

Jenna's Place, LLC v Legion Ins. Co.

2008 NY Slip Op 31956(U)

July 7, 2008

Supreme Court, New York County

Docket Number: 0601188/2001

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 601188/2001

JENNA'S PLACE

VS.

LEGION INSURANCE

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss/stay

PAPERS NUMBERED

1,2

7

8,9

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3,4 5,6

Upon the foregoing papers, it is ordered that this motion *or cross-motions to*
dismiss are granted without prejudice, in accordance
with the attached memorandum of law.

FILED

JUL 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN

Dated: 7/10/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

REASON(S) FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
JENNA'S PLACE, LLC d/b/a THE MODERNE and
TRI-BORO APPLE, INC.,

Plaintiffs,

Index No.:
601188/01

- against -

Motion Seq. 002

LEGION INSURANCE COMPANY,

Defendant.

-----X
LEGION INSURANCE COMPANY,

Third-Party Plaintiff,

Index No.:
591072/01

-against-

56th STREET LLC, PLAZA CONSTRUCTION CO.,
URBAN FOUNDATION/ENGINEERING LLC and
LANGAN ENGINEERING AND ENVIRONMENTAL
SERVICES, INC.,

Third-Party Defendants.

-----X
DORIS LING-COHAN, J:

FILED

JUL 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

In this insurance action, defendant/third-party plaintiff,
Legion Insurance Company (Legion) moves, pursuant to CPLR 3211
(a) (1), for an order dismissing the complaint on the ground that
a defense is founded upon documentary evidence; or alternatively,
pursuant to CPLR 2215, for an order staying the action.

Third-party defendant, Langan Engineering and Environmental
Services, Inc. (Langan) joins in the motion with respect to
Legion and cross-moves, pursuant to CPLR 2215 and 3211 (a) (1),
for an order dismissing the third-party complaint against
Lanagan. Third-party defendants 56th Street LLC, Plaza

*3]
Construction Co. and Urban Foundation/Engineering LLC also cross-move to dismiss.

As discussed more fully below, defendant/third-party plaintiff's motion and the cross motions by third-party defendants are granted.

Background

This action stems from an insurance policy issued by Legion to Amsterdam Hospitality and other various entities, including plaintiff Jenna's Place, LLC d/b/a The Modern (The Moderne) for the period of October 28, 1999 through October 28, 2000.

Legion is domiciled in the Commonwealth of Pennsylvania, and was licensed in the state of New York as a property and casualty insurer.

The Moderne is located at 243 West 55th Street, New York, New York, adjacent to a construction site where, at the time in question, a high-rise building was being constructed.

On May 11, 2000, plaintiff submitted a claim to Legion for property damage incurred by The Moderne. Legion allegedly denied the claim on the basis that coverage did not exist under the policy's terms.

On March 6, 2001, plaintiffs commenced this lawsuit asserting two causes of action for breach of contract stemming from losses allegedly covered by the aforementioned insurance policy. As a result of the alleged breach, plaintiffs seek to

recover damages in the amount of approximately \$1,750,000.00.

Commonwealth Court of Pennsylvania Order of Liquidation dated July 25, 2003

On July 25, 2003, the Commonwealth Court of Pennsylvania granted a petition by the Insurance Commissioner of the Commonwealth of Pennsylvania to liquidate Legion (see Order of Liquidation dated July 25, 2003 [Pennsylvania Order]; Affirmation in Support by Amy J. Kallal, Exhibit B). Pursuant to the Liquidation Order, Legion was "declared insolvent and ordered to be liquidated pursuant to the [Pennsylvania] Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, as amended, 40 P.S. §§ 221.1-221.63 (id., ¶ 1).

The Liquidation Order stays all pending litigation against Legion and directs that any relief sought against Legion shall be pursued by filing a proof of claim against the estate of Legion (id., ¶ 23).

New York Supreme Court Order

On August 22, 2003, this Court in the case of Matter of the Application of Gregory v Serio, Superintendent of Insurance of the State of New York, for an Order of Appointment as Ancillary Receiver of Legion Insurance Company, (Sup Ct, NY County, Aug. 22, 2003, Figueroa, J., Index No.: 402670/03), appointed a New York State Superintendent of Insurance Ancillary Receiver for Legion [New York Order] (see Kallal Affirmation, Exhibit C). Therein, the court revoked Legion's New York license and authorized the

* 5]

ancillary receiver to take possession of Legion's property and assets in New York as well as its claims for the benefit of creditors, policyholders and interested parties (*id.*, ¶¶ 2,9).

In addition, the court ordered that "all ... persons, including but not limited to claimants, plaintiffs and petitioners who have claims against Legion, be and they are hereby enjoined and restrained from bringing or further prosecuting any action or proceeding ... against Legion ..." (*id.*, ¶ 5).

According to plaintiffs, they have since filed a timely claim with the New York State Liquidation Bureau.

Discussion

In order to prevail on a motion to dismiss based on documentary evidence, the movant must present documentary evidence that "utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002], citing Leon v Martinez, 84 NY2d 83, 88 [1994]; see also Randazzo v Gerber Life Ins. Co., 3 AD3d 485, 485-486 [2d Dept 2004]). Here, Legion asserts that the action must be dismissed based on the Pennsylvania Order and New York Order regarding its insolvency.

The federal Uniform Insurers Liquidation Act (UILA) was adopted with the main purpose of providing a uniform system for

the orderly and equitable administration of assets and liabilities of multi-state insurers (G.C. Murphy Co. v Reserve Ins. Co., 54 NY2d 69 [1981]).

New York Insurance Law § 7412 (a), adopted as part of New York's rendering of UILA, provides: "[i]n a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants residing in this state may file claims either with the ancillary receiver, if any appointed in this state or with the domiciliary receiver." There is no dispute that Pennsylvania is a reciprocal state.

Here, the Commonwealth of Pennsylvania ordered the liquidation of Legion and stayed all actions pending against it (Pennsylvania Order, ¶ 23), which includes the instant action.

In response to the Pennsylvania Order and due to Legion's possession of assets in New York, as required under New York Insurance Law, this court enjoined all plaintiffs who have pending claims against Legion from further prosecuting any action against it (see New York Order; see also Matter of National Sur. Co., 283 NY 68 [1940] [upon the entry of an order of liquidation, the corporate existence of the insolvent insurance company terminates, and any pending actions abate]). An ancillary receiver was appointed therein.

Under New York Insurance Law, "when a New York receiver has been appointed, New York has the primary right to exercise

control over certain assets located within the state, even if a domiciliary receiver also exists" (Matter of Levin v National Colonial Ins. Co., 1 NY3d 350, 357 [2004]). As an ancillary receiver has been appointed with respect to Legion's assets in New York, plaintiff is entitled to pursue its claim before the Liquidation Bureau in New York, which, as noted above, has already been filed (see id.; see also Matter of General Acc. Fire & Life Assur. Corp. (Hawkins), 115 AD2d 357, 358-359 [1st Dept 1985] ["[i]t is hornbook law that the provisions of the Insurance Law with reference to liquidation by the Superintendent are exclusive in their operation and furnish a complete procedure for the protection of rights of all parties interested" [internal quotation marks and citation omitted]; cf. G.C. Murphy Co., 54 NY2d 69 [absent appointment of an ancillary receiver in New York, claims asserted in New York action against an Illinois insurance company undergoing liquidation in Illinois were required to be brought in Illinois]).

Since it is unlikely that the stay will be lifted in the Pennsylvania court, this action is dismissed, without prejudice and subject to restoration, upon a showing that the stay has been vacated or Legion's liquidation has been nullified.

Moreover, as the dissolution of an insurance company nullifies "all litigation in which the corporation is appearing either as plaintiff or defendant," (20B Carmody-Wait 2D § 121:555

[Mar 2008], citing Matter of National Sur. Co., 286 NY 216[1941], Matter of National Sur. Co., 283 NY 68, supra), the cross motions by third-party defendants Langan and 56th Street LLC, Plaza Construction Co. and Urban Foundation/Engineering LLC to dismiss the third-party complaint are granted. As such, the third-party action is dismissed without prejudice subject to restoration upon a showing that the stay has been vacated or Legion's liquidation has been abated.

Conclusion

Accordingly, it is

ORDERED that defendant/third-party plaintiff Legion Insurance Company's motion to dismiss is granted and the complaint is dismissed without prejudice with costs and disbursements to defendant/third-party plaintiff as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion to dismiss by third-party defendant Langan Engineering and Environmental Services, Inc. is granted, and the third-party complaint and any all cross claims is dismissed, without prejudice, as against it; and it is further


ORDERED that the cross motion to dismiss by third-party defendants 56th Street LLC, Plaza Construction Co. and Urban Foundation/ Engineering LLC is granted, and the third-party

complaint and any all cross claims are dismissed, without prejudice, as against them; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, defendant/third-party plaintiff shall serve a copy upon all parties with notice of entry.

Dated: July 6, 2008



Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Dismiss\Jennas Place insurance.legion ins.wpd

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK