

**Bovis Lend Lease LMB, Inc. v Garito Cntr,
Inc.**

2008 NY Slip Op 32828(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 103616/05

Judge: Judith J. Gische

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

PART 10

PRESENT: _____
Justice

Index Number : 103616/2005
BOVIS LEND LEASE LMB
VS.
GARITO CONTRACTING
SEQUENCE NUMBER : 004
REFERENCE - HEAR & REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**



FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Oct 14 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
(Check and report)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

BOVIS LEND LEASE LMB, INC. and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,
Plaintiffs,

Decision/Order

Index No.: 103616/05
Seq. No. : 004

-against-

Present:
Hon. Judith J. Gische
J.S.C.

GARITO CONTRACTING, INC. and TWIN
CITY FIRE INSURANCE COMPANY
*(pertaining to an underlying action entitled
John Armentano et ano v. Broadway Mall
Properties, Inc., et al.),*

Defendants.

FILED
OCT 16 2008

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Bovis/NU n/m (reference) w/HBA affirm, exhs	1
Twin's opp w/MEP affirm	2
Garito's opp w/LGA affirm	3
Bovis reply to Twin w/HBA affirm, exhs	4
Bovis reply to Garito w/HBA affirm, exhs	5

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment. The court now has before it a motion by plaintiffs for an order setting this case down before a special referee for a hearing on damages.

Arguments

This court granted summary judgment in favor of plaintiffs in its prior decision dated March 28, 2006. In that decision, the court held that the insurance policy that

* 3]

Garito Contracting, Inc. ("Garito") had in effect with Twin City Fire Insurance Company ("Twin City") at the time of an underlying accident involving John Armentano ("Armentano") affords Bovis Lend Lease LMB, Inc. ("Bovis") with primary coverage as to those claims. The other named plaintiff, National Union Fire Insurance Company of Pittsburgh, PA., ("National Union") is Bovis' insurer. That decision was affirmed on appeal. Bovis Lend Lease LMB, Inc., et al v. Garito Contracting, Inc., et al, 38 A.D.3d 260 (1st Dep't 2007) ("the appellate decision"). Thereafter, Twin City moved to reargue, based upon the jury's verdict in separately commenced the Armentano personal injury case. Although the court permitted reargument, and considered whether the verdict in Armentano affected the court's prior decision on summary judgment, this court ultimately adhered to its original decision granting summary judgment for plaintiffs.

Bovis and National Union (collectively "plaintiffs") now seek an order of reference to a special referee for a hearing on damages. Garito and Twin City separately oppose the motion. Twin City argues that it has filed an appeal of this court's decision denying reargument and this court should wait until the Appellate Division decides its appeal because there has been no "final" resolution of this case. Twin City, sought but was denied, leave to appeal to the Court of Appeals (June 26, 2007).

Garito, while acknowledging that plaintiffs seek no relief against it in this action, nonetheless joins in Twin City's opposition, arguing that a hearing on damages is premature, and cannot proceed, until Twin City's appeal is decided. Garito relies upon a number of arguments that it previously made in connection with the prior motions, including that this court's decisions are both "wrong," and they worked to Twin City's disadvantage in the Armento case.

Discussion

Section 5519 (c) of the CPLR applies to stays of enforcement of orders pending an appeal. It provides that the court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal. Whether to grant or deny the stay is within the discretion of the court where it is the court's own order. CPLR § 2201. As a general matter, the party seeking a stay must establish that it is necessary to prevent some serious harm, injustice, prejudice, loss, etc. Merola v. Bell, 47 N.Y.2d 985 (1979) (stay to address issues about press coverage).

This court's decision on summary judgment was upheld on appeal and the Court of Appeals has denied leave to appeal. This court permitted the defendants to reargue and renew the original motion, but adhered to its decision. There is no reason for this court to delay the hearing on the damages that plaintiffs are entitled to. In fact, Garito acknowledges that plaintiffs seeks no damages from them, but only from their insurer, Twin City. Consequently, Garito's "opposition" to plaintiffs' motion is more symbolic than substantive.

Although Twin City has not cross moved for a stay, even if it had, such motion would have been denied because it has not established that a stay is necessary to prevent some serious harm, injustice, prejudice, or loss. Merola v. Bell, 47 N.Y.2d 985 (1979) (*stay to address issues about press coverage*). There is, therefore, no reason to delay the damages hearing any further and plaintiffs' motion for a hearing is granted.

It is unclear, however, whether plaintiff seeks a "determination" or that the referee hold a hearing and make recommendations to the court in a written report that

would have to be confirmed (or rejected) by the court. CPLR §§ 4317 (a), (b) or 4320.

Although plaintiffs cite CPLR § 4317 pertaining to determinations by a special referee, plaintiffs request that the referee "hear, report and make a recommendation on plaintiffs' damages." The court can, in the absence of consent of the parties, order that the assigned referee determine the issues referred, either on a motion for that relief, or on the court's own initiative, in certain circumstances. CPLR § 4317 (b). Neither defendant addresses, let alone opposes, this branch of plaintiff's motion.

The court will be guided by the plaintiffs' preferences which appear to be for a report, not a determination, notwithstanding the statute cited. The court directs that there be an inquest on damages before a special referee who will report his or her recommendations to the court in a written report. The issue referred is how much does Twin City have to reimburse/pay to National Union for its defense of Bovis in the Armentano personal injury action, and in connection with this motion?

Plaintiffs shall serve the Clerk in the Office of the Special Referee, 60 Centre Street, Room 119 with a copy of this decision/order so that the reference can be placed on the calendar and assigned.

Conclusion

Plaintiff's motion is granted in all respects and directs that there be an inquest on damages before a special referee who will make recommendations to the court in a written report.

Plaintiffs shall serve the Clerk in the Office of the Special Referee, 60 Centre Street, Room 119 with a copy of this decision/order so that the reference can be placed on the calendar and assigned.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 14, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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COUNTY CLERK'S OFFICE
NEW YORK