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

PRESENT: O. PETER SHERWOOD, *Justice* **PART** 49

GRANITE STATE INSURANCE COMPANY *et al.*,

Plaintiffs,

-against-

TRANSATLANTIC REINSURANCE COMPANY,

Defendant.

INDEX NO. 652506/2012
MOTION DATE April 3, 2013
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss defenses

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ✓ No

Upon the foregoing papers, plaintiffs' motion to dismiss defendant's third, fourth, fifth, sixth, ninth, tenth, fourteenth, fifteenth, nineteenth, and twenty-fourth affirmative defenses is decided in accordance with the accompanying Decision and Order.

Dated: December 23, 2013

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

---X

GRANITE STATE INSURANCE COMPANY,
AMERICAN HOME ASSURANCE COMPANY,
AND NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Plaintiffs,

-against-

TRANSATLANTIC REINSURANCE COMPANY,

Defendant.

---X

DECISION AND ORDER

Index No.: 652506/2012
Motion Seq. Nos.: 001 & 002

O. PETER SHERWOOD, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is an action to recover monetary damages for breach of contract, as well as for a declaratory judgment ordering defendant to fulfill commitments to plaintiffs under reinsurance agreements memorialized in 13 facultative reinsurance certificates issued by defendant Transatlantic Reinsurance Company ("TRC").

In motion sequence number 001, plaintiffs Granite State Insurance Company ("Granite State"), American Home Assurance Company ("American Home") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively referred to as "plaintiffs" or the "AIG Insurers") move to dismiss defendant TRC's third, fourth, fifth, sixth, ninth, tenth, fourteenth, fifteenth, nineteenth, and twenty-fourth affirmative defenses.

In motion sequence number 002, plaintiff Granite State seeks partial summary judgment: (1) declaring that TRC is liable to Granite State under three reinsurance certificates for a share of losses and expenses arising out of a settlement agreement with Transamerica Corporation ("Transamerica"); (2) awarding monetary damages of $683,548.22, plus pre-judgment interest, to Granite State on counts seven through twelve of plaintiffs' complaint; and (3) dismissing defendant's second through fourth counterclaims and setoffs against Granite State, which seek reimbursement of certain amounts defendant paid to Granite State after a January 1, 2011 transfer of US asbestos-related losses to a third-party.

In their complaint, plaintiffs allege that their group of companies, all under the American International Group, Inc. ("AIG") umbrella, issued 13 excess liability policies to certain insureds. The plaintiffs then allegedly purchased contributing facultative reinsurance from TRC for a portion of each of the 13 excess policies, which allegedly was evidenced in 13 facultative reinsurance certificates. At issue in the instant motions are losses that occurred under three of these excess policies, which Granite State issued to Transamerica in 1980, 1981 and 1982.

The principal issue for the court's determination is whether the AIG Insurers' transfer of all of AIG's U.S. asbestos-based losses to Eaglestone Insurance Company ("Eaglestone") and then to National Indemnity Company ("NICO") falls within the carve-out clause for "treaty reinsurance" as contained in the "Retention" provision of the subject facultative reinsurance certificates.

The Excess Policies and Facultative Reinsurance Certificates

Excess Policy and Facultative Reinsurance Certificate #1

Plaintiffs allege that, in 1980, Granite State issued excess policy no. 6180-2083 to Transamerica for the term of April 1, 1980 to April 1, 1981 ("1980 Transamerica Policy"). Liability under the 1980 Transamerica Policy allegedly attached excess of $20 million per occurrence/$20 million aggregate above either underlying insurance or a self-insured retention ("SIR"). The limit of the 1980 Transamerica Policy was allegedly $20 million per occurrence/$20 million aggregate.

Plaintiffs have proffered a copy of a facultative reinsurance certificate that states that defendant reinsured $1.0 million of the $20 million of the 1980 Transamerica Policy, through contributing excess facultative reinsurance, as evidenced in certificate number C80-77440. *See* affidavit of Joanne Caprice ("Caprice"), exhibit 2.

Pursuant to Item 3 of that facultative reinsurance certificate, the "COMPANY RETENTION" required for Granite State was $5.0 million of the 1980 Transamerica Policy $20 million excess layer.

Excess Policy and Facultative Reinsurance Certificate #2

According to their complaint, plaintiffs allege that, in 1981, Granite State issued excess policy no. 6181-2970 to Transamerica for the policy term April 1, 1981 to April 1, 1982 ("1981 Transamerica Policy"). Liability under the 1981 Transamerica Policy allegedly attached excess of $20 million per occurrence/$20 million aggregate above underlying insurance or SIR. Plaintiffs

allege that the limit of the 1981 Transamerica Policy was $20 million per occurrence/$20 million aggregate.

Plaintiffs have proffered a copy of a facultative reinsurance certificate that states that defendant reinsured $1.75 million of the $20 million layer of exposure within the 1981 Transamerica Policy, through contributing excess facultative reinsurance, as evidenced in certificate number C81-78210. *See* Caprice affidavit, exhibit 3.

Pursuant to Item 3 of the facultative reinsurance certificate, the "COMPANY RETENTION" that Granite State was required to retain was $5.0 million of the 1981 Transamerica Policy $20 million excess layer.

Excess Policy and Facultative Reinsurance Certificate #3

Plaintiffs allege that Granite State issued excess policy no. 6182-3560 to Transamerica for the term April 1, 1982 to April 1, 1983 (1982 Transamerica Policy). Liability under the 1982 Transamerica Policy allegedly attached excess of $20 million per occurrence/$20 million aggregate above underlying insurance or SIR. The limit of the 1982 Transamerica Policy was allegedly $20 million per occurrence/$20 million aggregate.

Plaintiffs proffer a copy of a facultative reinsurance certificate stating that defendant reinsured $1.75 million of the $20 million of exposure of Granite State's layer of the 1982 Transamerica Policy, through contributing excess facultative reinsurance, as evidenced in certificate number C82-78643. *See* Caprice affidavit, exhibit 4.

Pursuant to Item 3 of that facultative reinsurance certificate, the "COMPANY RETENTION" required for Granite State was $4.75 million of the 1982 Transamerica Policy $20 million excess layer.

Relevant Common Provisions of the Facultative Reinsurance Certificates

All three of the facultative reinsurance certificates contain the following language: "2. Retention. The Company warrants that it shall retain for its own account, subject to treaty reinsurance only, if any, the amount specified on the face of this Certificate."

Paragraph 3, entitled Claims, contains subsection (b), which states: "The term 'loss' shall mean only such amounts as are actually paid by the [ceding] Company in settlement of claims or in satisfaction of awards or judgments."

Additionally, paragraph 11 of each reinsurance certificate states: "The terms of this Certificate shall not be waived, amended or in any way modified unless such waiver, amendment of [sic] modification is contained in an endorsement to this Certificate . . . . Assignment of this Certificate shall not be valid except with the written consent of Reinsurer."

Factual Background

In their complaint, the AIG Insurers allege that, over many years, a subsidiary of Transamerica was the subject of many asbestos-related personal injury claims and, as the result of these claims, that subsidiary brought a declaratory judgment action in Mercer County, New Jersey Superior Court ("Mercer County DJ Action"). The Mercer County DJ Action allegedly resulted in a settlement, which, based on an insurance allocation plan, required Granite State to make multi-year quarterly payments to Transamerica under the three excess policies at issue in the instant motion, i.e., the 1980 Transamerica Policy, the 1981 Transamerica Policy, and 1982 Transamerica Policy.

Plaintiffs assert that, from 2008 through 2012, Granite State made those quarterly payments to Transamerica and, as payments were made, invoiced TRC for a portion of those payments, as required under the facultative reinsurance certificates nos. C80-77440, C81-78210, and C82-78643. It is uncontested that, for invoices dated from September 2008 through November 2011, TRC paid $1,878,487.63. *See* Caprice affidavit, exhibit 6.

Plaintiffs allege that, commencing with invoices dated and sent in April 2012, TRC failed to make any further payments to Granite State. Plaintiffs further allege that, in total, $683,548.22 was paid by Granite State to Transamerica, invoiced to defendant, and has gone unpaid.

As respects the facultative reinsurance certificates at issue, the AIG Insurers seek damages for breach of contract (counts 7, 9, and 11), as well as a declaration of plaintiffs' rights under those facultative reinsurance certificates (counts 8, 10, and 12).

In response, TRC avers that Granite State breached the three reinsurance certificates at issue, in that the AIG Insurers entered into a January 1, 2011 transfer of all of AIG's U.S. asbestos-based losses to Eaglestone and then to NICO, a subsidiary of Berkshire Hathaway, without TRC's permission. Defendant maintains that such transfer was a violation of Item 3, COMPANY RETENTION, of each facultative reinsurance certificate, and that, therefore, payments under the reinsurance certificates have been justifiably withheld. *See* affidavit of Beth Levene ("Levene"), ¶8.

TRC asserts that it properly made payments only until it became aware of the transfer to Eaglestone/NICO, and that it does not owe further monies or reinsurance coverage under the facultative reinsurance certificates. Additionally, in its second through fourth counterclaims and setoffs, defendant seeks the return of $757,707.38 in payments made to Granite State and its alleged putative agent for claims paid after the effective date of the transfer.

The AIG Insurers respond that Granite State met the requirements of Item 3 of the facultative reinsurance certificates in that its transfer to Eaglestone was "treaty reinsurance" within the meaning of the definition of "Retention ."

Discussion

A. Motion to Dismiss

As noted above, the AIG Insurers move for an order, pursuant to CPLR 3211 (b) to dismiss TRC's third, fourth, fifth, sixth, ninth, tenth, fourteenth, fifteenth, nineteenth, and twenty-fourth affirmative defenses.

Relevant to the court's analysis is the purpose of reinsurance, as well as the distinction between the two main forms of reinsurance, facultative reinsurance and treaty reinsurance. "Reinsurance is 'the insurance of one insurer [the 'reinsured'] by another insurer [the 'reinsurer'] by means of which the reinsured is indemnified for loss under insurance policies issued by the reinsured to the public.'" *Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 105-106 (1996) [internal citation omitted]. The nature of reinsurance is that "an insurance company agrees to pay a particular premium to a reinsurer in return for reimbursement of a portion of its potential financial exposure under certain direct insurance policies it has issued to its customers." *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 587 (2001). Treaty reinsurance requires a reinsurer to accept certain groups of risks that the ceding company underwrites, while facultative reinsurance is policy-specific meaning that it covers only a particular risk or portion of it, which is underwritten by the reinsurer. *See Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 74 (1st Dept 2009); *See also Travelers Cas. & Sur. Co.,* 96 NY2d at 587.

Against this backdrop, the court now turns to the particular affirmative defenses that the AIG Insurers seek to dismiss. Insofar as relevant to the instant motion to dismiss, TRC alleges that: (1) the AIG Insurers did not pay any losses under the excess policies, did not maintain the retention

required in the facultative reinsurance certificates, nor were the facultative reinsurance certificates triggered by any events (3rd affirmative defense); (2) the AIG Insurers breached the warranties of the facultative reinsurance certificates, including the retention obligation and the duty to promptly settle an action (4th affirmative defense); (3) plaintiffs' transfer of the US asbestos-based claims to NICO was not a treaty reinsurance agreement (5th affirmative defense); (4) the AIG Insurers failed to obtain its consent prior to transferring the asbestos-related claims to NICO (6th affirmative defense); (5) plaintiffs breached their obligation of *uberrima fides* (ninth affirmative defense); (6) there is no coverage under the facultative reinsurance certificates because the AIG Insurers materially changed the risk underwritten by TRC without defendant's permission (10th affirmative defense); (7) all claims against TRC are precluded by the terms, provisions, conditions, exclusions and limitations of the facultative reinsurance certificates (14th affirmative defense; (8) the AIG Insurers breached the facultative reinsurance certificates (15th affirmative defense); (9) the transfer of the asbestos-related claims to NICO comprised an impermissible assignment (19th affirmative defense); and (10) the attempt to transfer the asbestos-related claims is void as an impermissible assignment (24th affirmative defense).

On a motion to dismiss affirmative defenses, "the plaintiff bears the burden of demonstrating that [such] defenses are without merit as a matter of law. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept. 2011) (internal citations omitted). A defense should not be stricken where there are questions of fact requiring a trial. *Id. See Atlas Feather Corp. v Pine Top Ins. Co.,* 128 AD2d 578, 579 (1st Dept. 1987).

Interpretation of reinsurance agreements is subject to the same rules of law as any other contract. "[I]n interpreting reinsurance agreements . . . the intention of the parties should control. To discern the parties' intentions, the court should construe the agreements so as to give full meaning and effect to the material provisions." *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 (2004) (internal citations omitted).

In resolving the issue presented, the court will address the ten affirmative defenses that plaintiffs seek to have dismissed within the following five categories.

1. **Retention**

The reinsurance certificates are entitled Certificates of Casualty Facultative Reinsurance. Paragraph two of each of the three reinsurance certificates requires Granite State to "retain ..., subject to treaty reinsurance only, ... the amount specified on the face of this Certificate."

As their titles suggest, the certificates memorialize a facultative reinsurance relationship between Granite State and defendant, i.e., a prospective agreement made in 1980, 1981, and 1982 for certain excess coverage purchased for a specific risk insured by Granite State, the cedent. *See Gulf Ins. Co.*, 69 AD3d at 74 (1st Dept 2009) (quoting Ostrager and Vyskocil, *Modern Reinsurance Law and Practice* § 2.01 [b] [2d ed 2000]).

Treaty reinsurance, however, consists of a relationship between the cedent and the reinsurer, where "there is '1) no individual risk scrutiny by the reinsurer, 2) obligatory acceptance by the reinsurer of covered business, and 3) a long-term relationship in which the reinsurer's profitability is expected, but measured and adjusted over an extended period of time.'" *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d at 587-588 (quoting *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 106 [1996]). "Treaty reinsurance is obtained in advance of actual coverage and may cover any risk the primary insurer covers. The contract is formed when the primary insurer 'cedes' part of the premiums for its policies and the losses on those policies to the reinsurer." *Matter of Midland Ins. Co.*, 79 NY2d 253, 258 (1992); *see also Unigard Sec. Ins. Co., v North Riv. Ins. Co.*, 79 NY2d 576 (1992); *Gulf Ins. Co.*, 69 AD3d at 74.

The dispute between the parties in this case concerns whether or not a transfer of all of Granite State's U.S. asbestos-based losses to Eaglestone and then NICO took place in January 2011, and, further, if such transfer took place, some 30 years after Granite State wrote the excess policies, and after the losses occurred, did any such transfer constitute the purchase of treaty reinsurance within the meaning of the retention requirements of Item 3 of the reinsurance certificates at issue.

Plaintiffs have proffered an unsigned "Loss Portfolio Transfer Reinsurance Agreement" (LPT Reinsurance Agreement), between the plaintiffs and their affiliate, Eaglestone (*see* April 30, 2013 Oral Argument, tr at 9), which was included in the Form 10Q report for AIG for the period ending March 31, 2011 (also in an unsigned condition, which caused a request for more information for the Securities and Exchange Commission [SEC]). *See* affirmation of Bryce L. Friedman (Friedman),

exhibit 3. Under this alleged LPT Reinsurance Agreement, plaintiffs ceded to Eaglestone, "100% of [plaintiffs'] ultimate net loss on the Subject Asbestos Liabilities in excess of ... retention." *See* Friedman affirmation, exhibit 3. According to plaintiffs, Eaglestone "then entered a treaty...with [NICO,] an affiliate of Berkshire Hathaway."[1] *Id.*

In addition to the fact that an undated unsigned copy of the alleged LPT Reinsurance Agreement was proffered to this court, no copy of the agreement between Eaglestone and NICO has been included in any of the papers for evaluation by this court. Therefore, it cannot be determined whether or not a transfer actually took place.

Nevertheless, the court cannot overlook that treaty reinsurance, as defined by the highest court of this State, is obtained **in advance** of actual coverage. *See Matter of Midland Ins. Co.*, 79 NY2d at 258; *see also Unigard Sec. Ins. Co., Inc.*, 79 NY2d at 579, n 1. Therefore, even if plaintiffs were to proffer properly executed documents that provide for a transfer of all US asbestos-based losses to another entity, such transfer could not be treaty reinsurance. For this reason, that part of plaintiffs' motion that seeks to dismiss: (1) that portion of the third and fourth affirmative defenses as concerns retention, as well as (2) the entirety of defendant's fifth, fourteenth, and fifteenth affirmative defenses, are denied.

2. Payments as Loss

In its third affirmative defense, defendant alleges that, since the transfer of the US asbestos-based losses on January 1, 2011, plaintiffs have not made payments that qualify as losses under the facultative reinsurance certificates. Paragraph 3 (b) of the facultative reinsurance certificates states: "[t]he term 'loss' shall mean only such amounts as are actually paid by the [ceding] Company in settlement of claims or in satisfaction of awards or judgments." Plaintiffs have not proffered copies of the payments that have been made under the Transamerica settlement agreement; it cannot be determined whether or not the post-Eaglestone/NICO payments are losses that would be covered within paragraph 3 (b) of the facultative reinsurance certificates. Therefore, that portion of plaintiffs' motion that seeks to dismiss defendant's third affirmative defense is denied.

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[1] It appears from a letter sent by the SEC to AIG, that the transaction between Eaglestone and NICO took place on June 17, 2011. *See* affirmation of Joseph D'Ambrosio, exhibit 10.

