Chao Jiang v Ping An Ins.
2016 NY Slip Op 31534(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 652260/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
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CHAO JIANG,

Plaintiff,

-against-

PING AN INSURANCE, a China Limited Company; PING AN PROPERTY & CASUALTY INSURANCE COMPANY OF CHINA, LTD., a China Limited Company; CHINA PING AN INSURANCE OVERSEAS (HOLDINGS) LIMITED, a Hong Kong Limited Company; HUATAI INSURANCE GROUP OF CHINA, a China Limited Company; ACE INSURANCE LIMITED, a Hong Kong Limited Company; ACE GROUP HOLDINGS INC., a Delaware Corporation; CHUBB CORPORATION, a New Jersey Corporation; FEDERAL INSURANCE COMPANY, an Indiana Corporation; and CHUBB INSURANCE (CHINA) COMPANY LIMITED, a China Limited Company,

Defendants.

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Index No.: 652260/2015

Mtn Seq. Nos. 003 & 007

DECISION AND ORDER

JEFFREY K. OING, J.:

This matter concerns defendant insurers' alleged failure to satisfy their contractual obligations to defend plaintiff, Chao Jiang, in actions brought against him by the United States Department of Justice ("DOJ") and the United States Securities and Exchange Commission ("SEC").[1]

[1]By letter, dated July 28, 2016, plaintiff's counsel notified this Court that plaintiff has settled his claims against

Mtn Seq. No. 003

Defendants, Ace Group Holdings, Inc. and Ace Insurance Limited, move, pursuant to CPLR 3211, to dismiss the complaint.

Mtn Seq. No. 007

Plaintiff moves, pursuant to 3215, for an order granting him a default judgment against defendant Hautai Insurance Group of China.

Defendant Hautai Insurance Group of China cross-moves, pursuant to CPLR 3211, to dismiss the complaint without leave to re-plead or re-serve the complaint, or, in the alternative, pursuant to CPLR 327(a), to dismiss on forum non conveniens ground.

These motions are consolidated for disposition.

Background

Plaintiff is a former officer of China North East Petroleum Holding Ltd. ("CNEP"), a Nevada Corporation which, during the relevant time period, had offices in the state of California and the state of New York. He was allegedly based in the United States and worked for CNEP in California and New York.

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defendants, Ping An Insurance, Ping An Property & Casualty Insurance Company of China, Ltd. and China Ping An Insurance Overseas (Holdings) Limited (NYSCEF Doc. No. 207). Accordingly, mtn seq. nos. 004, 005, and 006 are rendered moot.

The Insurance Policies

In 2010, CNEP purchased two insurance policies covering its directors and officers. In 2011, CNEP extended both policies through April 30, 2012. The first policy purchased by CNEP (the "Primary Policy") was initially underwritten fifty percent (50%) by defendants, Ping An Insurance, Ping An Property & Casualty Insurance Company of China, Ltd. and China Ping An Insurance Overseas (Holdings) Limited (the "Ping An defendants"), and fifty percent (50%) by American International Group ("AIG"). The Primary Policy provided aggregate coverage of $5 million dollars.

The initial policy period for the Primary Policy ran from May 1, 2010 through April 30, 2011. CNEP subsequently extended the Primary Policy's policy period. The extension of Primary Policy period ran from May 1, 2011 through April 30, 2012. According to plaintiff, the Ping An defendants refused to extend coverage for a second period.

Defendants Huatai Insurance Group of China ("Huatai Group") and ACE Insurance Limited ("ACE Insurance") and ACE Group Holdings ("ACE Group") (ACE Insurance and ACE Group collectively referred to as "ACE") allegedly negotiated the Primary Policy extension and signed the Primary Policy extension such that the Huatai Group became co-insurers for CNEP for the subject

extension of the initial Primary Policy period. At the same time, AIG allegedly continued to provide coverage for the second Primary Policy period.

CNEP purchased a second policy in 2010, and again in 2011 (the "Excess Policy"), which was underwritten by defendants Federal Insurance Company and defendants Chubb Insurance (China) Company Limited (collectively, "Chubb") that provided additional aggregate insurance of $5 million dollars.

