

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEIL D. LEVIN, SUPERINTENDENT : CIVIL ACTION
OF INSURANCE OF THE STATE OF :
NEW YORK, AND HIS SUCCESSORS IN :
OFFICE AS SUPERINTENDENT OF :
INSURANCE OF THE STATE OF NEW :
YORK, AS LIQUIDATOR OF NASSAU :
INSURANCE COMPANY, IN THAT :
CAPACITY AND IN HIS CAPACITY AS :
RECEIVER OF CERTAIN RIGHTS AND :
ASSETS OF JUDGMENT DEBTOR ARDRA :
INSURANCE COMPANY :

vs. :

NO. 95-5284
TIBER HOLDING CORPORATION :

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 26th day of March, 1999, upon consideration of the submissions of the parties relating to the choice of law issues implicated in plaintiff's breach of contract claim, **IT IS ORDERED**, for the reasons set forth in the accompanying Memorandum, that New York law will be applied to plaintiff's breach of contract claim.

MEMORANDUM

1. **Facts and Procedural History:** The court will not repeat the lengthy factual and procedural history of this case in this Memorandum and Order, except to the extent relevant to the instant motion.¹ In the Amended Complaint plaintiff sets forth four

¹ For a more complete discussion of the history of this case, see Curiale v. Tiber Holding Corp., No. CIV.A. 95-5284, 1997 WL 597944 (E.D. Pa. September 18, 1997), and Muhl v. Tiber

claims.² First, plaintiff seeks to pierce Ardra's corporate veil and enforce the 1994 judgment against defendant. Second, plaintiff asserts that certain transfers of assets from Ardra to Tiber Holding Corp. ("Tiber") were fraudulent conveyances. Third, plaintiff asserts a breach of contract claim. Fourth, plaintiff asserts a claim for post-suit fraudulent conveyances.

On September 18, 1997, the Court decided that New York law applies to plaintiff's veil-piercing and fraudulent conveyance claims, but deferred its choice of law decision regarding plaintiff's breach of contract claim because the factual record was incomplete and inconsistent. Curiale v. Tiber Holding Corp., No. CIV.A. 95-5284, 1997 WL 597944 (E.D. Pa. September 18, 1997). The Court ordered the parties to augment the record "with respect to the place of contracting, the place or places of negotiation, the place of performance, and all other relevant factors." Id. In response, the parties submitted a Stipulation of Facts Regarding Choice of Law on Breach of Contract Claim on October 27, 1997. On February 5, 1998, Tiber filed a motion for summary judgment on the fraudulent conveyance and breach of contract claims.

On August 24, 1998, the Court denied summary judgment on the breach of contract claim because the October 27, 1997

Holding Corp., 18 F.Supp.2d 514 (E.D. Pa. 1998).

² There were only three claims in plaintiff's original complaint. The fourth claim, for post-suit fraudulent conveyances, was included in the Third Amended Complaint, filed October 2, 1998. That claim is not relevant to this Memorandum.

stipulation did not address several issues vital to the choice of law determination, including, inter alia, the places of contracting and performance. The Court again ordered the parties to submit supplementary materials on the issue, by stipulation if they were in agreement. Muhl v. Tiber Holding Corp., 18 F.Supp.2d 514, 522-23 (E.D. Pa. 1998).

The parties were unable to agree to any other facts related to the choice of law issue, but they submitted additional facts for the Court's consideration and agreed to a resolution by the Court of all factual disputes relevant to that issue. On the basis of this record the Court will now decide the choice of law issue with respect to the breach of contract claim.

2. Choice of Law -- the Breach of Contract Claim: The Court has already determined that New York law applies to two of the causes of action asserted in this case -- the veil piercing and fraudulent conveyance claims. Curiale, 1997 WL 597944 at *6. However, a choice of law analysis must be performed for each of plaintiff's causes of action. Knieriemen v. Bache Halsey Stuart Shields Inc., 427 N.Y.S.2d 10, 13 (N.Y.App.Div.), app. dismissed 410 N.E.2d 745 (N.Y. 1980).

A. Center of Gravity Doctrine³

³ The Court recognizes that "the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the law of the jurisdictions involved. Miller v. Bombardier, Inc., 872 F.Supp. 114, 114 (S.D.N.Y. 1995). However, because of the difficulty involved in ascertaining whether there is an actual conflict

In contract cases, New York courts apply a "center of gravity" or "grouping of contacts" approach. Babcock v. Jackson, 191 N.E.2d 279, 283-84 (N.Y. 1983). Under this approach, courts may consider a spectrum of significant contacts, including the places of contracting, negotiation, and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. In re Allstate Ins. Co. and Stolarz, 613 N.E.2d 936, 940 (N.Y. 1993)(citing Restatement (Second) of Conflict of Laws § 188(2)(1969)). New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." Id. at 939. The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis. Id.

Applying these factors, plaintiff initially argued that the law of Delaware, the state of incorporation of both the contracting parties, Tiber and Corporate Holding Corporation ("CHC"), provides the rule of decision on the breach of contract claim. However, at a Status Conference conducted on May 12, 1997, because plaintiff's initial argument was merely conclusory, the

between the three jurisdictions identified in the submissions of the parties - Pennsylvania, New York, and Bermuda - and the fact that the parties must know which law will be applied in order to prepare the case for trial, the Court will forego an analysis of any differences in the law of the jurisdictions under consideration. See Curiale v. Tiber Holding Corp., 1997 WL 597944 at *7.

Court directed plaintiff to file a supplemental memorandum elaborating upon his position. In that submission, plaintiff's Supplemental Submission on Choice of Laws Issues, plaintiff changed his position and now argues that New York law applies to the breach of contract claim. Defendant, in its supplemental submission, argues that either Bermuda or Pennsylvania law applies.

B. Relevant Facts

As stated earlier, in response to the September 17, 1997 Order entered by the Court, the parties submitted a Stipulation of Facts regarding choice of law on the breach of contract claim. However, in its August 24, 1998 Memorandum the Court noted the following factual discrepancies and omissions:

[D]efendant states that the contract was executed in Pennsylvania but there is no evidence of that in the record. Moreover, there is evidence that the DiLoretos who executed the contract were domiciled in Pennsylvania but spent considerable time living in New York. There is no evidence of the place or places of negotiation. With respect to performance, the Court notes that notwithstanding the fact that Ardra is a Bermuda corporation, there is no evidence of the location of the account or accounts into which any payments made by defendant pursuant to the contract were to have been deposited, i.e., New York, Bermuda, or another jurisdiction.

Muhl, 18 F.Supp.2d at 522-23.

As directed, the parties have submitted additional materials for the Court to review. An analysis of the present record follows.

(1) Plaintiff's Version of the Relevant Facts

With respect to the place of execution of the contract, plaintiff argues that the contract was executed and performed in New York. In support, plaintiff submits the following facts: (1) at all relevant times, Richard DiLoreto was the sole shareholder, officer, director, and employee of CHC; (2) Mr. DiLoreto has said repeatedly that he does not recall whether the agreement for the sale of Tiber's stock in Ardra, dated December 3, 1990, was signed in Pennsylvania or New York,⁴ that at the time he signed the agreement he lived in Pennsylvania, and that he does not recall whether the third person to sign the agreement, his wife, Jeanne DiLoreto, lived with him in Pennsylvania when she signed the agreement. Additionally, Mr. DiLoreto admitted that at one time he lived in New York, although he did not recall when he moved from New York to Pennsylvania, and that Mary Ciullo, the daughter of Mr. and Mrs. DiLoreto and an officer of Tiber, signed the agreement when she lived in New York; (3) on December 3, 1990, Mary Ciullo lived in New York; (4) Jeanne DiLoreto stated that six months before and one month after the agreement was signed she lived in New York; (5) Tiber's federal tax return for 1990 indicates that Mrs. DiLoreto resides in New York; (6) Mr. DiLoreto has stated that

⁴ In a list of unexplained witness corrections made to Mr. DiLoreto's deposition transcript, the witness states that "Mary Ciullo signed on behalf of Tiber after the meeting in Pennsylvania [and] I signed on behalf of [CHC] after the meeting of [CHC] in Delaware."

at all times he has lived in New York despite owning property in Pennsylvania; (7) defendant has failed to turn over documents related to his place of residence in 1990; (8) Mr. DiLoreto claims not to have copies of his 1990 state income tax return, his 1990 driver's license, or his 1990 voter's registration card; (9) in Regis Insurance Co. v. Fidelity & Deposit Company of Maryland, CIV.A. No. 90-6674, 1992 WL 142022 (E.D.Pa. June 17, 1992), the Court implicitly found that in September 1991, nine months after the execution of the agreement of sale, Mr. DiLoreto resided in New York;⁵ and (10) on October 3, 1991, the DiLoreto's transferred ownership of their New York residence to Regia Insurance Co.

With respect to Ardra obligations guaranteed by the agreement, plaintiff alleges the following facts: (1) during its entire existence, Ardra has had no business aside from its reinsurance of Nassau and Ardra's related retrocessions; (2) during the effective period of the surplus guaranty, Nassau was being liquidated under New York insurance law, in a New York State court.

With respect to the place of performance of the agreement, the agreement obligated Tiber to cover Ardra's legal fees arising from the New York litigation; (2) from December 3, 1990 to December 3, 1995, Tiber performed its obligations in New

⁵ The Court stated that Richard DiLoreto proposed to sell his New York home, and the offer was accepted because "it was in the corporation's interest to have DiLoreto relocate to Pennsylvania in order to be closer to Regis. Thus, Judge Gawthrop found that at that time, September 1991, DiLoreto resided in New York. Regis, 1992 WL 142022 at *4.

York by transferring funds from the Bahamas to New York attorneys in return for legal services, and (3) Ardra's bank accounts are in New York. Thus, the funds due under the contract were transferred to New York bank accounts. All of these allegations are well documented by attached exhibits.

(2) Defendant's Version of the Relevant Facts

Defendant maintains that the place of contracting was Pennsylvania and that the place of performance was Bermuda. In support of this position, defendant submits significantly less voluminous evidence -- an affidavit from Mr. DiLoreto and two documents purported to be a) the minutes of a December 3, 1990 meeting of the Board of Directors of Tiber in Berwyn, Pennsylvania reflecting approval of the Agreement of Sale, and b) the minutes of a meeting of the Board of Directors of CHC held in Wilmington, Delaware from the same date reflecting agreement to the sale. According to the meeting minutes, the December 3, 1990 Berwyn meeting was attended by Mr. and Mrs. DiLoreto and Mary Ciullo. Additionally, in his affidavit, Mr. DiLoreto states that his New York legal bills were paid through a Pennsylvania insurance company by withdrawal of funds from a Nassau bank account.

(3) Plaintiff's Response to Defendant's Evidence

Plaintiff responded to defendant's version of events by presenting excerpts from two depositions. The first is from the deposition of Mary Ciullo, during which she was asked about the circumstances of the sale of Ardra. Ms. Ciullo refused to answer

these questions. The second excerpt is from the deposition of Mrs. DiLoreto, who, when asked about the meeting referenced in Mr. DiLoreto's affidavit, replied that she had no recollection of being present.

C. Conclusion -- New York Law Applies to the Breach of Contract Claim

Based on the weight of the evidence, the Court finds that the place of contracting and performance was New York. Plaintiff has exhaustively detailed the DiLoreto's residences both immediately before and after the contract was executed, while the DiLoretos had at best a vague recollection of these matters. The DiLoretos, the principal officers of the both Tiber and CHC, resided in New York at the time the contract was executed. This is strong evidence that the contract was executed in New York. Moreover, the legal fees were paid into the New York bank accounts of a New York law firm. Thus, the contract was performed, at least in part, in New York. These findings support plaintiff's argument that New York law applies to the breach of contract claim. In re Allstate Ins. Co. and Stolarz, 613 N.E.2d at 939.

In addition, as the Court noted in its November 10, 1997 Memorandum and Order, New York has a much stronger interest than Bermuda in the outcome of this case. Curiale v. Tiber Holding Corp., No. CIV.A. 95-5284, 1997 WL 713950 at *4 (E.D. Pa. Nov. 17, 1997). The Bermuda Supreme Court has refused to enforce the judgment underlying this litigation, Muhl v. Ardra, 1995 No. 484 (Berm.Sup.Ct. May 16, 1997), even though the New York Court of

Appeals has upheld the decision, Curiale v. Ardra, 667 N.E.2d 313
(N.Y. Ct. App. 1996).

BY THE COURT:

JAN E. DUBOIS, J.