UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

-v- 6:13-CV-995

CENTURY INDEMNITY COMPANY, as Successor to CCI Insurance Company, as Successor to Insurance Company of North America,

Defendant.

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DAVID N. HURD
United States District Judge

DECISION and ORDER

I. INTRODUCTION

Plaintiff Utica Mutual Insurance Company ("Utica") alleges that defendant Century Indemnity Company ("Century"), which reinsured portions of two umbrella policies Utica issued to Goulds Pumps, has failed to properly reimburse Utica for money it paid out on Goulds's behalf to resolve a slew of asbestos claims.[1] As relevant here, Century (the "reinsurer") moved before United States Magistrate Judge Andrew T. Baxter for leave to amend its answer and add a counterclaim against Utica (the "cedent" or "reinsured") alleging Utica manipulated its records in an effort to extract millions of dollars from Century beyond what it was otherwise contractually obligated to pay out under these reinsurance agreements.

On March 18, 2015, Judge Baxter granted Century leave to amend its answer and add a counterclaim based on this legal theory, which the parties refer to as a claim for "reverse bad faith." Utica objects. The motion was considered on the basis of the submissions without oral argument.

II. LEGAL STANDARD

As an initial matter, the parties dispute the applicable standard of review. Utica contends that "[w]here a magistrate judge applies the Rule 12(b)(6) standard to rule on futility arguments with respect to a motion to amend, the order is treated as 'dispositive,' and *de*

[1] "Reinsurance occurs when one insurer (the 'ceding insurer' or 'reinsured') 'cedes' all or part of the risk it underwrites, pursuant to a policy or group of policies, to another insurer." Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1053 (2d Cir. 1993) (citations omitted).

novo review applies." Pl.'s Mem., ECF No. 168-1, 6.[2] Century responds that, since the portion of the ruling to which Utica objects "did not remove a claim or defense of either party," the order should be reviewed under the more deferential "clear error" standard. Def.'s Mem. Opp'n, ECF No. 186, 10.

The answer to this question, of course, turns on whether or not Judge Baxter's March 18 order granting Century's motion to amend its answer and add counterclaims is properly considered dispositive. See 28 U.S.C. § 636; Fed. R. Civ. P. 72. Surprisingly, courts in this district have often divided on the proper resolution of this question. See, e.g., Allen v. United Parcel Serv., Inc., 988 F. Supp. 2d 293, 297 (E.D.N.Y. 2013) (noting that "[a]uthority is divided about whether a motion for leave to amend a [pleading] is a dispositive or non-dispositive matter" and collecting cases).

To complicate matters, "some District Courts within the Second Circuit have suggested that a motion for leave to amend may be dispositive [only] when denied." DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 341 (S.D.N.Y. 2009) (citations and internal citations omitted). In fact, this "dispositive when denied" analysis seems to have been employed in a decision from this District cited by both parties in support of their respective arguments. Children First Found., Inc. v. Martinez, No. 1:04-CV-0927(NPM), 2007 WL 4618524, at *4-5 (N.D.N.Y. Dec. 27, 2007) (McCurn, S.J.) (noting the tension between some courts treating orders granting leave to amend as non-dispositive and others treating denials of such motions as dispositive and concluding that "[t]he latter holding is more appropriate in

[2] Pagination corresponds to that assigned by CM/ECF.

this case" because the objection was to an order denying in part a party's motion to amend her answer).

But notwithstanding the holding in Martinez, the Second Circuit has repeatedly chosen to characterize motions to amend a pleading as non-dispositive in nature. Fielding v. Tollaksen, 510 F.3d 175, 178 (2d Cir. 2007); Kilcullen v. N.Y.S. Dep't of Transp., 55 F. App'x 583, 584 (2d Cir. 2003) (summary order). Indeed, "the weight of authority appears to be that such motions [to amend pleadings] are non-dispositive regardless of the outcome." DiPilato, 662 F. Supp. 2d at 341 (emphasis added); see also Partminer Info. Servs., Inc. v. Avnet, Inc., (S.D.N.Y. Apr. 21, 2009) (noting the intra-circuit uncertainty but nevertheless applying clear error analysis); Rubin v. Valicenti Advisory Servs., Inc., 471 F. Supp. 2d 329, 333 (W.D.N.Y. 2007) (same); Stetz v. Reeher Enters., Inc., 70 F. Supp. 2d 119, 120 (N.D.N.Y. 1999) (McAvoy, C.J.) ("Orders granting leave to amend are nondispositive, as they do not remove claims or defenses of a party." (citation omitted)). Accordingly, Judge Baxter's order granting Century's motion to amend is non-dispositive and will only be modified or set aside if it is "clearly erroneous" or "contrary to law." 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a).

"Under the clearly erroneous standard of review of Rule 72(a), the magistrate judge's findings should not be rejected merely because the court would have decided the matter differently. Rather, the district court must affirm the decision of the magistrate judge unless the district court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Pall Corp. v. Entegris, Inc., 655 F. Supp. 2d 169, 172 (E.D.N.Y. 2008) (citation omitted).

"Meanwhile, an order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." Pall Corp., 655 F. Supp. 2d at 172 (citation,

internal quotation marks, and alterations omitted). Importantly, however, "a magistrate judge's decision is contrary to law only where it runs counter to controlling authority." Id. In other words, a magistrate judge's order "simply cannot be contrary to law when the law itself is unsettled." Id. (citation omitted).

III. DISCUSSION

Utica contends that New York courts do not recognize a reverse bad faith claim in the reinsurance context and asserts that extra-circuit case law demonstrates that courts routinely rejects such claims. Century responds that New York law explicitly recognizes that a reinsured owes its reinsurer a duty of "utmost good faith" and argues that it would be nonsensical for such a duty to exist if there were no recourse in the event of its breach.

A thorough review of Judge Baxter's March 18 order confirms that it is neither clearly erroneous nor contrary to law. Taking the second question first, Utica has failed to cite to any controlling authority affirmatively rejecting Century's claim. Certainly, Utica does not dispute that New York law recognizes an implied duty of good faith and fair dealing in all contracts. See, e.g., Van Valkenburgh, Nooger & Neville v. Hayden Pub. Co., 281 N.E.2d 142 (N.Y. 1972). Nor can it dispute that in the reinsurance context, this legal relationship between the parties has repeatedly been characterized by courts as one of "utmost good faith." Christiana Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 278 (2d Cir. 1992); United Fire & Cas. Co. v. Arkwright Mut. Ins. Co., 53 F. Supp. 2d 632, 641 (S.D.N.Y. 1999) ("A reinsured owes its reinsurer a duty of utmost good faith.").

But while Utica correctly notes that no New York court appears to have expressly allowed such a theory to proceed, the related absence of any controlling authority explicitly rejecting Century's claim—which essentially seeks redress for an alleged breach of this

seemingly well-established contractual duty—is fatal to any "contrary to law" objection. Accordingly, Judge Baxter's order is not contrary to law.

The remaining question, then, is whether a review of the entire evidence leaves the Court with a definite and firm conviction that a mistake has been committed. A recent decision from the District of Connecticut is instructive here. In Travelers Indem. Co. v. Excalibur Reinsurance Corp., the Court engaged in an exhaustive review of recent developments in New York Court of Appeals decisions before concluding that "Excalibur [the reinsurer] is entitled . . . to challenge the reasonableness of Travelers' [the reinsured] post-settlement allocation decision, and to argue that the economic consequence of that allocation violates or disregards provisions in the reinsurance contract." No. 3:11-CV-1209 CSH, 2013 WL 1409889, at *10 (D. Conn. Apr. 8, 2013).

Century is making the same sort of claim about the reasonableness of Utica's allocation decisions: it alleges that Utica's conduct breached the duty of "utmost good faith" implied in the reinsurance contracts it maintained with Century and other reinsurers by allocating its liabilities in the various underlying asbestos settlements in such a way as to "artificially shift payments due under its unreinsured primary policies to reinsured umbrella policies for Goulds Pumps" and that, as a result, "Utica billed Century and other reinsurers at least $10 million more . . . than it was contractually obligated to pay" under the reinsurance policies. Def.'s Mem. Opp'n at 7-8.

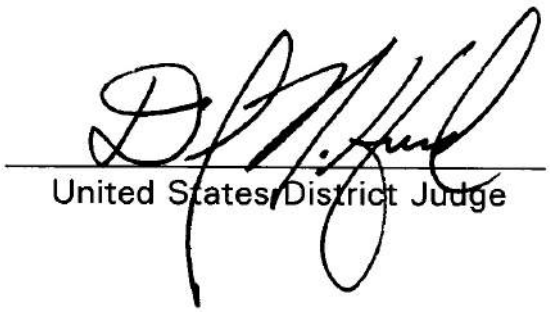
This claim—whether labeled as one for "reverse bad faith" or something else—is at least a plausible one under current New York precedent. As Judge Baxter aptly noted on the record, the appropriate question at this juncture is not whether Century's counterclaim will ultimately succeed, but merely whether such a claim is so implausible under the modern

pleading regime that granting Century leave to amend to add it to this action would be futile. Given the persuasive character of Excalibur Reinsurance Corp.'s thorough review of New York precedent and the clear analysis conducted by Judge Baxter in reaching his decision, it is far from clear that granting Century leave to amend to add this claim was a mistake. Accordingly, Judge Baxter's order is not "clearly erroneous."

IV. CONCLUSION

Judge Baxter's March 18, 2015 order was neither clearly erroneous nor contrary to law. Therefore, plaintiff's objections are OVERRULED.

IT IS SO ORDERED.



Dated: May 11, 2015
Utica, New York.