The Investigations and Insurance Coverage

In August 2010, the SEC opened a formal order of investigation into CNEP and its officers and directors. The DOJ commenced an investigation into CNEP and CNEP's officers and directors in the fall of 2010. On June 1, 2011, the SEC issued a subpoena to plaintiff requiring that he provide deposition testimony and documents to the SEC. In November 2012, the SEC named CNEP and a number of former officers and directors, including plaintiff, in civil proceedings entitled SEC v China North East Petroleum Holdings Ltd., No. 12-cv-8696 (SD NY) Rel. No. 225522, alleging diversion of offering proceeds and violation of various securities laws (the "SEC Action"). In early 2013, the DOJ commenced a parallel criminal proceeding (United States v Jiang, No. 1:13-cr-00152-RJL (D DC) (the "DOJ Action").

Plaintiff subsequently pleaded guilty to knowing failure to implement internal controls (United States v Jiang, 2014 WL 11071979 [D DC December 18, 2014]).

According to plaintiff, because of the complex nature of the proceedings, the limits of the Primary Policy were reached. AIG advanced defense costs for both the SEC and DOJ Actions, however, the Ping An defendants and Huatai Group refused to pay out their respective policy limits. As a consequence, Chubb refused to pay out under the Excess Policy layer, as the Primary Policy had not been exhausted. This refusal allegedly compounded the purported harm to plaintiff because his legal fees alone exceeded the $5 million provided under the Primary Policy.

The Four Causes of Action

The complaint asserts four causes of action against all defendants[2]: 1) deceptive business practices; 2) breach of contract; 3) breach of the covenant of good faith and fair dealing; and 4) declaratory judgment.

In the first cause of action, plaintiff alleges deceptive practices under General Business Law § 349 by pleading that defendants reached into U.S. markets to sell insurance, but that

[2]As noted, supra, plaintiff has settled his claims with the Ping An defendants.

they denied their obligations under those contracts and engaged in tactics designed to mislead consumers. Plaintiff maintains that such tactics resulted in harm to the public generally, and to him in particular. He seeks to recover actual damages, reasonable attorneys' fees associated with bringing this claim, and, due to the willful and wanton nature of the conduct, punitive damages in amounts to be determined at trial.

The second cause of action, for breach of contract, alleges that defendants and CNEP entered into contracts for the provision of insurance to directors and officers of CNEP, including third-party beneficiaries such as plaintiff, and that defendants failed to provide the obliged coverage. Plaintiff maintains that he gave timely written notice of the SEC and DOJ Actions, which triggered such coverage obligation. Plaintiff asserts that defendants breached their independent duty to advance his defense costs before the final disposition of the respective claims. Moreover, plaintiff alleges that the obligation to advance such defense costs attached independently of any position they may take on plaintiff's ultimate liability. Meanwhile, due to defendants' refusal to meet their obligations, plaintiff, though largely successful at trial, was forced to defend against the SEC and DOJ Actions, and ultimately, was forced to accept a plea

bargain rather than fight a re-trial. As a result of his plea, plaintiff is prohibited from traveling to China during his three-year probation period.

The third cause of action, for breach of the covenant of good faith and fair dealing, alleges that defendants entered into the Primary and Excess Policies with CNEP, and collected the associated premiums, but then took action to deprive plaintiff of the benefits of the Policies, causing undue hardship and harm. Plaintiff therefore claims compensatory and consequential damages in an amount to be proven at trial.

Finally, under the fourth cause of action, plaintiff seeks a declaration, pursuant to CPLR 3001, that: (i) defendants are estopped from raising, or have waived, any exclusions in either the Primary or the Excess Policy that may have been triggered as a result of plaintiff's failure to successfully defend the SEC or DOJ Actions; (ii) defendants are estopped from raising, or have waived, any exclusions in either the Primary or the Excess Policy that may have been triggered as a result of plaintiff's acceptance of a settlement arrangement and plea in the SEC or DOJ Actions, respectively; (iii) defendants are estopped from raising, or have waived, any rights they may have had to approve or deny settlement arrangements or plea agreements made in the

SEC or DOJ Actions; (iv) Huatai Group must advance defense costs as required under the Primary Policy; and (v) Chubb must advance defense costs as required under the Excess Policy.

Mtn Seq. No. 003

ACE moves to dismiss the complaint against it. According to the complaint, in the spring of 2011, ACE entered into negotiations with CNEP over the replacement of the Ping An defendants as the insurers for the Primary Policy. The negotiations were allegedly led by Douglas Wong, an ACE employee, who issued a questionnaire to CNEP. The questionnaire lists the ACE Group as "Strategic Partner" in the letterhead, and upon review, although there are numerous references to Huatai Insurance Company of China Limited (Huatai Limited), as distinguished from Huatai Group, in the document no other reference to ACE is contained in the document. Wong, on behalf of Huatai Limited signed the Primary Policy confirmation document (Bhandari Affirm., Ex. D). Finally, the complaint describes a number of dilatory actions by Wong, which were allegedly at least partial causes of Huatai Group's failure to extend coverage to plaintiff.

Breach of Contract

A breach of contract claim requires the existence of a contract, due performance by the plaintiff, breach of the

contract by defendant, and damages resulting from the breach (JP Morgan Chase v J.H. Elec. of N.Y., Inc., 69 AD3d 802, 803 [2d Dept 2010]). Here, there was no contract between CNEP and ACE. Although generally speaking, one who is not a party to an agreement cannot be bound by it and sued for breach, a cause of action may be pleaded if there is a separate basis for the nonparty's liability such as piercing the corporate veil or some plausible manifestation of an intent to be bound (Pacific Carlton Dev. Corp. v 752 Pac., LLC, 62 AD3d 677 (2d Dept 2009); HDR, Inc. v International Aircraft Parts, 257 AD2d 603 (2d Dept 1999); National Survival Game of N.Y. v NSG of LI Corp., 169 AD2d 760 (2d Dept 1991).

Although Wong negotiated the Primary Policy on behalf of Huatai Limited, the argument that Wong signed the Primary Policy as representative of ACE is undermined by the notation above Wong's confirmatory signature that states he is signing "[f]or and on behalf of Huatai Insurance Company of China Limited" (Bhandari Affirm., Ex. D). If Wong were signing in any other capacity, or, as plaintiff seems to imply, in his capacity as an officer of ACE, this notation would be either supplemented or unnecessary. There being no clear privity between ACE and CNEP, there can also be no contract except in extraordinary

circumstances, which is absent here (Canon Fin. Servs., Inc. v Meyers Assoc., LP, 139 AD3d 575 [1st Dept 2016]).

To the extent that plaintiff argues that ACE was acting as the agent of Huatai Group in the negotiation, and is somehow liable, the principle is well settled that an agent who acts on behalf of a disclosed principal cannot be simultaneously liable for a breach of contract absent unambiguous evidence of an intention to be bound (Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 7 [1964]["courts should refrain from foisting such an obligation upon a party, be he individual or corporation, who simply signs as agent, absent the requisite clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability"]); Pascual v Rustic Woods Homeowners Assn., Inc., 134 AD3d 1003, 1005-1006 [2d Dept 2015][similar principle with regard to personal liability of agent]). In addition, the very idea of "[j]oint liability of both principal and agent is inconsistent. Where the party contracts as an agent of a disclosed principal, he binds either his principal or himself but not both. It involves both a practical as well as a legal anomaly" (Huntington Pennysaver v Tire Supply Corp. of Long Is., 59 Misc 2d 268, 271 [Suffolk Dist Ct 1969]).

The complaint and the record also offer no viable inference of apparent authority for Wong to bind ACE to the Primary Policy. "Apparent authority arises where words or conduct of the principal, communicated to a third party, lead to the appearance and belief that the agent possesses authority to enter into a particular transaction" (Lawyers' Fund for Client Protection of State of N.Y. v Manufacturers Hanover Trust Co., 153 Misc 2d 360, 361 (Sup Ct, Albany County 1992).

