



Slip Copy

Page 1

Slip Copy, 14 Misc.3d 1216(A), 2006 WL 3904521 (N.Y.Sup.), 2006 N.Y. Slip Op. 52538(U)  
 (Cite as: Slip Copy)

**H**

Briefs and Other Related Documents

AIU Ins. Co. v. Robert Plan Corp. N.Y. Sup., 2006. NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.  
 AIU INSURANCE COMPANY, et al., Plaintiffs,

v.

The ROBERT PLAN CORP., et al., Defendants.  
 No. 603159/2005.

Dec. 26, 2006.

BERNARD J. FRIED, J.

\*1 Plaintiffs ("AIU") have made this motion for leave to reargue my August 11, 2006 Decision and Order (the "previous Order"), which granted the motion by an Order to Show Cause (Mot. Seq. No. 10) by Defendants ("TRP") for a preliminary injunction compelling AIU to provide Defendants with certain information under Article IV, paragraph 9 of the MGA Agreement ("paragraph 9" of the "agreement"), pursuant to C.P.L.R. §§ 6301 and 6311. <sup>FN1</sup> Paragraph 9 provides, in pertinent part:

FN1. For the sake of conciseness, this decision presumes the reader's familiarity with the previous Order, (*see* 2006 N.Y. Slip Op 52536[U]).

\*1 All books, accounts, buyout agreements or other documents constituting, embodying, or in any way relating to the business to be conducted under this Agreement or any Predecessor Agreement, or the transactions contemplated hereby or thereby, except computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business, which are the property of AGENT, are the property of the COMPANY whether paid for by it or not.

Each party shall be entitled at all times, *including after termination of this Agreement*, to create and/or retain copies of all such books, accounts, customer lists, customer and client records, buyout agreements and other documents that are designated hereunder as the property of the other party.

\*1 MGA Art. IV § 9 (emphasis added). <sup>FN2</sup>

FN2. For purposes of this dispute, "COMPANY" in paragraph 9 means AIG; "AGENT" means TRP.

\*1 Plaintiffs now move to reargue the previous Order under C.P.L.R. § 2221(d), which provides that such a motion may be made "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

\*1 Oral argument on this motion was held on October 19, 2006. Both parties represented at the argument that there is no factual issue for me to decide. *See, e.g.*, Oral Arg. Trans. at 23, 26 (Oct. 19, 2006).

\*1 For the reasons that follow, and based on the previous Order, which I incorporate by reference into this decision, I grant the motion for leave and deny the motion to reargue.

\*1 Plaintiffs challenge my conclusion in the previous Order that Defendants have shown a likelihood of success on the merits. Plaintiffs contend that this conclusion is based on a misunderstanding that the parties had agreed that TRP owned the computer software systems and other items described in clause B. <sup>FN3</sup> Plaintiffs argue, as they argued at argument on July 14, 2006, that, unless I infer that paragraph 9 refers only to property located at TRP's offices, my interpretation of clause B would imply the absurd result that TRP owns AIU's computer software systems at AIU's

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy, 14 Misc.3d 1216(A), 2006 WL 3904521 (N.Y.Sup.), 2006 N.Y. Slip Op. 52538(U)  
**(Cite as: Slip Copy)**

offices. In order to avoid this result, Plaintiffs maintain that I must conclude that paragraph 9 contains an implied geographic limitation: it refers only to property located at TRP's offices as a result of TRP's agency.

FN3. As defined in the previous Order, clause B means the phrase: "except computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business."

\*1 It appears to me, for the reasons that follow and for the reasons stated in the previous Order, that my original decision was correct in concluding that Defendants have shown a likelihood of success on the merits of their position that paragraph 9 of the agreement was intended to entitle TRP to access certain claims and actuarial information in the possession of AIU relating to insurance policies written during the term of the Master and Interim Agreements. Nevertheless, it also appears to me that a strict grammarian, interpreting paragraph 9 in isolation, could plausibly reach the conclusion endorsed by Plaintiffs here.

\*2 The language in the previous Order about which Plaintiffs are chiefly complaining states: "[T]he parties agree that TRP owns the property described as computer software systems, customer lists, customer and client records, and other matters relating to the marketing of LAD/CLAD business." Order at 3 (citing Oral Arg. Trans. at 22-23 (July 14, 2006)). At the July 14, 2006 argument, counsel for Plaintiffs admitted that TRP owned the customer lists and proprietary computer software that were located at TRP's own offices. Oral Arg. Trans. at 22-23 (July 14, 2006). The previous Order refers to this admission in the quoted language from page 3. There is no dispute that TRP owns these items.

\*2 In the previous Order, I concluded that the universe of property owned by Plaintiffs is the property described in clause A,<sup>FN4</sup> after subtracting the property described in clause B. Order at 2-3, 3 n. 2. I further stated that clause C the phrase, "which are the property of AGENT"

modifies the property described in clause B. Order at 3-4 n. 2. These conclusions followed July's oral argument, at which the parties focused on whether "which" modified clause A or clause B. July 14 Trans. at 36-43. The issue of *how* "which" modified clause B did not arise. It seems necessary now to investigate how clause C modifies clause B, and, in particular, the significance of the word "which" in clause C.

FN4. Clause A means the phrase, "All books, accounts, buyout agreements or other documents constituting, embodying, or in any way relating to the business to be conducted under this Agreement or any Predecessor Agreement, or the transactions contemplated hereby or thereby."

\*2 Strict grammarians prefer the use of the word "that" as the defining, or restrictive relative pronoun, while reserving "which" as the nondefining, or nonrestrictive relative pronoun. William Strunk, Jr. & E.B. White, *The Elements of Style* 59 (4th ed.2000). So, for example, in the sentence, "The lawn mower that is broken is in the garage," the restrictive pronoun "that" tells the reader which mower is in the garage. (The broken one.) In contrast, in the sentence, "The lawn mower, which is broken, is in the garage," the nonrestrictive "which" adds a fact about the only mower in question. *Id.*

\*2 In practice, however, "not all writers observe the distinction between restrictive clauses [ ] and non-restrictive clauses." *The New Fowler's Modern English Usage* 774 (R.W. Burchfield ed., 3d ed., Clarendon Press 1996). In fact, "it would be idle to pretend that it is the practice either of most or of the best writers." *Id.* (quoting with approval H.W. Fowler, *A Dictionary of Modern English Usage* 635 (1st ed., Oxford Univ. Press 1926)). The relative pronoun "which" is commonly used in both written and spoken English in place of the restrictive relative pronoun "that." Strunk, *The Elements of Style* at 59. In fact, writers of English sometimes use "which" in both the restrictive and the nonrestrictive sense in the same piece of writing. *The New Fowler's Modern English Usage* at 774 (

