UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AXA VERSICHERUNG AG, on its own behalf and as successor in interest to ALBINGIA VERISCHERUNGS AG,	05 Civ. 10180 (JSR)
Plaintiff,	MEMORANDUM ORDER
-v-	
NEW HAMPSHIRE INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,	
Defendants.	

JED S. RAKOFF, U.S.D.J.

Plaintiff and defendants each move for summary judgment. For the reasons set forth below, the Court denies the motions in their entirety.

This case relates to two contracts between, on the one side, Albingia Verischerungs AG ("Albingia"), to which plaintiff AXA Verischerung AG is the successor in interest, and, on the other side, three subsidiaries of American International Group, namely, defendants New Hampshire Insurance Company, American Home Assurance Company, and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (collectively, "AIG"). Albingia agreed in 1996 to participate in a reinsurance facility for AIG for a fourteen month period commencing on November 1, 1996 (the "1997 Facility") and then agreed to renew its participation for a thirteen month period commencing on December 1, 1997 (the "1998 Facility"). See Defendants' 56.1 Statement ("Def. 56.1") ¶¶ 26, 86; Plaintiff's Response 56.1 ("Pl. Resp. 56.1") ¶¶ 26, 86. Plaintiff alleges that

AIG misrepresented or failed to disclose certain material facts in connection with the negotiation of these contracts and sues for intentional misrepresentation, negligent misrepresentation, material nondisclosure, and breach of the duty of utmost good faith. See Second Amended Complaint dated March 22, 2007 ("Complaint").[1] Both sides move for summary judgment in their respective favor on the claims of intentional misrepresentation, material nondisclosure, and breach of the duty of utmost good faith. Defendants also move for summary judgment on the claim of negligent misrepresentation and on plaintiff's request for punitive damages.

Defendants contend that New York law bars each of plaintiff's claims under the applicable statute of limitations, which provides that a claim for contract rescission based on fraud must be commenced within six years of the execution of the contract or within two years from the date upon which the fraud was, or with reasonable diligence could have been, discovered, whichever is later. See Bowes & Co., Inc. v. American Druggists' Ins. Co., 61 N.Y.2d 750, 752 (N.Y. 1984). Plaintiff initiated this action over six years after Albingia executed the contracts for the 1997 and 1998 Facilities. Def. 56.1 ¶ 18; Pl. Resp. 56.1 ¶ 18.

The Court cannot conclude that the case is time-barred, however, because the determination of when plaintiff reasonably could

[1] The Complaint also contains a claim for conspiracy to commit fraud, which the Court dismissed on consent of the plaintiff on May 16, 2007. See transcript 5/16/07 at 3.

have discovered the alleged misrepresentations involves genuinely disputed issues of fact not appropriate for summary judgment. See Robertson v. Seidman and Seidman, 609 F.2d 583, 591 (2d Cir. 1979). For example, plaintiff alleges that defendant misled Albingia concerning what sort of facility the contracts created, "facultative" or "facultative obligatory."[2] See Complaint ¶ 38. On the one hand, evidence has been adduced that would allow a fact finder to conclude that Albingia should have discovered that the contract provided for a facultative facility by August 1998: most significantly, all five of the final contracts for the 1998 Facility, which two Albingia employees each read and initialed in August 1998, contained the words "Reinsurance Facultative Facility" in their title and explicitly provided for reinsurance on a facultative basis. Def. 56.1 ¶¶ 85, 87; Pl. Resp. 56.1 ¶¶ 85, 87. However, the record also contains evidence that would allow a fact finder to conclude that AIG initially intended for the 1997 Facility to be facultative obligatory. To begin with, an early fax from AIG to an insurance intermediary concerning what became the 1997 Facility refers to the "AIG Facultative Obligatory Treaty." Def. 56.1 ¶ 5; Pl. Resp. 56.1 ¶ 5. More importantly, a "file note" written by an AIG executive on October 2, 1998 indicates that AIG knew that the facility had been placed "on the basis of a facultative obligatory treaty," knew that

[2] Under a "facultative" contract the reinsurer retains the option to reject or accept each risk offered by the ceding company; under a "facultative obligatory" contract the reinsured is obligated to accept all risks under the contract ceded by the reinsured.

the reinsurers would not have agreed to participate if they had known that the facility would be facultative, and knew that reinsurers continued to believe that the treaty was facultative obligatory. See Plaintiff's 56.1 Statement ("Pl. 56.1") ¶ 54; Defendants' Response 56.1 ("Def. Resp. 56.1") ¶ 54. Given that AIG's own executive seemed unsurprised by Albingia's understanding, a fact finder could conclude that Albingia did not, at that time, have constructive knowledge of the alleged misrepresentation. Accordingly, the timeliness of the claims arising out of the alleged misrepresentation concerning whether the facilities were facultative or facultative obligatory cannot be resolved on summary judgment.

Likewise, there remain genuine disputes of fact as to when Albingia should have first discovered AIG's alleged failure to disclose certain losses on the 1997 Facility in connection with Albingia's consideration of whether to renew its participation in November and December of 1997. Although AIG argues that Albingia had full knowledge of the previously undisclosed losses on the 1997 Facility by September 12, 2000 when AIG disclosed a list of losses to Albingia, Def. 56.1 ¶ 120; Pl. Resp. 56.1 ¶ 120, AIG does not point to anything that requires the conclusion that Albingia should have known at that time that AIG had *knowingly* failed to disclose those losses (i.e., that AIG knew of the losses when it failed to disclose them in 1997). Thus, the question of when Albingia acquired constructive knowledge on this and the other alleged misrepresentations and non-disclosures does not lend itself to determination on summary judgment.

Further, these same uncertainties render the case inappropriate for summary judgment on the merits as well as on the statute of limitations issue. Although the Court is skeptical that plaintiff can succeed on a claim alleging that AIG misrepresented or failed to disclose the facultative nature of the facilities (given that the 1998 Facility contracts each expressly provided for a facultative facility, see Def. 56.1 ¶ 85; Pl. Resp. 56.1 ¶ 85), the "file note" described above allows at least some inference that AIG insufficiently disclosed the nature of the contract, particularly when considered in the context of AIG's duty of utmost good faith. With respect to the alleged misrepresentation concerning the number of losses under the 1997 Facility, issues of fact remain concerning whether AIG knowingly provided false information and whether Albingia relied on it. In short, genuinely disputed issues of fact render each of plaintiff's remaining claims inappropriate for summary judgment.

Finally, defendants argue that punitive damages are barred as a matter of law because of the requirement under Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603 (N.Y. 1994), that there be a showing of public harm in order for a plaintiff to recover punitive damages for a tort that arises from a contractual relationship. It is doubtful, however, that this doctrine applies to a claim for fraudulent inducement, which, under established New York law, sounds in fraud not contract, see Brown v. Lockwood, 76 A.D.2d 721, 729 (N.Y.A.D. 1980), and by definition precedes the formation of any contract. See New York University v. Continental Ins. Co., 87

N.Y.2d 308 (N.Y. 1995) (the Rocanova requirements apply where the claim has "has its genesis in the contractual relationship between the parties"); see also Topps Co., Inc. v. Cadbury Stani S.A.I.C., 380 F.Supp.2d 250 (S.D.N.Y. 2005).

Thus, for the reasons set forth above, all summary judgment motions are hereby denied. The parties are directed to appear for trial at 9 a.m. on Monday, September 24, 2007.

SO ORDERED

Dated: New York, NY
July 23, 2007

JED S. RAKOFF, U.S.D.J.