

Avenue Capital Mgt. II, L.P. v Chubb Eur. Group S.E.

2024 NY Slip Op 34422(U)

December 9, 2024

Supreme Court, New York County

Docket Number: Index No. 654855/2022

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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AVENUE CAPITAL MANAGEMENT II, L.P., STORM
PETREL LEASING 979 LIMITED, STORM PETREL
LEASING 1002 LIMITED, SHEARWATER AIRCRAFT
LEASING II 28520 LIMITED, SHEARWATER AIRCRAFT
LEASING 28533 LIMITED,

Plaintiff,

- v -

CHUBB EUROPEAN GROUP S.E., BERKSHIRE
HATHAWAY INTERNATIONAL INSURANCE LTD.,
HOUSTON CASUALTY COMPANY, LONDON BRANCH,
MAPFRE ESPANA COMPANIA DE SEGUROS Y
REASEGUROS S.A., MITSUI SUMITOMO INSURANCE
COMPANY (EUROPE) LIMITED, LLOYD'S SYNDICATE
0510 KLN, LLOYD'S SYNDICATE 1880 TMK, SWISS RE
INTERNATIONAL SE, LLOYD'S SYNDICATE 2623 AFB,
LLOYD'S SYNDICATE 0623 AFB, FIDELIS
UNDERWRITING LIMITED, LLOYD'S SYNDICATE 0435
FDY, LLOYD'S SYNDICATE 1919 CVS, LLOYD'S
SYNDICATE 1084 CSL, HDI GLOBAL SPECIALTY SE,
GREAT LAKES INSURANCE SE, CONVEX INSURANCE
UK LIMITED, AXIS SPECIALTY EUROPE SE, LLOYD'S
SYNDICATE 0609 AUW, LLOYD'S SYNDICATE 3010
LRE, LLOYD'S SYNDICATE 2010 MMX, LLOYD'S
SYNDICATE 4472 LIB, LLOYD'S SYNDICATE 2012 AAL,
LLOYD'S SYNDICATE 1729 DUW, ARCH MANAGING
AGENCY LIMITED FOR AND ON BEHALF OF THE 2021
UNDERWRITING MEMBERS OF SYNDICATE 2012 AT
LLOYD'S, ATRIUM UNDERWRITERS LIMITED FOR AND
ON BEHALF OF THE 2021 UNDERWRITING MEMBERS
OF SYNDICATE 609 AT LLOYD'S, LIBERTY
CORPORATE CAPITAL LIMITED AS SOLE CORPORATE
MEMBER OF SYNDICATE 4472 AT LLOYD'S FOR THE
2021 YEAR OF ACCOUNT, BEAZLEY FURLONGE
LIMITED FOR AND ON BEHALF OF THE 2021
UNDERWRITING MEMBERS OF SYNDICATE 623 AND
SYNDICATE 2623 AT LLOYD'S, CHAUCER
CORPORATE CAPITAL (NO. 3) LTD. (UK) AS THE SOLE
CORPORATE MEMBER OF SYNDICATE 1084 AT
LLOYD'S FOR THE 2021 YEAR OF ACCOUNT, DALE
MANAGING AGENCY LIMITED FOR AND ON BEHALF
OF THE 2021 UNDERWRITING MEMBERS OF
SYNDICATE 1729 AT LLOYD'S, LANCASHIRE
SYNDICATES LIMITED FOR AND ON BEHALF OF THE
PARTICIPATING 2021 UNDERWRITING MEMBERS OF
SYNDICATE 3010 AND SYNDICATE 2010 AT LLOYD'S,
TOKIO MARINE KILN SYNDICATES LIMITED ON
BEHALF OF ALL UNDERWRITING MEMBERS OF

INDEX NO. 654855/2022

MOTION DATE 09/11/2024

MOTION SEQ. NO. 015

**DECISION + ORDER ON
MOTION**

LLOYD'S SYNDICATE 510 AND LLOYD'S SYNDICATE
 1880, FARADAY CAPITAL LIMITED, THE SOLE
 MEMBER OF AND CAPITAL PROVIDER TO LLOYD'S
 SYNDICATE 435, STARR SYNDICATE LIMITED AS
 SOLE UNDERWRITING MEMBER OF LLOYD'S
 SYNDICATE 1919, STARR MANAGING AGENTS
 LIMITED ON BEHALF OF LLOYD'S SYNDICATE CVS
 1919, DOES 1-10,

