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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA
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8 Employers Reinsurance)
9 Corporation,)
10 Plaintiff,)
11 v.)
12 Guaranteed Financial)
13 Corporation, et al.,)
_____ Defendants .)

CIV 04-884 PHX VAM

O R D E R

14 In this litigation, plaintiff seeks to hold defendants liable
15 for a default judgment entered by the United States District Court
16 for the Western District of Missouri against American Investors
17 Insurance, Ltd. (hereinafter "AII") in the amount of \$1,568,710.
18 Earlier in the litigation the parties asked the Court to resolve
19 the effect of the Missouri default judgment on the defendants in
20 this action. (Docs. 31, 49, 51, 54). This Court entered an
21 Order, dated August 24, 2005, indicating that ". . .if plaintiff
22 proves (1) the alter ego theory as set forth in the Court's prior
23 Order (Doc. 49) and (2) plaintiff establishes defendants' control
24 or ability to defend at the time of the default judgment, the
25 judgment may be enforced against each defendant for whom plaintiff
26 satisfies its burden of proof on these two issues." (Doc. 63).
27 The reasoning behind this ruling is set forth in the Court's
28 earlier Orders. (Docs. 49, 63).

1 Now pending before the Court is defendants' Motion for
2 Partial Summary Judgment seeking a ruling that plaintiff cannot
3 establish control/ability to defend at the time the Missouri
4 default judgment was entered. (Docs. 79, 80). Plaintiff opposes
5 the Motion for Summary Judgment arguing that defendants may not
6 have had actual control of AII at the time of the default judgment
7 but that they had the "ability to defend" AII. (Docs. 85, 86).
8 Plaintiff also opposed defendants' Motion for Summary Judgment by
9 arguing the documents relied upon by defendants were not
10 admissible in support of the summary judgment motion as they were
11 Bermuda documents which were unauthenticated. (Doc. 88).

12 The Motion for Summary Judgment was argued on May 15, 2006
13 (Doc. 90). During that hearing, the Court indicated that the
14 documents needed to support plaintiff's Motion for Summary
15 Judgment were not authenticated and could not be relied upon by
16 the Court. The Court gave the parties additional time to
17 determine whether the documents could be stipulated to or
18 authenticated and to provide additional briefing. (Docs. 90, 97).
19 The parties have now filed a Stipulation regarding the
20 authenticity of certain documents (Doc. 98). The matter is now
21 fully briefed and the Court will proceed with a ruling on
22 defendants' Motion for Summary Judgment regarding control of AII
23 at the time of the default judgment.

24 A. Summary Judgment Standard

25 Summary judgment is appropriate when the movant shows "there
26 is no genuine issue as to any material fact and that the moving
27 party is entitled to judgment as a matter of law." Rule 56(c),
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1 F.R.Civ.P.; California Architectural Building Products, Inc. v.
2 Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987),
3 cert. denied, 484 U.S. 1006 (1988). There is a genuine issue of
4 material fact "if the evidence is such that a reasonable jury
5 could return a verdict for the non-moving party." Anderson v.
6 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party
7 bears the burden of demonstrating that there is no material fact
8 precluding summary judgment. Adickes v. S.H. Cress and Company,
9 398 U.S. 144, 157 (1970).

10 Substantive law determines which facts are material.
11 Anderson v. Liberty Lobby, 477 U.S. at 248; Jesinger v. Nevada
12 Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). "Only
13 disputes over facts that might affect the outcome of the suit
14 under the governing law will properly preclude the entry of
15 summary judgment." Anderson, 477 U.S. at 248.

16 A principal purpose of summary judgment is "to isolate and
17 dispose of factually unsupported claims." Celotex Corporation v.
18 Catrett, 477 U.S. 317, 323-24 (1986). Summary judgment is
19 appropriate against a party who "fails to make a showing
20 sufficient to establish the existence of an element essential to
21 that party's case, and on which that party will bear the burden of
22 proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322
23 (1986); see also Citadel Holding Corporation v. Roven, 26 F.3d
24 960, 964 (9th Cir. 1994). The moving party need not disprove
25 matters on which the opponent has the burden of proof at trial.
26 Celotex, 477 U.S. at 323.

27 Furthermore, the party opposing summary judgment "may not
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1 rest upon the mere allegations or denials of the [party's]
2 pleadings, but . . . must set forth specific facts showing that
3 there is a genuine issue for trial." Rule 56(e), F.R.Civ.P.;
4 Celotex, 477 U.S. at 324; Matsushita Elec. Indus. Co. v. Zenith
5 Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Lind Rose Joint
6 Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). There is no issue
7 for trial unless there is sufficient evidence favoring the non-
8 moving party. If the evidence is merely colorable or if not
9 significantly probative, summary judgment may be granted.
10 Anderson, 477 U.S. at 249-50. However, "the evidence of the non-
11 movant is to be believed and all justifiable inferences are to be
12 drawn in his favor." Id. at 255.

13 B. Defendants' Motion Regarding Control

14 With the filing of the Stipulation establishing authenticity
15 of certain documents submitted in support of defendants' Motion
16 for Summary Judgment and in plaintiff's Opposition to the Motion
17 for Summary Judgment, the Court makes the following findings of
18 uncontested facts:

19 1. AII is a Bermuda corporation. On March 28, 2003, a
20 creditor (International Corporate Services, Ltd.) filed a petition
21 in Bermuda to wind-up (the equivalent of an involuntary
22 bankruptcy) AII under The Companies Act 1981. (Doc. 80, Exhibit 4
23 at Attachment A and Doc. 33 at Exhibit 11 as authenticated by
24 Document 98 at pars. 7 and 8).

25 2. On January 23, 2004, the Supreme Court of Bermuda
26 appointed a "provisional liquidator of affairs" for AII and
27 ordered the company be "wound up" under the provision of The

1 Companies Act 1981. (Doc. 33 at Exhibit 11 as authenticated by
2 Doc. 98, par. 8).

3 3. AII's counsel filed a Motion to Withdraw in the
4 litigation pending against AII in the United States District Court
5 for the Western District of Missouri on December 4, 2003. The
6 Court ordered AII to obtain new counsel on or before February 27,
7 2004 or risk entry of default judgment. (Doc. 33 at Exhibit 10).

8 4. On March 1, 2004, counsel for the official
9 receiver/provisional liquidator of AII, appointed by the Supreme
10 Court of Bermuda, wrote to the U.S. District Judge in the Missouri
11 litigation asking for additional time to determine whether it
12 should hire counsel to defend, or apply for a stay, and requested
13 the District Judge not enter default judgment. (Doc. 33 at
14 Exhibit 14 as authenticated by Doc. 98, par 10).

15 5. On March 5, 2004, the United States District Court for
16 the Western District of Missouri entered a default judgment in
17 favor of Employers Reinsurance and against AII in the amount of
18 \$1,568,710. (Doc. 33 at Exhibit 15; Doc. 80 at par. 12).

19 6. The Companies Act 1981 (Exhibit B to Document 79) is an
20 authentic copy of Bermuda Law and governs the winding up of AII.
21 (Doc. 98 at par. 1 and Doc. 80, Exhibit 4 at Attachment A). The
22 Companies Act 1981 contains a section entitled "Part VIII Winding
23 Up." Section 175 of the Companies Act 1981 sets forth the powers
24 of the liquidator and indicates that the liquidator in a winding
25 up shall have ". . .the power, with the sanction either of the
26 court or of the committee of inspection, to bring or defend any
27 action or other legal proceedings in the name and on behalf of the

1 company." (Doc. 79 at Exhibit B, Section 175(1)(a) and
2 Stipulation re Authenticity at Doc. 98, par. 1). Under the
3 Companies Act 1981 the liquidator for AII was in control of
4 litigation involving AII and had the power to defend the
5 litigation in the Western District of Missouri, with approval of
6 the Court (Bermuda Court) or "committee of inspection." (Id.).

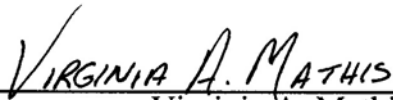
7 The above facts are not contested by plaintiff. Instead of
8 arguing that defendants actually controlled AII after the wind up,
9 plaintiff argues they had the ability to take certain steps and
10 regain control of AII by paying off debts. (Doc. 95). In support
11 of its position, plaintiff has submitted an opinion by an attorney
12 practicing in Bermuda as to what actions "could have" been taken
13 by defendants which "would likely have" allowed AII to avoid the
14 winding up petition, placement of a liquidator and entry of the
15 default judgment. (Doc. 95). This does not change the fact that
16 AII was in winding up and under the control of a liquidator of the
17 Bermuda Court at the time of the entry of default judgment.

18 This Court previously determined that plaintiff would have to
19 establish two things to hold the present defendants liable on a
20 default judgment entered against another corporation (AII), i.e.
21 alter ego theory as set forth in the Court's Order (Doc. 49) and
22 that defendants controlled or had the ability to defend at the
23 time of the default judgment. The Court finds that the above
24 uncontested facts establish that defendants in this lawsuit did
25 not actually control AII at the time of the default judgment; the
26 liquidator/Court in Bermuda was in control of AII and defendants
27 did not have the ability to direct the litigation, i.e. defend

1 against the default judgment. It is speculative as to whether or
2 not defendants could have regained control of AII and avoided the
3 default judgment. What is known is that they did not control and
4 the "liquidator" was making the decisions regarding the litigation
5 in the Western District of Missouri. As a result, plaintiff may
6 not enforce the default judgment against the present defendants
7 (Guaranteed Financial Corporation, Robert P. LeMarr and Lois J.
8 LeMarr).

9 **IT IS THEREFORE ORDERED** granting defendants' Motion for
10 Summary Judgment on the issue of control. (Doc. 79). The Court
11 finds that defendants did not have control of AII or the ability
12 to defend against the default judgment in the Western District of
13 Missouri. As a result, the default judgment against AII may not
14 be enforced against the defendants in the present action.

15 DATED this 26th day of September, 2006.

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19 Virginia A. Mathis
20 United States Magistrate Judge
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