

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

TRANSATLANTIC REINSURANCE COMPANY,

Plaintiff,

INDEX NO. 152812/2013

-against-

MOTION DATE Oct. 3, 2013

AMERICAN INTERNATIONAL GROUP, INC., et al.,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

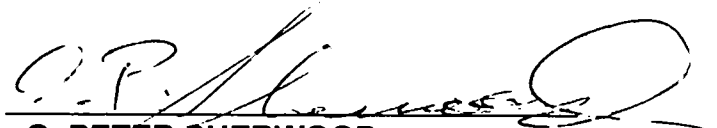
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: February 6, 2014


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
TRANSATLANTIC REINSURANCE COMPANY,

Plaintiff,

-against-

**AMERICAN INTERNATIONAL GROUP, INC.,
GRANITE STATE INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY
of PITTSBURGH, PA and LEXINGTON
INSURANCE COMPANY,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

DECISION AND ORDER

**Index No.: 152812/2013
Mot. Seq. Nos.: 001 & 002**

In this declaratory judgment action, defendant American International Group, Inc. (AIG) moves, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss the complaint as against it. Defendants Granite State Insurance Co. (Granite State), National Union Fire Insurance Company of Pittsburgh, PA (National Union) and Lexington Insurance Company (Lexington), which are AIG subsidiaries (collectively, the Insurers), also move, pursuant to CPLR 3211 (a) (1), to dismiss the claims pertaining to the six No-Claim Certificates and the Unspecified Certificates. The motions, 001 and 002 respectively, are consolidated for determination.

BACKGROUND

Plaintiff Transatlantic Reinsurance Company (TransRe) commenced this action to obtain a declaratory judgment that it has no obligations under various facultative reinsurance contracts (the Certificates) which it issued to the Insurers. Pursuant to the terms of the Certificates, TransRe indemnified the Insurers for a portion of the risk of certain insurance policies issued by the Insurers. (Complaint, NYSECF Doc. No 1, ¶ 13). Each of the Certificates contained, *intra alia*, four terms which TransRe claims have been breached: a “loss paid” provision, a retention warranty, an anti-assignment clause, and an access to records clause.

The “loss paid” provisions “reinforce that [the relevant Insurer] . . . must itself bear a loss before asking the reinsurer (TransRe) to indemnify its portion thereof” (*id.*, ¶9). In other words, the Insurers must bear the cost of the loss before TransRe may be asked to indemnify its portion of that

loss, in order to “maintain the alignment of the parties’ financial interests” (*id.*). According to TransRe, the retention warranty ensures that the Insurers have a financial interest in the risk reinsured by TransRe throughout the life of the contractual relationship, which also preserves the unity of the financial interests of the Insurers and TransRe (*id.*, ¶ 22). The anti-assignment provision ensures that, without the reinsurer’s written consent, the entity responsible for the underwriting and claims management of the reinsured risk will not be changed during the life of the contract (*id.*, ¶ 25). Finally, TransRe states that the “access to records” clause provides TransRe with the right to inspect, audit, and examine any and all of the Insurers’ and AIG’s books, records and papers that relate to the business reinsured (*id.*, ¶ 26).

According to the allegations set forth in the complaint, AIG began a “de-risking” strategy in or before 2011 and, as a part of that strategy, AIG entered into the AIG/NICO LPT to transfer its legacy asbestos liabilities to a separate, independent, non-AIG entity, NICO. In this “loss portfolio transfer transaction,” NICO agreed to take on the asbestos coverage liability for all of AIG’s insurance subsidiaries (*id.*, ¶12, 27-28). TransRe alleges that, as a result of this transaction, NICO, rather than the Insurers, would receive the benefits of the reinsurance, and NICO now bears the economic consequence of any loss that is not paid by reinsurance, rather than the Insurers. In its complaint, TransRe asserts that AIG improperly assigned rights granted by the Certificates without advance notice to TransRe.

TransRe’s complaint alleges additional violations of the Certificates, including the access to records provisions, based on the defendants’ refusal to provide TransRe with access to the operative AIG/NICO LPT documents and other materials concerning the risk reinsured by TransRe.

THE MOTIONS TO DISMISS

Motion No. 001- Motion to Dismiss Complaint as Against Defendant AIG

AIG moves to dismiss this action on the ground that there is no contractual privity between AIG and TransRe. As AIG is not a party to the Certificates, it argues, AIG has no rights or obligations to TransRe with respect to the Certificates. Further, AIG contends that TransRe, in its complaint, does not allege that AIG has asserted, or has threatened to assert, any claim against TransRe in connection with the Certificates, or that AIG owes any duty to TransRe or that any such duty had been breached. Finally, AIG asserts that dismissal is proper because, even if TransRe were to prevail, the judgment TransRe seeks would have no effect on AIG’s rights or obligations.

Motion No. 002- Insurer Defendants' Motion to Dismiss the Declaratory Judgment Claim as to "Six No-Claim Certificates" and "Unspecified Certificates"

In the Insurers' motion, they seek to dismiss TransRe's claims related to Certificates for which TransRe has not alleged that the Insurers have demanded payment. This motion covers all but three of the Certificates at issue in the matter.

DISCUSSION

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively establishing* a defense as matter of law" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009][citation omitted]).

On a motion to dismiss a claim for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the [pleading] as true and provide [the party opposing the motion] the benefit of every possible inference [citation omitted]. Whether [the party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the facts as alleged in the pleading fit within any cognizable legal theory, not whether there is evidentiary support to establish a meritorious cause of action or counterclaim (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

CPLR § 3001 states that:

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

“A declaratory judgment action thus ‘requires an actual controversy between genuine disputants with a stake in the outcome . . . [internal citations omitted]’” (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]) and may not be used simply to obtain an advisory opinion (*Combustion Eng’g v Travelers Indem. Co.*, 75 AD2d 777, 778 [1st Dept 1980], *affd* 53 NY2d 875 [1981]).

Motion No. 001- Motion to Dismiss Complaint as Against Defendant AIG

AIG argues that, because of the lack of contractual privity between AIG and TransRe, there is no justiciable controversy between these two parties. AIG also points out that TransRe seeks a judgment “declaring that TransRe owes no reinsurance obligations under the TransRe Certificates” (Complaint, ¶A), which would not directly implicate AIG, as it is not a signatory to those Certificates and is owed no obligations under them. Therefore, AIG claims, TransRe is not seeking any remedy from AIG, and AIG should be dismissed from the action.

TransRe agrees that AIG is not a signatory to the Certificates at issue here. However, TransRe asserts it seeks a declaratory judgment against AIG based upon an alter-ego theory, that AIG dominated and controlled the actions of the Insurers, AIG’s subsidiaries, who were signatories to the Certificates. According to TransRe, “AIG dominated and controlled the AIG Insurers as part of the acts constituting AIG’s “de-risking” strategy, which forms the basis of the Complaint” (Memorandum of Law in Opposition to American International Group, Inc.’s Motion to Dismiss, NYSCEF Doc. No. 26, at 1). TransRe alleges:

Upon information and belief, AIG . . . places, manages, directs, controls and makes all substantive decisions concerning ceded reinsurance matters (such as those at issue here) on behalf of the AIG family members, including, but not limited to National Union, Granite State and Lexington.

(Complaint, ¶9.) Thus, TransRe argues, because AIG negotiated the AIG/NICO LPT for the purpose of “de-risking,” AIG caused the Insurers to breach the retention warranty, the anti-assignment clause, the “loss paid” provision and the anti-modification provision in each of the Certificates.

In order to pierce the corporate veil to implicate a defendant parent company on an alter-ego theory of liability, a party must plead and prove:

(1) complete domination and control of the subsidiary by the parent, not only generally, but with respect to the transaction at issue, (2) that this control was used to commit a fraud or other wrong, in contravention of the plaintiff's rights, and (3) that the control and its misuse caused the loss

(*Eastern States Elec. Contrs. v Crow Constr. Co.*, 153 AD2d 522, 523 [1st Dept 1989]; see also *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]). However, “the corporate veil will be pierced to achieve equity, even absent fraud, [w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and be called the other's alter ego” (*Campane v Pisciotta Servs., Inc.*, 87 AD3d 1104, 1105 [2d Dept 2011], quoting *Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 895 [3d Dept 2003]). However, where the plaintiff has not pled that “the parent company engaged in self-dealing, commingled funds, or [that it] lacked corporate formalities, a complaint seeking to pierce the corporate veil should be dismissed for failing to state a cause of action” (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 153 [1st Dept 2013]). Moreover, the alter-ego claim fails where the complaint does not plead the fact that corporate capitalization is not adequate to meet the demands of the alleged liability (*id.*).

TransRe's complaint does not contain allegations that AIG has abused its control of the Insurers to the point of ignoring the separation of the entities. It has not set forth allegations concerning the sufficiency of the Insurers' capitalization, or their inability to meet their liability obligations. Nor does TransRe allege a lack of formal corporate structure, or that AIG commingled funds with the Insureds, for example. TransRe's allegations that AIG's “de-risking” strategy interfered with the Insureds' abilities to meet their obligations under their contracts with TransRe do not permit this court to find that AIG has made a sham of the corporate formalities of the Insurers, as required to establish alter-ego liability. Thus, TransRe has not pled the elements necessary to establish an alter-ego theory of liability, and, therefore, because of the lack of privity between AIG and TransRe, TransRe may not maintain this action against AIG.

Motion No. 002- Insurer Defendants' Motion to Dismiss the Declaratory Judgment Claim as to “Six No-Claim Certificates” and “Unspecified Certificates”

In the complaint, TransRe describes various Certificates under which it reinsured excess liability insurance policies, and seeks a declaration that it has no obligations thereunder. Some of

these Certificates are only vaguely described, and their Certificate numbers are not provided (the “Unspecified Certificates”). TransRe also specifically identifies nine Certificates, numbered: C80-77756, C84-68784, 8077557, C84-68791, C82-38253, 8034196, 83-40229, 82-38381, and 2006218.

Three of the identified Certificates are not covered by the Insureds’ Motion to Dismiss (the “Claimed Certificates”). These are Nos. 83-40229, 82-38381, 2006218. The Insureds have already demanded payment from TransRe pursuant to these certificates, and do not dispute the justiciability of a claim related to these certificates.

The justiciability of TransRe’s claim regarding the six remaining specified Certificates, for which no claim has yet been made (the “No-Claim Certificates”) is disputed in the Insureds’ Motion to Dismiss. Three of those Certificates, C80-77756, C84-68784, and C84-68791, were issued by either Granite State or Lexington to General Motors, and TransRe alleges it has been given notice of a coverage action which could implicate each of these three. Certificates 8077557 and C82-38253 are also currently related to pending coverage actions, and TransRe claims that Lexington has provided it with a notice of loss related to Certificate C8034196, the “Ampco-Pittsburgh” Certificate. The Insurers argue that without a claim, there is no justiciable controversy with respect to the six No-Claim Certificates. In opposition, while TransRe concedes that there have been no demands for payment with respect to these six Certificates, it argues that the notice given by AIG of the pending actions with respect to four of those Certificates and the pending actions concerning the other two are sufficient to find a justiciable controversy.

According to the Appellate Division, First Department, “it appears well settled that a declaratory judgment action against insurers, including excess carriers, is permitted prior to judgment where the ‘judgments likely to be recovered’ or the ‘potential liability’ might well reach into the coverage contracted for” (*Cabrini Med. Ctr. v KM Ins. Brokers*, 142 AD2d 529, 530 [1st Dept 1988][citations omitted]). Speculation as to the amount of damages that may be recovered in the underlying action is not sufficient to warrant declaratory relief (*see Combustion Eng’g*, 75 AD2d 777). In *Long Is. Light. Co.*, (35 AD3d 253), in determining whether to grant a declaratory judgment, the Appellate Division found a question of fact as to whether the excess insurance policy was implicated. That Court took into account the plaintiff’s submission which asserted that the excess policy would be reached, and offered projected damages based upon an expert report (*id.* at

253-254; see also *Booth Memorial Hosp. & Med. Cent. v Merson & Co., Inc.*, 162 AD2d 100 [1st Dept 1990]).

Here, there are no facts alleged which would establish that the reinsurance provided by TransRe, memorialized by the six No-Claim Certificates, will be triggered by the underlying litigations. The parties agreed that neither AIG nor the Insurers have made demands for payment with respect to the No-Claim Certificates. There are no allegations in the complaint indicating that any such demand is imminent. Further, TransRe's complaint does not allege that demands for payment under those Certificates will be triggered by the underlying litigation, or contain any other allegations regarding potential liability that may result from the underlying litigations. For each of these six Certificates, TransRe offers the limits of the coverage and describes the liabilities insured under the Certificates as being the subject of legal actions, but does not offer any estimates or amounts at issue in those litigations. Nor does it describe the likelihood of any outcome of the litigations.

The affidavit of Wesley Sherman, a senior claims examiner at TransRe, identifies the No-Claim Certificates and states that they are the subject of ongoing coverage actions that "may potentially result in AIG seeking reinsurance under a Contested Certificate" (Sherman aff, ¶ 22). Yet, in his affidavit, Sherman does not offer any amounts or estimates sought in the underlying litigations that would establish "judgments likely to be recovered" or "potential liability" that would trigger the reinsurance coverage provided by TransRe. Any declaratory relief at this point with respect to the No-Claim Certificates would be premature. These allegations are too speculative to provide a sufficient factual basis to establish justiciability.

The Insurers additionally argue that any allegations regarding any other "reinsurance certificates (contracts) that TransRe issued to the AIG Defendants prior to 1986" (Memorandum of Law in Support of the Insurer Defendants' Motion to Dismiss, NYSCEF Doc. No. 13 at 2, quoting the complaint, ¶ 12), which are not specifically identified in the complaint (the Unspecified Contracts), should likewise be dismissed. In response, TransRe acknowledges that it "has not sought a declaration with respect to any such certificates" (Memorandum of Law in Support of Opposition to Defendants' Motion to Dismiss, NYSCEF Doc. No. 37 at 4).

Based upon the above, defendant Insurers' motion to dismiss the portion of the dispute related to the six No-Claim Certificates and the Unspecified Certificates is granted.

Accordingly, it is hereby

ORDERED that the defendant American International Group's motion to dismiss the complaint herein, (motion sequence no. 001) is granted and the complaint is dismissed in its entirety against AIG, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendant AIG; and it is further

ORDERED that defendants Granite State Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA and Lexington Insurance Company's motion to dismiss the complaint as to the six No-Claim Certificates and the Unspecified Certificates (motion sequence no. 002) is granted, and the complaint is dismissed with respect to those certificates; and it is further


ORDERED that the remainder of the action is severed and defendants Granite State Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA and Lexington Insurance Company are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendants Granite State, National Union and Lexington are directed to appear for a preliminary status conference on Wednesday, February 26, 2014 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: February 6, 2014

ENTER,


O. PETER SHERWOOD
J.S.C.