoint an Umpire selected from three candidates to be nominated by Utica Mutual." Claims may be brought under Section 5 of the FAA when there is "a lapse in the naming of an arbitrator . . . or in filling a vacancy." 9 U.S.C. § 5. Plaintiff contends there is a lapse in selecting the third arbitrator or umpire because defendants have refused to proceed with selecting this third arbitrator as required by the arbitration agreement. It is well settled that this type of claim may be pursued under Section 5 of the FAA. *See Stop & Shop Supermarket Co. LLC v. United Food and Commercial Workers Union Local 342, AFL-CIO, CLC*, 246 Fed. Appx. 7, 11 (2d Cir. 2007) (holding that district court had the authority, and the obligation, under FAA § 5 to correct the breakdown in the selection process by "designat[ing] and appoint[ing] an arbitrator" or umpire). Thus, there is no basis to dismiss Utica Mutual's claim under Section 5 of the FAA.

E. Motion for Stay of Present Action Pending Resolution of Wisconsin Litigation

1. First-Filed Rule

Defendants contend that the present action should be stayed based on the "first filed" rule which requires district courts to stay an action that was first filed in another federal court out of respect for the comity of its sister courts. *AEP Energy Services Gas Holding Co. v. Bank of Am.*, 626 F.3d 699, 722 (2d Cir. 2010); *Employers Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 275 (2d Cir. 2008). The "first-filed" rule is a "sound rule" dictating that "the issues should be tried in the district where suit is first brought." *Mattel, Inc. v. Louis Marx & Co.*,

353 F.2d 421, 424 (2d Cir. 1965). This rule furthers a number of important principles, including those that benefit the courts, such as "considerations of judicial administration and conservation of resources" and those that further the parties' interest to "be free from the vexation of concurrent litigation over the same subject matter." *AEP*, 626 F.3d at 722 (internal citations omitted). In fact, the Second Circuit has affirmatively stated that the first-filed rule "plays a unique role in conserving judicial resources and that a court's failure to stay its hand unduly burdens the litigation process." *Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir. 1991). Whether the second-filed action should be stayed rests within the sound discretion of the district court. *See AEP*, 626 F.3d at 719. But, as a general rule, such sound discretion "dictates that the second court decline its consideration of the action" and a court may very well exceed the bounds of its discretion "when it refuses to stay or dismiss a duplicative suit." *Id.* at 723 (internal citations omitted).

In determining whether an action is duplicative, the court should look to the underlying transaction on which the claims are based: "That claims arising out of the same transactions may rely on different legal theories does not eliminate their redundance." *Sheinbrot v. Pfeffer*, 954 F.Supp. 555, 561 (E.D.N.Y. 1997) (citing *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). Another test for whether a lawsuit is duplicative is to ask whether the claim being brought in the second-filed action should have instead been raised as a counterclaim in the first-filed action. *See, e.g.*, *Adam*, 950 F.2d at 92 (vacating the district court judgment and ordering the district court to dismiss an action that should have been raised as a compulsory counterclaim in the first-filed action).

According to defendants, the claims that Utica Mutual raises herein are identical to those at

issue in the Wisconsin proceeding. They involve the same contracts, the same losses, the same dispute. Defendants argue that the claims raised here arise out of the exact same transaction from which the claims in Wisconsin arise and Utica Mutual asks this Court to address the very same issue that National Casualty raised in the Wisconsin litigation, that is, H&W's disqualification.

Plaintiff responds that this suit is not duplicative of the Wisconsin action. In the first instance, Utica Mutual contends that the Wisconsin action is limited to National Casualty's claims against Utica Mutual. In this action, although Utica Mutual has sued National Casualty, it has also named Employers Insurance as a defendant, since Employers Insurance raised the exact same disqualification dispute and has, just like National Casualty, refused to proceed with appointing an umpire in the arbitration. Accordingly, the parties are not identical in the two actions, and the motion to dismiss or stay this action should be denied. *See Burton v. Exxon Corp*., 536 F. Supp. 617, 623-24 (S.D.N.Y. 1982) (dismissal not warranted when parties and main issues not identical); *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1552 (11th Cir. 1986) (reversing dismissal where second action had additional defendants).

Secondly, plaintiff contends that the causes of action in this case and the Wisconsin case are different. In the Wisconsin action, National Casualty has sought a declaration regarding the disqualification dispute. In contrast, Utica Mutual has asserted claims herein relating to the disqualification dispute as well as a claim for relief under the FAA. Accordingly, the causes of action in the two cases are different.

Third, the relief sought in this action and the Wisconsin action are not the same. In the Wisconsin action, National Casualty seeks a declaration that Utica Mutual's counsel be disqualified from representing Utica Mutual in the arbitration. In this action, Utica Mutual is

seeking additional relief, since Utica Mutual has named Employers Insurance as a defendant and has asserted a claim under the FAA. Thus, the question is which court can comprehensively resolve the dispute between all three parties. *See Hyrpo, Inc. v. Seeger-Wanner Corp*., 292 F. Supp. 342, 344 (D. Minn. 1968) ("a court should seek to determine which of the two actions will serve best the needs of the parties by providing a comprehensive solution of the general conflict").

This Court agrees with plaintiff's contention that the present action and the Wisconsin litigation are not duplicative because they involve different parties and different claims. Moreover, plaintiff asserts that it is not amenable to personal jurisdiction in Wisconsin which is another factor which weighs against granting of a stay. Defendants' motion to stay the present action based on the first-filed rule must be denied.

IV. CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint or in the alternative stay the present action (Dkt. #7) is DENIED.

IT IS SO ORDERED.

Date: September 26, 2013

Norman A. Mordue
Senior U.S. District Judge