IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EMPLOYERS INSURANCE
COMPANY OF WAUSAU,

OPINION AND ORDER

Plaintiff,

13-cv-85-bbc

v.

ONEBEACON INSURANCE
COMPANY,

Defendant.

- -

In this action for breach of contract, plaintiff Employers Insurance Company of Wausau contends that defendant OneBeacon Insurance Company owes it $590,555.69 and prejudgment interest under two reinsurance certificates. Two motions are before the court. First, plaintiff has moved for summary judgment on its breach of contract claim. After plaintiff filed that motion, defendant moved to stay this case pending resolution of an arbitration dispute between plaintiff and defendant in Massachusetts.

Because defendant does not establish a pressing need for a stay, I will deny its motion. I will grant plaintiff's motion for summary judgment because defendant does not deny that it owes plaintiff the claimed amount and will calculate the prejudgment interest due it under Wisconsin law.

UNDISPUTED FACTS

A. The Contracts

Both plaintiff Employers Insurance Company of Wausau and defendant OneBeacon Insurance Company are insurance companies authorized to do business in Wisconsin. Defendant reinsures plaintiff under two faculative reinsurance certificates issued in January 1983 and January 1984. Under the terms of the certificates, defendant indemnifies plaintiff for any loss plaintiff may sustain under an umbrella liability insurance policy plaintiff issued to The Marley Company. Both certificates state that

> All claims involving this reinsurance, when settled by [plaintiff], shall be binding on [defendant], who shall be bound to pay its proportion of such settlements, and in addition thereto, in the ratio that [defendant's] loss payment bears to [plaintiff's] gross loss payment, its proportion of expenses, other than [plaintiff's] salaries and office expenses, incurred by [plaintiff] in the investigation and settlement of claims or suits and, with the prior consent of [defendant] to trial court proceedings, its proportion of court costs and interest on any judgment or award.

Both certificates also state that "[p]ayment of its proportion and expense paid by [plaintiff] will be made by [defendant] to [plaintiff] promptly following receipt of proof of loss."

Plaintiff sent defendant its first billing under the certificates in January 2012. Plaintiff sent additional billings to defendant every quarter as new amounts became due. In total, plaintiff has billed defendant $590,555.69 that defendant has not paid.

B. The Arbitration

In April 2012, defendant commenced an arbitration action against plaintiff to collect balances due on a series of reinsurance contracts not at issue in this case. Defendant and

plaintiff assigned the arbitration to Massachusetts by contract. A dispute arose over the umpire selection process. In October 2012, plaintiff filed suit against defendant in the United States District Court for the District of Massachusetts seeking relief related to the arbitration action. The arbitration action and the related court case are pending.

OPINION

A. Subject Matter Jurisdiction

In its complaint, plaintiff relies on 28 U.S.C. § 1332 as a basis for jurisdiction, which requires diversity of citizenship between the parties and an amount in controversy greater than $75,000. Unfortunately, the parties did not include the information necessary to make that determination in their pleadings or their proposed findings of fact. Although it is clear that the amount in controversy is sufficient because plaintiff is seeking approximately $600,000 in damages, the record is not as clear about the parties' citizenship.

In both its complaint and its proposed findings of fact, plaintiff alleges that it is a "company" that is "organized" under the laws of Wisconsin, which is also the location of its principal place of business. It makes a similar allegation that defendant is a "company" that is "organized" under the laws of Pennsylvania and has its principal place of business in Minnesota. Although defendant admits these allegations, they are not sufficient to determine the parties' citizenship because plaintiff does not identify what *type* of "company" each party is. This is important because the citizenship of an incorporated business is determined differently from that of an unincorporated business. Compare 28 U.S.C. §

1332(c)(1) (corporations are citizens of states in which they are incorporated and have their principal place of business) with Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998) (limited liability companies are citizens of each state in which their members are citizens). These rules are well established, so it is not clear why the parties did not provide more specific information.

Although the parties failed to prove subject matter jurisdiction, it is unnecessary to ask the parties for additional evidence. I have confirmed from public records maintained by the Wisconsin Office of the Commissioner and the Pennsylvania Department of State that plaintiff is a Wisconsin corporation and that defendant is a Pennsylvania corporation, so I conclude that jurisdiction is present under § 1332. I anticipate that in the future, counsel will be more precise about jurisdiction.

B. Defendant's Motion to Stay

Defendant wants to stay this case indefinitely pending the resolution of an arbitration action in Massachusetts between plaintiff and defendant. The grant of an indefinite stay requires the court to decide whether the moving party has established a "pressing need" for the stay by weighing the relevant interests and arguments. E.g., Cherokee Nation of Oklahoma v. United States, 124 F.3d 1413, 1416 (Fed. Cir. 1997); SanDisk Corp. v. Phison Electronics Corp., 538 F. Supp. 2d 1060, 1065-66 (W.D. Wis. 2008).

Defendant does not assert that the merits of the arbitration dispute overlap in any respect with the merits of plaintiff's claims in this case or that it cannot afford to pay the

amount claimed against it. Instead, defendant argues that a stay is appropriate because the resolution of the arbitration between plaintiff and defendant could eventually result in a setoff against plaintiff's claim in this case. In addition, defendant argues that a stay will discourage plaintiff from stalling the arbitration. Neither reason establishes a pressing need for granting an indefinite stay in this case.

Although neither party cites it, Soo Line Railroad Co. v. Escanaba & Lake Superior Railroad Co., 840 F.2d 546 (7th Cir. 1988), is instructive. In that case, the court of appeals concluded that a stay was not appropriate under circumstances similar to this case. Like plaintiff and defendant, the two railroad companies were locked in a dispute that resulted in both a lawsuit and an arbitration action. Id. at 547. The district court ordered the railroad companies to arbitrate one dispute and entered judgment with respect to another, awarding damages to Soo Line. Id. Escanaba moved for a stay of the judgment, arguing as defendant does in this case, that if it prevailed in arbitration, any award could be used to set off the court's award to Soo Line. Id. at 548, 551. The court of appeals rejected Escanaba's argument that a stay was appropriate under those circumstances, finding that the judgment against Escanaba and the pending arbitration were "related only in the sense that the two railroads [had become] antagonists, and each [wanted] money from the other." The court refused to defer settling one debt "while the arbitrators deliberate about a second." Id. It held that a potential setoff was not an adequate ground for a stay, noting that a possible claim "just sets the stage for a setoff and does not resolve the question whether delay in anticipation of setoff should be permitted." Id. at 552. The same circumstances are present

in this case. The pending arbitration in Massachusetts involves the same parties, but unrelated reinsurance contracts. It is possible, as defendant argues, that the arbitrator may award defendant some or all of the outstanding balance it claims plaintiff owes, but under Soo Line that possibility does not justify a stay. Although the procedural posture of Soo Line involved a request to stay a judgment rather than a request to stay the case, that difference does not undermine the relevance of Soo Line to this case. If anything, the standard for staying a case is more demanding than the standard for staying a judgment because it requires a finding of a "pressing need," rather than merely the "good reason," that the court of appeals required in Soo Line. Id. at 551

Defendant cites Dias v. Bank of Hawaii, 764 F.2d 1292, 1294 (9th Cir. 1985), and National Management Corp. v. Adolfi, 715 N.Y.S.2d 526 (N.Y. App. Div. 2000), for the proposition that a potential setoff may justify a stay, but both cases are distinguishable. In Dias, the court never reached the merits of the decision to stay execution and remanded, requiring the district judge to make findings of fact to support granting the stay. The pending federal action at issue in National Management arose out of the same franchise agreement as a state foreclosure action, leading the court to conclude that the two proceedings were sufficiently related to justify staying the foreclosure action. 715 N.Y.S.2d at 555.

In Soo Line, 840 F.2d at 552, the court of appeals not only rejected a potential setoff as justification for a stay, but refused to consider Soo Line's alleged conduct in the arbitration action. The court acknowledged that Soo Line may have "dragged its heels in the

arbitration," but still stood clear of that dispute because "the parties [had] assigned [the arbitration] by contract to a different forum." Id. In this case, defendant argues that a stay would discourage plaintiff from trying to stall the arbitration pending in Massachusetts. As the court held in Soo Line, any concerns regarding plaintiff's conduct should be raised in the forum the parties have chosen. Therefore, I will not consider any of defendant's allegations regarding plaintiff's conduct in proceedings pending elsewhere.

Defendant is asking for extraordinary relief that would require plaintiff to wait indefinitely for a resolution of its claim in this court. Granting such relief requires a pressing need, which defendant has not shown. In particular, defendant has not shown how staying this case would simplify the issues or affect defendant's rights in the arbitration. Therefore, it is unnecessary to consider defendant's arguments about the extent to which a stay would prejudice plaintiff.

B. Plaintiff's Motion for Summary Judgment

Plaintiff has moved for summary judgment on its breach of contract claim, contending that defendant failed to pay the portion of a settlement and expenses that plaintiff billed it under the reinsurance certificates. To succeed on its motion, plaintiff must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Parent v. Home Depot U.S.A., Inc., 694 F.3d 919, 922 (7th Cir. 2012).

Defendant does not deny that it has not paid plaintiff and it does not deny that it is

liable for the amounts plaintiff billed under the language of the certificates. Instead, defendant raises four other arguments in opposition to plaintiff's motion for summary judgment:

1. Defendant may be entitled to a setoff in this case depending on the result of pending arbitration;

2. Plaintiff did not follow this court's summary judgment procedures regarding proposed findings of fact when it submitted evidentiary materials;

3. Plaintiff did not support its request for prospective relief;

4. Plaintiff is not entitled to prejudgment interest, but if prejudgment interest is awarded, the rate should be calculated according to Wisconsin law.

Defendant's first three arguments require little discussion. Defendant's argument about a potential setoff is simply a repeat of its argument in support of its motion to stay. Its argument that plaintiff failed to submit its statement of proposed findings of fact in a separate document is moot because plaintiff subsequently filed its proposed findings of fact in accordance with the court's procedures and the court granted defendant the opportunity to respond. Finally, plaintiff abandoned its request for prospective relief when it did not address this issue in its reply to defendant's brief in opposition to plaintiff's motion for summary judgment.

This leaves the issue of prejudgment interest. Plaintiff asserts that it is entitled to prejudgment interest under either Wisconsin or Pennsylvania law. Plaintiff does not explain why it believes that the choice of law is between these two states, but presumably

it is because plaintiff is a Wisconsin corporation and defendant is a Pennsylvania corporation. Defendant's only argument that plaintiff is not entitled to prejudgment interest is that plaintiff waived it by not developing an argument in its opening brief, but defendant cites no authority for the proposition that a plaintiff moving for summary judgment must raise all potential issues in its motion. In any event, I permitted defendant to respond to the arguments plaintiff raised in its reply brief, so defendant has not been unfairly prejudiced. Because there is no actual dispute over whether plaintiff is entitled to prejudgment interest, I will award it.

Wisconsin and Pennsylvania calculate prejudgment interest at different rates, Wisconsin's rate being lower. Defendant argues that Wisconsin law applies in this case because Wisconsin has the most significant relationship to the certificates at issue. Both plaintiff and defendant are authorized to do business in Wisconsin and the certificates reinsure risks insured by plaintiff, making Wisconsin the place of contract performance. Because plaintiff does not develop any argument in favor of applying one state's law over the other, I will apply Wisconsin law. Future-Source LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) (courts should apply law of forum state when there is no actual dispute over which state's law governs).

With respect to the calculation method, plaintiff assumes that the rates should be calculated from the initial bill date, but it has not explained the reasons for its assumption. Defendant argues that prejudgment interest should be calculated from the time payment is due, which it says is 30 days after the date of the bill. In support, defendant relies on

language from the reinsurance certificates, which require that defendant pay plaintiff "promptly following receipt of proof of loss." Defendant argues that Wisconsin law defines "promptly" as requiring payment within 30 days, which means that plaintiff's calculations overstate the total interest due by that amount of time. Dkt. #35, at 6 (citing Wis. Stat. § 628.46). According to defendant's calculation method, plaintiff is due $20,510.61. Because plaintiff has not given any reasons to support a different amount, I will adopt defendant's calculation of the prejudgment interest due plaintiff under Wisconsin law.

ORDER

IT IS ORDERED that

1. Defendant OneBeacon Insurance Company's motion to stay, dkt. #20, is DENIED.

2. Plaintiff Employers Insurance Company of Wausau's motion for summary judgment, dkt. #14, is GRANTED. The clerk of court is ordered to enter judgment for plaintiff in the amount of $590,555.69 plus $20,510.61 in prejudgment interest and close this case.

Entered this 8th day of July, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge