

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT

Charles Edward Ramos

PART **53**

Index Number : 401720/2005

SPITZER, ELIOT

vs

AMERICAN INTERNATIONAL GROUP

Sequence Number : 008

SUBPOENA DUCES TECUM

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED

MAR 01 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/21/07

[Signature]
CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
THE PEOPLE OF THE STATE OF NEW YORK
by ELIOT SPITZER, Attorney General
of the State of New York, and HOWARD
MILLS, Superintendent of Insurance
of the State of New York,

Plaintiffs,

-against-

MAURICE R. GREENBERG and HOWARD I. SMITH,
Defendants.

Index No. 401720/05

-----X
Charles Edward Ramos, J.S.C.:

In motion 07, American International Group Inc. moves pursuant to CPLR 2304 and 3103 to quash Howard I. Smith's deposition subpoena.

In motion 08, defendant Maurice R. Greenberg moves pursuant to CPLR 3102, 3108 and 3120 directing an open commission issue on General Re Corporation.

In motion 09, defendants Greenberg and Howard I. Smith move pursuant to CPLR 1003 to remove Howard Mills the Superintendent of Insurance from this action as a misjoined plaintiff.

In motion 010, Smith moves pursuant to CPLR 3124 to compel AIG to produce documents.

In motion 011, Greenberg moves pursuant to CPLR 3214 to compel AIG to produce documents.

Motions 7, 10 and 11 were decided on the record on December 13, 2006 and will not be discussed here.

Background

On May 26, 2005, plaintiffs, the People of the State of New

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York by Eliot Spitzer, Attorney General of the State of New York, and Howard Mills, Superintendent of Insurance of the State of New York filed this action against AIG, Greenberg and Smith asserting claims for securities fraud pursuant the General Business Law §352 (the Martin Act) and fraud pursuant to Executive Law §63(12) and a claim for common law fraud. Plaintiff also asserted a claim against AIG for violations of Insurance Law §310(a)(3). Plaintiffs allege "several misleading accounting and financial reporting schemes, projecting an unduly positive picture of AIG's underwriting performance for the investing public," including two "sham insurance transactions to give the investing public the impression that AIG had a larger cushion of reserves to pay claims than it actually did" and "hid losses from two of its insurance underwriting businesses by converting underwriting losses to capital losses." Complaint ¶3.

On February 9, 2006, AIG announced that it had entered into a settlement with federal and state regulators, including plaintiffs. On September 7, 2006, plaintiffs filed an amended complaint. The three remaining claims are against Greenberg and Smith for violations of the Martin Act and the Executive Law § 63(12). At least initially, the complaint in this action contained claims against an insurance company for violation of the Insurance Law. The investigated insurance transactions remain the basis of this action.

Analysis

Defendants argue that the Superintendent of Insurance lacks

standing to assert a claim under either the Martin Act or Executive Law §63(12) or any other statute except the Insurance Law. Plaintiffs counter that nothing precludes the Attorney General from joining the head of a state agency as a co-plaintiff in asserting claims on behalf of the State. However, the parties agree on two things. First, the Superintendent could not bring this action alone. Second, this is an issue of first impression. The question is whether the Superintendent is prohibited from bringing this action on behalf of the People of the State of New York in addition to the Attorney General.

Initially, the Court must address plaintiffs' procedural objection with the timing of defendants' motion. This motion was initiated on October 31, 2006. Defendants could not have moved sooner as it was not until the amended complaint was served on September 7, 2006 that it became clear that the Superintendent would be prosecuting the claims against Greenberg and Smith on behalf of the People of the State of New York. From the original complaint, it appeared that the claims were brought by the Superintendent against AIG under the Insurance Law, while the other claims were brought by the Attorney General.

The authority for dismissing a misjoined party is set forth in CPLR 1003 which provides:

Misjoinder of parties is not a ground for dismissal of an action. . . Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just.

Little guidance exists on how to determine when a redundant or superfluous plaintiff is misjoined. Some courts have looked for

prejudice in continuing the action with the objectionable party. *JCD Farms v Juul-Nielsen*, 300 AD2d 446 (2d Dep't 2002); *Nichols v State Mutual Life Assurance Co. of Am.*, 18 AD2d 772 (4th Dep't 1962). See also, *In Re Cowles' Will*, 22 AD2d 365 (1st Dept 1965), aff'd 17 NY2d 567 (1966) (denying motion to drop infant parties where their interests were not remote, their presences would not add to any delay or expense in conducting the litigation and they had fully participated in the proceedings). According to defendants, they are prejudiced by the Superintendent's presence as plaintiff because having two plaintiffs instead of one delays discovery. Defendants claim that they waited longer for documents from the Superintendent than from the Attorney General.

The Court finds that defendants have failed to show prejudice sufficient to dismiss the Superintendent. The Superintendent completed document production in October 2006. While this motion was initiated in October 2006, it was argued in December 2006, well after document production was complete. Indeed, defendants may have benefitted from the Superintendent's participation in discovery as a party instead of non-party because defendants received documents faster. See *State of New York v AMTRAK*, 233 FRD 259 (NDNY 2006) (an action by one agency does not subject all state agencies to disclosure scrutiny. To obtain documents from government agency not a party to the action, party proceeds as it would against any non-party). Though special circumstances are no longer required for non-party

disclosure, courts are cognizant of the unfair burden of discovery on non-parties and are more generous with party obligations in discovery. CPLR 3101. The cases are legion where discovery delays occur because of the difficulty of getting documents from government agencies. *Careccia v Metro. Suburban Bus Auth.*, 18 AD3d 793 (2d Dept), appeal dismissed, 5 NY3d 880 (2005); *Mendez v City of New York*, 7 AD3d 766 (2d Dep't 2004); *Espinal v City of New York*, 264 AD2d 806 (2d Dep't 1999). Where the Superintendent produces documents after the Attorney General, but certainly not substantially later, there is hardly prejudice. If anything, the Superintendent is superfluous or redundant and it is unnecessary to dismiss where the proper plaintiff, here the Attorney General, is joined. *MacAffer v Boston and Maine Railroad*, 242 AD 140, 148 (3d Dept 1934) ("immaterial" whether defunct railroad corporation is joined as co-plaintiff where the receiver and successor trustee are proper plaintiffs), reversed on other grounds, 268 NY 400 (1935). Therefore, defendants' motion must be denied for failure to show any prejudice.

Plaintiffs argue that the Superintendent is a proper plaintiff because superintendents of state agencies have served as co-plaintiffs with the Attorney General in other cases. In all of the cases cited by plaintiffs, the actions were brought under a statute authorizing the relevant superintendent to sue in addition to the Attorney General and the superintendent's capacity and standing were not challenged in any of those cases. *State of New York v American Motor Club Inc.*, 179 AD2d 277 (1st

Dep't) (joint action brought under the Insurance Law), appeal dismissed, 80 NY2d 893 (1992); *State of New York v Autosure Inc.*, 131 Misc 2d 546 (Sup Ct, NY County 1986) (joint action brought under the Insurance Law); *State of New York v Reliable Movers, Inc.*, (Index No. 98-400283, Sup Ct, NY County) (Commissioner of Transportation and claim under Transportation Law); *State of New York v MIFA Moving Corp.*, Index No. 402235/98, Sup. Ct., NY County) (Commissioner of Transportation and claim under Transportation Law). The Court rejects plaintiffs' argument as tradition does not constitute legal authority.

Defendants argue that since private parties have no standing to bring an action under either the Martin Act or Executive Law 63, the Superintendent is likewise barred. Private parties do not have standing under the Martin Act because it

"is not consistent with the legislative scheme underlying the Martin Act...to create a statutory mechanism in which the Attorney General would have broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution; and that consistency of purpose with the statute includes consistency with this enforcement mechanism."

CPC International Inc. v McKesson Corp., 70 NY2d 268, 276-77 (1987). As the Attorney General is a plaintiff in this action, CPC and its progeny are simply not applicable here.

Rather, we begin by looking at who is the true plaintiff here. The caption states, as it must under CPLR 1301, that The People of the State of New York are plaintiffs. However,

"the People of the State of New York are only nominally the plaintiff or defendant in a civil proceeding and the true actors for any litigation are the agencies functioning within their "zone of interest" and authority. And to the extent that the Attorney General does prosecute or defend a civil action, his respective client at that moment is the agency who has the authority to protect or defended its constitutional or statutory mandates."

State of New York v AMTRAK, 233 FRD 259, 265 (NDNY 2006).

