

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY V. SERIO, Superintendent of Insurance
of the State of New York, as Rehabilitator of Frontier
Insurance Company and as Assignee of Platinum
Indemnity, Ltd.

Plaintiff,

-v-

DWIGHT HALVORSON INSURANCE
SERVICES, INC. d/b/a F.S.I.M. Insurance Services

Defendants.

Case No. 04-CV-3361 (KMK)

OPINION & ORDER

Appearances:

Randall J. Ezick, Esq.
Featherstonhaugh, Wiley, Clyne & Cordo, LLP
Albany, New York
Counsel for Plaintiff

Lorienton N.A. Palmer, Esq.
Marc Ian Kunkin, Esq.
Schindel, Farman & Lipsius LLP
New York, New York
Counsel for Defendants

KENNETH M. KARAS, District Judge:

This diversity action arises from a dispute over a series of related insurance agreements. Plaintiff, Gregory V. Serio, New York's Superintendent of Insurance, brings this action as the rehabilitator of the Frontier Insurance Company ("Frontier"). He asserts Frontier's claims and the claims of Platinum Indemnity, Ltd. ("Platinum"), which assigned its claims to Frontier as part of a 2002 settlement agreement. The Complaint asserts five causes of action. However, with this Motion, Plaintiff seeks summary judgment with respect to only Count IV, which

contends that Defendant Food Service Insurance Managers, Inc. (“FSIM”) defaulted on its obligations under a promissory note.

For the reasons stated herein, Plaintiff’s Motion for Summary Judgment is granted.

I. Background

A. Facts

This case involves the relationships between four companies and the various agreements that governed those relationships. Because Plaintiff seeks summary judgment with respect to just one cause of action, the facts set forth herein focus on only those relationships and agreements that are relevant to this Motion.

Frontier is a New York insurance company that sells, among other things, workers’ compensation insurance. (Pl.’s Rule 56.1 Stmt. ¶¶ 1-2.) Platinum is a reinsurer organized under the laws of Bermuda. (*Id.* ¶ 9.) Defendants Dwight Halvorson Insurance Services, Inc. (“DHIS”) and FSIM are California corporations that obtain insurance for the food services industry, particularly in California and Nevada. (*Id.* ¶¶ 8, 11.) Beginning in late 1997, Frontier, Platinum, DHIS, and FSIM jointly developed a workers’ compensation insurance program aimed at the food service industry. (Pl.’s Rule 56.1 Stmt. ¶¶ 14-16; Defs.’ Rule 56.1 Stmt. ¶¶ 14-16.) This program came to be known as the FSIM Program. (Pl.’s Rule 56.1 Stmt. ¶ 14.) Because DHIS and FSIM were not licensed insurers, they required the services of an established insurance carrier in order to effectuate the FSIM Program. (Mem. of Law in Supp. of Pl.’s Mot. for Partial Summ. J. 4-5 (“Pl.’s Br.”).) Frontier was enlisted as that carrier, and it entered into an agreement with DHIS, whereby DHIS was permitted to quote, bind, and decline workers’ compensation insurance coverage on behalf of Frontier, which served as the primary insurer.

(Compl. ¶ 39.)

In order to limit Frontier's risk as the primary insurer, FSIM entered into a Subscription and Shareholders Agreement (the "Subscription Agreement") with Platinum, pursuant to which Platinum agreed to provide reinsurance protection to Frontier. (McComb Decl. Ex. B.) In this capacity, Platinum operated as a "rent-a-captive" reinsurer for the FSIM Program. Under the Subscription Agreement, FSIM was required to indemnify Platinum for any underwriting loss it suffered. (*Id.*) The Subscription Agreement referred to such underwriting loss as a "Negative Balance." (*Id.*) FSIM was also required to make periodic payments to Platinum under the Subscription Agreement. These payments are identified as "Additional Capital Contributions" in schedule 2 to the Subscription Agreement. (*Id.*)

During the first year of the FSIM Program, which covered the 1998 calendar year, FSIM made periodic capital contributions directly to Platinum. (Halvorson Decl. ¶¶ 14, 16.) In the second year of the Program (calendar year 1999), allegedly at Frontier's request, FSIM began making the contribution payments to Frontier, with the understanding that Frontier would forward the appropriate amounts to Platinum. (*Id.* ¶ 16.) Plaintiff alleges that by the end of the first year, however, FSIM had incurred a Negative Balance in its account (McComb Decl. ¶ 28), and that ultimately there was an "unfunded gap for the 1998 underwriting year" of \$469,515. (McComb Reply Decl. Ex. B.)

