

FIREMAN'S FUND INSURANCE COMPANY

v.

HAROLD GREENBERG, ET AL.

United States District Court, Southern District of California, February 26, 2008

No: 07-CV-1566

JURISDICTION — 1521. Contracts Partly Maritime and Partly Non-Maritime — MARINE INSURANCE — 1515. Yachts — 33. Excess Cover — YACHTS AND PLEASURE BOATING — 16. Insurance.

An excess liability policy covering excess of underlying policies including a yacht policy and non-marine policies by following form is marine to the extent that it so incorporates the terms of the marine policy. The insurer's action for declaration of non-coverage of the assured's liabilities from a yacht casualty is an action on marine insurance within admiralty jurisdiction.

JURISDICTION — 1371. Sufficient Contacts — 1372. Fairness and Reasonableness — MARINE INSURANCE — 30. Actions on Policies.

In an action by insurers to declare non-coverage of marine liabilities, the Arizona citizens' ownership of and visits to a vacation home in Cal. are not the continuous and systematic contacts sufficient for general jurisdiction of them. But the purchase and visits and the filing in this court of a related limitation action establish purposeful availment, and the claim here to avoid coverage for the accident arises sufficiently out of the related activity of defendants in filing the limitation action here to found specific jurisdiction, which is not unreasonable in light of defendants' visits and litigation activities here, the proximity of their residence in Ariz. and other factors. Dismissal denied.

Timothy R. Lord (Lewis, Brisbois, Bisgaard & Smith) *for Fireman's Fund Ins.*
Robert G. Wilson (Cotkin & Collins, P. C.) *for Greenberg*

ROGER T. BENITEZ, D.J.:

I. INTRODUCTION

This case concerns the obligation, if any, owed by Plaintiff Fireman's Fund Insurance Company ("Plaintiff" or "FFIC") to Defendants Harold Greenberg, Edith Greenberg, and the Harold and Edith Greenberg Family Revocable Trust dated 12/04/99 ("Defendants")¹ under an excess liability policy. Defendants move to dismiss the Complaint for lack of subject matter and personal jurisdiction. Plaintiff opposes the motion. For the reasons below, the motion is denied.

1. Defendant Sue Saunders did not join in this motion and is not included in the collective reference to "Defendants" as used in this Order.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Complaint alleges as follows: the policy at issue is a homeowner's policy, accompanied by a "Catastrophe Cover Excess Liability Declaration," issued by FFIC to Harold Greenberg (collectively "the FFIC policy"). Under certain specified circumstances, the excess coverage included marine risk.

Defendant Harold Greenberg owned a yacht named *M/V Charlotte B* ("the vessel"). On April 18, 2006, the vessel ran aground on the coast of Baja, Mexico, and was severely damaged.

The FFIC policy did not directly cover damages arising out of the ownership, maintenance or use of boats. However, it provided "follow form" coverage if the occurrence was covered by required underlying insurance. Under the follow form provisions, FFIC was to use the provisions of the applicable required underlying insurance or a different policy.

In addition to the FFIC policy, Greenberg had a Yachtsman/Windjammer Boatsman policy ("the ACE policy") through ACE American Insurance Company ("ACE"), that was in effect at the time of the grounding incident. The ACE policy extended to liability arising out of the ownership, operation or maintenance of the vessel. Plaintiff alleges that the ACE policy constituted the required underlying insurance as defined in the FFIC policy.

The present action is the third lawsuit filed in relation to the grounding incident. The first lawsuit was filed by Harold Greenberg in this District on August 30, 2006. Greenberg's action sought exoneration from or limitation of liability arising out of the grounding incident ("the limitation action").² Sue Saunders ("Saunders"), a defendant in the present action, is also a claimant in the limitation action. Saunders's husband was a crew member on the *Charlotte B* and died as a result of the grounding incident.

The second lawsuit, a wrongful death action, was filed by Saunders on October 17, 2006 in the Central District of California.

Finally, on August 8, 2007, FFIC filed the present action, seeking a declaratory judgment regarding the coverage provided by the FFIC policy. On September 13, 2007, Saunders filed a counter-claim and cross-claim in the present lawsuit for intentional infliction of emotional distress and declaratory relief.

FFIC named as Defendants Harold and Edith Greenberg and the Harold and Edith Greenberg Family Revocable Trust dated 12/04/99 (hereinafter "the Greenberg Trust"). Harold and Edith Greenberg are long-time resi-

2. Case No. 06-CV-1764 BEN (POR).

dents of Arizona, although they own a vacation home in Coronado, California. The Greenberg Trust is organized under the laws of the state of Arizona.

III. LEGAL STANDARD

Rule 12(b)(1) challenges to subject matter jurisdiction can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. *See White v. Lee*, 227 F.3d 1214, 1242 (9 Cir. 2000). “Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040 (9 Cir. 2003) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9 Cir. 1989)).

IV. DISCUSSION

As concluded below, this Court has both subject matter and personal jurisdiction over Defendants.

A. Subject Matter Jurisdiction

This Court has admiralty subject matter jurisdiction over this action because the FFIC policy is a maritime contract. The Constitution grants federal courts jurisdiction over “all Cases of admiralty and maritime Jurisdiction.” Art III, §2, cl. 1. Congress passed 28 U.S.C. §1331, giving district courts original jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction.” *See id.*

Admiralty jurisdiction extends to maritime insurance contracts. *Sentry*, 2007 AMC at 922, 481 F.3d at 1217 (citations omitted). “Our cases do not draw clean lines between maritime and nonmaritime contracts.” *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 23, 2004 AMC 2705, 2710-11 (2004). Courts “cannot simply ask ‘whether a ship or other vessel was involved in the dispute,’ or focus solely on ‘the place of the contract’s formation or performance.’” *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 2007 AMC 913, 923, 481 F.3d 1208, 1218 (9 Cir. 2007) (citing *Norfolk*, 543 U.S. at 23-24, 2004 AMC at 2711). The status of a vessel as a “pleasure” boat rather than a “commercial” boat does not control the existence of admiralty jurisdiction. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-76, 1982 AMC 2253, 2259.

The dispositive inquiry in whether a contract is maritime is “whether the ‘primary objective’ of the . . . policy was to provide insurance coverage for maritime commerce.” 2007 AMC at 905, 481 F.3d at 1219. For example, a commercial general liability policy that covers liability arising out of marine operations has been found to be a marine insurance policy. See *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 2005 AMC 1747, 1759, 413 F.3d 307, 317 (2 Cir. 2005). In contrast, an umbrella policy that covers crew members’ shore-based activities has been held not to be a marine contract. See *Sentry Select*, 2007 AMC at 915, 481 F.3d at 1208.

The primary objective of the FFIC policy is to insure maritime commerce because the policy’s terms follow form of an underlying maritime policy. “Ultimately, coverage determines whether a policy is ‘marine insurance,’ and coverage is a function of the terms of the insurance contract and the nature of the business insured.” *Folksamerica*, 2005 AMC at 1758, 413 F.3d at 317. The “Catastrophe Cover Excess Liability Declaration” of the FFIC policy extended to damages arising out of the ownership or use of a boat, if such damages were in turn covered by underlying insurance. Under such circumstances, the FFIC policy provided “follow form” coverage. Pursuant to the “follow form” provisions, FFIC was to use the definitions, coverages, conditions, and other provisions of the applicable underlying insurance.

Here, the underlying insurance policy is a maritime contract. The underlying insurance was written by ACE. The ACE policy is a Yachtsman/Windjammer/Boatman policy, which provides coverage for liability arising as a result of the ownership, operation, or maintenance of the vessel due to the destruction of the insured property; bodily injury or loss of life; liability to paid crew; loss or damage to any property; and pollution or contamination. Thus the primary objective of the ACE policy is to cover various losses arising in the course of maritime commerce.

Next, the FFIC policy follows form of the ACE maritime policy, using the latter’s applicable definitions, coverages and conditions. Therefore the FFIC policy is also a maritime contract.

Defendants argue that the FFIC policy was essentially a homeowner’s policy, and the provisions related to boat coverage were only a minor part of it. Under the legal precedent, however, the issue is whether the primary objective of the contract is marine coverage, and not the presence of other types of insurance. Defendants rely heavily on the *Sentry* decision, where an umbrella policy covering crew members’ shore-based risks was found not to be a marine contract. See *Sentry Select*, 2007 AMC 915, 481 F.3d

1208. The policy at issue in *Sentry*, however, covered risks related to traditional shore-side activities, such as painting, scrubbing of decks of tugs or barges, and loading and unloading. 2007 AMC at 927, 481 F.3d at 1219-20. Here, the FFIC policy, under its follow form provisions, covered a rather complete list of traditional maritime risks. Therefore the record shows that the primary objective of the follow form provisions is maritime coverage.

B. Personal Jurisdiction

Plaintiff has met its burden of a prima facie showing that the court has specific personal jurisdiction over Defendants.

The plaintiff bears the burden of establishing the district court's personal jurisdiction over the defendants. *See Harris Rutsky & Co. Ins. Services, Inc. v. Bell and Clements Ltd.*, 328 F.3d 1122, 1128-29 (9 Cir. 2003). Plaintiff is required to "make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9 Cir. 2006) (citations omitted). "[F]or the purpose of this demonstration, the court resolves all disputed facts in favor of the plaintiff. . . ." *Id.*

"Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute. Second, the exercise of jurisdiction must comport with federal due process." *Dow Chemical Co. v. Calderon*, 422 F.3d 827, 830 (9 Cir. 2005) (citations omitted).

California's state long-arm statute is §410.10 of the California Code of Civil Procedure, which "...allows courts to exercise jurisdiction to the limits imposed by the Due Process Clause of the United States Constitution." *Mattel, Inc. v. Greiner and Hausser GmbH*, 354 F.3d 857, 863 (9 Cir. 2003). "Thus, we examine whether exercising jurisdiction over Defendants would offend due process." *Id.* Due process requires an out-of-state defendant to have such minimum contacts with the forum state that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

There are two types of personal jurisdiction, general and specific. *Fields v. Sedgwick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9 Cir. 1986). As shown below, general personal jurisdiction has not been established. Specific personal jurisdiction in this Court is proper.

1. General Jurisdiction

Plaintiff does not argue there is general jurisdiction over Defendants, and instead focuses on the issue of specific jurisdiction. Therefore Plaintiff has not met its burden of showing that the court has general personal jurisdiction. Regardless, the record does not support general personal jurisdiction over Defendants.

General jurisdiction “. . . enables the court to hear cases unrelated to the defendant’s forum activities,” and “exists if the defendant has ‘substantial’ or ‘continuous and systematic’ contacts with the forum state.” *Fields*, 796 F.2d at 301. “This is a fairly high standard in practice.” *Id.*

It is undisputed that the individual Defendants are long-term residents of the state of Arizona. The Greenberg Trust purchased a vacation home in Coronado, California. The individual Defendants have visited the home on several occasions. These visits to California fall short of the “substantial” or “continuous and systematic” contacts required to establish general personal jurisdiction.

2. Specific Jurisdiction

The exercise of specific personal jurisdiction, however, is appropriate. The Ninth Circuit employs a three-part test to determine whether the district court can exercise specific personal jurisdiction. *See Mattel*, 354 F.3d at 863. The test is satisfied when “(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant’s forum-related activities, and (3) the exercise of jurisdiction is reasonable.” *Pebble Beach*, 453 F.3d at 1155. The plaintiff has the burden of establishing the first two prongs of the test. *Id.* The defendant bears the burden with respect to the third prong. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

First, Defendants purposefully availed themselves of the privileges of conducting activities in California by the purchase of a vacation home in Coronado. Even if Defendants visit the home only occasionally, they still enjoy the benefits and protections of California property laws.

In addition, Harold Greenberg filed a limitation action in this District. Filing a lawsuit constitutes purposeful availment of the privilege of conducting activities in California. *See Mattel*, 354 F.3d at 863. As at least one other court noted, it would be an anomaly to allow someone to bring a case in this District as a plaintiff, but to preclude another party from naming the same person as a defendant in another action. *See Corhill Ins. PLC JAC*

v. *Maitland Bros. Co.*, 1992 WL 111183 at *2 (E.D. La. 1992). Defendants' assertion that the limitation action is irrelevant, because it does not name FFIC as a party, is unavailing. The very filing of the action constitutes the use of the forum state privileges. See *Mattel*, 354 F.3d at 863. In addition, the limitation action arose out of the grounding incident and is related to the present case. As part of the limitation action, Greenberg sought to enjoin all claims against himself and his insurers, including FFIC. Therefore the first prong is satisfied.

Second, the claim arises out of and results from Defendants' forum-related activities. The Ninth Circuit uses a "but-for" test for this analysis. *Mattel*, 354 F.3d at 864. Courts look at whether the plaintiff's claims would have arisen but for the defendants' contacts with the state. *Id.* Here, the present action would not have been filed but for the grounding incident and the ensuing litigation initiated by Greenberg and Saunders. Greenberg's limitation action sought to enjoin all suits against himself arising out of the grounding incident, including suits against his insurers. FFIC is one of Greenberg's insurers. Thus the limitation action raised the issue of FFIC's liability relating to the incident.

Furthermore, the limitation action also invited all potential claimants to file their claims. On November 29, 2006, Saunders filed a Claim and Answer in the limitation action. Subsequently, in the present action, FFIC requested a declaratory judgment that the FFIC policy does not provide liability coverage to Greenberg for any claims brought by Saunders in the limitation action. To the extent that the FFIC policy may cover any of Saunders's claims, FFIC seeks to limit the coverage to \$2,000,000. Consequently, had the limitation action not been filed, FFIC would not be seeking the above-described relief. Thus FFIC's claim arises out of and results from Defendants' forum-related activities.

With respect to the other two Defendants, Edith Greenberg is likely to be among the beneficiaries of the Greenberg Trust which purchased the Coronado home. The Greenberg Trust also purchased the vessel. Accordingly, Edith Greenberg and the Greenberg Trust sufficiently participated in the forum-related activities.

Third, the exercise of personal jurisdiction is reasonable. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

Defendants' case is not compelling. "In determining whether the exercise of jurisdiction comports with 'fair play and substantial justice,' and is

therefore 'reasonable,' we consider seven factors under our case law. . . .'' *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1114 (9 Cir. 2002). The *Dole* factors are:

- (1) the extent of the defendants' purposeful injection into the forum state's affairs;
- (2) the burden on the defendant of defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) the forum state's interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;
- (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
- (7) the existence of an alternative forum.

Id.

First, Defendants have purposefully injected themselves into California's affairs by buying a vacation home here and initiating the limitation action in this jurisdiction. Second, the burden of defending in California has not been established as high. Although Defendants reside in Arizona, they have the option of using their home in Coronado, California. Third, there is no sharp conflict with the sovereignty of Arizona. Defendants argue that the FFIC policy was purchased in Arizona, that Arizona law is applicable, and that the coverage issues should be heard in that jurisdiction. Defendants did file a declaratory judgment and bad faith action in the District of Arizona, but on November 16, 2007, the case was dismissed for failure to join Saunders as an indispensable party. *See Greenberg v. Fireman's Fund Ins. Co.*, 2007 WL 4105990, *3 (D. Ariz. 2007). Therefore Arizona does not appear the likely forum for a complete and fair resolution of all issues. Further, even if Arizona law does govern the interpretation of the policy terms, this is only one consideration in the jurisdictional test.

Fourth, California has an interest in adjudicating the dispute because Saunders, one of the Defendants and a party to the other two cases, is a resident of Santa Barbara, California. Saunders is a claimant in the limitation action and a plaintiff in her wrongful death action. "California has a strong interest in providing a forum for its residents and citizens who are tortuously injured." *Dole*, 303 F.3d at 1115-16. Further, all three cases related to the grounding incident are pending in California. Fifth, California seems to provide the most efficient forum. All three actions related to the grounding incident are pending in California. The Arizona action was dismissed for failure to join Saunders as an indispensable party. A joinder of Saunders in Arizona may not be feasible. Sixth, FFIC is a California corporation, and will prefer to litigate in its home state. And seventh, although an alternative forum does exist, it may not be the most convenient or even

practicable to conduct litigation there. Saunders as a California resident may not be subject to personal jurisdiction in Arizona.

Based on the above, Defendants have not shown that the exercise of personal jurisdiction by this Court is unreasonable. Accordingly, specific personal jurisdiction exists over all Defendants.

V. CONCLUSION

Accordingly, Defendants' Motion to Dismiss the Complaint is denied.

