SCANNED ON 11/26/2007

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

PRESENT: _____ PART 56

Justice

Gulf Insurance Company

- v -

Transatlantic Reinsurance Company, et al.

INDEX NO. 601602/03

MOTION DATE 7/17/07

MOTION SEQ. NO. 021

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence number 021, 022, 023 and 024 are consolidated for disposition.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Dated: 1-2-08

_____
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----------X

GULF INSURANCE COMPANY,

Plaintiff,

Index No. 601602/03

-against-

TRANSATLANTIC REINSURANCE COMPANY, XL REINSURANCE AMERICA INC., ODYSSEY AMERICA REINSURANCE CORPORATION, and GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA,

Defendants.

UNFILED JUDGMENT
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----------X

RICHARD B. LOWE III, J.:

Motion sequence numbers 021, 022, 023 and 024 are consolidated for disposition.

During the pendency of this motion, plaintiff Gulf Insurance Company (Gulf) and defendant Odyssey America Reinsurance Corporation (Odyssey) reached a settlement. Motion sequence number 023, which seeks an order striking portions of Odyssey's opposition papers to Gulf's motion for partial summary judgment, is thereby rendered moot, and is denied as such.

In motion sequence number 021, Gulf seeks partial summary judgment on its first cause of action for breach of contract, requiring the remaining defendants, which at the time included Transatlantic Insurance Company (Transatlantic), Odyssey and Gerling Global Reinsurance Corporation of America (Gerling) to pay their pro rata share of the losses related to the settlement of the First Union litigation. The action has been discontinued as against Transatlantic. Thus, this motion is currently proceeding against only Gerling.

In motion sequence number 022, Gerling moves, pursuant to CPLR 3212, for summary judgment: on its sixth cause of action seeking a declaration that no agreement exists between Gerling and Gulf with respect to the 1998 Treaty, and that Gerling is not obligated to reimburse Gulf for losses arising from business covered by that Treaty; on the seventh cause of action and sixth counterclaim declaring that Gerling's participation in the 1999 and 2000 years must be calculated against the cession percentages specified in those treaties; dismissing Gulf's fourth and eighth counterclaims and fourth cause of action that seek reformation of the contract; and on the fifth cause of action and fifth counterclaim and seventeenth affirmative defense seeking a declaration that the First Union Policy is not covered by the 1999 treaty and dismissing Gulf's first, second, third and fifth causes of action and Gulf's first, second and third counterclaims.

In motion sequence number 024, Gerling moves to strike points III(A) and III(B) of Gulf's reply memorandum submitted on motion sequence number 021, or, in the alternative, seeks leave to submit sur-reply papers.

FACTS

The facts regarding the transactions that led to this dispute have been set forth in prior decisions of this court, familiarity with which is assumed. The facts recited are limited to those necessary for consideration of these motions.

Gulf insured automobile financing institutions against losses with respect to the residual value of leased cars, in the event that those values were less than projected at the commencement of the lease term. Gerling entered into three residual value insurance (RVI) reinsurance contracts with Gulf, which covered the years 1999, 2000, and 2001, respectively. Gulf was involved in litigation with First Union Corporation regarding RVI claims, and eventually settled the matter in

February 2003 for $266 million. The reinsurers did not pay the pro rata share that Gulf claims was due, and this action ensued. Gerling was not involved in the initial reinsurance agreements, which were placed in 1996. The First Union policy, which resulted in the large claims that were eventually made against the policies, was issued in 1996, with renewal coverage for 1997 and 1998. Negotiations for a 1999 policy renewal never reached fruition, but the 1998 policy was extended to April 30, 1999 during those negotiations.

DISCUSSION

Motion Seq. Number 021 - Breach of 1999 Residual Value Contract

Rescission

After discussing that the First Union policy, and the settlement reached in the litigation that arose from that policy, were covered by the reinsurance agreement, Gulf argues that defendants waived any right to rescind the treaties because of their delay in questioning whether the First Union policy was within the scope of the reinsurance agreements. Gulf maintains that defendants did not attempt to rescind their contractual obligations until three years after they learned of the First Union litigation, and the amount of the losses that were claimed. Since the reinsurers did not seek rescission within a reasonable time, they cannot seek rescission now.

For purposes of this motion, Gerling is not disputing that the First Union policy is a "Business Covered" under the 1999 agreement, or that the settlement was reasonable under the circumstances.

Gerling seeks rescission of all three years of agreements, not just the 1999 agreement which is at issue in Gulf's first cause of action. Gerling maintains that, in this motion, Gulf fails to address Gerling's claim for equitable rescission for misrepresentation. By failing to address

the viability of Gerling's claim for rescission, Gulf has failed to meet its burden for summary judgment.

Gerling contends that Gulf failed to meet its duty of providing it, as a potential reinsurer, with all material facts concerning the original risk, and that such failure entitles it to rescind the contract. *See Sumitomo Mar. & Fire Ins. Co. - U.S. Branch v Cologne Reins. Co. of Am.*, 75 NY2d 295, 303 (1990). Gerling submits affidavits to support its position that, at the time that Gulf represented to Gerling that it expected a 37.5% estimated loss ratio for the automobile residual values (ARV) program, Gulf's actuary had issued a memorandum indicating that the assumptions upon which that figure had been based were not valid. Further, by the time Gerling participated in the reinsurance treaty, Gulf's underwriting manager possessed additional information which was sufficient for Gulf to forecast loss ratios in excess of 100%. When Gerling was invited to participate in the reinsurance treaties, Gulf's 1996-1998 vehicle portfolio was already in a significant existing loss position, which was not revealed. Gulf's managing general agent, Lee & Mason, received analyses from First Union in December 1997 projecting more than $59 million in losses, including more than $14 million in losses on 1996 vehicles, which figure represented more than 100% of the earned premium for the entire 1996 ARV portfolio. Further, during this same period, Lee & Mason performed an analysis on the Gulf First Union vehicles portfolio (1996-1998), which projected losses of in excess of $110 million. The premium for that period was $33 million.

Gerling also presents evidence of failure to disclose increased loss frequencies, Gulf's attempt to negotiate a rate increase of more than 350% of the expiring premium, and Gulf's failure to disclose overstatements of residual values.

Gerling maintains that it did not delay in bring its rescission claim because it was involved in settlement negotiations with Gulf until this action was commenced. Further, Gulf has not presented any evidence regarding when Gerling found out about the misrepresentations. Many of the documents that support Gerling's claim of misrepresentation were obtained for the first time during discovery in this action.

Gulf contends that it did not possess the loss information on which Gerling bases its assertion of bad faith, and, therefore, could not disclose it to Gerling. Additionally, Gulf was not obligated to undertake the expensive analysis that Gerling obtained for purposes of this litigation, and differing analyses cannot form the basis for rescission. Finally, Gulf maintains that Gerling delayed seeking rescission until after the settlement with First Union, and after it was billed for its share. Such delay, it asserts, was unreasonable, where Gerling accepted the benefit of the contract until that time.

The question of whether Gulf possessed the loss information presented by Gerling cannot be determined on this motion. However, the existence of such information suffices to raise a question of fact as to whether Gulf had access to it when Gulf presented its reinsurance proposal to Gerling. If it did have that information, Gerling would have a valid basis to seek rescission, since Gulf's failure to provide information would be a breach of its duty to disclose all facts that materially affect the risk. *See Sumitomo Mar. & Fire Ins. Co. - U.S. Branch v Cologne Reins. Co. of Am.*, 75 NY2d 295, *supra*.

Gulf's argument that Gerling delayed in raising this claim is uncompelling. If Gerling first became aware of this failure to disclose during the course of this litigation, it cannot be faulted for not having raised it before Gulf settled its litigation with First Union. Additionally,

the court notes that Gulf's assertion that it would not have been reasonable for it to undertake the type of expensive analysis that Gerling submitted in the first instance is conclusory. Even if Gulf had submitted an expert's opinion to that effect, this argument was first raised in the reply, and the court could not consider such evidence to support the motion. *Batista v Santiago*, 25 AD3d 326 (1st Dept 2006).

Accordingly, Gulf's motion for partial summary judgment is denied, because Gerling has raised a question of fact regarding whether or not it has a valid basis to demand that the agreement be rescinded.