Here, all of the documents, including the communications between the parties in the aftermath of the actions brought against plaintiff explicitly refer to the liability of Huatai Group or Limited, and in no place the liability or potential liability of ACE. Indeed, plaintiff's counsel contacted ACE stating that she "would be grateful if [ACE] would please forward a contact email address for Huatai Group's China claims department. A client has a D&O insurance claim that we would like to submit, but we haven't yet received a response from the contact we were previously given" (Bhandari Affirm., Ex. H). Thus, under these circumstances, there was no expectation that ACE was considered to be the Primary Policy insurer. Indeed, all further correspondence with regard to the coverage under the Primary Policy came directly from Huatai Group or Limited. Although the information was sent to ACE, the claim was

apparently forwarded, without objection, to Huatai Group or Limited.

Plaintiff rightly argues, however, that a parent company can be held liable as a party to its subsidiary's contract if the parent's conduct manifests an intent to be bound by the contract, and an inference of such intent may be drawn from the parent's participation in negotiation of a contract, or if the subsidiary is a mere instrumentality of the parent (Horsehead Indus. v Metallgesellschaft AG., 239 AD2d 171, 171-72 [1st 'Dept 1997]).

Plaintiff maintains that such an inference may be drawn in this matter because ACE, through Douglas Wong, was "directly responsible for negotiating, issuing, and denying coverage claims under the [Primary] Policy [, and the] Primary Policy documents specifically reference [ACE], demonstrating that [ACE] intended to be viewed by the insureds as issuers of the Primary Policy" (Memorandum in opp at p. 17).

While plaintiff states the appropriate legal principle, plaintiff's application of that principle to the facts herein misses the mark. To begin, although an employee of ACE was involved in the negotiations, there is no indication, in the questionnaire arising in the negotiation, in the confirmation, in the signatures, in the Primary Policy issued, or in the coverage discussions via email that ACE was the actual party in interest.

Indeed, all of the documents bear the name of Huatai Limited, and only the questionnaire includes the name of ACE, and then only in the letterhead of the document. Meanwhile, all of the provisions of the questionnaire refer to Huatai Group or Limited (Bhandari Affirm., Ex. D). Moreover, the Primary Policy does not mention ACE anywhere, not even in the letterhead. Finally, the Primary Policy coverage confirmation comes, rather, from Chartis, and states that 50% coverage is from Chartis, and 50% coverage is from Huatai Limited (Id., Ex. C). Again, no mention of ACE.

Neither does the complaint sufficiently allege, or the documentation give any particular indication, that ACE exercises such control over the day-to-day operations of Huatai Limited that Huatai Limited could be deemed a mere instrumentality, dummy corporation, or agent of ACE in order to impose enterprise liability on ACE, or to pierce the corporate veil of Huatai Group or Limited (Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 656-657 [1976]; Pritchard Servs. (NY) v First Winthrop Props., 172 AD2d 394, 395 [1st Dept 1991]; Astrocom Elecs. v Lafayette Radio Elecs. Corp., 63 AD2d 765, 766 [3d Dept 1978]).

Moreover, to the extent that ACE was representing Huatai Limited in the negotiations, it was doing so with the apparent full knowledge of CNEP, yet CNEP took no action to secure the signature of ACE on the Primary Policy, or to determine the

extent of Wong's authority. CNEP cannot now be heard to claim that it believed Wong was signing on behalf of ACE, but made no inquiry as to how this one agent (Wong) could bind two principals -- both Huatai Limited and ACE (Compare UA-Columbia Cablevision of Westchester v Fraken Bldrs., 96 AD2d 509, 510 [2d Dept 1983]).

Finally, there is uncontroverted documentary evidence that Douglas Wong did not work for ACE Insurance Limited (Hong Kong) or Ace Group Holdings Inc., the named defendants in this action, but, rather, worked for ACE INA Holdings, Inc., an unnamed corporation, which was the actual "strategic partner" of Huatai Limited that plaintiff refers to in the complaint (Wong Affirm., Ex. A [Amended and Restated Strategic Partnership Agreement]). As such, even if the theory of liability proffered by plaintiff were viable, and it is not, the ACE defendants named herein would be arguably entitled to dismissal on grounds that they are not the proper parties.

Accordingly, ACE Insurance Limited and ACE Group Holdings' motion to dismiss the complaint against them is granted, and the complaint is hereby dismissed against them.

Mtn Seq. No. 007

Plaintiff seeks a default judgment against Huatai Group on the basis that Huatai Group was lawfully served, and waived

objections to service of process by appearance of its counsel, but has, thus far, failed to respond to the complaint.

Huatai Group cross-moves, pursuant to CPLR 3211, to dismiss the complaint without leave to re-plead or re-serve the complaint, or, in the alternative, pursuant to CPLR 327(a), to dismiss on forum non conveniens ground.

CPLR 3215 provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him."

Oddly, plaintiff supports his application for default by stating that "when a defendant fails to appear or otherwise respond to a complaint, a plaintiff is entitled to seek default judgment. Huatai has not responded to Mr. Jiang's complaint, and he is entitled to a default judgment against Huatai" (Memorandum in Support at p. 1). But, as evidenced by the very first decision of this Court in this matter, Huatai Group appeared in this action through pro hac vice applications of counsel, which have been granted (Jiang v Ping An Ins., Index No. 652260/2015, decision and order of August 24, 2015 [NYSCEF Doc. No. 44]).

Where a party has actually appeared in the action, application of CPLR 3215 must be denied (Vitiello v Mayrich

Constr. Corp., 255 AD2d 182, 183 [1st Dept 1998]["defendant could not have been in default because it appeared in opposition to plaintiff's motion"]); see Rubenstein v Manhattan & Bronx Surface Tr. Operating Auth., 280 AD2d 312, 313 [1st Dept 2001][although defendants never filed an answer, their appearance at a settlement conference made dismissal of the complaint under CPLR 3215 improper]). Moreover, where a party has appeared in an action, as here, this Court is reluctant to violate the public policy preference to hear and decide matters on the merits (Buchholz v A.L.A.C. Contr. Corp., 122 AD3d 660, 661 [2d Dept 2014]["public policy favor[s] the resolution of cases on the merits, [and] the Supreme Court providently exercised its discretion in denying the plaintiffs' motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant"]).

Accordingly, plaintiff's motion for a default judgment against defendant Huatai Group is denied.

Turning to Huatai Group's cross motion to dismiss the complaint, the uncontroverted documentary evidence establishes that Huatai Group is not the direct signatory to the Primary Policy, but, rather, is a holding company. The signatory of the Primary Policy, and the strategic partner of ACE, is patently and unambiguously "Huatai Insurance Company of China Limited," or,

herein, Huatai Limited (See Primary Policy; see also Wong Affirm., Ex. A [Amended and Restated Strategic Partnership Agreement, which distinguishes between Huatai Insurance Group of China and Huatai Insurance Company of China Limited]).

To be sure, the complaint itself does not allege that Huatai Group had a degree of control over Huatai Limited that was "so complete that the subsidiary is, in fact, merely a department of the parent" (Delagi v Volkswagenwerk AG of Wolfsburg, Germany, 29 NY2d 426, 432 [1972]; see also Rotoli v Domtar, Inc., 224 AD2d 939 [4th Dept 1996]). Notably, "[a] parent corporation's complete ownership of a subsidiary's stock is also insufficient, by itself, to pierce the corporate veil" (Oxbow Calcining USA Inc. v American Indus. Partners, 96 AD3d 646, 649 [1st Dept 2012]). Moreover, without a degree of control over the activities of Huatai Limited such that it appears to be a mere department of Huatai Group, a finding of agency for jurisdictional purposes cannot be inferred (Amsellem v Host Marriott Corp., 280 AD2d 357, 359 [1st Dept 2001]).

Accordingly, Huatai Group's cross motion to dismiss the complaint is granted only to the extent that the complaint as against Huatai Group is dismissed without prejudice. That branch of the motion to dismiss based on forum non conveniens is denied as moot.

Accordingly, it is hereby

ORDERED that the motion (mtn seq. no. 003) of defendant ACE Group Holdings and ACE Ins. Ltd., pursuant to CPLR 3211, to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against said defendants; and it is further

ORDERED that the motion (mtn seq. no. 007) of plaintiff, pursuant to CPLR 3215, for a default judgment against defendant Huatai Insurance Group of China is denied; and it is further

ORDERED that the cross motion of defendant Huatai Insurance Group of China to dismiss the complaint as against that defendant is granted, and the complaint is dismissed in its entirety without prejudice; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 242, 60 Centre Street, on September 15, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/11/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.