Therefore, we turn to whether the Superintendent here functions within his zone of interest and authority.

He does. The Superintendent of Insurance has supervisory and regulatory authority over insurance matters in the State of New York, including the authority to investigate and examine insurers subject to his jurisdiction "for the protection of the interests of the people of the state" and to prevent fraud in the business of insurance. Insurance Law §§ 305(a) and (b), 309, 401, 2404. See *Blue Cross & Blue Shield of Central NY Inc. v McCall*, 89 NY2d 160 (1996). Defendants were the principals of AIG when the challenged transactions occurred. The Superintendent certainly has an interest in regulating the activities of the principals of an insurance giant; net income of \$11 billion on revenues of \$100 billion; 93,000 employees in 130 countries. Complaint ¶2.

Plaintiffs argue that the Attorney General's broad authority under both the Martin Act and the Executive Law enable him to decide whether the Superintendent may be joined as a plaintiff. Defendants counter that such authority would usurp the legislature's role in defining the powers of administrative

agencies.

The Court agrees that these statutes provide such authority. Executive Law §63(12)(2) authorizes the Attorney General to deputize another to investigate. It provides:

2. The attorney-general, his deputy or other officer designated by him is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or a magistrate, a court of record or a judge or justice thereof and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and examination shall not abate or terminate by reason of any action or proceeding brought by the attorney-general under this article.

Here the investigation into the fraudulent and deceptive business practices of an insurance company and its officers was conducted jointly by the Attorney General and the Superintendent.

Further, Executive Law §63 provides:

The attorney-general shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state. No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.

Pursuant to the underlined portion of Executive Law §63, the attorney general could authorize the Superintendent, or any other agency, to bring or defend an action or proceeding without the

Attorney General. See 1960 NY Op Atty Gen. 146, 1960 WL 98198 ("Attorney General has permitted the Counsel for the Temporary State Housing Rent Commission to prosecute and defend actions and proceedings brought on behalf of or against the Commission."). Defendants insist that while the Attorney General could authorize the Superintendent to proceed in place of the Attorney General, it could not choose to proceed with the Superintendent. The Court must reject this argument as the statute specifically states that the Attorney General "may participate or join therein."

The Martin Act is equally supportive. It provides:
Investigation by attorney-general

1. Whenever it shall appear to the attorney-general, either upon complaint or otherwise, that in the advertisement, investment advice, purchase or sale within this state of any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title all of which are hereinafter called commodities, or that in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution within or from this state, of any stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein, sold or transferred in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls or options therefor hereinafter called security or securities, any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or that any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have made, makes or attempts to make within or from this state fictitious or pretended

purchases or sales of securities or commodities or that any person, partnership, corporation, company, trust or association, or agent or employee thereof shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase, exchange, investment advice or sale of securities or commodities which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser, or that any broker, dealer, or salesman, as defined by section three hundred fifty-nine-e of this article, or any agent or employee thereof, has sold or offered for sale or is attempting to sell or is offering for sale any security or securities in violation of the provisions of said section or section three hundred fifty-nine-ee, or that any other section of this article has been violated, any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions and courses of business are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices or he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person, partnership, corporation, company, trust or association, or any agent or employee thereof, to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate, and for that purpose may prescribe forms upon which such statements shall be made. The attorney-general may also require such other data and information as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

General Business Law §352. The commodity at issue here is insurance. Because the purpose of the Martin Act is remedial in nature, the courts have held that its terms "must not be strictly interpreted but should be given pliable yet resilient construction enabling them to be applied to individual situations

in a manner which best fulfill their beneficial purpose." *Matter of Gardner v Lefkowitz*, 97 Misc 2d 806, 813 (Sup Ct., NY County 1978).

However, the Attorney General's authority is not boundless. The attorney general could not, for example, authorize the Superintendent to bring an action for securities fraud not involving insurance. Therefore, the Court rejects plaintiffs' reliance on *People v Bunge Corp.*, 25 NY2d 91, 98 (1969) where the Court of Appeals stated that in enacting the Martin Act, the Legislature intended to insulate "the Attorney General's exercise of discretion in dealing with a Martin Act violation" from judicial review. The Superintendent must have some connection to the matter. As the Attorney General has standing to sue, the question is one of capacity, not standing to sue, for the Superintendent.

[T]he concept of capacity is often confused with the concept of standing, but the two legal doctrines are not interchangeable [citations omitted] "Standing" is an element of the larger question of "justiciability." [citations omitted]. The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to "cast[] the dispute 'in a form traditionally capable of judicial resolution.'" [citations omitted]. Often informed by considerations of public policy [citation omitted], the standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions [citation omitted]. "Capacity," in contrast, concerns a litigant's power to appear and bring its grievance before the court. The concept of a lack of capacity, which has also occasionally been intermingled with the analytically distinct concept of a failure to state a cause of action, does not admit of precise or comprehensive definition. [citation omitted]. Capacity, or the lack thereof, sometimes depends purely

upon a litigant's status. A natural person's status as an infant, an adjudicated incompetent or, formerly, a felony prisoner, for example, could disqualify that individual from seeking relief in court. [citations omitted]. Additionally, the capacity question has often arisen in connection with controversies involving trustees. [citations omitted].

Community Bd. 7 v Schaffer, 84 NY2d 148, 156 (1994). The question is whether the Superintendent has the status to seek relief from this Court. For the Superintendent to have capacity, express legislative authority is not required. "Rather, the capacity to sue may also be inferred as a 'necessary implication from [the agency's] power[s] and responsibilit[ies],' provided, of course, that "there is no clear legislative intent negating review." *Id.* at 156 (quoting *City of New York v City Civ Serv Commn*, 60 NY2d 436, 443-444 (1983), rehearing denied, 61 NY2d 759 (1984)). "[T]he power to bring a particular claim may be inferred when the agency in question has "functional responsibility within the zone of interest to be protected." *City of New York* at 445 (distinguishing *Matter of Pooler v Public Serv. Commn.*, where the Court held that the legislature expressly restricted the Consumer Protection Board to agency proceedings).

For example, in *Town of Palatine v The Canajoharie Water Supply Company*, 90 AD 548 (3d Dept 1904), there was a clear intent to negate the highway commissioners from bringing actions in their own names. The towns of Palatine and Canajoharie were joined by the respective commissioners of highways of the towns in an action against the water company seeking to restrain it from laying water pipes upon and over a highway bridge. The

relevant statutes had been modified to provide that such actions were to be in the name of the town. The highway law specifically provided the commissioners with authority to bring the action in the name of the town. Accordingly, the commissioners were dismissed as plaintiffs.

Here, there is no clear legislative intent to prohibit the Superintendent from bringing this action jointly with the Attorney General. Further, allowing the Superintendent to do so is consistent with his supervisory and regulatory authority over the insurance industry. Therefore, defendants' motion is denied.

General Re Commission

In motion 08, defendant Maurice R. Greenberg moves pursuant CPLR 3102, 3108 and 3120 directing an open commission issue on General Re Corporation.

Accordingly, it is

ORDERED that AIG's motion 07, pursuant to CPLR 2304 and 3103 to quash a subpoena of the custodian of records is permitted to be withdrawn as the parties negotiated a settlement at argument and denied as to Mr. Benzinger as the parties agreed to hold a deposition in March 2007; and it is further

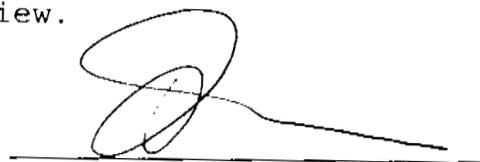
ORDERED, that defendant Maurice R. Greenberg's motion 08 for issuance of a commission issue on General Re Corporation is granted; and it is further

ORDERED, that defendants' motion 09, pursuant to CPLR 1003 to remove the Superintendent of Insurance from this action as a misjoined party is denied; and it is further

ORDERED, that Smith's motion 010 pursuant to CPLR 3124 to compel American International Group Inc. to produce documents is granted as agreed to by the parties at argument; and it is further

ORDERED, that Greenberg's motion 11 pursuant to CPLR 3214 to compel non-party American International Group Inc. to produce documents is granted as agreed by the parties at argument and AIG is directed to prepare a privilege log concerning the settlement documents for the court's in camera review.

Dated: February 21, 2007



J.S.C.

Counsel are hereby directed to obtain a copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

CHARLES E. RAMOS

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