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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 Employers Reinsurance Corporation,
12 Plaintiff,

13 v.

14 Guaranteed Financial Corporation;
15 Robert P. LeMarr, Lois J. LeMarr,
16 Defendants.

No. CV 04 0884 PHX VAM

**MOTION FOR SUMMARY
JUDGMENT RE: DEFENDANTS'
CONTROL OF AII AND ABILITY
TO DEFEND AII AT THE TIME OF
THE MISSOURI DEFAULT
JUDGMENT**

17
18 Employers Reinsurance Corporation's ("ERC's"/Plaintiff's") attempt to enforce
19 the Missouri Default Judgment it obtained against non-party American Investors
20 Insurance, Ltd. ("AII") against these Defendants has been the subject of five briefs, two
21 oral arguments, and two orders. The issue has been narrowed to a question of "control."
22 Pursuant to this Court's order of August 24, 2005 ("Order"), Defendants Guaranteed
23 Financial Corporation ("GFC"), Robert P. LeMarr and Lois J. LeMarr ("the LeMarrs")
24 move for a ruling from this Court finally resolving the effect of the Missouri Default
25 Judgment. Before Plaintiff obtained its Default Judgment against AII, the Supreme Court
26 of Bermuda appointed a liquidator for AII and ordered AII wound-up. Defendants did not
27 have control of AII or the ability to defend AII thereafter; the subsequently-entered
28 Default Judgment does not have res judicata or collateral estoppel effects in this litigation.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Plaintiff's lawsuit seeks to collect monies allegedly owed to it by non-party AII. (Second Amended Complaint ("SAC") at ¶¶ 11-37, 63-72.) AII entered into a contract with ERC that ERC alleges AII breached. (SAC at ¶¶ 25-31.) AII is a Bermuda Company. (SAC at ¶ 7.) AII is currently in "winding-up" (bankruptcy) proceedings in Bermuda. (SOF ¶ 1.) Defendant Guaranteed Financial is an Arizona corporation which has engaged in numerous businesses over its nearly 40-year history including insurance, financing, farming, and real estate. (SOF ¶ 2.) Guaranteed Financial acquired all of AII's stock from American Investors Financial Ltd. ("AIF") in 1999. (SAC at ¶ 9.) AII maintained its own board of directors (including outside directors as required by Bermuda law), utilized separate bank accounts, retained Bermuda legal counsel, engaged a Bermuda management company as required by Bermuda law, underwent audits annually by KPMG, and in all other respects maintained itself as a separate business entity. (SOF ¶¶ 3-4.)

A. The Missouri Litigation

The relationship between AII and ERC has given rise to numerous lawsuits including *American Investors Insurance (Bermuda), Ltd. v. Employers Reinsurance Corporation*, Case No. CIV01-0278-PHX-SRB, which was transferred to the United States District Court, Western District of Missouri, Western Division, Case No. 03-0019-FJG. There the case was consolidated with *Employers Reinsurance Corporation and Westport Insurance Corporation v. American Investors Financial, Ltd. and American Investors Insurance (Bermuda), Ltd.*, Case No. 01-0709-CV-W-FJG (hereinafter the "Missouri Litigation"). (SOF ¶ 5.)

On March 28, 2003, International Corporate Services Ltd. filed a petition to wind-up AII pursuant to Section 162(a) of the Bermuda Companies Act 1991. (SOF ¶ 7.) On January 23, 2004, the Bermuda Supreme Court appointed a provisional liquidator ("the Liquidator") for AII. (SOF ¶ 8.) The only other defendant in the Missouri Litigation,

1 AIF, declared bankruptcy November 21, 2003. (SOF ¶ 9.) As a result of AIF's
2 bankruptcy, the district court judge in the Missouri Litigation ordered the proceedings
3 stayed against AIF. (*Id.*) This left AII as the only defendant in the Missouri Litigation.¹

4 In January 2004, AII's counsel withdrew from representing AII in the Missouri
5 Litigation, because they were unable to contact AII and AII had not paid them. (SOF ¶
6 10.) After AII's counsel withdrew, the Judge ordered AII to hire new counsel on or
7 before February 27, 2004. (*Id.*) On March 1, 2004, AII's Liquidator, through its counsel,
8 wrote the district court to request more time to retain counsel or otherwise deal with the
9 matter. (SOF ¶ 11.) Liquidator's counsel's letter explained:

10 Our client is anxious that no default judgment be entered until
11 such time as the position has been examined in more detail.
12 The Official Receiver will have to consider if it is appropriate
13 to either (a) appoint local counsel to advise or (b) to apply to
14 the Federal Bankruptcy Court for a stay of proceedings under
15 the provision of section 304 of the Federal Bankruptcy Code.
16 However, that decision cannot be made without reviewing the
17 pleadings in these cases to determine if AII should continue to
18 participate.

19 (*Id.*)

20 That letter also requested that the Court stay entry of Default against AII until the
21 Liquidator could make an informed decision regarding how AII wanted to proceed. (*Id.*)
22 In spite of the Liquidator's request to stay entry of default and AII's inability to defend
23 itself, a default judgment was entered in the Missouri Litigation against AII in favor of

24 ¹ After the Missouri court stayed the proceedings against AIF, AII moved for an order
25 staying the case against it. (SOF ¶ 13.) That motion was supported by the legal opinion
26 of Bermuda counsel declaring that under Bermuda law, "the hearing of the petition by
27 International Corporate Services, Ltd. against American Insurance (Bermuda), Ltd. will
28 act as an effective stay of proceedings in all jurisdictions" (*Id.*) The court never
made a substantive ruling on AII's motion to stay the proceedings. Rather, a short time
later the Court entered default judgment against AII for failing to appoint counsel and
denied AII's motion to stay the proceedings as moot. (*Id.*)

1 ERC in the amount of \$1,568,710.00.² (SOF ¶ 12.) None of the Defendants in this action
2 were parties to the Missouri Litigation, and in fact the judge specifically denied ERC's
3 request to add GFC and the LeMarrs as defendants. (SOF ¶ 6.)

4 **B. This Court's Order**

5 On January 19, 2005, Defendants moved for an order from this Court declaring that
6 the Missouri Default Judgment did not have res judicata or collateral estoppel effect.³
7 That motion was fully briefed and argued before this Court. On May 16, 2005 the Court
8 ordered supplemental briefing on the issue. (Order (May, 16, 2005) at 15:2-10.) After
9 supplemental briefing, the Court determined that the Missouri Default Judgment *will only*
10 *have* res judicata effect if "plaintiff proves (1) the alter ego theory as set forth in the
11 Court's prior Order and (2) plaintiff establishes defendants' control or ability to defend at
12 the time of the default judgment" (Order (August 24, 2005) at 2:12-17.) Defendants
13 did not have control over AII or the ability to defend AII at the time of the default
14 judgment. Only AII's Bermuda Liquidator had control over AII and the ability to defend
15 AII.⁴

16 ² Had AII been incorporated in the United States there is no question the district court
17 would have had to stay the proceedings. *See* 11 U.S.C. § 362(a)(1) ("[the filing of a
18 bankruptcy petition] operates as a stay, applicable to all entities, of the commencement or
19 continuation, including the issuance or employment of process, of a judicial,
20 administrative, or other action or proceeding against the debtor that was or could have
21 been commenced before the commencement of the case under this title, or to recover a
22 claim against the debtor that arose before the commencement of the case under this title").
23 Additionally, had the Missouri litigation been litigated in Bermuda, the Bermuda Court
24 would have stayed the action until AII was wound up. *See* The (Bermuda) Companies
25 Act 1981 § 165(1) ("At any time after the presentation of a winding-up petition, and
26 before a winding-up order has been made, the company or any creditor or contributory
27 may, where an action or proceeding against the company is pending, apply to the Court
28 for a stay of those proceedings."); *Id.* at § 167(4) ("When a winding-up order has been
made or a provisional liquidator has been appointed, no action or proceeding shall be
proceeded with or commenced against the company except by leave of the Court and
subject to such terms as the Court may impose.")

3 ³ Motion to: (1) Dismiss Pursuant to Rule 12(b)(6); (2) In the Alternative, Stay
Proceeding; (3) Resolve Bermuda Law to AII Piercing Claims; and (4) Resolve Effect of
Missouri Default Judgment

4 ⁴ This motion does not address ERC's inability to prove that AII was the alter ego of GFC
and the LeMarrs. Since neither GFC nor the LeMarr's controlled or could defend AII
when the Missouri Default Judgment was entered, as required by this Court for the
Missouri Default Judgment to have res judicata effect, ERC's alter ego claim is irrelevant
to this motion.