In the summer of 2000, Platinum and FSIM began what would be several months of correspondence and discussions regarding certain funds that were due to Platinum under the Subscription Agreement. (Halvorson Decl. ¶ 18, Ex. A; McComb Decl. ¶ 33; McComb Reply Decl. Exs. A-C.) The Parties' descriptions of these discussions differ. FSIM claims that the

Director and Chief Financial Officer of Platinum, Andrew McComb (“McComb”), implied to FSIM that the periodic contribution payments for the *second* policy year (1999) had not been made and that the Bermuda regulatory authorities would take action against Platinum if this was not remedied. (Halvorson Decl. ¶¶ 18-19.) Plaintiff contends, based on a variety of documents, that FSIM had failed to meet its periodic payments under the Subscription Agreement; however, in Plaintiff’s view, the dispute concerned only the *first* policy year (1998), not the second. (McComb Decl. ¶ 28; McComb Reply Decl. ¶ 10.)

On November 8, 2000, in an effort to resolve the dispute, FSIM executed a promissory note (the “Note”), “FOR VALUE RECEIVED,” the terms of which required FSIM to pay Platinum \$469,515 plus interest, in monthly installments. (McComb Decl. Ex. A.) Dwight Halvorson (“Halvorson”), President of FSIM, signed the Note to secure what he understood to be FSIM’s obligations under the Subscription Agreement. (Answer ¶ 55.) None of the Parties disputes that the Note is valid on its face. However, FSIM now contends that “McComb misrepresented the facts in order to get [Halvorson] to sign the Note” and that, for reasons not explained, FSIM signed the Note even though it received no consideration therefor. (Halvorson Decl. ¶¶ 20-21.)¹

By its terms, the Note is governed by Bermuda law. (McClomb Decl. Ex A.) FSIM began making \$21,000 monthly payments to Platinum in September 2000, purportedly to

¹The only evidence supporting FSIM’s claims of misrepresentations by McComb and a lack of consideration for the Note is found in Halvorson’s Declaration. As discussed below, however, that Declaration was directly contradicted by Halvorson’s subsequent deposition and other documents.

discharge its obligations under the Subscription Agreement.² (Halvorson Decl. Ex. A.) FSIM ceased making these payments in April 2001, leaving a balance on the Note of \$322,515, plus interest. (Compl. ¶ 66; Answer ¶ 66.) On December 2, 2002, Platinum and Frontier executed a settlement agreement to resolve disputes stemming from the FSIM Program. (Compl. ¶¶ 73-74.) As part of the settlement agreement, Platinum transferred to Frontier its rights under the Note. (*Id.* ¶ 77.)

II. Discussion

A. Dwight Halvorson's Deposition Testimony

During oral argument, it was brought to the Court's attention that, after the Motion had been fully briefed, Halvorson was deposed regarding topics bearing on the outcome of the Motion. Consequently, the Court ordered limited additional briefing to address the admissibility and effect of Halvorson's deposition testimony.

Plaintiff argues that the Court should consider the Halvorson deposition. Not surprisingly, FSIM opposes consideration of the deposition, even while conceding that "it is within the discretion of th[e] Court . . . to consider the March, 2006 deposition of Mr. Halvorson." (Mem. of Law in Opp'n to Pl.'s Motion for Partial Summ. J. 2 ("FSIM's Supplemental Mem.")). FSIM argues that the Court should nevertheless prohibit Plaintiff from supplementing the record given the length of time that has passed since the Motion was first filed. The Court rejects this argument. While it would undoubtedly have been more efficient for

²FSIM began making monthly payments approximately two months before it executed the Note. However, both Parties appear to consider all of FSIM's payments applicable to its obligations under the Note, including those made before the Note was issued. (*See* Compl. ¶ 66; Answer ¶ 66.)

Plaintiff to have supplemented his Motion at an earlier date (or to have waited until after Halvorson's deposition to file this motion), FSIM has not substantiated any claim that it has been prejudiced by this delay, and, in fact, because FSIM has been given ample time to address Plaintiff's Motion and its reliance on Halvorson's deposition, no claim of prejudice would be credible. *See Warner Bros. Inc. v. Am. Broad. Co.*, 720 F.2d 231, 246 (2d Cir. 1983) (permitting renewal of motion for summary judgment where "plaintiffs . . . did not act to their detriment in reliance on the initial ruling"). Moreover, because a "party may renew its motion for summary judgment as long as it is supported by new material[,]" *Wechsler v. Hunt Health Sys., Ltd.*, 198 F. Supp. 2d 508, 514 (S.D.N.Y. 2002), Plaintiff would in any event be permitted to renew its Motion should the Court exclude Halvorson's deposition testimony in this instance.

Accordingly, because both Parties have had the opportunity to file briefs regarding the effect of Halvorson's testimony, and because no Party will be prejudiced by inclusion of the testimony, the Court will consider that testimony in deciding this Motion.

B. Choice of Law

Before turning to the merits, the Court must determine which jurisdiction's law applies. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). In determining which jurisdiction's substantive law governs, "[f]ederal courts sitting in diversity must apply the choice-of-law rules of the forum state." *Every v. Makita U.S.A., Inc.*, No. 02 Civ. 8545, 2005 WL 2757952, at *1 (S.D.N.Y. Oct. 24, 2005). Here, the Note contains a choice-of-law provision, dictating that "this promissory note shall be governed by Bermuda law." (McComb Decl. Ex. A.) In the face of such a provision, "New York law is unambiguous

[A]bsent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction.” *Int’l Minerals & Resources, S.A. v. Pappas*, 96 F.3d 586, 592 (2d Cir. 1996) (internal quotation marks omitted) (second alteration in original); *accord RLS Assocs. v. United Bank of Kuwait PLC*, 464 F. Supp. 2d 206, 214 (S.D.N.Y. 2006). Accordingly, because the Note contains a Bermuda choice-of-law provision, because there is no claim of fraud in connection with this provision, and because one of the original contracting parties, Platinum, was a Bermuda corporation, the Court will apply Bermuda substantive law in evaluating the Note. About this conclusion, there is no disagreement among the Parties.

But this does not end the inquiry. The Court must also determine what rules constitute substantive, as opposed to procedural, law. *See Gasperini*, 518 U.S. at 427. Clearly, questions relating to the formation, avoidance, and legality of a promissory note are substantive and are therefore governed by Bermuda law. It is less clear, however, whether the Court should apply the federal summary judgment standard or its Bermuda counterpart. On this question, the Second Circuit has been silent: “It is not settled in this circuit whether, in a diversity case, the sufficiency of the evidence to warrant submission of an issue to a jury is a question governed by federal or state law.” *Willis v. Westin Hotel Co.*, 884 F.2d 1556, 1563 n.5 (2d Cir. 1989); *see also Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429 (2d Cir. 1999); *Every*, 2005 WL 2757952, at *2 (“Somewhat surprisingly, the question is unsettled in this Circuit. Our Court of Appeals has refused to decide the issue on many occasions.”). Moreover, the Parties unfortunately do not address this issue in their briefs.

Although the Second Circuit has not yet ruled on this issue, “most circuits that have

squarely addressed the issue agree that the federal standard under Rule 56 should control.” *Every*, 2005 WL 2757952, at *3; *see also Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994) (noting that “courts of appeals other than this one [the Seventh Circuit] use the federal standard” and that several circuits that had initially applied the state standard have since “changed their minds”). *But see McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800-01 (6th Cir. 2000) (applying state law in diversity action to determine sufficiency of evidence when reviewing district court’s grant of summary judgment). With some exceptions, this position is also “supported by most commentators.” 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2525 (2d ed. 2007).

As the Seventh Circuit noted in *Mayer*, and as Judge Lynch observed in *Every*, there is good reason to adopt the majority position. The question of *who* decides a particular issue is different than the question of *how* that issue is decided. “The [substantial evidence] standard determines *who* resolves the factual dispute, and the preponderance standard tells the body *how* to evaluate the evidence presented.” *Every*, 2005 WL 2757952, at *3 (internal quotation marks omitted) (alteration and emphasis in original). Thus, the “‘who’ question is a procedural one, so it is left to Rule 56.” *Id.* This conclusion is consistent with the “strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.” *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 538 (1958); *see also Mayer*, 29 F.3d at 335 (“Scholars . . . believe that the use of federal norms flows directly from the fact that the division of tasks between judge and jury in federal court is a subject of national law.”). For these reasons, the Court will apply Rule 56 when deciding whether there is sufficient evidence to

