

**CSSEL Bare Trust v Phoenix Life Ins. Co.**

2009 NY Slip Op 30569(U)

March 11, 2009

Supreme Court, New York County

Docket Number: 602934/08

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**

PART 57

Justice

Index Number : 602934/2008

**CSEL BARE TRUST**

VS.

**PHOENIX LIFE INSURANCE COMPANY**

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 602934-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to Dismiss / stay

PAPERS NUMBERED

1, 1A

2

3

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Memos of Law M1-M3

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

MAR 17 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/11/09



**MARCY S. FRIEDMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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CSSEL BARE TRUST, DATED AS OF APRIL 21,  
2006

Index No.: 602934/08

*Plaintiff,*

DECISION/ORDER

- against -

PHOENIX LIFE INSURANCE COMPANY,

*Defendant.*

\_\_\_\_\_ x

**FILED**  
MAR 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

This is an action for breach of contract brought by plaintiff CSSEL Bare Trust (CSSEL) against defendant Phoenix Life Insurance Company (“Phoenix”). CSSEL, the purchaser of policies issued by Phoenix insuring the life of third party Arthur Kramer, alleges that upon Mr. Kramer’s death Phoenix became obligated to pay CSSEL death benefits under the policies. Phoenix moves to dismiss or stay this action based on the pendency of a federal court action entitled Kramer v Lockwood Pension Servs., Inc., et al. (US Dist Ct, SD NY, 08 CV 2429, Batts, J.)

The federal action was brought by the Estate of Arthur Kramer against various insurance companies, including Phoenix, which issued policies on Mr. Kramer’s life, and against various assignees of the policies, not including CSSEL. The amended complaint in the federal action (Ex. B to Aff. In Support) seeks a declaration that various assignees engaged in a fraudulent scheme to violate the “insurable interest rule,” prohibiting a person from obtaining an insurance policy on the life of another without having an “insurable interest.” (See CPLR 3205[b][2].) The

action also seeks a declaration that because the assignees lacked an insurable interest, the insurance company defendants must pay the death benefits to the estate. In its amended answer in the federal action (Ex. D to Aff. In Support), Phoenix alleges third-party claims against the principal of certain assignees other than CSSEL, based on the allegations that he participated with Mr. Kramer in a fraudulent scheme to procure insurance policies for the benefit of stranger investors with no insurable interest in Mr. Kramer's life.

The federal and instant actions lack the substantial identity of parties and causes of action that would warrant a dismissal or stay pursuant to CPLR 3211(a)(4). (White Lights Prods., Inc. v On The Scene Prods., Inc., 231 AD2d 90 [1<sup>st</sup> Dept 1997].) The court finds, however, that a discretionary stay of the later state court action should be granted pursuant to CPLR 2201.

As Phoenix argues, the core issue in this action and a core issue in the federal action is whether the subject policies lack an insurable interest and, if so, whether the insurable interest defense is barred by the expiration of the contestability period. (Phoenix Memo. In Support at 5; Phoenix Amended Answer to Kramer Action, Sixth Defense ["No Insurable Interest"].) Indeed, CSSEL sought, but was denied, leave to submit an amicus brief in the federal action in support of the Estate's motion to dismiss which argues that Phoenix is precluded by the passage of the contestability period from contesting its payment obligations. (See CSSEL Memo. In Opp. at 5.)<sup>1</sup> Notably also, the Estate and CSSEL seek payment of the same death benefits from the same Phoenix policies, although they rely on different theories to support their claim to recovery.<sup>2</sup>

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<sup>1</sup> Contrary to CSSEL's contention (see id.), it has not been excluded from participation in the federal action but has chosen not to seek leave to intervene.

<sup>2</sup> For reasons that do not appear on this record, the Estate named various other assignees of the death benefits, but not CSSEL.

\* 4 ]

The court is unpersuaded by CSSEL's contention that there is no possibility of inconsistent adjudications. (See CSSEL Memo. In Opp. at 12-13.) The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue raised in prior action or proceeding and decided against that party or those in privity." (Buechel v Bain, 97 NY2d 295, 303 [2001], cert denied 535 US 1096 [2002].) As Phoenix is a party to the federal litigation and is actively defending that action, it appears that if the federal court were to hold that Phoenix is barred from asserting the insurable interest defense, that holding would be binding in the instant action against Phoenix. An independent finding here on the insurable interest defense would thus pose the risk of an inconsistent adjudication on this critical issue.

There is authority that it is not an abuse of discretion for a court to decline a stay where "the two actions do not share complete identity of parties or issues." (700 Madison Partners, LLC v Hubrecht, 48 AD3d 358, 1359 [1<sup>st</sup> Dept 2008]; Hope's Windows v Albro Metal Prods. Corp., 93 AD2d 711 [1<sup>st</sup> Dept 1983], lv dismissed 59 NY2d 968.) However, even absent a complete identity of parties and issues, the appellate courts have found that a stay is a provident exercise of discretion where there are "overlapping issues and common questions of law and fact and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action." (Belopolsky v Renew Data Corp., 41 AD3d 322 [1<sup>st</sup> Dept 2007] [internal citations and quotation marks omitted]; Goodridge v Fernandez, 121 AD2d 942 [1<sup>st</sup> Dept 1986]. Compare Fewer v GFI Group Inc., 2009 NY Slip Op 01295, 2009 WL 396123 [1<sup>st</sup> Dept 2009] [stay improperly granted where despite closely related parties and issues, "the two matters [were] not inextricably interwoven such that the . . . determination [in the earlier action] could resolve the issues" in the later action.]; Somoza v Pechnik, 3 AD3d 394 [1<sup>st</sup> Dept 2004].)


[\*5]

Applying this authority, the court concludes that a stay is warranted to avoid potentially inconsistent determinations and duplication of judicial resources. Dismissal motions have been served in the federal action on the insurable interest defense, and the federal court determination could resolve or significantly limit the issues in this action if the federal court holds that Phoenix is barred from asserting this defense. The court recognizes that CSSEL does not concede that it will be bound by the federal court determination if it is in favor of Phoenix. However, if Phoenix prevails in the federal action, there may be a threshold issue here as to whether the relationship between CSSEL and the Estate was such that the determination has collateral estoppel effect. Pending such determination, judicial resources will have been conserved. Finally, while there are claims in the federal court action that are not raised in the instant action, a stay is appropriate given the primacy of the common insurable interest defense as well as the interest in avoidance of inconsistent determinations of this defense.

It is accordingly hereby ORDERED that Phoenix' motion is granted to the extent of staying this action pending determination in the action entitled Kramer v Lockwood Pension Servs., Inc., et al (US Dist Ct, SD NY, 08 CV 2429, Batts, J.) of Phoenix' Sixth Defense of No Insurable Interest.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 11, 2009

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
MAR 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK