Mobility Seller Representative LLC v Amtrust Fin. Servs., Inc.
2025 NY Slip Op 34284(U)
November 6, 2025
Supreme Court, New York County
Docket Number: Index No. 652780/2022
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MOBILITY SELLER REPRESENTATIVE LLC, UNIVERSAL RE-INSURANCE COMPANY LIMITED,

Plaintiffs,

- v -

AMTRUST FINANCIAL SERVICES, INC., WESCO INSURANCE COMPANY,

Defendants.

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INDEX NO. 652780/2022

MOTION DATE 02/18/2025, 02/18/2025

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 206, 207, 208, 212, 214, 215, 216, 217

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 209, 213, 218, 219

were read on this motion for SUMMARY JUDGMENT.

Plaintiffs Mobility Seller Representative LLC ("Mobility Seller") and "Universal Re-Insurance Company Limited as agent and manager on behalf of its Segregated Account No. URFTM-21-01" ("Segregated Account," and together with Mobility Seller, "Plaintiffs") move for summary judgment pursuant to CPLR 3212 on their claims for breach of contract. Defendants AmTrust Financial Services, Inc. ("AmTrust") and its affiliate Wesco Insurance Company ("Wesco," and together with AmTrust, "Defendants") oppose Plaintiffs' motion and cross-move for summary judgment dismissing the Complaint.

For the reasons set forth below, Plaintiffs' motion is denied. Defendants' cross-motion to dismiss is granted. "Segregated Account's" claim for breach of the Quota Share Reinsurance Agreement ("QSRA") is dismissed without prejudice to naming a plaintiff entity with legal capacity to sue. Mobility Seller's claim for breach of a non-binding Letter of Understanding ("LOU") is dismissed with prejudice.

BACKGROUND

I. Factual Background

This action arises from a fronted insurance and reinsurance arrangement in connection with the for-hire vehicle business of Fast Track Leasing ("Fast Track"). Plaintiff Mobility Seller is the successor-in-interest to Fast Track (NYSCEF 125 [Merger Agreement] Section 2.7). As part of its routine business operations, Fast Track maintained commercial automobile liability insurance, reinsured under a captive reinsurance program[1] (NYSCEF 77 [Rothman Dep] 29:12-24; 30:11-31:8).

When Fast Track's prior insurer declined to renew its coverage in 2021, AmTrust and its affiliate Wesco agreed to front a commercial auto insurance program (Rothman Dep 26:22-48:5; NYSCEF 80 [E. Rothman Email to B. Goldman]).

On June 29, 2021, after AmTrust and Fast Track's insurance brokers, Research Underwriters, exchanged several drafts, AmTrust's President Jo Spittle sent to the brokers a Letter of Understanding "regarding the terms of your commercial automobile insurance

[1] A "captive" reinsurer, or "captive" insurer, is an insurance company that is wholly owned and controlled by the insured or a group of insureds. The insurance policy is typically issued on the paper of a fronting company, and, pursuant to a contractual arrangement, the underlying risk is then transferred to the captive. (Joanna M. Roberto, *In Front and Behind the Scenes with Fronting Insurance Programs*, 15 No. 4 In-House Def. Q. 28, 29 [Fall 2020]). In this case, Fast Track utilized a rented captive cell—or "segregated cell"—from URe.

program" (NYSCEF 99 [Spittle Email]; NYSCEF 100 [LOU]). The LOU memorialized the proposed structure of the program, including that the policy was going to be reinsured by the Bermuda-based Universal Re-Insurance Company Limited ("URe") pursuant to a Quota Share Reinsurance Agreement ("QSRA") (*id.*).

Further, the LOU stated that URe would be entitled to a ceding commission of $2,873,700 "payable relative to the premium ceded" and that "[p]remiums will be ceded as received" (*id.*). It also contemplated that "[c]ollateral and premium ceded to Universal Re will be put in a trust account" (*id.*). The LOU was signed only by Jo Spittle (*id.*).

Subsequently, Wesco entered into a QSRA with URe (*see* NYSCEF 118 [QSRA]). URe signed the QSRA "[f]or and on behalf of Segregated Account No. URFTM-21-01" (*id.* at 12). Notably, the agreement defines the Segregated Account *and* URe collectively as the "Reinsurer" (*id.* at 1).

The QSRA provides that "the Reinsurer shall allow [Wesco] a ceding commission of $2,873,700" that "shall be payable in six equal monthly installments beginning on the effective date of this Agreement and shall be deducted by [Wesco] from the Gross Net Written Premium remitted to [URe]" (*id.*, Article 8).[2] The QSRA further states that "[p]ursuant to New York law, any cancellation of Policies will be pro-rata and not subject to short rate penalties or minimum earned premiums, fees, taxes, or related expenses" (*id.*, Article 3).

On October 7, 2021, Fast Track was acquired by Voyager18, and the underlying policies were subsequently canceled 98 days into their one-year term (NYSCEF 125 [Cancellation

[2] By contrast, the LOU provided that the premium would be paid in ten installments (LOU, ¶ 4).

Notice], 127 [Merger Agreement]). Shortly thereafter, Defendants withdrew the entire annual commission from the trust account (NYSCEF 133).

In this action, Plaintiffs allege that Wesco breached the LOU and QSRA when it wrongfully withdrew the full $2,873,700 ceding commission from the trust account, of which Plaintiffs claim $2,394,750 was unearned. Specifically, Plaintiffs contend that the ceding commission was tied to premiums actually paid by Fast Track and therefore should have been prorated upon cancellation. Defendants counter that they were entitled to the entire ceding commission pursuant to the terms of the QSRA and LOU. These competing interpretations of the agreements form the crux of the parties' summary judgment motions.

II. Procedural Background

Plaintiffs commenced this action on August 8, 2022, asserting claims against Defendants for breach of contract, breach of the Trust Agreement, breach of fiduciary duty, conversion, and unjust enrichment (NYSCEF 2).

Defendants moved to dismiss certain claims (NYSCEF 18). By Decision and Order dated June 30, 2023, the Court granted in part Defendants' motion, dismissing certain claims and allowing the breach of contract claims to proceed (NYSCEF 25).

Plaintiffs now seek summary judgment on the breach of contract claims, contending that Defendants breached the QSRA and LOU by withdrawing commissions that had not yet been earned and failing to provide the required accounting. Defendants cross-move for summary judgment dismissing the Complaint, arguing that (i) they were entitled to the full commission despite the early cancellation and (ii) putative Plaintiff "Segregated Account" lacks capacity to sue for breach of the QSRA.

The Court addresses first the issue of capacity, then the enforceability of the LOU.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

If the moving party crosses that threshold, the party opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017]).

I. The Segregated Account Lacks Capacity to Sue for Breach of the QSRA

The named Plaintiff asserting a claim for breach of the QSRA is "Universal Re-Insurance Company Limited as agent and manager on behalf of its Segregated Account No. URFTM-21-01." As noted below, Plaintiffs' counsel has confirmed that URe is not a party to this action in its own right, which is consistent with the phrasing of the caption indicating URe as agent and the Segregated Account as principal. Thus there is a threshold legal question whether the Segregated Account has the legal capacity to sue for breach of contract. As discussed below, it does not.

"An entity's capacity to be sued is determined by the law of the jurisdiction where the entity is organized or established" (*Norex Petroleum Ltd. v Blavatnik*, 48 Misc 3d 1226(A), 22

NYS3d 138 [NY Sup 2015], *judgment entered sub nom. Norex Petroleum Ltd. v Blavatnik, et al.* [N.Y. Sup Ct 2015], and *affd, appeal dismissed,* 151 AD3d 647 [1st Dept 2017]).

URe was incorporated in Bermuda under the Universal Reinsurance Company Limited Act 1999 (NYSCEF 190, the "URe Act"). The URe Act attributes the key corporate characteristics to the company itself rather than to any separate account within the company (NYSCEF 187 [Luthi Aff]).[3] It defines a separate account as "an account established or recorded in the records of the Company as a Separate Account and maintained pursuant to section 4 of this Act" (URe Act § 2[2][r]). As relevant here, the URe Act vests contractual capacity and winding-up authority in the *company*, not the segregated account. It also provides that the company, not the segregated account, bears liability in connection with obligations arising from that account, though in certain circumstances such liability does not extend to the company's general assets unrelated to the account. Specifically, Section 4(9) of the Act provides that:

> Where a liability of the Company to a person arises from a matter, or is otherwise imposed, in respect of a Policy the provisions of which require the establishment of a Separate Account, unless the parties shall otherwise provide, such liability shall not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the general assets of the Company.

In addition, the URe Act, among other things, imposes recordkeeping obligations on the company with respect to each separate account (§ 4[2]); grants the company exclusive discretion to manage assets associated with a separate account (Section 4[4]); confirms that the company retains legal ownership of all assets and property, rather than the separate account (Section 4[7]); and authorizes the company to transfer or credit assets to a separate account (Section 5[2]).

[3] By contrast, segregated cells established pursuant to Bermuda's Incorporated Segregated Accounts Act 2019 are conferred with independent corporate personality (*see* NYSCEF 187 [Luthi aff]; NYSCEF 188 [Segregated Accounts Companies Act 2000]).

Applying these provisions here, the "Segregated Account No. URFTM-21-01" is, under Bermuda law, merely a separate account maintained within URe. Any legal rights or obligations arising out of the QSRA are attributable to (and enforceable by and against) URe itself, albeit potentially with certain limits on recourse beyond the Segregated Account. Thus, the Court finds that the Segregated Account lacks capacity under Bermuda law to sue for breach of the QSRA.

Plaintiffs argue that Defendants waived the defense that the Segregated Account lacks capacity to sue because they did not raise it in their Answer or motion to dismiss. That argument is unavailing. The issue of capacity came to light during discovery when Plaintiffs' counsel responded to Defendants' request for a URe witness, stating in a September 2024 email:

> We are working to identify a witness and potential dates for Universal Re-Insurance Company with Respect to its Segregated Account No. URFTM-21- 01, and will follow-up with you. **Universal Re-Insurance Company Limited is not a party to our action. We do not represent Universal Re-Insurance Company Limited**, and do not know who represents Universal Re-Insurance Company Limited.

(NYSCEF 145 [emphasis added]). In these circumstances, Defendants did not waive their capacity defense (*Lance Intern., Inc. v First Nat. City Bank*, 86 AD3d 479, 479 [1st Dept 2011] ["While a defense that a party lacks capacity to sue (*see* CPLR 3211[a] [3]) is waived if not raised in a pre-answer motion or in a responsive pleading (*see* CPLR 3211[e]), plaintiff's lack of capacity did not arise until after joinder of issue, and therefore, defendant did not waive that defense"]).

In sum, the Complaint's Third Cause of Action for breach of the QSRA is dismissed due to the Segregated Account's lack of capacity to sue. The claim is dismissed without prejudice to substituting URe (or another appropriate entity having the capacity to sue) as the proper plaintiff. Because the claim is dismissed on capacity grounds, the Court does not reach the parties'

competing interpretations of "ceding commission." Without a proper party to assert the claim, the question of whether and to what extent the commission was earned is not ripe for decision.

II. The LOU was not a binding agreement

Defendants also seek summary judgment dismissing the Second Cause of Action for breach of the LOU, contending that the LOU is not a binding contract, and even if it were, it was not breached. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kowalchuk v Stroup*, 61 AD3d 118, 121, 873 NYS2d 43 [1st Dept 2009]). Critically, "meeting of the minds must include agreement on all essential terms" (*id*.).

The LOU is not a binding agreement; it is, explicitly, a "proposal" for Wesco to write commercial automobile insurance for Fast Track (NYSCEF 100, [LOU] at 1). Notably, the document concludes with the following statement from AmTrust's president: "Please let me know any questions or clarifications you have and if you agree with the outline above, please sign below" (*id*.). The only signature at the bottom of the document is that of AmTrust's president (*id*.; NYSCEF 149, tr 112:15-22; NYSCEF 99 [J. Spittle Email to B. Helt (June 29, 2021)]; NYSCEF 109 [Jo Spittle dep tr 47:7-48:11]). The fact that Fast Track apparently never countersigned the LOU is further evidence of the LOU's non-finality (*Wilson v Dantas*, 173 AD3d 460, 461 [1st Dept 2019] [finding a term sheet that was not countersigned despite an express request to do so as "evincing the absence of mutual assent."]).

That the LOU was merely an offering document is further reinforced by the fact that Fast Track's insurance brokers viewed the terms of the deal to be in flux. Ten days after Spittle sent the unilaterally-signed LOU, Fast Track's insurance brokers sent a memo to Fast Track's leadership stating that they "will continue to work with alternative fronting and reinsurance

partners, and all parties are engaged in discussions on restructuring the terms of the AmTrust agreement. The goal is to reduce the overall funding requirement by addressing parked/inactive vehicles, lowering collateral obligations, and confirming actual premium taxes and fees" (NYSCEF 157 [July 2021 Email between Fast Track and Research Underwriters]). These statements indicate that Fast Track's insurance brokers themselves did not consider the terms of the LOU to be agreed.

Moreover, the LOU expressly contemplates that additional agreements—including the QSRA and related trust documents—would be negotiated and executed to govern the actual mechanics of the program. It sets out only a general framework, not binding obligations. Nothing in the LOU indicates that performance was intended to be governed by its terms alone. To the contrary, the text signals that critical details would be formalized later, underscoring its preliminary nature (LOU ¶ 15 ["All elements of our agreements are subject to change by mutual agreement and documented in writing between parties prior to their implementation"]).

Accordingly, the Court finds based on the summary judgment record that the LOU was a proposal, not a binding agreement, and therefore the Second Cause of Action for breach of the LOU is dismissed with prejudice.

III. Plaintiffs' Request for Attorney's Fees Is Denied

Plaintiffs request to recover attorneys' fees and costs is denied. Because Plaintiffs did not prevail on their summary judgment motion, the Court need not determine at this time whether *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592 (2004), on which Plaintiffs principally rely, would provide a basis for awarding fees in the event Plaintiffs had prevailed.

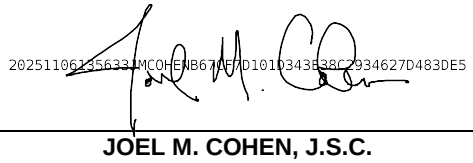
The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment is **DENIED**; and it is further

ORDERED that Defendants' cross-motion for summary judgment is **GRANTED** such that Plaintiffs' Second Cause of Action for breach of the LOU is dismissed with prejudice and their Third Cause of Action for breach of the QSRA is dismissed without prejudice.

This constitutes the Decision and Order of the Court.



11/6/2025
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**