UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE INSURANCE CO.,

Plaintiff(s)

-v-

No. 03 Civ. 8889 (LTS)(DCF)

CANALI REINSURANCE CO., LTD.,
FELD CHEVROLET CO., and
ANDREW S. WOLFSON,

Defendant(s).

MEMORANDUM OPINION AND ORDER

APPEARANCES:

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LAURA TAYLOR SWAIN, United States District Judge

Petitioner New Hampshire Insurance Company ("NHIC") filed a Notice of Petition to Compel Arbitration on October 21, 2003, in the Supreme Court of the State of New York, in connection with a dispute over money allegedly owed to Petitioner pursuant to a reinsurance contract covering a vehicle service contract program. Shortly thereafter, the matter was removed to this Court. Respondent Canali Reinsurance Company ("Canali") now moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Petition for failure to state a claim; Respondents Feld Chevrolet ("Feld") and Andrew S. Wolfson ("Wolfson") move to dismiss pursuant to Rule 12(b)(2) based on lack of personal jurisdiction. For the following reasons, Canali's motion to dismiss is granted.

BACKGROUND

The following relevant facts are alleged in the Petition to Compel Arbitration. Petitioner NHIC has an agreement with a company known as Warrantech Automotive, Inc. ("Warrantech"), under which NHIC reimburses Warrantech for expenses incurred through claims on certain vehicle service contracts ("VSCs") that Warrantech sells to car dealership customers. (Petition to Compel Arbitration ¶ 19.) A VSC provides a new or used car buyer with coverage in case of mechanical failure that extends beyond the car's factory warranty. (Id. ¶ 18.) Insurers profit on VSCs to the extent that the premium paid for VSCs exceeds the amounts paid out in claims under the VSCs. (Id. ¶ 21.) Because claims for repairs are paid out over the life of the contract, which is up to seven years, and because claims occur more frequently toward the end of the seven-year contract, insurers of VSCs, such as NHIC here, receive an influx of cash during the beginning of the contract and are able to earn interest on that cash flow. (Id.) In order to

capitalize on that cash flow, certain car dealerships have created reinsurance companies that reinsure NHIC's obligations to Warrantech. (Id. ¶ 22.)

Canali and NHIC entered into such an agreement in April 1997 (effective as of October 1996) (the "Reinsurance Agreement"). (Id. ¶ 24.) The agreement contained an arbitration clause that provides in relevant part:

> All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two arbitrators, one to be chosen by each party, and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators.

(Id. ¶ 13.)

NHIC and Canali also entered into a Trust Agreement under which NHIC made deposits to a trust account of money due to Canali under the Reinsurance Agreement in order to ensure that there would be sufficient money available to cover the relevant VSC claims and premiums at all times. (Id. ¶¶ 25, 30.) As NHIC made these "cession" payments into the trust account, it issued quarterly cession statements to Canali that, according to NHIC, should have notified Respondents of the total amounts that they should have deposited into the trust account to satisfy obligations under the Reinsurance Agreement and Trust Agreement. (Id. ¶ 31.) Petitioner asserts the Respondents underfunded the trust account and therefore materially breached the Reinsurance Agreement. (Id. ¶¶ 14, 33-40.)

Petitioner submitted a written demand to Respondents for arbitration pursuant to the Reinsurance Agreement on March 4, 2003. (Id. ¶ 56.) Respondents have not complied with the demand, contending that the question of whether the Reinsurance Agreement has been breached is one that is outside the scope of the arbitration clause of the Reinsurance Agreement. (Resp. Mem. of Law in Support of Mot. to Dismiss. at 8.) Respondent Canali now moves on this

same basis, pursuant to Rule 12(b)(6), to dismiss the Petition to Compel Arbitration for failure to state a claim.

DISCUSSION

In deciding a motion to dismiss for failure to state a claim upon which relief may be granted, a court must accept as true the material facts alleged by the plaintiff and draw all reasonable inferences in plaintiff's favor. Grandon v. Merrill Lynch, 147 F.3d 184, 188 (2d Cir. 1998). The court must not dismiss the action unless "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000).

The Second Circuit has established a two-part test to determine the arbitrability of claims not derived from federal statutes: "(1) whether the parties agreed to arbitrate disputes at all; and (2) whether the dispute at issue comes within the scope of the arbitration agreement." Ace Capital Re Overseas Ltd. v. Central United Life Ins. Co., 307 F.3d 24, 28 (2d Cir. 2002). Because Article XIV of the Reinsurance Agreement contains an arbitration clause, there is no dispute as to the first part of the test, at least as to Respondent Canali, which is the only Respondent that executed the Reinsurance Agreement. The Court therefore turns to the question of whether the dispute, as framed by Petitioner, falls within the scope of the arbitration clause.