1 II. LEGAL ARGUMENT

2 A. Summary Judgment

3 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment,
4 after adequate time for discovery and upon motion, against a party who fails to make a
5 showing sufficient to establish the *existence of an element essential to that party’s case,*
6 *and on which that party will bear the burden of proof at trial.*” *Celotex Corp. v. Catrett*,
7 477 U.S. 317, 322-23 (1986) (emphasis added). “One of the principal purposes of the
8 summary judgment rule is to isolate and dispose of factually unsupported claims or
9 defenses,” and Rule 56(c) “should be interpreted in a way that allows it to accomplish this
10 purpose.” *Id.* at 323-24. Thus, Rule 56 “must be construed with due regard . . . for the
11 rights of persons opposing such claims and defenses to demonstrate in the manner
12 provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”
13 *Id.* at 327.

14 Here, ERC bears the burden of proving that GFC and the LeMarrs controlled AII
15 or could defend AII at the time of the Missouri Default Judgment. ERC cannot meet its
16 burden and cannot establish a legitimate question of fact re same; neither GFC nor the
17 LeMarrs controlled AII or were able to defend AII at the time of the Missouri Default
18 Judgment. Only the Bermuda Liquidator could defend AII when the Missouri Default
19 Judgment was entered.

20 B. Defendants Did Not Control AII At The Time of the Missouri Default 21 Judgment.

22 Default Judgment was entered against AII in the Missouri Litigation on March 5,
23 2004, for failure to appear through appointed counsel. (SOF ¶ 12.) In order to enforce
24 that Default Judgment against these Defendants, ERC must prove that the Defendants
25 controlled AII on *March 5, 2004*. (See Order at 2:12-17.)

26 On *March 28, 2003*, International Corporate Services Ltd. filed a petition to wind-
27 up AII pursuant to Section 162(a) of the Bermuda Companies Act 1991 (for the Court’s
28 convenience, a copy the Bermuda Companies Act 1991 is attached to this motion as

1 Exhibit 2). (SOF ¶ 7.) A “Provisional Liquidator” was appointed for AII on January 23,
2 2004, by a Bermuda Chief Judge. (SOF ¶ 8.) As the Court pointed out during the August
3 18, 2005 hearing, “if [Bermuda law is] like bankruptcy law here in the United States
4 where a trustee is put in or somebody. And basically the debtor in possession is gone, and
5 this third party now controls everything ... the alter ego is no longer in control of the
6 litigation and does not have an opportunity to defend.” (Trans. of Proceedings (August
7 18, 2005), attached as Exhibit A, at 44:16-45:4.) Like United States law, Bermuda law
8 put AII’s Liquidator in control of AII once the winding-up proceedings began.
9 Defendants could not have defended AII in the Missouri litigation at the time the Default
10 Judgment was entered.

11 AII was a Bermuda Ltd. (SAC ¶ 7.) Its rights and liabilities are governed by the
12 the (Bermuda) Companies Act 1981. *See* Companies Act 1981, attached as Exhibit B.
13 On March 28, 2003, International Corporate Services Ltd. filed a petition to wind-up AII.
14 (SOF ¶ 7.) A “Provisional Liquidator” was appointed for AII on January 23, 2004, by a
15 Bermuda Chief Judge. (SOF ¶ 8.) The (Bermuda) Companies Act 1981 provides that
16 “[w]here a winding-up order has been made or where a provisional liquidator has been
17 appointed, the liquidator or the provisional liquidator, as the case may be, *shall take into*
18 *his custody or under his control all of the property and things in action to which the*
19 *company is or appears to be entitled.*” § 174(1) (emphasis added). Therefore, on or
20 before January 23, 2004, under the (Bermuda) Companies Act 1981, AII’s Liquidator had
21 control of all AII’s property.

22 Not only did AII’s Liquidator control AII’s property on January 23, 2004, he also
23 controlled AII’s ability to defend any legal proceeding and to appoint counsel for AII as
24 required by the Missouri Court to avoid default:

25 (1) The liquidator in a winding-up by the Court shall have
26 power, with the sanction either of the Court or of the
committee of inspection –

27 **(a) to bring or defend any action or other**
28 **legal proceeding in the name and on behalf**
of the company;

1 (b) to carry on the business of the company
2 so far as may be necessary for the beneficial
3 winding up thereof;
4 (c) to appoint an attorney to assist him in
5 the performance of his duties;
6 (d) to pay any classes of creditors in full;
7 (e) to make any compromise or arrangement
8 with creditors or persons claiming to be
9 creditors or having or alleging themselves to
10 have any claim, present or future, certain or
11 contingent ascertained or sounding only in
12 damages against the company, or whereby the
13 company may be rendered liable;
14 (f) to compromise all calls and liabilities to
15 calls, debts and liabilities capable of resulting
16 in debts, and all claims, present or future,
17 certain or contingent, ascertained or sounding
18 only in damages, subsisting or supposed to
19 subsist between the company and a
20 contributory or alleged contributory or other
21 debtor or person apprehending liability to the
22 company, and all questions in any way relating
23 to or affecting the assets or the winding up of
24 the company, on such terms as may be agreed,
25 and take any security for the discharge of any
26 such call, debt, liability or claim and give a
27 complete discharge in respect thereof.
28

Companies Act 1981 § 175 (emphasis added).

Therefore, neither GFC nor the LeMarrs had control of AII on March 5, 2004 — the day the Default Judgment against AII was entered. Neither GFC nor the LeMarrs could appoint counsel for AII in the Missouri Litigation to avoid the Default Judgment.⁵

The letter that Liquidator's counsel sent to the Missouri district court implicitly attests to this. (SOF ¶ 11.) In the letter the Liquidator recognized that it had that power to

⁵ As the Court noted (Exhibit 1 at 44:16-45:4), had AII been incorporated in the United States this conclusion would be the same. "From the time of the filing of the [bankruptcy] petition, the assets [of the corporation] are in custodia legis and over them the bankruptcy court has exclusive jurisdiction and the sole right to determine the validity of any and all alleged liens thereon." *Ripp v. Fleming*, 242 F.2d 849, 852 (7th Cir. 1957). Once a trustee is appointed for the corporation "all assets in the bankrupt[] [corporation's] custody, possession or control passed to him." *Id.* If AII were incorporated in the United States, however, ERC would have violated 11 U.S.C. § 362 by continuing to prosecute its claim after the bankruptcy petition was filed. *Infra*. n.2. Willful violation of 11 U.S.C. § 362(a)(1) justifies an award of punitive damages. *See* 11 U.S.C. § 362(k)(1); *see also, e.g., In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989) (affirming an award of punitive damages against a creditor who violated an 11 U.S.C. § 362(a)(1) automatic stay.)

1 appoint counsel for AII (*id.*); however, the Liquidator needed more time to consider
2 whether to appoint counsel and presumably what counsel to appoint. (*Id.*)

3 Thus, under to The (Bermuda) Companies Act 1981 and as acknowledged by the
4 Liquidator's letter to the Missouri district Court, the Liquidator had control of AII when
5 the Default Judgment was issued. Further, it was the Liquidator that could appoint
6 counsel for AII and avoid the Default Judgment – not these Defendants. Plaintiffs cannot
7 establish an element of this claim as set forth in the Court's Order. Therefore, summary
8 judgment is appropriate on Plaintiff's claim that the Missouri Default Judgment has res
9 judicata effects — it does not.

10 **III. CONCLUSION**

11 For all of the reasons set forth above GFC and the LeMarrs respectfully request this
12 Court enter summary judgment declaring that the Missouri Default Judgment has no res
13 judicata or collateral estoppel effect on these proceedings.

14 DATED this 6th day of March, 2006.

15
16 SNELL & WILMER L.L.P.

17
18 By s/ Gregory B. Collins

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22 Attorneys for Defendants Guaranteed Financial
23 Corporation, Robert P. LeMarr and Lois J. LeMarr
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 6, 2006 I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
4 Notice of Electronic Filing to the following CM/ECF registrants:

5 E.J. Kotalik, Jr., Esq.
6 Mark H. Brain, Esq.
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8 3030 North Central Avenue, Suite 1106
9 Phoenix, AZ 85012
10 Attorneys for Plaintiff Employers
11 Reinsurance Corporation

12 I further certify that on March 6, 2006, I served a courtesy copy of the
13 aforementioned document and transmittal of a Notice of Electronic Filing by mail on the
14 following:

15 The Honorable Virginia A. Mathis
16 United States District Court
17 401 West Washington Street, SPC 12
18 Suite 323
19 Phoenix, AZ 85003-2156

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