Xome Settlement Services, LLC et al v. Certain Underwriters at Lloyds, London Subscribing to Polic

2019 | Cited 0 times | E.D. Texas | April 17, 2019

United States District Court

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION XOME SETTLEMENT SERVICES, LLC and QUANTARIUM, LLC v. CERTAIN UNDERWRITERS AT LLOYD S, LONDON SUBSCRIBING TO POLICY NO. B0621PXOME000116

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Civil Action No. 4:18-CV-00837 Judge Mazzant

MEMORANDUM OPINION AND ORDER Pending before the Court is Plaintiffs Xome Settlement Services, LLC and Quantarium, LLC Motion to Remand (Dkt. #5). Having considered the motion and the relevant pleadings, the Court finds that the motion should be denied.

BACKGROUND Plaintiffs filed this insurance coverage action in the 367th Judicial District Court of Denton County, Texas seeking a declaration of their rights under an insurance policy issued by Defendants Certain Underwriters a subscribing to Policy No. B0621PXOME000116 (Dkt. #1; Dkt. #5 at p. 1). The Certain Underwriters subscribing to the Policy are

Canopius Syndicate, Barbican Syndicate, and Antares Syndicate (Dkt. #1 ¶ 8).

On November 29, 2018, Defendants removed the case to this Court (Dkt. #1). On December 20, 2018, Plaintiffs filed their Motion to Remand (Dkt. #5). Defendants filed a response to the motion on January 18, 2019 (Dkt. #9). Plaintiffs filed a reply in support of the motion on January 22, 2019 (Dkt. #10). The parties dispute whether Defendants waived their removal rights in the Policy.

LEGAL STANDARD Gunn v. Minton, 568 U.S. 251, 256 (2013) (quoting Kokkonen v.

Guardian Life Ins. Co. of Am. urt actions that originally Caterpillar Inc. v. Williams that has been removed to federal court, a district court is required to remand the case to state court

Humphrey v. Tex. Gas Serv., No. 1:14-CV-485, 2014 WL 12687831, at *2 (E.D. Tex. Dec. 11,

201 Howery v. Allstate Ins. Co. ambiguities are construed against removal and in favor of remand to state cour Mumfrey v. CVS

Pharmacy, Inc., 719 F.3d 392, 397 (5th Cir. 2013) (citing Manguno v. Prudential Prop. & Cas. Ins. Co. party bears the burden of showing that federa Humphrey, 2014 WL 12687831, at *2 (quoting Manguno, 276 F.3d at 723).

ANALYSIS I. Subject Matter Jurisdiction Before addressing whether Defendants waived their right to remove the case from state court, the Court must determine whether it may exercise subject matter jurisdiction in this case. See Sangha v. Navig8 ShipManagement Private Ltd., 882 F.3d 96, 100 (5th Cir. 2018) (citations bject-matter jurisdiction at the

. . . Defendants allege the Court may exercise subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Section 1332(a) provides that federal district courts may exercise subject matter $75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or

subjects of a foreign state . . Subject matter jurisdiction established by § 1332 is referred to as . Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 297 (5th Cir.

2010) (quoting Whalen v. Carter Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1079 (5th Cir.

2008) (quoting McLaughlin v. Miss. Power Co., 376 F.3d 344, 353 (5th Cir. 2004)). In other same citizens Stiftung, 603 F.3d at 297 (citations omitted). A

incorporated and of the State or foreign state where it has its principal pla 28 U.S.C. § 1332(c)(1). The citizenship of unincorporated entities is determined by the citizenship

of all its members. Americold Realty Tr. v. Conagra Foods, Inc., 136 S. Ct. 1012, 1016 (2016) (citing Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990)); Harvey, 542 F.3d at 1080 (citations omitted) (he citizenship of a is determined by the citizenship of all of its members. Stiftung, 603 F.3d at 297 (citing Howery,

243 F.3d at 919).

It its Notice of Removal, Defendants claim Plaintiff Xome is a Pennsylvania corporation with a principal place of business in Texas and Plaintiff Quantarium is a Washington corporation with a principal place of business in Washington (Dkt. #1 ¶¶ 6 7). Therefore, Defendants conclude Plaintiffs are citizens of Pennsylvania, Texas, and Washington (Dkt. #1 ¶¶ 6 7).

, Plaintiffs claim they are LLCs (Dkt. #1-3 ¶¶ 2 3). Both Plaintiff sole member is Xome Holdings LLC

(Dkt. #1-3 ¶¶ 2 (Dkt. #1-3

¶ 2). 1

Nationstar Sub1 LLC and Nationstar Sub2 LLC (Dkt. #1-3 ¶ 2). Nationstar Sub1 LLC and Nationstar Sub2 by Nationstar Mortgage Holdings, Inc. (Dkt. #1-3 ¶ 2). Nationstar Mortgage Holdings, Inc. is a

Delaware corporation with a principal place of business in Texas (Dkt. #1-3 ¶ 2). Accordingly, ntiffs are citizens of Delaware and Texas.

plaintiff[ ] shares the 2

Stiftung, 603 F.3d at 297. Defendants allege they are unincorporated foreign entities whose members are foreign citizens (Dkt. #1 ¶¶ 8 11). Dkt. #1- 3 ¶¶ 4 6). Consequently, Defendants are foreign citizens. Comparing Plaintiff citizenship Pennsylvania, Texas, Washington, and Delaware foreign no plaintiff shares the same citizenship as any one defendant. Therefore, the Court may

exercise subject matter jurisdiction over this case pursuant to § 1332 if Defendants did not waive their removal rights in the Policy.

1 if this assumption is incorrect. 2

II. Waiver of Removal Rights

There are three ways in which a party may waive its removal rights: [1] by explicitly stating that it is doing so, [2] by allowing the other party the right to choose venue, or [3] by Ensco Intern., Inc. v. Certain Underwriters at Lloyd s, 579 F.3d 442, 443 44 (5th Cir. 2009) (alterations in original) (quoting City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004)). removal rights need not contain explicit words. , 182

F. Ap Waters v. Browning-Ferris Indus., Inc., 252 F.3d 796, 797 (5th Cir. 2001)). However, New Orleans, 376 F.3d at 504 (citing McDermott Intern., Inc. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991); Waters, 252 F.3d at 796). Grand View PV Solar Two, LLC v. Helix Elec., Inc./Helix Elec.

of Nev., L.L.C., J.V., 847 F.3d 255, 258 (5th Cir. 2017) (citing New Orleans, 376 F.3d 505 06).

Plaintiffs contend Defendants clearly and unequivocally waived their removal rights under the language of the . The Choice of Law and Jurisdiction provision contains two sentences. The second sentence provides:

Any disputes between the Insured and Underwriters arising under or in connection with this Insurance policy shall be subject to the exclusive jurisdiction of Texas. (Dkt. #5-1 at p. 24) (emphasis added). Plaintiffs argue the language of this sentence is like the language analyzed in Grand View, Ensco, Dixon, Waters, and Paolino (Dkt. #5 at pp. 3 4) (citing Grand View, 847 F.3d at 255; Ensco, 579 F.3d at 442; Dixon v. TSE Intern. Inc., 330

F.3d 396 (5th Cir. 2003); Waters, 252 F.3d at 796; Argyll Equities LLC v. Paolino, 211 F. App x. 317 (5th Cir. 2006)).

The language at issue is distinguishable from the language in Grand View, Ensco, and Paolino because the language in these cases specified that specific states courts in Texas possessed exclusive jurisdiction. Grand View, 847 F.3d at 258 (Defendant waived the sole and exclusive jurisdiction of the courts of Harris County in the

State of Texas for any action, suit or proceeding arising out of or relating to this Agreement or the Proposed Transaction.); Ensco The Policies forum selection clause fixes exclusive venue for litigation in the Courts of Dallas County, Texas. This, prima facie, satisfies New Orleans. Paolino, 211 F. App x. at 319 ([T]he district court properly concluded that it is not a court sitting in Kendall County. If the language of the Policy here read, shall be subject to the exclusive jurisdiction of [the courts of Denton County], Texas the case finding Defendants clearly and unequivocally waived their removal rights in accordance with Grand View, Ensco, and Paolino. However, the issue here is not whether the parties agreed to submit to the exclusive jurisdiction of courts in a specific county, but whether the words be subject to the exclusive jurisdiction of Texas any

Texas state court.

Waters is also distinguishable because it concerns a defendant waiving its removal rights by agreeing to allow the plaintiff the exclusive right to choose venue. 252 F.3d Reading each of the three clauses together, it is apparent that BFI (1) agreed that Waters may sue it in any court of Texas, (2) consented to the jurisdiction of any court in Texas to decide the case, and (3) waived any objection to venue in any court in Texas, including the 23rd Judicial District Court of

Wharton County, Texas. 3

In fact, the contract in Waters enabled the plaintiff to sue the Id. at 797. As the plaintiff in Waters could sue the defendant in either state or federal court, the case does not help the Court

Dixon is the most applicable case cited by Plaintiffs. 330 F.3d at 397. In Dixon, the defendant removed the case to this District. Id. The parties disputed whether the defendant waived its removal rights Id. The Courts of Texas, U.S.A., shall have jurisdiction over all controversies with respect to the execution, interpretation or performance of this Agreement, and the parties waive any other

venue to which they may be entitled by virtue of domicile or otherwise. Id. The district court held, courts of the Eastern District of Texas are not court of Texas because they do not belong to Texas, but rather are courts of Id. at 397 98 (emphasis in original). The Fifth Circuit Federal district courts may be in Texas, but they are not of Texas. Id. at 398 (emphasis in original). The Court reads Dixon to suggest the parties agreed to litigate disputes arising from the Policy exclusively in Texas state court by . See id. Even so, Dixon is distinguishable for two reasons. First, the language at issue here does not state Courts of Texas jurisdiction of Texas. the s in or of analysis from Dixon is not applicable

in this case. Second, unlike the contract in Dixon, the Policy here contains other provisions that .

3. Waters fits under a different New Orleans factor. 376 F.3d at 504 (emphasis added) (A party waives its right to by allowing the other party the right to choose venue, or by

Other Provisions language alone, but must examine the Policy as a whole to harmonize and give effect to all provisions of the contract. See M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) (citing Universal C. I. T. Credit Corp. v. Daniel, 150 Tex. 513, 518 (1951)); Clark v. Cotten Schmidt, L.L.P., 327 S.W.3d 765, 773 (Tex. App. Fort Worth 2010, no pet.). B language previously cited, other provisions of the Policy also concern jurisdiction.

i. Appearing he first sentence of the Choice of Law and Jurisdiction provision states:

This Insurance shall be governed by and construed in accordance with the laws of Texas, each party agrees to submit to the exclusive jurisdiction of any competent court within the United States of America. (Dkt. #5-1 at p. 24) (emphasis added). c also appears in the

(Dkt. #5-1 at p. 3).

court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy. Court of Competent Jurisdiction, BLACK S LAW DICTIONARY (10th ed. 2014) sentence suggests the parties agreed to submit to any court in the United States with the power and authority recognized by law as possessing the right to adjudicate a controversy. Further, n sentence indicates that the parties agreed only to litigate in Texas state court or that Defendants

waived their removal rights. Case 4:18-cv-00837-ALM Document 16 Filed 04/17/19 Page 8 of 15 PageID #: 190 and the diversity of citizenship discussion above, this Court qualifies as a competent court in the United States that has the power and autho

Other Courts have reached similar conclusions analyzing comparable language. In French America This insurance shall be governed by and construed in accordance with the laws of the State of Louisiana and each party agrees to submit to the exclusive jurisdiction of any court of competent

jurisdiction within the United States Great N. & S. Navigation Co. LLC French Am. Line v. Certain Underwriters at Lloyd s London, CV 18-4665, 2019 WL 1417305, *2 (E.D. La. Mar. 29, 2019). 4

Interpreting this he provision here does not clearly and unequivocally waive Id.

Similarly, in McDermott, the Fifth Circuit analyzed a policy with competing jurisdictional provisions. 944 F.2d at 1199 d Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States . . . Id. at 1200. Finding some ambiguity between the Service of Suit Clause and the Arbitration provision of the policy, The service-of-suit clause does not explicitly waive Underwriters removal rights. Id. at 1206. 5

4. There is no indication that the policy in French America found in the Policy here. See 2019 WL 1417305, *2. 5. In McDermott, the Fifth Circuit distinguished Nutmeg, a case containing similar language. McDermott, 944 F.2d at 1207 (citing City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13 (5th Cir. 1991)). The policy in Nutmeg [i]n the event of our [Nutmeg s] failure to pay any amount claimed to be due under your [Rose City s] policy, we, at your request agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States at 14 (alterations in original). The Fifth Circuit found McDermott distinguishable from Nutmeg, in part, because McDermott contained more than one jurisdictional clause while Nutmeg contained only one. 944 F.2d at 1207. As the Policy here contains more than one jurisdictional clause, it is more like McDermott than Nutmeg. Moreover, the issue in Nutmeg concerned the second New Orleans factor allowing one party the right to choose venue See Nutmeg, 931 F.2d 15 16; New Orleans, 376 F.3d at 504. This

any disputes arising from the Policy in indicates the parties agreed to submit to the exclusive jurisdiction of any competent court within

the United States federal or state, within or outside of Texas. Unfortunately, two additional clauses of the Policy further muddy the water.

ii. Service of Suit Clause l:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. (Dkt. #5-1 at p. 23) (emphasis added).

The first emphasized again express their intent to litigate disputes anywhere in the United States, not simply Texas state

courts in this sentence, one party agrees to submit to the venue chosen by the other party. Read alone, this clause could be construed as a different New Orleans. See Nutmeg, 931 F.2d 15 16; New Orleans, 376 F.3d at 504 (emphasis added) (A party may waive its rights by explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract. However, the next

removal rights. Therefore, at least in the Service of Suit Clause, Defendants explicitly reserved their removal rights. III. Harmonizing the Provisions

Details and Choice of Law and Jurisdiction provisions indicates the parties agreed to litigate their claims in any competent court within the United States federal or state, within or outside of Texas. Defendants then appear to waive their removal rights language found in the Service of Suit Clause by agreeing to submit to Plaintiff venue choice.

Yet, the Service of Suit clause then specifically states that no language in the Clause constitutes a removal rights. The Court must attempt to harmonize the provisions.

Federal law governs the enforceability of jurisdictional agreements while state law governs the interpretation of such clauses. Weber v. PACT XPP Techs., AG, 811 F.3d 758, 770 (5th Cir. 2016); DSA Promotions, LLC v. Vonage Am., Inc., 3:17-CV-3055-D, 2018 WL 1071278, at *3 (N.D. Tex. Feb. 27, 2018) (quoting DBS Sols. LLC v. Infovista Corp., 3:15-CV-03875-M, 2016 WL 3926505, at *2 (N.D. Tex. July 21, 2016) In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) (citations omitted). interpretation of a contract is in issue, the trial court must first determine whether the provisions

Nicol v. Gonzales, 127 S.W.3d 390, 394 (Tex. App. Dallas 2004, no pet.) (citing Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983)). he question of whether a contract is ambiguous is a ques s determination. Id. Plains Expl.

& Prod. Co. v. Torch Energy Advisors Inc., 473 S.W.3d 296, 305 (Tex. 2015) (citing El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802, 806 (Tex. 2012)).

Proposed Harmonization

i. Plaintiffs propose three ways to harmonize the provisions in the Policy. First, Plaintiffs clauses of the Choice of Law and Jurisdiction

Combined, these two sentences provide the following limitations: (1) disputes must be heard in a court; and (2) disputes are subject to these two conditions is a Texas state court. (Dkt. #10 at p. 3). This proposed harmonization is not valid for three reasons. First proposal renders the first condition

superfluous as the second condition alone requires the parties to file cases exclusively in Texas. See Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468, 477 (Tex. 2016) language 6

Second, competent court in the United States of reading are Texas state courts. See Coker he court must consider the entire instrument so that none of the provisions will be rendered meaningless. proposal changes the language of the Policy. The the exclusive jurisdiction of any competent court in the United

6

(Dkt. #10 at p. 4). Yet, the Policy includes an provides:

Upon any controversy arising out of or relating to the rights and obligations owed under this Policy, including the effect of any applicable statutes or common law upon the contractual obligations otherwise owed, the Underwriters or any Insured may request that the dispute be subjected to binding arbitration. (Dkt. #5-1 at p. 18). Consequently, the Policy contemplates that disputes could be subject to a judicial or arbitral forum, contrary to Plaintiffs suggested reading of the Policy. Nothing in this . . . to remove an action to a United States District Court . . . language, Plaintiffs argue that while Defendants did not waive their removal rights in the Service

of Suit Clause, Defendants waived their removal rights in the Choice of Law and Jurisdiction provision (Dkt. #10 at pp. 4 5). 7

The Court disagrees for two reasons. First, it is illogical that

7. Plaintiffs cite Motiva frequently. Motiva Enters. LLC v. Swiss Re Intern. S.E., 577 F. App x. 136 (3d Cir. 2014). In Motiva terms of the policy would be subject t Id. at 137 (alteration in original). The Service of Suit provision of the [n]othing in this Clause constitutes or should be understood to constitute a waiver of Underwriters rights . . . to remove an action to a United States District Court. Id. a waiver of Underwriters rights . . . to ied the first provision of the policy. Id. Any other reading would ignore or contradict the arbitration and forum-selection clauses elsewhere in the policy. Id. The Court first notes that Motiva is nonbinding and unpublished authority. Even so, Motiva is distinguishable for at least two reasons. First, the policy in Motiva contemplated three types of claims. Id. at 138 39. The policy only removal rights under one type of claim. Id. The policy here does not make such a distinction (See Dkt. #5-1). Second, in Motivia, Law and Jurisdiction provision would remain unresolved.

Defendants would explicitly preserve their removal rights on one page of the Policy, but then immediately waive their rights on the next page (Dkt. #5-1 at pp. 23 24). 8

Second, Plaintiff proposed reading does not re conflict found in the Choice of Law and Jurisdiction

provision.

ii. Responding to P Dixon, Defendants contend:

[B]y clearly and unequivocally refer to the state courts of Texas as the proper venue to the complete exclusion of federal courts within Texas that have jurisdiction over a matter on diversity grounds. (Dkt. #9 at p. 5). Dixon.

IV. Clear and Unequivocal

New Orleans, 376 F.3d at 504 (citing

McDermott, 944 F.2d at 1199; Waters Grand View, 847 F.3d at 258 (citing New Orleans, 376 F.3d 505 06). In the Policy, the parties first agreed competent court within the United #5-1 at pp. 3, 24). The parties next

#5-1 at p. 24). Defendants also [Defendants] will submit to the

8. the Service of Suit #9 at p. 7).

-1 at p. 23). Defendants then specifically reserved their removal rights Noting in this Clause . . to remove an action to a United States District Court . . (Dkt. #5-1 at p. 23). The parties do not propose adequate interpretations of these clauses that enable the Court to harmonize the language. The Court also cannot independently harmonize the provision. Accordingly, regardless of the exact interpretation of these clauses, Defendants did not clearly and unequivocally waive their removal rights

CONCLUSION Based on the preceding discussion, it is therefore ORDERED that Remand is hereby denied (Dkt. #5).

IT IS SO ORDERED.