3. **Duty to Promptly Settle Action**

In its fourth affirmative defense, TRC alleges that the AIG Insurers failed to settle "the action"[2] promptly. However, defendant does not assert that plaintiffs breached their duty promptly to settle the action with Transamerica. Additionally, "a reinsurer is bound 'to accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation.'" *Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 121 (1st Dept 2007), quoting *British Intl. Ins. Co. Ltd. v Seguros La Republica, S.A.*, 342 F3d 78, 85 (2d Cir 2003). Granite State was a party to the settlement in the Mercer County DJ Action, and plaintiffs contributed to that settlement. Therefore, that part of plaintiffs' motion that seeks dismissal of that portion of defendant's fourth affirmative defense, alleging that plaintiffs breached its duty to promptly settle the action, is granted, and that portion of defendant's fourth affirmative defense is stricken.

4. **Consent to Assignment**

Paragraph 11 of the facultative reinsurance certificates requires TRC's consent prior to the assignment of the certificates. Defendant's sixth, tenth, nineteenth and twenty-fourth affirmative defenses allege that the 2011 transactions, transferring all of AIG's U.S. asbestos-based losses to Eaglestone and then to NICO, were assignments. As stated above, courts should construe reinsurance agreements "so as to give full meaning and effect to the material provisions." *Excess Ins. Co. Ltd.*,, 3 NY3d at 582. Although the word "assignment" is not defined in the reinsurance contract, New York courts have provided that "[a]n assignment, without reservation, is generally a transfer of one's whole interest." *Aetna Cas. & Sur. Co. v McCullough*, 41 AD2d 161, 162 (1st Dept 1973). Plaintiffs assert that, pursuant to the alleged transfer with Eaglestone/NICO, they retain liability over a certain dollar amount, and that, therefore, they have not assigned the facultative reinsurance certificates.

TRC counters that a reinsurance relationship is a personal relationship – that the identity of the reinsured is part of the risk being insured. *See* Memorandum of Law in Opposition to Motion to Dismiss Certain Defenses at 12. However, under New York law, facultative insurance certificates are construed as ordinary contracts. *See British Intl. Ins. Co. Ltd. v Seguros La Republica, S.A.*, 342 F3d 78, 82 (2d Cir. 2003). Therefore, no personal relationship is to be considered beyond that of an

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[2] Plaintiffs do not specify exactly which action.

ordinary contractual obligation and the duty of *uberrima fides* that attaches to all reinsurance contracts.

Because plaintiffs have failed to proffer a copy of the fully executed contracts that would serve as documentary evidence that the facultative reinsurance certificates have not been assigned, that part of plaintiffs' motion as seeks to dismiss the sixth, tenth, nineteenth and twenty-fourth affirmative defenses is denied.

5. *Uberrima fides*

A cedent owes the reinsurer a duty of utmost good faith. *See Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 106 (1996). The obligation is reciprocal, and, therefore, also "requires a reinsurer to indemnify its cedent for losses that are even arguably within the scope of the coverage reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties' obligations under which the reinsurer could avoid payment." *United Fire & Cas. Co. v Arkwright Mut. Ins. Co.*, 53 F Supp 2d 632, 642 (S.D.N.Y. 1999).

The relationship between a reinsurer and a reinsured also requires "the reinsured to disclose to the reinsurer all facts that materially affect the risk of which it is aware and of which the reinsurer itself has no reason to be aware." *Christiania Gen. Ins. Corp. of N.Y. v Great Am. Ins. Co.*, 979 F2d 268, 278 (2d Cir. 1992). Despite the fact that, "[c]edents are not the fiduciaries of reinsurers, and are not required to put the interests of reinsurers ahead of their own," (*United States Fidelity & Guar. Co. v American Re-Ins. Co.*, 20 NY3d 407, 420 [2013]), a cedent must disclose anything material affecting the risk to the reinsurer.

TRC's allegation that the AIG Insurers were required to disclose certain material information is encompassed within its fifteenth affirmative defense, alleging that plaintiffs breached its agreement with TRC. The ninth affirmative defense, which alleges *uberrima fides*, to wit, a breach of duty of good faith and fair dealing, is duplicative of its breach of contract defense. As it arises from the same set of facts, under New York law, the *uberrima fides* affirmative defense must be dismissed. *See Cerberus Intl., Ltd. v BancTec, Inc.*, 16 AD3d 126 (1st Dept 2005). That portion of plaintiffs' motion that seeks to dismiss defendant's ninth affirmative defense is granted.

B. Summary Judgment

It is well settled that a "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate

the absence of any material issues of fact". *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). As is often stated by the New York courts, summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 321 [2009] (in dissent); *City Univ. of N.Y. v Finalco, Inc.*, 93 AD2d 792, 793 (1st Dept 1983). In deciding whether there is a material triable issue of fact, "the facts must be viewed in the light most favorable to the nonmoving party." *Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 401 (2006).

Granite State contends that it is entitled to summary judgment, declaring that TRC is liable to Granite State under the three facultative reinsurance certificates, and for monetary damages under those same certificates. In addition, Granite State seeks to dismiss defendant's second through fourth counterclaims and setoffs.

The Court notes that there has been no discovery in this action, and Granite State has not proffered the relevant executed documents for this court to examine. Nevertheless, it seeks summary judgment on its claims based upon waiver and account stated.

1. <u>Waiver</u>

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed." *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 (1988). Granite State and TRC entered into a contract, i.e., the reinsurance certificate, paragraph 11 of which states that "[t]he terms of this Certificate shall not be waived, amended or in any way modified unless such waiver, amendment of [sic] modification is contained in an endorsement to this Certificate."

Granite State contends that defendant has waived its right to object to the 2012 invoices as defendant paid the invoices sent to it from 2008 through 2011, without a reservation of rights. Granite State, additionally, maintains that a letter was sent to defendant's Executive Vice President for Claims on July 25, 2011, explaining the transaction (*see* Caprice affidavit, ¶ 18), and that payments were made by defendant to Granite State after that notification. Finally, Granite State asserts that defendant waited too long after being invoiced to object to the invoices.

TRC, however, maintains that there was no breach of the facultative reinsurance certificates until the transfer to Eaglestone/NICO occurred, so there was no reason to reserve its rights. Additionally, defendant avers that, as soon as it understood the extent of the transfer, it notified both AIG and NICO that it would not be paying for any further claims. *See* Levene affidavit, ¶¶ 10-15.

"Doctrines of waiver and estoppel may not be invoked to extend coverage or to create coverage where none exists." *United Fire & Cas. Co. v Arkwright Mut. Ins. Co.*, 53 F Supp 2d at 643. There are material questions of fact as to whether Granite State breached the facultative reinsurance certificates, in which case, coverage would not exist. Additionally, the facultative reinsurance certificates state that their terms cannot be waived without a written endorsement. Therefore, the motion for summary judgment must be denied to the extent it is predicated on a theory of waiver.

2. <u>Account Stated</u>

Granite State also seeks summary judgment upon a claim of an account stated. Although plaintiffs have not raised the claim in their complaint, Granite State asserts that TRC made payments for more than three years on invoices for its portion of the Transamerica settlement agreement, and never objected or paid with a reservation of rights. Granite State further avers that by making the payments from 2008 through 2011, defendant evidenced a promise that it would continue paying those invoices until the Transamerica settlement agreement claims were completed. Finally, Granite State contends that TRC did not timely object to the invoices that were sent to it in 2012.

Upon the review of the record, the court finds that there are material questions of fact as to whether or not TRC made a timely objection to the 2012 invoices, as well as whether it could object to payments made after the alleged transfer of the US asbestos-related losses. Granite State has failed to meet its burden of demonstrating, as a matter of law, that defendant failed to challenge plaintiffs' invoices after making partial payments on the Transamerica settlement (*see RSL Com U.S.A. v Atlas Communications*, 309 AD2d 677 [1st Dept 2003]), and, therefore, Granite State is not entitled to summary judgment on an account stated.

3. <u>Counterclaims and Setoffs</u>

Finally, Granite State seeks summary judgment dismissing TRC's second through fourth counterclaims and setoffs for reimbursement of certain amounts defendant paid to Granite State after

the January 1, 2011 transfer of U.S. asbestos-related losses to Eaglestone/NICO. Because there are material questions of fact as to whether those monies should be returned to defendant, that portion of Granite State's motion as seeks dismissal of the second through fourth counterclaims and setoffs is denied.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiffs' motion to dismiss certain of the defendant's affirmative defenses is **GRANTED**, to the extent that: (1) that part of defendant's fourth affirmative defense that alleges that plaintiffs breached their duty to promptly settle the action, and (2) the ninth affirmative defense are **DISMISSED**, and is otherwise **DENIED**; and it is further

ORDERED that the motion of plaintiff Granite State Insurance Company for summary judgment in its favor against defendant is **DENIED**.

This constitutes the decision and order of the court.

DATED: December 23, 2013

E N T E R,

O. PETER SHERWOOD
J.S.C.