

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

AIU Insurance Company, et al.
Plaintiffs,
- v -
The Robert Plan Corp., et al.
Defendants,

FBEM

INDEX NO. 603159/2005
MOTION DATE _____
MOTION SEQ. NO. 015
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

This motion is decided in accordance with the accompanying memorandum decision.

FILED
DEC 27 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/26/06


J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

FBEM

-----X
AIU INSURANCE COMPANY, ET AL.,

Plaintiffs,

INDEX NO.: 603159/2005

-against-

THE ROBERT PLAN CORP., ET AL.,

Defendants.
-----X

FRIED, J.:

Plaintiffs (“AIU”) have made this motion for leave to reargue my August 11, 2006 Decision and Order (the “previous Order”), which granted the motion by an Order to Show Cause (Mot. Seq. No. 10) by Defendants (“TRP”) for a preliminary injunction compelling AIU to provide Defendants with certain information under Article IV, paragraph 9 of the MGA Agreement (“paragraph 9” of the “agreement”), pursuant to C.P.L.R. §§ 6301 and 6311.¹ Paragraph 9 provides, in pertinent part:

All books, accounts, buyout agreements or other documents constituting, embodying, or in any way relating to the business to be conducted under this Agreement or any Predecessor Agreement, or the transactions contemplated hereby or thereby, except computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business, which are the property of AGENT, are the property of the COMPANY whether paid for by it or not. Each party shall be entitled at all times, *including after termination of this Agreement*, to create and/or retain copies of all such books, accounts, customer lists, customer and client records, buyout agreements and other documents that are designated

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For the sake of conciseness, this decision presumes the reader’s familiarity with the previous Order, which is attached as an Appendix.

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NEW YORK

hereunder as the property of the other party.

MGA Art. IV § 9 (emphasis added).²

Plaintiffs now move to reargue the previous Order under C.P.L.R. § 2221(d), which provides that such a motion may be made “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

Oral argument on this motion was held on October 19, 2006. Both parties represented at the argument that there is no factual issue for me to decide. *See, e.g.*, Oral Arg. Trans. at 23, 26 (Oct. 19, 2006).

For the reasons that follow, and based on the previous Order, which I incorporate by reference into this decision, I grant the motion for leave and deny the motion to reargue.

Plaintiffs challenge my conclusion in the previous Order that Defendants have shown a likelihood of success on the merits. Plaintiffs contend that this conclusion is based on a misunderstanding that the parties had agreed that TRP owned the computer software systems and other items described in clause B.³ Plaintiffs argue, as they argued at argument on July 14, 2006, that, unless I infer that paragraph 9 refers only to property located at TRP’s offices, my interpretation of clause B would imply the absurd result that TRP owns AIU’s computer software systems at AIU’s offices. In order to avoid this result, Plaintiffs maintain that I must conclude that paragraph 9 contains an implied geographic limitation: it refers only to property located at TRP’s offices as a result of TRP’s agency.

It appears to me, for the reasons that follow and for the reasons stated in the previous Order, that my original decision was correct in concluding that Defendants have shown a likelihood of success on the merits of their position that paragraph 9 of the agreement was

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For purposes of this dispute, “COMPANY” in paragraph 9 means AIG; “AGENT” means TRP.

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As defined in the previous Order, clause B means the phrase: “except computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business.”

intended to entitle TRP to access certain claims and actuarial information in the possession of AIU relating to insurance policies written during the term of the Master and Interim Agreements. Nevertheless, it also appears to me that a strict grammarian, interpreting paragraph 9 in isolation, could plausibly reach the conclusion endorsed by Plaintiffs here.

The language in the previous Order about which Plaintiffs are chiefly complaining states: “[T]he parties agree that TRP owns the property described as ‘computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business.’” Order at 3 (citing Oral Arg. Trans. at 22-23 (July 14, 2006)). At the July 14, 2006 argument, counsel for Plaintiffs admitted that TRP owned the customer lists and proprietary computer software that were located at TRP’s own offices. Oral Arg. Trans. at 22-23 (July 14, 2006). The previous Order refers to this admission in the quoted language from page 3. There is no dispute that TRP owns these items.

In the previous Order, I concluded that the universe of property owned by Plaintiffs is the property described in clause A,⁴ after subtracting the property described in clause B. Order at 2-3, 3 n.2. I further stated that clause C – the phrase, “which are the property of AGENT” – modifies the property described in clause B. Order at 3-4 n.2. These conclusions followed July’s oral argument, at which the parties focused on whether “which” modified clause A or clause B. July 14 Trans. at 36-43. The issue of *how* “which” modified clause B did not arise. It seems necessary now to investigate how clause C modifies clause B, and, in particular, the significance of the word “which” in clause C.

Strict grammarians prefer the use of the word “that” as the defining, or restrictive relative pronoun, while reserving “which” as the nondefining, or nonrestrictive relative pronoun. William Strunk, Jr. & E.B. White, *The Elements of Style* 59 (4th ed. 2000). So, for example, in the sentence, “The lawn mower that is broken is in the garage,” the restrictive pronoun “that” tells the reader which mower is in the garage. (The broken one.) In contrast,

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Clause A means the phrase, “All books, accounts, buyout agreements or other documents constituting, embodying, or in any way relating to the business to be conducted under this Agreement or any Predecessor Agreement, or the transactions contemplated hereby or thereby.”

in the sentence, “The lawn mower, which is broken, is in the garage,” the nonrestrictive “which” adds a fact about the only mower in question. *Id.*

In practice, however, “not all writers observe the distinction between restrictive clauses [] and non-restrictive clauses.” *The New Fowler’s Modern English Usage* 774 (R.W. Burchfield ed., 3d ed., Clarendon Press 1996). In fact, “it would be idle to pretend that it is the practice either of most or of the best writers.” *Id.* (quoting with approval H.W. Fowler, *A Dictionary of Modern English Usage* 635 (1st ed., Oxford Univ. Press 1926)). The relative pronoun “which” is commonly used in both written and spoken English in place of the restrictive relative pronoun “that.” Strunk, *The Elements of Style* at 59. In fact, writers of English sometimes use “which” in both the restrictive and the nonrestrictive sense in the same piece of writing. *The New Fowler’s Modern English Usage* at 774 (*emphasis added*).

The agreement itself contains other instances of “which” used in place of “that” as a restrictive relative pronoun. *E.g.* Agreement art. IV ¶ 4 (“In addition to... any applicable underwriting guideline, bulletin or instruction which may be issued from time to time...”); *id.* art. VI ¶ 3 (“AGENT will promptly advise the COMPANY in writing of any Insurance Department notice which specifically threatens the Company with disciplinary actions or penalties.”).

However, a strict grammarian would point out that in both of these instances, “which” is not preceded by a comma, whereas it is in clause C. Ordinarily, a comma setting off a modifying clause indicates that the modifier is nonrestrictive. *See* Strunk, *The Elements of Style* at 4. Thus, a comma preceding “which” in clause C would tend to suggest that “which” is being used as a nonrestrictive pronoun and that clause C does not limit or define clause B. This is the reading favored by Plaintiffs.

This reading is supported by the fact that a purpose of paragraph 9 appears to be to identify who, between AIU and TRP, owned certain items relating to the business of TRP’s agency. If “which” in clause C were read as a restrictive pronoun, clause B would no longer identify the items that were owned by TRP. Instead, clause B would assume that the reader knew which items were owned by TRP and would

simply carve them out from the items identified in clause A, which were owned by AIU.

Under New York principles of contract interpretation, however, strict rules of grammar do not have the last word, when a grammatical construction of a contract is inconsistent with the parties' intent. Rather, a court's purpose in interpreting a written contract should be:

to discover the intention which the parties have formulated in its written language. Often punctuation and grammatical construction are reliable signposts in the search. At times the language of a contract, read as a whole and in the light of the circumstances surrounding its execution, may disclose an intention which would be thwarted by a strict grammatical construction. We refuse to follow a signpost when it appears that it points in the wrong direction. Intention may be formulated in words that are not strictly accurate and in terms that are not grammatical.

Wirth & Hamid Fair Booking v. Wirth, 265 N.Y. 214, 219, 220-21 (1934) (concluding that a fair construction of the language of a written contract manifested that parties intended that defendant should have right to book performances for two circuses during summer months, notwithstanding the strict grammatical construction of the restrictive covenant to the contrary).

The Court of Appeals has further instructed:

Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. The court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.