The Supreme Court has instructed that where, as here, a contract contains an arbitration clause, there is a presumption of arbitrability "*unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.*" AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 650

(1986) (emphasis added). The arbitration clause of the Reinsurance Agreement between NHIC and Canali focuses on disputes or differences arising out of the interpretation of the Agreement. The dispute here concerns Respondents' alleged failure to deposit funds to the trust account pursuant to the terms of the Reinsurance Agreement and the Trust Agreement. Because there is no indication that there is any dispute over the calculation of the amounts due, there is nothing in the Petition that even remotely implicates a need for interpretation of the Reinsurance Agreement.

Narrow arbitration clauses such as the one upon which the Petition relies cannot authorize compulsion of the arbitration disputes beyond their scope. See Gerling Global Reinsurance Corp. v. Home Ins. Co., 302 A.D. 2d 118, 123-24 (N.Y. App. Div., 1st Dept. 2002) (dispute regarding a party's obligation to refund money pursuant to an insurance contract was not within the purview of the arbitration clause specifying arbitration only in the event of a dispute as to contract interpretation); see also Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 225 (2d Cir. 2001) ("When parties use expansive language in drafting an arbitration clause, presumably they intend all issues that 'touch matters' within the main agreement to be arbitrated . . . while the intended scope of a narrow arbitration clause is obviously more limited.").

Petitioner's contention that the arbitration clause is a broad one rests on a reading of the provision that is plainly inconsistent with its terms. Petitioner represents that the relevant clause mandates arbitration of "[a]ll disputes or differences arising out of . . . this Agreement." That is true, but only if the reader ignores the middle of the clause, which in its entirety provides for arbitration of "[a]ll disputes or differences *arising out of the interpretation* of this

Agreement." (Reinsurance Agreement, Art. XIV) (emphasis added). Petitioner's reading of the clause renders the interpretation language as mere surplusage and defies the plain meaning of the clause. As the Second Circuit has explained, " . . . it is axiomatic that, when interpreting a contract, the court generally must consider the contract as a whole so that it may give significance to each term." T.G.I. Friday's Inc. v. Nat'l Restaurants Mgmt., Inc., 59 F.3d 368, 373 (2d Cir. 1995).

Read properly and as a whole, the arbitration clause, which is integral to the Petition, clearly covers only a specific category of disputes – ones arising out of the interpretation of the Reinsurance Agreement. Also confirming a narrow reading of the arbitration clause is the fact that the parties included a separate Service of Suit clause in Article XVI of the Reinsurance Agreement providing that in the event that there is a dispute regarding amounts due pursuant to the Agreement, the parties will submit to the jurisdiction of a United States court with the specific provision that

> [n]othing in this clause constitutes or should be understood to constitute a waiver of Reinsurers' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any state in the United States.

(See Reinsurance Agreement, Art. XVI.) Such provisions clearly show that the parties contemplated disputes that would not fall within the scope of the arbitration clause.

Even when the Petition is read in the light most favorable to the Petitioner, it can nonetheless be said with positive assurance in this matter that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Accordingly, the Petition fails to

state a claim upon which relief may be granted and must be dismissed.[1]

CONCLUSION

Because neither the factual allegations of the Petition nor the language of the clause pursuant to which Petitioner seeks to compel arbitration of the reinsurance liability dispute would entitle Petitioner to the relief it seeks (i.e., an order compelling arbitration of the underlying dispute), Canali's motion to dismiss is granted, and the Petition is dismissed as against all Respondents for failure to state a claim upon which relief may be granted.

Petitioner has requested leave to amend its allegations to demonstrate that this is a dispute within the scope of the arbitration clause, that is, one requiring interpretation of the Reinsurance Agreement. Petitioner's application is granted. NHIC shall serve and file an amended Petition to Compel Arbitration no later than Friday, April 23, 2004. If Petitioner files an amended Petition, the Court will hold an Initial Pre-trial Conference on Wednesday, June 30, 2004, at 11:00 a.m. If Petitioner fails to file and serve its amended Petition by April 23, 2004, this action will be dismissed with prejudice without further notice to the parties.

The motion to dismiss the Petition as against Respondents Wolfson and Feld for

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[1] The gravamen of the claim Petitioner seeks to arbitrate is the contention that NHIC should be able to enforce the financial cession payment provisions of the Reinsurance Agreement against Respondents Feld and Wolfson, even though neither of those Respondents was a signatory to the Reinsurance Agreement. Petitioner alleges that Canali has neither the funds to make good its reinsurance obligations nor an independent income stream. (Petition to Compel Arbitration ¶¶ 41-47.) Petitioner's theory of liability thus rests on alleged fraud and piercing of the corporate veil, rather than an interpretation of any provisions of the Reinsurance Agreement. (See id. ¶ 47 ("As a consequence of their wrongful and fraudulent activity toward NHIC, Wolfson, Feld and Canali are alter egos and jointly and severally liable for the losses experienced by NHIC.").)

lack of personal jurisdiction, pursuant to Rule 12(b)(2), is denied without prejudice as moot in light of the Court's determination as to the viability of the current pleading.

SO ORDERED.

Dated: New York, New York
April 12, 2004

LAURA TAYLOR SWAIN
United States District Judge