SCAJ

INDEX
NO. 2912/00

SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 25 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 7-14-00
Submission Date: 11-2-00
Motion Sequence No.: 001/ MOT D

x

PREMIUM RISK GROUP, INC., PRG BROKERAGE, INC., and PROMPT CLAIMS SERVICE, INC.,

Plaintiffs,

- against -

LEGION INSURANCE COMPANY; LEGION MANAGEMENT CORP.; COMMONWEALTH RISK SERVICES, INC.; MUTUAL HOLDINGS (BERMUDA) LTD.; and MUTUAL INDEMNITY (BERMUDA) LTD.

Defendants.

x

PLAINTIFF'S ATTORNEY
Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482

DEFENDANT'S ATTORNEY
(for Mutual Holdings (Bermuda) Ltd., and Mutual Indemnity (Bermuda) Ltd.)
Benjamin A. Fleischner, Esq.
140 Broadway - 30th Floor
New York, New York 10005

Upon the following papers read on Defendants' motion seeking dismissal for lack of subject matter and personal jurisdiction:

Defendants' Notice of Motion;
Affirmation of Benjamin A. Fleischner, Esq. and supporting papers;
Affidavit of Gary Roche;
Affidavit of Natalie Tull Greene;
Defendants' Memorandum of Law;
Affidavit of Lawrence W. Blessinger in Opposition;
Affidavit of Robert W. Brundige, Jr., Esq. in Opposition;
Plaintiff's Memorandum of Law in Opposition;
Affidavit of Keith A. Schwab;
Defendants' Reply Memorandum of Law.

Defendants Mutual Holdings (Bermuda) Ltd. ("Mutual") and Mutual Indemnity (Bermuda) Ltd. ("Indemnity") made this motion for an order, pursuant to CPLR 3211 (a) (2) and (8), dismissing the complaint of the Plaintiffs Premium Risk Group, Inc. ("Premium") PRG Brokerage Inc. ("PRG") and Prompt Claims Service, Inc.("Prompt") on the grounds that the court lacks jurisdiction over the subject matter of this action and that the court lacks personal jurisdiction over the moving Defendants is **granted** to the extent set forth herein.

BACKGROUND

This action, sounding in breach of contract, breach of fiduciary duty, unjust enrichment and quantum meruit or quasi contract, arises out of a shareholders agreement dated February 28, 1996, between Plaintiff Premium and Defendant Mutual as well as a Deductible Reimbursement Policy issued March 28, 1996 by Defendant Indemnity to "Named insureds as covered by Legion Policy Nos. CA1-000-344 to CA1-000-368, as endorsed by Premium Risk Group, Inc." Defendants Legion Insurance Company ("Legion"), Legion Management Corp. and Commonwealth Risk Services, Inc. ("Commonwealth") are not parties to this motion.

Plaintiffs are involved in the insurance business and specialize in insuring the livery taxi industry in New York City. Mutual Risk Management, Ltd. ("MRM"), not a party in this action, is the parent holding company of the Defendants. Defendants

Mutual and Indemnity are Bermuda corporations who themselves do no business in New York. Commonwealth, a Pennsylvania corporation, is the marketing arm of MRM. Legion, a Pennsylvania Corporation, is licensed to write insurance in New York and is referred to as the "fronting carrier." According to Plaintiffs, in 1995, they entered into a relationship with Commonwealth and Legion whereby they referred their "Taxi Program" policies to Commonwealth and Legion. By the terms of the shareholders agreement, Premium became a shareholder of Mutual and was to share in the profits realized by Mutual from its various subsidiaries which insured the Plaintiffs' insureds. Plaintiffs allege that Legion mismanaged the business and that Mutual and Indemnity failed to adequately ensure that Legion and Commonwealth performed their duties, causing Plaintiffs to lose profits.

ISSUE PRESENTED

The central question presented on this motion is the validity and enforceability of the forum selection clauses which are part of the shareholders agreement and the Deductible Reimbursement Policy Section 10 of the shareholders agreement provides:

> This agreement has been made and executed in Bermuda and shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this agreement shall be resolved exclusively by the courts of Bermuda.

The Deductible Reimbursement Policy provides:

> This policy has been applied for, negotiated and issued in Bermuda and, accordingly, is subject to the exclusive jurisdiction of the courts of Bermuda and shall be interpreted according to the laws of Bermuda.

DISCUSSION

Plaintiffs argue that Defendants have waived their jurisdictional arguments by moving to consolidate the instant action with another and participating in the defense of the action. The court disagrees. The law is clear that no waiver is effected where, as here, the defenses are raised in the Defendants' answer. See, Dinicu v. Groff Studios Corp., 215 A.D. 2d 323, 626 N.Y.S. 2d 800 (1st Dept. 1995); and Bank Hapoalim, B.M., v. Kotten Machine Co. of Brooklyn, Inc., 151 A.D. 2d 374, 543 N.Y.S. 2d 75 (1st Dept. 1989).

One of the landmark cases on forum selection clauses is M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct 1907 (1972), where the United States Supreme Court noted:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

Likewise, the law in New York is that forum selection clauses are *prima facie* valid and enforceable. See, Koob v. IDS Financial Services, Inc., 213 A.D. 2d 26, 629 N.Y.S. 2d

426 (1st Dept. 1995). As observed by the court in Shah v. Shah 215 A.D. 2d 287, 626 N.Y.S. 2d 786 (1st Dept. 1995):

> It is beyond dispute that forum selection clauses are *prima facie* valid and are not to be set aside except in instances of fraud or overreaching or where the enforcement of the clause would be so unreasonable and unjust as to make a trial in the selected forum "so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court ..." (*British West Indies Guar. Trust Co., Ltd. v Banque Internationale A Luxembourg,* 172 A.D.2d 234, 567 N.Y.S.2d 731; *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12-18, 92 S.Ct. 1907, 1914-1917, 32 L.Ed.2d 513; *Fidelity & Deposit Co. of Maryland v. Altman,* 209 A.D.2d 195, 618 N.Y.S.2d 286). Further, the burden of establishing that New York is an improper forum is a heavy one and rests on the shoulders of the Defendants (*Banco Ambrosiano v. Artoc Bank & Trust,* 62 N.Y.2d 65, 74, 476 N.Y.S.2d 64, 464 N.E.2d 432; *Kastendieck v. Kastendieck,* 191 A.D.2d 328, 595 N.Y.S.2d 184). 215 A.D. 2d at 288-9, 626 N.Y.S. 2d at 788-9.

While this principle may not apply where one party is a much more powerful entity and obtains an unfair jurisdictional advantage through overreaching, where two large independent corporations bargain at arm's length for such a clause it should be honored. As observed by Judge Friendly in AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 156 (2d Cir. 1984), "There can be nothing 'unreasonable

and unjust' in enforcing such an agreement; what would be unreasonable and unjust would be to allow one of the [parties] to disregard it." Where, as here, the possibility of inconvenience in litigating in another jurisdiction is foreseen, it would be improper to ignore the parties' bargain absent a showing that litigating in the foreign jurisdiction is tantamount to a party being deprived of its day in court. Plaintiff has failed to make a sufficient showing that litigating this matter in Bermuda will prevent it from having a fair hearing on the merits.

The fact that the dispute involves insurance does not create a special situation where public policy would dictate a different result. See, Koko Contracting v. Continental Environmental Asbestos Removal Corp., __ A.D. 2d __, 709 N.Y.S. 2d 825 (2nd Dept. 2000).

Plaintiff argues that since only Premium was a party to the shareholders agreement, the dismissal should only be as to that Plaintiff. This argument also fails. Such rights as any of the Plaintiffs have derive from the agreement between Premium and Mutual and from the Deductible Reimbursement Policy. All Plaintiffs, therefore, are subject to the same rights and defenses as Premium. See, Artwear Inc v. Hughes, 202 A.D. 2d 76, 615 N.Y.S. 2d 689 (1st Dept. 1994). See also, 22 N.Y. Jur.2d Contracts, § 313.

While it appears to the court that Plaintiffs' allegations of common ownership, parent/subsidiary relationships and minimal contacts with New York other than through

its subsidiaries are insufficient to give the court personal jurisdiction over the moving Defendants (see, Huxley Barter Corporation v. Considar, Inc., 216 A.D. 2d 24, 627 N.Y.S. 2d 639 [1st Dept. 1995]; and Porter v. LSB Industries, 192 A.D. 2d 205, 600 N.Y.S. 2d 867 [4th Dept. 1993]), the court finds it unnecessary to decide this question in light of its ruling that the forum selection clauses involved here entitle the moving Defendants to a dismissal. Therefore, it is,

ORDERED, that the motion of Defendants Mutual Holding (Bermuda) Ltd. and Mutual Indemnity (Bermuda) Ltd. to dismiss the complaint as to them is **granted**, provided that said Defendants agree to accept service of Bermuda process and waive any jurisdictional and limitations defenses.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 17, 2001

Hon. LEONARD B. AUSTIN, J.S.C.