The Terms of the Contract

Gerling maintains that, even assuming that the policy is not rescinded, Gulf has failed to establish that it is entitled to summary judgment. Gerling contends that three separate provisions of the 1999 agreement preclude granting Gulf's motion respecting Gulf's First Union billing under the 1999 agreement. First, the First Union policy did not attach during the term of the 1999 agreement, because efforts to renew the First Union policy were unsuccessful. Thus, the policy under which Gulf was billing the First Union losses was First Union's 1998 policy. Second, the First Union Settlement was primarily for extra-contractual liabilities which are deemed to have been incurred on January 1, 1996. That was before Gerling participated in the ARV program, so Gerling should not have been billed for those amounts. Finally, Gerling maintains that Gulf billed it 6.5% of the total amount of the Section A share. However, Gerling contends that it should have been computed on the basis of 6.5% of the reinsurer's 45% participation in Gulf's liabilities, not 6.5% of Gulf's 100% liability.

Gulf responds that the First Union policy was properly ceded to the 1999 reinsurance

treaty, that the settlement with First Union was not for extra contractual obligations, and that Gulf did not overstate its bill to Gerling. Even if the bill had been overstated, Gulf maintains that the disputed portion of the amount could await trial, but that it should be granted judgment as to the portion that is not in question.

Gerling's reinsurance placement slip provides that it covers losses, effective January 1, 1999, respecting losses occurring on leases incepting on or after the effective date. Thus, Gerling's obligations arise only with respect to policies whose inception date was on or after January 1, 1999. Gulf maintains that the First Union 1998 policy is included, because the 1998 policy was extended beyond the December 31, 1998 term, and was in effect until April 30, 1999.

The question raised here is whether Gulf's agreement with First Union to extend the terms of the 1998 policy until April 30 constitutes a renewal, which would be treated as the inception of a new policy, or whether it is treated as a continuation of the 1998 policy, which incepted in 1998.

Gulf maintains that the extension is the same as a renewal, and cites Black's Law Dictionary, 6th Edition, in support of its position, as well as citing New York Insurance Law. However, Gulf has not suggested why New York law would apply to First Union's policy. First Union is a North Carolina company. Under North Carolina Law, and according to more recent editions of Black's Law Dictionary,

> "Renewal" is defined as "[t]he re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." Black's Law Dictionary 1322 (8th ed. 2004).

Duganier v Carolina Mountain Bakery, 633 SE2d 696, 700 (NC App 2006). Gulf has not offered any argument or law to counter this definition. There is no question, according to the

papers before the court, that the policy with First Union was not renewed in 1999. The parties were attempting to reach an agreement in order to be able to renew the policy, but were unsuccessful. Under such circumstances, the court must conclude that the First Union policy was merely extended. As such, there was no inception of any policy in 1999. Gerling did not participate as a reinsurer in 1998. Therefore, Gulf has failed to demonstrate that there is any basis upon which to hold Gerling liable for claims under the First Union policy. Thus, even if there were no question of rescission, First Union would not be entitled to summary judgment on its first cause of action as against Gerling.

Under these circumstances, any discussion of whether a portion of the First Union settlement was for extra contractual obligations which arose in 1996, is academic.

It is also unnecessary, with respect to Gulf's motion, to address the question of the contractual language regarding the percentage of the risk attributable to Gerling. That issue will be addressed below, in the context of Gerling's motion.

Motion Sequence Number 022

Gerling moves for summary judgment against Gulf declaring that Gerling has no liability for losses arising from business covered by the 1998 treaty; declaring that Gerling's participation is to be calculated against 45% of section A and 65% of Section B cessions set forth in the 1999 and 2000 treaties; dismissing Gulf's claims for reformation; and declaring that the First Union policy is not covered under the 1999 treaty.

Commencement Date of Section B of the 1999 Treaty

Gulf maintains that Gerling's participation in the 1999 treaty had an effective date of August 1, 1998, with respect to Section B of the treaty. Gulf relies on the March 1999

confirmation fax of its broker, Guy Carpenter, to Gerling, in which the August date was stated as the effective date for Section B, as well as a May 1999 letter from Guy Carpenter to Gerling reciting August 1, 1998 as the effective date.

It is well settled that written contracts must be construed according to the terms as written. It is further well established that parole evidence cannot be used to modify the written terms or to create an ambiguity. *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 (1990).

The reinsurance placement slip signed by Gerling states that the effective date is January 1, 1999. It does not state a different effective date for Section B. Notice of Motion, Ex. H, at GG 03172. The agreement contains a clause stating that it constitutes the entire agreement between the parties, and that any change or modification to the agreement is null and void unless made by amendment to the agreement and signed by the parties. *Id.* at GG 03180. Gulf has not produced any signed amendment purporting to change the effective date for Section B. The only documents that it produced are the confirmation, and a later letter from Guy Carpenter to Gerling, neither of which were signed by Gerling. Consequently, Gulf is bound by the terms of the written agreement, which provides for the January 1, 1999 date. Thus, Gulf has failed to refute Gerling's evidence that the contract applies only to policies incepting on or after January 1, 1999.

Percentages of Interests and Liabilities

Gerling maintains that, according to the contracts for 1999 and 2000, its percentage participation in the interests and liabilities applies to the reinsurers' portion of Gulf's premiums and losses, not to the full amount of Gulf's premiums and losses. Gulf contends that the parties' course of conduct demonstrates that the parties intended that the percentage stated would be

based on 100% of Gulf's residual value losses. Gulf further argues that Gerling's reading would mean that the reinsurance covered only an unreasonably small portion of the risk, and that when Gerling participated in 2001, it increased its participation by a factor of 10.

It is only if the terms of a contract are ambiguous that the court can look beyond the writing to determine the intent of the parties. *See W.W.W. Assoc.*, 77 NY2d at 162-163. Here, the contract is not ambiguous. The contract provides that Gerling will have "a 6.50% participation as respects Section A. and a 26.50% participation as respects Section B. in the Interests and Liabilities of the Reinsurer as set forth in the Agreement attached hereto entitled Quota Share Reinsurance Agreement." Notice of Motion Ex. I, at GG 00365. The Quota Share Reinsurance Agreement defines "Reinsurer" as the "Subscribing Reinsurer(s) executing the Interests and Liabilities Contract(s) attaching to and forming a part of this Agreement." *Id.* at GG 00368. The Quota Share Reinsurance Agreement further provides that the Reinsurer will have a 45% quota share participation in Section A, and a 65% quota share participation in Section B. Thus, the agreement provides that Gerling has a 6.5% participation of the reinsurers' 45% participation in Section A, and that Gerling has a 26.5% participation of the reinsurers' 65% participation in Section B. The Quota Share Reinsurance Agreement for 2000 has the same provisions as the 1999 agreement, with respect to this issue. Gerling's percentages increased to 10% participation in Section A, and 30% participation in Section B "in the Interests and Liabilities of the Reinsurer ... ." *Id.*, Ex. K, at GG 01686, GG 01694-01695.

The fact that Gulf may have made a mistake in drafting the agreement, and, due to its mistake, may have ended up obtaining less reinsurance than it intended, does not mean that Gerling must accept a greater percentage of participation than that provided in the contract, and

that it claims that it intended. Gerling's agreement does not refer to the agreements of the other reinsurers, and does not include them. Thus, Gerling had no way of knowing whether the portions that the other reinsurers accepted totaled 45% and 65% as anticipated. Nor was that necessary for Gerling to ascertain. It merely agreed to a percentage of the reinsurers' obligation, and cannot be forced to accept a modification based upon Gulf's misunderstanding of the contractual language.

Cause of Action for Reformation

Gerling seeks dismissal of Gulf's cause of action for reformation of the 1999 and 2000 contracts, which seeks to change the 45% and 65% figures to 100%. Gerling points out that, in order to reform a contract, it must be demonstrated that at the time the parties entered into the contract, both parties intended the contract to be different from the way it was written. Gerling presents evidence that Gerling intended to enter into the contract as written, and maintains that there is no evidence that Gerling's intention was any different - whether in the form of letters, memoranda, e-mails, or other written documents. In fact, Gerling's contemporary authorization specifically stated the treaty percentage of the reinsurers. Gerling also notes that Gulf's former Senior Vice President of Ceded Reinsurance, Susan Morgan, realized that the wording did not provide for the reinsurance shares to be out of 100%, and spoke to the broker about it, saying that she wanted to modify the prior years' agreements. However, no such modification was ever presented to Gerling.

Gulf argues that Gerling accepted the premiums based upon 100% (until after the settlement with First Union, at which time Gerling returned the additional amounts) and that the parties intended the participation to be on that basis. However, that is not enough to raise an

issue of fact as to whether reformation is appropriate.

In order to resist pretrial dismissal of a reformation claim, a party must "tender a 'high level' of proof in evidentiary form." *Chimart Assoc. v Paul*, 66 NY2d 570, 574 (1986). The mistake must exist at the time the agreement was signed. *Shults v Geary*, 241 AD2d 850, 852 (3d Dept 1997). As discussed above, the contract is not ambiguous, and is not in accordance with Gulf's understanding of the parties' intention. While Gulf relies on Gerling having accepted premium payments based upon 100%, that is insufficient to raise a question of fact where there is no evidence that, at the time that the parties entered into the contract, Gerling intended to participate in the higher amount. The fact that Gulf forwarded higher amounts of premiums does not bind Gerling to different terms. Gerling explains that its acceptance of the amount was based upon its mistaken acceptance of the broker's representations to its bookkeeping department that the amounts were correct. Again, that cannot serve to demonstrate that Gerling had an intention to participate at the greater percentage when it signed the agreement.

In view of Gerling's demonstration that the contract was not ambiguous, and Gulf's failure to present any evidence contemporaneous with the signing of the agreement that would raise a question of fact as to the parties' intent, Gulf's cause of action for reformation is dismissed.

Did the First Union Policy Attach in 1999

This issue was discussed in the context of motion sequence 021, above. As discussed there, the court concludes that the First Union Policy incepted in 1998, and was not renewed in 1999. Therefore, the First Union policy is not reinsured under the 1999 treaty with Gerling.

Motion Sequence Number 024

Gerling seeks to strike portions of Gulf's reply memorandum of law, or, in the alternative, to be permitted to submit sur-reply papers in motion sequence number 021.

Gerling maintains that, in its motion, Gulf inaccurately stated that Gerling seeks rescission based only on its argument that the First Union policy was not within the scope of the reinsurance agreements, and addressed only Gerling's supposed delay in raising that issue in seeking summary judgment. After Gerling responded, Gulf raised issues in its reply memorandum which it had not raised in its original moving papers. Specifically, in Point III, Gulf addressed Gerling's real rescission claim, which was based upon Gulf's misrepresentations.

The relief Gerling seeks is unnecessary. Since Gulf did not raise the issue of alleged misrepresentations in its moving papers, once Gerling raised the issue in opposition, the court could not grant Gulf's motion. The fact that Gulf offers arguments counter to Gerling's position does not suffice to warrant striking that portion of its memorandum. Nonetheless, as discussed above, such arguments cannot be permitted to support a different basis for granting summary judgment. Thus, while the court can consider those arguments to determine whether Gerling raised issues of fact to preclude summary judgment, the arguments are not an independent basis for granting summary judgment, and no sur-reply is necessary.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Gulf Insurance Company (Gulf) (motion sequence number 021) for partial summary judgment is denied; and it is further

ORDERED that the motion of Gerling Global Reinsurance Corporation of America (Gerling) (motion sequence number 022) is granted as follows: it is hereby

ORDERED that Gerling's sixth cause of action (index no. 601077/04) is severed; and it is

ADJUDGED AND DECLARED that Gerling is not obligated to reimburse Gulf for losses arising from business covered by the 1998 insurance treaty; and it is further

ORDERED that Gerling's seventh cause of action (index no. 601077/04) and sixth counterclaim (index no. 601602/03) are severed; and it is

ADJUDGED AND DECLARED that Gerling's participation in the 1999 and 2000 years must be calculated as against the 45% and 65% amounts that were ceded to reinsurers; and it is further

ORDERED that Gerling's fifth cause of action (index no. 601077/04) and fifth counterclaim (index no. 601602/03) are severed, and Gulf's first, second, third and fifth causes of action (index no. 601602/03), and Gulf's first, second and third counterclaims (index no. 601077/04) are severed and dismissed; and it is

ADJUDGED AND DECLARED that the First Union policy, which was effective from January 1, 1998 to December 31, 1998, and which was extended during negotiations until April 30, 1999, is not covered by the 1999 treaty; and it is further

ORDERED that Gulf's fourth cause of action (index no. 601602/03) and fourth and eighth counterclaims (index no. 601077/04) for reformation are dismissed; and it is further

ORDERED that motion sequence number 023 is denied as moot; and it is further

ORDERED that Gerling's motion to strike a portion of Gulf's reply memorandum of law submitted in motion sequence number 021, or to permit Gerling to submit a sur-reply (motion sequence number 024), is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 21, 2007

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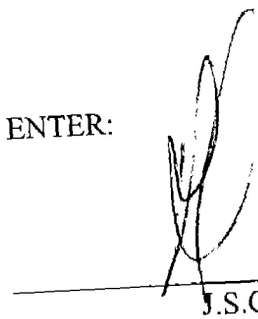

J.S.C.

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