Defendant.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 015) 177, 178, 179, 180, 181, 182, 183, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 217, 227, 228, 229, 230

were read on this motion for

LEAVE TO AMEND COMPLAINT

Plaintiffs Avenue Capital Management II, L.P., Storm Petrel Leasing 979 Limited, Storm Petrel Leasing 1002 Limited, Shearwater Aircraft Leasing II 28520 Limited, and Shearwater Aircraft Leasing 28533 Limited (collectively “Plaintiffs”) seek leave to file a Third Amended Complaint (“TAC”) to conform the allegations in the complaint to evidence obtained in discovery. Upon the foregoing documents and the following reasons, Plaintiffs’ motion is **granted**.

The Court may permit parties to amend their pleadings at any time to conform them to the evidence (CPLR 3025 [c]). Leave to amend pursuant to CPLR 3025 should be freely given “as a matter of discretion in the absence of prejudice or surprise” . . . [but] denied where the proposed amendment lacks merit” (*Cafe Lughnasa Inc. v A&R Kalimian LLC*, 176 AD3d 523, 523 [1st Dept 2019], *quoting Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]). Courts have held that prejudice “arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]; *Anoun v*

City of New York, 85 AD3d 694, 694 [1st Dept 2011]). A party opposing leave to amend “must overcome a heavy presumption of validity in favor of [permitting amendment].” (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2010]).

Defendants argue that the motion should be denied because the TAC impermissibly pleads alternative facts (*see Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co.*, 157 Misc. 2d 198, 207-08 [Sup Ct, NY County 1993]). But the TAC does no such thing. Rather, Plaintiffs permissibly allege alternative legal theories consistent with the same set of facts (*see CPLR* 3014; *Centrone v C. Schmidt & Sons, Inc.*, 114 Misc 2d 840, 841 [Sup Ct, Nassau County 1982] [“Pleading in the alternative is, of course, permissible when plaintiff does not know who among several persons has wronged him although he knows one did”]).

In the TAC, Plaintiffs argue two alternative causes of action: breach of contract against the All Risk Insurers and breach of contract against War Risk Insurers (NYSCEF 181 at ¶¶ 87-113). Under these distinct causes of action, the Plaintiffs make the following respective assertions: the planes were stolen by their Lessee airline Nordwind in an act of private theft, and therefore covered by the All Risk Insurers, or the planes were seized, restrained, and detained by Nordwind acting at the direction the Russian government, and therefore covered by the War Risk Insurers (*id.*). These are permissible alternative theories of recovery, and reflect the fact that circumstances surrounding the removal of the subject property remain uncertain.

Nor does the amendment substantially prejudice the Defendants. The reason that Nordwind did not return the aircraft to Plaintiffs has always been at the heart of this case: either the planes were detained for war-related reasons, or they were not. The All Risk insurers have always been motivated to find evidence that the loss was caused by war. The War Risk insurers have always been motivated to find evidence that the loss was caused by anything but war. The

same remains true under the TAC, which merely clarifies that Plaintiffs’ assertion that the aircraft were detained at the direction of the Russian government was based on Nordwind’s word alone, which Plaintiffs learned during the deposition of TrueAero, LLC, the company responsible for the servicing and management of the aircraft. The operative facts remain the same. Defendants’ assertion that additional discovery will be needed to evaluate the motive of Nordwind – which has been a relevant question from the outset – does not constitute substantial prejudice per se (*see Forty Cent. Park S., Inc v Anza*, 130 AD3d 491, 491 [1st Dept 2015]).

In sum, Defendants have not overcome the presumption in favor of permitting amendment of the complaint. Accordingly, it is

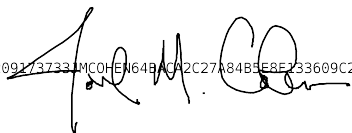
ORDERED that Plaintiffs’ motion for leave to file the third amended complaint is **granted**; it is further

ORDERED that Defendants shall serve an answer or otherwise respond to the Third Amended Complaint within 20 days from the date of said filing.

This constitutes the decision and order of the Court.

12/9/2024

 DATE

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 JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE