

**Great Am. Ins. Co. of N.Y. v
TA Operation Corp.**

2008 NY Slip Op 32147(U)

July 25, 2008

Supreme Court, New York County

Docket Number: 0603694/2007

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C. _____
Justice

PART 1

Index Number : 603694/2007
GREAT AMERICAN INSURANCE COMPANY
VS.
TA OPERATING CORPORATON
SEQUENCE NUMBER : # 001
DISMISS

INDEX NO. 603694-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED	
1	_____
2	_____
3,4	_____


Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-G
Cross-motion
Answering Affidavits — Exhibits A-P
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motion are
decided in accordance with the attached decision
and order.

FILED
JUL 31 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 25, 2008


MARTIN SHULMAN _____
J.S.C. _____

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
GREAT AMERICAN INSURANCE COMPANY
OF NEW YORK and NOVARTIS
PHARMACEUTICAL CORPORATION,

Index No.: 603694/07

Plaintiffs,

DECISION & ORDER

-against-

TA OPERATING CORPORATION d/b/a
TRAVELCENTERS OF AMERICA,
TRAVELCENTERS OF AMERICA, INC.,
TRAVELCENTERS PROPERTIES, LP,
TRAVELCENTERS OF AMERICA LLC, TA
LEASING LLC, and TA OPERATING LLC and
NEW PRIME INC. d/b/a PRIME INC.,

Defendants.

FILED

JUL 31 2008

NEW YORK
COUNTY CLERK'S OFFICE

-----X

Plaintiffs Great American Insurance Company of New York and Novartis Pharmaceuticals Corporation (collectively "plaintiffs") commenced this action against the defendants alleging various causes of action after a shipment of pharmaceuticals manufactured by plaintiff Novartis was stolen in Bloomsbury, New Jersey. Plaintiffs previously commenced an action arising from this incident in the U.S. District Court for the Southern District of New York (the "federal action").

Defendants TA Operating Corporation d/b/a Travelcenters of America, Travelcenters of America, Inc., Travelcenters Properties, LP, Travelcenters of America LLC, TA Leasing LLC, and TA Operating LLC (collectively "defendants") allege that the complaint in this action is duplicative of the plaintiffs' already pending federal action. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(4), and for sanctions pursuant to 22 NYCRR §130-1.1 against plaintiffs and plaintiffs' counsel.

Defendants assert that the plaintiffs' federal complaint is identical to the complaint at bar except for the new addition of TA Leasing LLC and TA Operating LLC (collectively the "TA defendants") herein, which are wholly owned subsidiaries of the Travel Centers of America parent entity. Defendants have consented to amend the complaint in the federal action to add the TA defendants as parties therein. Plaintiffs do not dispute that the federal action and this action now involve the same parties and same causes of action.

Plaintiffs cross-move to stay this action pursuant to CPLR 3211(a)(4) and/or CPLR §2201, and oppose defendants' motion for dismissal and sanctions. Plaintiffs assert as a basis for staying this action that because there is a possibility that federal subject matter jurisdiction will be found wanting, they commenced this state action to ensure their day in court. Specifically, plaintiffs cite the applicable two-year statute of limitations, claiming that if the federal court grants a pending motion to dismiss due to lack of subject matter jurisdiction, they would be time barred from bringing their claims in state court. In short, plaintiffs commenced this action as a precautionary measure.

In response, defendants argue that no stay should be granted where, as here, there has been extensive discovery and pre-trial proceedings in the identical prior action. Defendants further argue that since the plaintiffs were aware of the New York statute of limitations when they filed the federal complaint, they should have filed their state-based complaint concurrently.

Analysis

Both the defendants' motion to dismiss this action and the plaintiffs' cross-motion for a stay are grounded in CPLR 3211(a)(4), which provides that a party may move to dismiss a cause of action asserted against it on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires..." (CPLR 3211[a][4]). The court also has power to issue a stay under CPLR §2201, which states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

Houston v. Trans Union Credit Info. Co., 154 A.D.2d 312, 546 N.Y.S.2d 600 (1st Dept, 1989), involved analogous circumstances and informs the case at bar. In *Houston*, the Appellate Division found that the trial court abused its discretion in dismissing a state court action rather than granting a stay pending the resolution of the prior federal action. The *Houston* court reasoned that "any state claims which are still actionable at the conclusion of the federal matter may be vulnerable to statute of limitations challenges." (*Id.* at 313). Thus, instead of dismissing the plaintiff's claim outright, the "less drastic remedy of stay" was more appropriate. *Id.*

The defendants attempt to differentiate *Houston* from the case at bar by stressing that in *Houston* the plaintiff waited only three months after filing the federal action before filing a complaint in New York state court. While the instant plaintiffs' federal action is

currently at a further stage of pre-trial development than in *Houston*, this does not change the discretionary nature of the court's authority under CPLR 3211(a)(4) and CPLR §2201. Although defendants urge that the delay has compromised the plaintiffs' right to bring this action, defendants lack support for this assertion.

In New York Practice §262 (4th ed.), David D. Siegel explains that an important factor in deciding whether or not to grant a stay is whether the plaintiff will suffer prejudice from a dismissal of the pending action.

“A stay can be especially appropriate when the action to which the instant one is asked to defer is pending . . . in a federal court. Since an outright dismissal . . . would surrender or in any event impede the New York Court's ability to lend its aid if some unforeseen difficulty should later arise in connection with the other action, a stay may be preferable.”

Indeed, Professor Siegel's commentary analyzes the exact situation raised here, indicating that a state court action can be filed as a precautionary measure.

There remains a slight possibility that federal subject matter jurisdiction will be found lacking. Were this to occur after a dismissal by this court of the plaintiffs' instant complaint, the plaintiffs would be left without a further legal remedy. While it would be unfair to burden the defendants with two concurrent identical complaints in both state and federal court, a stay of this action pending the resolution of the federal case need not create such a burden.

Further, as previously stated, the court has discretion to grant a stay upon such terms as may be just. Here, in the event that the federal action is dismissed on jurisdictional grounds and the stay herein is vacated, to avoid delay and duplication of

efforts, all discovery conducted in the federal action to date shall be used in this action. For all of the above reasons, defendants' motion for dismissal pursuant to CPLR 3211(a)(4) is denied and the plaintiffs' cross-motion for a stay is granted.

Regarding the defendants' motion for sanctions against the plaintiffs for allegedly commencing a frivolous and duplicitous legal action in state court, the plaintiffs' state court action is not without legal basis such that it would be frivolous under the statutory meaning of the word. 22 NYCRR §130-1.1 provides that conduct is frivolous if "[i]t is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or if "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or if "it asserts material factual statements that are false." (22 NYCRR §130-1.1).

The plaintiffs have filed this action in order to prevent being time barred from a later filing in the event that their federal court action is dismissed due to lack of subject matter jurisdiction. Soon after commencing this action, plaintiffs' counsel offered to discontinue it without prejudice to re-filing in the event of the federal court action's dismissal. Defendants' counsel adamantly rejected this offer, opting instead to engage in this unnecessary round of motion practice. Thus, it cannot be said that this action is without merit in law, or that the plaintiffs intend to litigate this action in both forums.

Finally, there is no evidence that the plaintiffs commenced the instant action as a delay tactic or to harass or injure the defendants. There is similarly no indication that

the plaintiffs have provided false information. For these reasons, defendants' motion for sanctions against plaintiffs pursuant to 22 NYCRR §130-1.1 is denied. Accordingly, it is hereby

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that plaintiffs' cross-motion is granted to the extent that further prosecution of and proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the determination of the motion to dismiss pending before the United States District Court, Southern District of New York in the action known as *Great American Insurance Company of New York, et al. v. TA Operating Corporation, et al.* (Case No. 06 CV 13230); and it is further

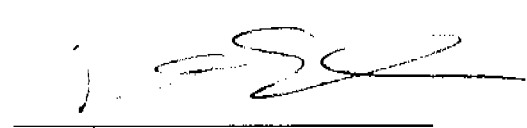
ORDERED that, in the event that the foregoing federal action is dismissed on jurisdictional grounds, all discovery conducted therein to date shall be used in this action.

The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

FILED
JUL 31 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York

July 25, 2008



Hon. Martin Shulman, J.S.C.