

**Villas of Ocean Dunes Assn., Inc. v First Specialty
Ins. Corp.**

2019 NY Slip Op 32435(U)

August 15, 2019

Supreme Court, New York County

Docket Number: 161299/2018

Judge: W. Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

VILLAS OF OCEAN DUNES ASSOCIATION, INC.

Petitioner,

- v -

FIRST SPECIALTY INSURANCE CORPORATION,

Respondent.

-----X

INDEX NO. 161299/2018

MOTION DATE April 17, 2019

MOTION SEQ. NO. 001 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 16, 17, 18, 19, 25, 32, 48

were read on this motion to/for COMPEL APPRAISAL

The following e-filed documents, listed by NYSCEF document number (Motion 006) 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62

were read on this motion to/for DISMISS

Petitioner, Villas of Ocean Dunes Association, Inc. ("Dunes") is a homeowners' association consisting of forty-six (46) buildings located in Stuart, Florida. In the verified Amended Petition, Dunes alleges that as a result of Hurricane Irma, the buildings sustained extensive damage to roofs and other elements. In motion sequence number 001, Dunes brings this special proceeding to compel appraisal pursuant to CPLR §7601 and New York Insurance Law §3408. Respondent, First Specialty Insurance Corporation ("First Specialty") issued a surplus lines excess insurance contract to Dunes and in motion sequence number 006, moves to dismiss the Amended Petition based on the terms of the excess policy which provide that all disputes are to be determined in the "exclusive" jurisdiction of the courts of the State of New York pursuant to New York law.

BACKGROUND/CONTENTIONS

This insurance coverage dispute arises out of alleged damage to condominium units in Florida due to Hurricane Irma. (NYSCEF Doc. No. 15). Petitioner Dunes' primary insurer, non-party Westchester Surplus Lines Insurance Company ("primary insurer" and/or "Westchester"), issued a primary insurance contract number D37449349 002 for the policy period November 30, 2016 to May 31, 2018. (NYSCEF Doc. No. 3). Respondent First Specialty issued an excess insurance contract number ESP 2001660 01 to Dunes for the policy period November 30, 2016 to May 31, 2018. (NYSCEF Doc. No. 4). The First Specialty contract is a surplus lines property policy that is excess to the primary commercial property insurance contract issued by primary insurer Westchester to Dunes for the same policy period. (NYSCEF Doc. No. 53, ¶4). The First Specialty excess contract contains a choice of law and forum selection clause wherein the parties "irrevocably" agreed that all disputes concerning "the construction, effect, and interpretation of this insurance contract" are to be determined in the "exclusive" jurisdiction of the courts of the State of New York pursuant to New York law. (NYSCEF Doc. No. 4, p. 24 of 25).

Petitioner Dunes, relying on an appraisal provision in the Westchester primary policy, in its Amended Petition seeks to compel First Specialty to participate in an appraisal process where each party will select an impartial appraiser, as the parties have been unable to agree on the value of the loss despite extensive negotiations to resolve this issue. Dunes alleges that "Westchester paid to Dunes Westchester's policy limits of \$5,000,000, and First Specialty to date has paid about \$1.3 million dollars. However, the amounts paid to date by Westchester and by First Specialty to Dunes are not enough to permit Dunes to repair all of the covered damage Hurricane Irma caused to the Property." (NYSCEF Doc. No. 15, ¶¶ 12 and 13).

Dunes contends that First Specialty's excess surplus lines property policy explicitly incorporates the conditions contained in Westchester's primary insurance contract, including the appraisal provision which it argues is not inconsistent with First Specialty's choice of law and forum selection clause. (NYSCEF Doc. No. 3, p. 10 of 15). Dunes posits that the appraisal provision is similar to an arbitration provision and inasmuch as First Specialty has invoked the forum selection clause in dismissing Dunes' Florida action, so that this dispute could be resolved in New York, this court has the authority to enforce the appraisal provision set forth in the Westchester primary policy. (NYSCEF Doc. No. 15, ¶29).

In its motion seeking dismissal of the Amended Petition, First Specialty argues that the appraisal provision that forms the basis of Dunes' special proceeding to compel appraisal is not contained in the First Specialty excess surplus lines property policy and as such cannot bind First Specialty to proceed to appraisal. First Specialty maintains that the express terms of its excess policy provide that it supersedes and does not follow form where the Westchester primary insurance contract is inconsistent with the First Specialty excess contract where it specifically states:

The provisions, terms, conditions and exclusions of this Policy, including any Attached Endorsements shall supersede, for the purposes of coverage under this Policy, any provisions of the Followed Policy that are inconsistent with this Policy. No endorsement, amendment, addition or modification to the Followed Policy or to any primary, underlying or any other insurance shall alter the provisions, terms, conditions or exclusions of this Policy, including without limitation, any Attached Endorsements (NYSCEF Doc. No. 4, p. 1 of 10).

First Specialty contends that its excess contract does not contain an appraisal provision and instead contains a choice of law and forum selection clause which requires the parties to "irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York" and is thus inconsistent with the Westchester primary insurance contract which contains an appraisal

provision that requires the parties to each select an impartial appraiser who will then select an umpire who will make a binding decision if the two appraisers fail to agree. (NYSCEF Doc. No. 3. P. 10 Of 15). As such, First Specialty maintains that its policy supersedes and does not follow form as respects the appraisal provision set forth in Westchester's primary policy. First Specialty argues that its forum selection clause controls and petitioner's efforts to force an appraisal arbitration in Florida and/or New York should be rejected as inconsistent with the plain terms of its excess policy. First Specialty argues that the clear and unambiguous language of its excess surplus lines property policy requires dismissal of the petition so that petitioner can commence an action by filing a complaint in New York, permitting First Specialty time to respond to the complaint and the parties should proceed to discovery, consistent with the provisions of the mandatory forum selection clause set forth in the excess policy.

STANDARD OF REVIEW and ANALYSIS

On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed, and courts must provide plaintiff with every favorable inference (see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 773 NE2d 496, 746 NYS2d 131 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]; see also *Held v Kaufman*, 91 NY2d 425, 432, 694 NE2d 430, 671 NYS2d 429 [1998] ["every favorable inference must be afforded the facts alleged in the complaint and in the various motion papers submitted by (the plaintiff)"]).

"Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 486 NE2d 827, 495 NYS2d 969 [1985]). "[W]ell-established principles governing the interpretation of insurance contracts . . . provide that the

unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131, 832 NYS2d 1 [1st Dept. 2006]).

"[T]he goal of a court reviewing an insurance policy is to ascertain whether, afford[ing] a fair meaning to all of the language employed by the parties in the contract and leav[ing] no provision without force and effect[,] . . . there is a reasonable basis for a difference of opinion as to the meaning of the policy" (*Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 102 AD3d 223, 231, 955 NYS2d 338 [1st Dept 2012], lv dismissed in part, denied in part 22 NY3d 948, 999 N.E.2d 540, 977 NYS2d 177 [2013] [internal quotation marks and citation omitted]).

Here, First Specialty seeks dismissal of the Amended Petition based on the clear and unambiguous terms of the choice of law and forum selection clause set forth in its excess surplus lines property policy. First Specialty argues that the identical choice of law and forum selection clause that is in the excess policy issued to Dunes, has been consistently upheld by the courts of this and other states and the plain language has been interpreted to require disputes under the First Specialty excess contract to be resolved solely in the New York State courts. (NYSCEF Doc. No. 54, pp. 10-14).

This court is compelled to afford unambiguous policy provisions with their plain and ordinary meaning and based upon that standard of review, this court finds that the choice of law and forum selection clause set forth in the First Specialty excess surplus lines policy to be clear and unambiguous and to require dismissal of Dunes' Amended Petition. Indeed, this court must be guided by the rules of contract interpretation because "[a]n insurance policy is a contract

between the insurer and the insured" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145, 855 NYS2d 459 [1st Dept 2008]). Thus, the extent of coverage is controlled by the relevant policy terms of First Specialty's excess surplus lines policy and not by the terms of the Westchester primary policy when those terms are "inconsistent" with First Specialty's excess contract. (NYSCEF Doc. No. 4, p. 1 of 10).

Petitioner's attempt to avoid the unambiguous language of First Specialty's forum selection clause in favor of the appraisal provision set forth in the Westchester primary policy is unavailing. Even abiding a liberal construction of the pleadings and giving petitioner every favorable inference, does not alter the plain language of the terms, conditions and endorsements set forth in First Specialty's excess surplus lines policy.

This court has reviewed the language of the policies at issue and notes that the excess policy contains a forum selection clause that is clear and unambiguous. Notably, unlike the primary policy, the excess policy does not contain an appraisal provision. Moreover, the choice of law and forum selection clause is mandatory and unmistakable in its scope, providing that "[t]he laws of the State of New York, without regard to any conflict of laws rules that would cause the application of the laws of any other jurisdiction, shall govern the construction, effect, and interpretation of this insurance agreement." (NYSCEF Doc. No. 4, p. 24 of 25). Additionally, the forum selection clause provides that the parties "irrevocably" agreed that all disputes are to be determined in the "exclusive" jurisdiction of the courts of the State of New York and the "parties expressly waive all rights to challenge or otherwise limit such jurisdiction." (id.).

Granting the relief sought in the Amended Petition, would be tantamount to this court rewriting the terms of the contract the parties negotiated and agreed to be bound by. The First

Specialty excess contract expressly states that the “provisions, terms, conditions and exclusions . . . shall supersede, for the purposes of coverage under this Policy, any provisions of the Followed Policy that are inconsistent with this Policy. No endorsement . . . to the Followed Policy or to any primary, underlying or any other insurance shall alter the provisions . . . of this Policy, including without limitation, any Attached Endorsements.” (NYSCEF Doc. No. 4, p. 1 of 10). As such, First Specialty has demonstrated that the terms of its excess contract require that all disputes be resolved exclusively in New York courts and that the policy does not contain the appraisal provision on which petitioner relies in seeking to compel First Specialty to participate in an appraisal.

Petitioner’s claim that First Specialty’s motion must be denied because it has not cited any legal authority that interprets the appraisal clause contained in Westchester’s primary policy misses the mark and ignores the critical condition that the terms of First Specialty’s excess contract “shall supersede for the purposes of coverage under this Policy, any provisions of the Followed Policy that are inconsistent with this Policy.” (NYSCEF Doc. No. 4, p. 1 of 10). As First Specialty correctly posits, a binding appraisal before three arbitrators as required by the Westchester primary policy, is patently “inconsistent” with the excess contract’s requirement that the “exclusive jurisdiction” for “all disputes” be decided in New York State courts. (see *Home Ins. Co. v. Am. Home Prod. Corp.*, 902 F.2d 1111, 1113 [2d Cir. 1990] [“although both policies must be looked to in determining the scope of Home’s [excess carrier] liability, the Home [excess] policy controls Home’s obligations if there is any conflict between the two insuring agreements.”]).

Accordingly, based on the plain terms of the excess contract, because the forum selection clause cannot be reconciled with the appraisal language in the primary policy, the language in the

excess policy "shall supersede" and any dispute involving coverage between petitioner and First Specialty must be submitted to the exclusive jurisdiction of the New York State courts and not be resolved through appraisal. (NYSCEF Doc. No. 4, p. 1 of 10; and p. 24 of 25).

Similarly, petitioner's reliance on Insurance Law §3408 is misplaced as the terms of that statute demonstrate that it is wholly inapplicable to the dispute raised by the parties here. Section 3408 of the Insurance Law pertains to the selection of umpires pursuant to the provisions relating to appraisals contained in the standard New York fire insurance policy when the loss occurred in New York.

Based on the facts alleged in the Amended Petition, New York Insurance Law §3408 is inapplicable here because the First Specialty excess surplus lines policy is not a standard fire insurance policy and the loss for which petitioner seeks coverage is not a loss that occurred in New York. As set forth in the Amended Petition, petitioner seeks coverage for alleged property damage due to Hurricane Irma that occurred in Florida. (NYSCEF Doc. No. 15). As such, the statute on which the Amended Petition is based is inapplicable and cannot form the basis to compel First Specialty to participate in an appraisal process.

Petitioner has failed to establish a contractual basis to support its Petition to compel appraisal pursuant to Article 76, and has failed to establish a statutory basis to compel appraisal pursuant to Insurance Law §3408. Based on the plain language of First Specialty's choice of law and forum selection clause the resolution of any dispute between petitioner and First Specialty is the "exclusive jurisdiction" of the Courts of the State of New York. Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent's cross motion to dismiss is granted; and it is further

ADJUDGED that respondent recovers from petitioner, costs and disbursements in the amount as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

8/15/2019
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	