William C. Atwater & Co. v. Panama R., 246 N.Y. 519, 524 (1927) (citations and internal quotations omitted). In *Atwater*, for instance, the Court refused to enforce a provision of a contract for the sale of coal that, read literally, precluded the plaintiff seller from obtaining damages for breach of contract as to any coal remaining unshipped at the expiration of the contract. The Court reasoned that a literal reading of the provision was inconsistent with the "general sense of the contract," read in the

light of “reason, equity, [and] fairness.” *Id.* at 523-24. The Court concluded that it was “evident that the plaintiff had not the remotest intention of releasing any claims against defendant [the buyer] for damages for breach of contract which had accrued at the date of the expiration of the agreement and that the defendant could not reasonably have so understood the language thus used.” *Id.* at 523.

Although *Wirth* and *Atwater* were decided some years ago, they articulate principles that remain valid. *See, e.g., Kass v. Kass*, 91 N.Y.2d 554, 566 (1998); *In re Estate of Stravinsky*, 4 A.D.3d 75, 81-82 (1st Dept. 2003).

I conclude that my job is not to police the rules of grammar, but to interpret the meaning of paragraph 9 fairly according to the parties’ intent. In that light, I conclude that Plaintiffs’ reading of paragraph 9 clashes with other contextual clues of the parties’ intent. As explained in more detail in the previous Order, nothing in paragraph 9 expressly limits its scope only to property at TRP’s premises or created during TRP’s agency. *See* Order at 3-4. Plaintiffs’ reading would require me to infer that TRP’s entitlement to create copies of “[a]ll” the items described as the property of AIU applies only to those items that were once located at TRP’s offices, and that TRP’s entitlement to copy them “at all times, including after termination of this Agreement” is merely a right to make copies of the same documents that were once at its own premises over and over again, year after year. This is a heavy burden of inference for just one comma to support.

Plaintiffs’ reading seems particularly dubious in light of the way business works in the assigned risk industry, as I understand it from the submissions I received with the original motion papers (Mot. Seq. No. 10). I remain persuaded by these submissions, and by those in the instant motion, that TRP would not be able competitively to price buy-out contracts for the coming year without incorporating the most recent claims and actuarial information relating to insurance policies written during the term of the parties’ Master and Interim Agreements. TRP has submitted evidence that companies like TRP typically receive claims for coverage over several years after policy coverage terminates; as this information rolls in, new documents

are generated to reflect the new information. This information would necessarily be in the possession of AIG after the expiration of the Master and Interim Agreements. TRP has submitted evidence that, without this claims and actuarial information, a company like TRP would be at a disadvantage in competing for the following year's buy-out contracts for those policies. Palm Aff. ¶ 10; Previous Order at 3-5. Even AIG conceded that the additional information would be useful to TRP, though AIG submitted an affidavit stating that TRP could still compete without it. Beck Aff. ¶ 10.

In light of these circumstances, the word “[a]ll” in paragraph 9 seems more likely to refer to all of the documents relating to the business, wherever they might be located, and the phrase, “at all times, including after termination of this Agreement,” reveals the parties’ intent that the parties should be able to copy documents relating to the business described as belonging to the other party, even if they were created after the expiration of the Master and Interim Agreements. It is evident that TRP “had not the remotest intention” of agreeing to be barred from access to the recent claims and actuarial information after the expiration of the Master and Interim Agreements, and that AIG “could not reasonably have so understood the language thus used.” *See Atwater*, 246 N.Y. at 523.

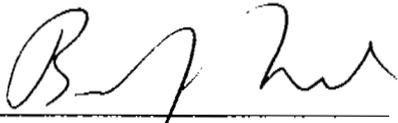
Therefore, I believe that I was correct in concluding that TRP is likely to succeed on the merits of its position that the parties intended in paragraph 9 for TRP to have access to certain claims and actuarial data relating to insurance policies written during the term of the parties’ Master and Interim Agreements. Consequently, I conclude that my previous Order correctly decided that Defendants have shown a likelihood of success on the merits of their position as to the meaning of paragraph 9.

Accordingly, it is hereby:

ORDERED that Plaintiffs’ motion for leave (Mot. Seq. No. 15) is GRANTED; and it is further

ORDERED that Plaintiffs' motion to reargue is DENIED.

DATED: 12/26/08



J.S.C.
BERNARD J. FRIED
J.S.C.

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