UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, INDIAN HARBOR INSURANCE COMPANY, QBE SPECIALTY INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZON, UNITED SPECIALTY INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, and INTERNATIONAL INSURANCE COMPANY OF HANNOVER SD,

Petitioners-Cross Respondents,

18 Civ. 10382 (CM)

-against-

VINTAGE GRAND CONDOMINIUM ASSOCIATION, INC.,

Respondents-Cross Petitioners.

DECISION AND ORDER DENYING ALL REQUESTED RELIEF AND DISMISSING BOTH THE PETITION AND CROSS-PETITION

McMahon, C.J.:

The facts behind these opposing petitions are simple.

Respondent-Cross Petitioner, Vintage Grand Condominium Association, Inc. ("Vintage"), is the owner of a condominium building in Sarasota, Florida. The building suffered water damage, and Vintage asserted a claim under a Commercial Property Insurance program, effective June 5, 2016 through June 5, 2017 (the "Policy"). (Decl. of Jeffrey S. Weinstein in Supp. of Pet. For Order Designating and Appointing an Arbitration Umpire ("Weinstein Decl.") Ex. 3, Dkt. No. 3.) Petitioners are the underwriters on the Policy. They denied coverage by letter dated June 15, 2018, based on the Policy's exclusions for faulty workmanship, faulty construction, deterioration, wet or dry rot, decay, and insect and vermin damage. (*Id.* Ex. 1.)

Vintage, through its counsel, objected to the denial of the claim, and by letter dated August 31, 2018, demanded arbitration as provided in the Policy. (Weinstein Decl. Ex. 3).

Insofar as is relevant to the dispute presently before the Court, the arbitration provision, which is found at Section VII, ¶ C of the Policy, states as follows:

> C. ARBITRATION CLAUSE: All matters in difference between the Insured and the Companies (hereinafter referred to as "the parties") in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the manner hereinafter set out.
>
> Unless the parties agree upon a single Arbitrator within thirty days of one receiving a written request from the other for Arbitration, the Claimant (the party requesting Arbitration) shall appoint his Arbitrator and give written notice thereof to the Respondent. Within thirty days or [sic] receiving such notice, the Respondent shall appoint his Arbitrator and give written notice thereof to the Claimant, failing which the Claimant may nominate an Arbitrator on behalf of the Respondent.
>
> Should the Arbitrators fail to agree, they shall appoint, by mutual agreement only, an Umpire to whom the matter in difference shall be referred.
>
> Unless the parties otherwise agree, the Arbitration Tribunal shall consist of persons employed or engaged in a senior position in Insurance underwriting or claims.
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>
> The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance.

(*Id.* at UW-000033.)

In its letter demanding arbitration, counsel for Vintage proposed one George W. Keys, SSPA, of Keys Claims Consultants, Inc., as the sole arbitrator – or, in the alternative, designating Keys as its party arbitrator. (Weinstein Decl. Ex. 2.) Petitioners rejected Keys as a sole arbitrator, and designated Gerald Albrecht as its party arbitrator. (Weinstein Decl. Ex. 4.) All such designations were timely.

Vintage, by letter dated October 5, 2018, objected to the designation of Albrecht as Petitioners' party arbitrator, on the ground that he was not a "person[] employed or engaged in a senior position in Insurance underwriting or claims." (Weinstein Decl. Ex. 5.) Vintage also designated Syracuse, New York as the seat of arbitration.

Petitioners responded by letter dated October 16, 2018, defending the appointment of Albrecht as their party arbitrator and objecting to the designation of Syracuse, New York as the seat of arbitration. (Weinstein Decl. Ex. 6.)

Vintage responded, by counsel, that Albrecht was unacceptable but that it would not object as long as one of three individuals – John Voelpel, Jon Doan or Richard Brown – was designated as the neutral Umpire to resolve disputes between the Arbitrators. (Weinstein Decl. Ex. 7.)

Petitioners refused this offer, and brought this Petition asking the Court to appoint a neutral Umpire. (Dkt. No. 1.)

Vintage opposed the Petition and filed a Cross Petition, seeking to disqualify Albrecht – as well as a second individual mention by Petitioners as a possible arbitrator, Lawrence Pollack – as arbitrators, and also demanding that either (1) this matter be litigated in Florida, rather than arbitrated in New York; or (2) Syracuse be designated by this Court as the seat of arbitration. (Dkt. No. 27.)

For the reasons set forth below, all relief requested in both the Petition and Cross Petition is DENIED and the Petition and Cross-Petition are DISMISSED.

DISCUSSION

In disposing of the Cross Petitions, the Court is guided by two governing principles.

The first is that courts have little business interfering in arbitrations. Courts have jurisdiction to decide whether the parties have made an agreement to arbitrate – something that is not in dispute here – and to confirm awards after they are made by arbitrators. But everything in between – even unto the scope of an arbitration agreement – is for the arbitrators to decide, not a judge, unless the parties have expressly agreed that a court should intervene or the Federal Arbitration Act ("FAA") authorizes court intervention.

The second governing principle is that the parties – both of them commercially sophisticated – have made an agreement, which should be construed according to its plain terms (and they are indeed plain – clear and unambiguous) and in accordance with settled maxims of contract construction.

With these rules in mind, we turn to the petitions.

(1) The Application to Have this Court Appoint a Neutral Umpire is DENIED.

Petitioners ask the court to appoint an Umpire, pursuant to Section 5 of the Federal Arbitration Act, which provides as follows:

> [i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filing a vacancy, then upon the application of either

> party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.

9 U.S.C. § 5. This is the only relief sought by the Petition.

Section 5 of the FAA is quite clear: it requires that whatever method for naming an arbitrator or umpire is provided in the arbitration agreement must be followed. Only if a party fails to avail himself of that method or if there is a lapse or a vacancy for some other reason is a court authorized to name the arbitrator or umpire.[1]

To date, no one has failed to avail himself of the method set forth in the agreement, and there has been no lapse or vacancy in the position of umpire. Which is not to say that one or both of those things will never happen – but neither has occurred yet.

The arbitration clause in the Policy says the following about the appointment of an umpire:

> Should the Arbitrators fail to agree, *they shall appoint, by mutual agreement only, an Umpire* to whom the matter in difference shall be referred. (Weinstein Decl. Ex. 3 at UW-000033.)

This provision, too, is crystal clear. There is no reason to appoint a neutral Umpire unless the Arbitrators fail to agree on something within their jurisdiction. And if "they" (i.e., the Arbitrators) fail to reach an agreement on some issue, *the Arbitrators* – not the parties or anyone else -- are to appoint the Umpire. Here, the Arbitrators have yet to meet, let alone fail to agree on some matter, which is a condition precedent to the appointment of an Umpire; nor have they failed to reach "mutual agreement" on how to exercise the appointment power that is given to them and them alone. There is, therefore, no warrant at present to ask a court to step in – because there has not yet been "a lapse in the naming of an…..umpire."

Should the Arbitrators, having reached a point of disagreement, fail to agree on the identity of a neutral Umpire, then either party may invoke Section 5 of the FAA to seek court appointment of an umpire. Until then, any such application is premature.

For that reason, the request for the appointment of an Umpire by the Court is DENIED, and the Petition is dismissed, without prejudice.

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[1] Petitioners also cite to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is codified in the FAA at 9 U.S.C. §§ 201 et seq.—specifically to § 206, which authorizes a court to appoint arbitrators "in accordance with the provisions of the agreement." But since the FAA and the Convention have "overlapping coverage" to the extent they do not conflict, nothing in § 206 of the Convention should be understood to authorize court appointment of an arbitrator under circumstances not authorized by § 5 of the FAA. *See Sole Resort, S A de C V v. Allure Resorts Mgmt, LLC*, 450 F.3d 100, 102 (2d Cir. 2006). Therefore, the Court's analysis will proceed under § 5, and there is no need for any parallel analysis under § 206.

(2) The Application to Have this Court Disqualify Albrecht is DENIED.

Thee types of relief are sought in the Cross-Petition.

First, Vintage seeks to have Albrecht disqualified as a party arbitrator.

Because Albrecht meets the requirements for being designated as an arbitrator, this application is DENIED.[2]

The arbitration clause provides that, unless the parties agree otherwise (and since they have so far agreed on nothing, I do not see that as a likely outcome), the members of the Arbitration Tribunal shall be "persons employed or engaged in a senior position in Insurance underwriting or claims." (Weinstein Decl. Ex. 3 at UW-000033.)

Albrecht is an attorney who, for over 30 years, practiced insurance law – at one point, chairing his law firm's Property Insurance Coverage Department. During those three decades, he engaged in the "investigation, evaluation and litigation of property insurance claims." (Decl. of Emilie Bakal-Caplan Esq. in Opp. to Resp'ts Cross-Pet. and in Further Supp. of Pet. for Order Designating and Appointing an Arbitration Umpire ("Bakal-Caplan Decl.") Ex. 3, Dkt. No. 32.) He is also an experienced arbitrator and mediator in the field of commercial insurance. Petitioners argues that Albrecht meets the qualifications for membership on the Tribunal that are specified in the Arbitration Clause.

I agree.

The arbitration clause in the Policy does not require that a member of the Arbitration Panel be employed by an insurance company; otherwise, the Policy would not say that arbitrators had to be "persons employed *or engaged in*" certain specified types of insurance work. Being "engaged in" insurance work is an alternative to being "employed" in connection with such work. Albrecht has never been employed by an insurance company, but he has been "engaged in" insurance-related work for a very long time. He has substantial experience being "engaged in" such work, to the point that he now works as an arbitrator and mediator, according to his web site.

The clause does not define "senior position," but the Chair of the Property Insurance Coverage Department at the Florida law firm of Butler Weihmuller Katz Craig obviously occupied a "senior position" in an enterprise that is "engaged in" insurance-related work. The Chair of the Department is the head person, and the head person is commonly understood to occupy a "senior position."

Finally, the clause authorizes the arbitrator to have been active in one of two fields in insurance – either underwriting *or* claims. While Albrecht was never an insurance underwriter, there is no such requirement in the policy. Albrecht has been involved in the alternative field of insurance claims. He has investigated, evaluated and litigated, and now he mediates and arbitrates, insurance claims. He has done this for more at least three decades.

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[2] It is unnecessary to address the qualifications of Lawrence Pollack, Esq., to serve as arbitrator.

The fact that he has been doing so as an attorney is of no moment. If the parties had wanted to limit themselves to persons who had spent a great deal of time *adjusting* insurance claims, they could have said so. They did not. Instead, they said that the individual had to have been "engaged" in the field of "Insurance…claims." Albrecht has been so engaged.

Accordingly, the application in the Cross Petition to disqualify Albrecht as a party arbitrator is denied.

(3) The Application to Have this Court Designate Syracuse – or Any Place – as the Seat of Arbitration is DENIED.

Vintage next asks this Court to bless its designation of Syracuse as the seat of arbitration. The Court DENIES this application because it has no business getting involved in such matters.

The arbitration clause designates "New York" as the place of arbitration. There is nothing ambiguous about this designation – it refers to the State of New York, and to nothing else. That the term "New York," as used in the Policy, refers only to the State of New York cannot be doubted; for in the next clause of the very same sentence, the Parties designate the law of "New York" as governing law. The reference to "New York" law can only be understood as aa reference to the law of the *State of New York*, since New York State law, not New York City law, governs the business of insurance and the construction of contracts. Applying the maxim of contract construction *noscitur a sociis*, two references to "New York" in the very same sentence must refer to the same thing. 11 Williston on Contracts § 32:6 (4th ed.); *White v. Knickerbocker Ice Co.*, 254 N.Y. 152, 159 (1930) *abrogated on other grounds by Knapp v. Hughes*, 19 N.Y.3d 672 (2012); *see also Kass v. Kass*, 91 N.Y.2d 554, 566 (1998). Therefore, the arbitration clause can only be read as requiring that the arbitration take place in the State of New York.

Moreover, had the Parties intended that the arbitration be held in the *City and State of New York*, they could have said so – by specifying either, "The City and State of New York," or simply, "New York, New York," in the arbitration agreement. By saying only "New York," the Parties did nothing more than specify the state in which the arbitration is to be held.

As the Policy plainly states that any arbitration must be held in "New York," there is absolutely no warrant for my directing that it be held in Florida. The fact that claims under the Policy were to be adjusted in Florida has nothing to do with the seat of arbitration; Vintage's argument is ridiculous.

Finally, there is no provision in the arbitration clause authorizing either of the Parties to designate *where* in the State of New York the arbitration should be held. And as the agreement is silent on the matter, the Court cannot intervene and direct that the arbitration be held in any particular place in New York; a court may only direct that an arbitration be held "in accordance with the agreement *at any place provided therein.*" 9 U.S.C. § 303(a). The "place provided therein" is the State of New York.

Since the parties did not designate in which city or county the arbitration must be held, it is obviously for the Arbitrators to decide where in the State of New York they will sit. And if

they cannot agree on that trivial administrative question, then, in strict accordance with the terms of the Policy, a neutral Umpire will decide the matter for them.

(4) The Application to Have this Court Authorize Litigation in Florida – or Anywhere Else – is DENIED.

Finally, Vintage asks the Court to send this matter to the court, rather than to have it resolved by arbitration. This I cannot do, either.

The arbitration clause is compulsory. It applies to "*all matters in difference* between the Insured and these Companies in relation to this insurance." (Weinstein Decl. Ex. 3 at UW-000033.) There exists in this situation a "difference between the Insured and these Companies in relation to this insurance" – specifically, a dispute over whether the Policy covers the loss. Under the plain terms of the Policy, any such dispute must be arbitrated. Period. End of story.

Vintage argues that it should be permitted to bring suit in Sarasota County, Florida (where the building is located) because Petitioners have breached the arbitration agreement by failing to appoint a [qualified] party arbitrator and by failing to pay its claim. But the Court has already concluded that Petitioners are not in breach by virtue of having appointed Albrecht as their party arbitrator. And the second alleged breach – failure to pay the claim – is precisely the sort of issue that must be resolved in arbitration, per the plain language of the Policy. Vintage's argument to the contrary (such as it is – there isn't much of it) is, frankly, ridiculous.

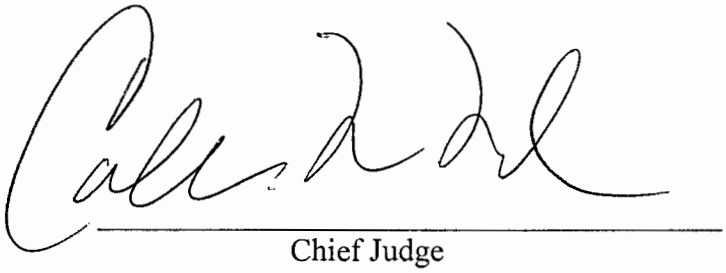
Vintage's invocation of the "Service of Suit" endorsement to the policy avails it nothing, since it has been settled law in this Court, for a very long time indeed, that a "service of suit" endorsement does not read an arbitration clause out of an insurance policy, but merely provides a means for enforcing an arbitration award in a court of law. If I may quote from the only case cited by Vintage in support of its contention that the "Service of Suit" endorsement authorizes it to avoid arbitration altogether, "It is settled that in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *Cnty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y. 2d 618, 628 (1994). Reading a similar "service of suit" endorsement and its accompanying policy together some thirty-six years ago, my esteemed colleague, The Hon. Robert Sweet, noted that an arbitration award could not be enforced without access to the courts, and that a service of suit clause was amended to a policy "to guarantee the enforcement of arbitration awards . . . not . . . to supersede an obligation to arbitrate disputes within the scope of the arbitration clause." *NECA Ins. Ltd. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 595 F. Supp 955, 958 (S.D.N.Y. 1984). That rule is still followed in this Court, because it is the only way to make sense of both clauses – to "read arbitration and service of suit clauses 'in harmony, rather than in conflict with each other.'" *Hudson Specialty Ins. Co. v. New Jersey Transit Corp.*, No. 15-cv-89(ER), 2015 WL 3542548, at *6 (S.D.N.Y. June 5, 2015).

Vintage wastes this busy Court's time with its frivolous application to have this Court read the arbitration clause out of the Policy. That prayer for relief, too, is DENIED.

CONCLUSION

For the reasons set forth above, all Parties' applications for relief from this Court are DENIED, and both the Petition and Cross Petition are DISMISSED. The dismissal of the Petition is without prejudice to renewal by the filing of a new Petition by any party if the Arbitrators are unable to agree on the identity of an Umpire. The Cross-Petition, however, is dismissed with prejudice.

Dated: February 6, 2019



Chief Judge

BY ECF TO ALL COUNSEL