

**Budget Installment Corp. v LaMere Assoc., Inc.**

2009 NY Slip Op 33137(U)

December 17, 2009

Supreme Court, Nassau County

Docket Number: 016105-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**BUDGET INSTALLMENT CORP.,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 016105-08**

**Motion Seq. No: 3**

**Submission Date: 11/13/09**

**-against-**

**LaMERE ASSOCIATES, INC., EVA LAMERE,  
MEADOWVIEW ESTATES LLC,  
RICHMAN PROPERTY SERVICES, INC.,  
THE HUDSON COMPANIES INCORPORATED,  
DANVEST, LLC,  
SENECA INSURANCE COMPANY, INC. and  
LANDMARK AMERICAN INSURANCE COMPANY,**

**Defendants.**

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**The following papers having been read on this motion:**

- Order to Show Cause, Affidavit of E. LaMere,**
- Affirmation of R. Zelin and Exhibit.....X**
- Memorandum of Law in Support.....X**
- Plaintiff's Affirmation in Opposition and Exhibits.....X**
- Plaintiff's Memorandum of Law in Opposition.....X**
- Defendant Seneca's Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Defendants LaMere Associates, Inc. and Eva LaMere<sup>1</sup> filed on October 20, 2009, which was

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<sup>1</sup> Counsel affirms that he represents Defendant Eva LaMere, and that Defendant LaMere Associates, Inc. is not represented by counsel. The Court grants his request that the Court permit him to "stand in" for Defendant LaMere Associates, Inc. for purposes of this application.

submitted on November 13, 2009 after oral argument before the Court. For the reasons set forth below, the Court denies the Order to Show Cause and vacates the stay issued on October 20, 2009. The Court directs Defendants Eva LaMere, LaMere Associates, Inc. and Seneca Insurance Company, Inc. to respond to Plaintiff Budget Installment Corp.'s pending discovery requests within forty-five (45) days of this decision. The Court further directs that any Defendant wishing to invoke a privilege with respect to those discovery requests must provide to the Court, within forty-five (45) days of this decision, all documents responsive to the discovery demands regarding which Defendant asserts a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question.

### BACKGROUND

#### A. Relief Sought

Defendant Eva LaMere ("LaMere") moves for an Order, pursuant to, *inter alia*, CPLR § 2201, 1) staying this civil action in its entirety against Defendant LaMere; and 2) staying discovery in this matter with respect to Defendant LaMere Associates, Inc. ("LaMere Associates").

Plaintiff Budget Installment Corp. ("Plaintiff" or "Budget") and Defendant Seneca Insurance Company, Inc. ("Seneca") oppose the application.

#### B. The Parties' History

In its Verified Complaint dated August 13, 2008 ("Complaint"), Plaintiff affirms that Budget is in the business of providing insurance premium financing, and LaMere Associates is an insurance broker with which Budget has conducted business since 1996. LaMere is the owner of LaMere Associates. The Complaint contains six causes of action, sounding in breach of contract, fraud, and breach of fiduciary duty against LaMere and/or LaMere Associates, based, *inter alia*, on their allegedly 1) forging signatures of the insureds and customers of Budget; 2) providing false information regarding whether certain insurance policies were in effect and authorized; 3) failing to pay to Budget all insurance premiums that the insureds and customers of Budget had paid; and 4) failing to remit to certain insurance companies the premiums that Budget paid to LaMere Associates. In Count 2 of the Complaint, Budget seeks to pierce the corporate veil of LaMere Associates, and hold LaMere personally liable for LaMere Associates' allegedly improper conduct.

In support of her motion, LaMere provides an Affidavit in Support dated August 28, 2009 in which she affirms that 1) she “understands” that she and LaMere Associates are the subjects of an investigation by the Nassau County District Attorney’s Office (“Parallel Criminal Matter”), arising out of the same facts and circumstances that are “at the heart of this action” (LaMere Aff. at ¶ 2); 2) she intends to invoke her Fifth Amendment privilege against self-incrimination for all purposes in the instant matter, including but not limited to a) answering oral or written questions in connection with a deposition; b) swearing to the truth of the contents of any affidavit, except the instant affidavit; c) swearing to the truth, or verifying any further pleading, amplification of a pleading or response to discovery; and d) producing documents responsive to a document demand or subpoena to LaMere or LaMere Associates. LaMere submits that she cannot adequately prepare a defense in this matter and, at the same time, preserve her privilege against self-incrimination in the Parallel Criminal Matter.

In support of her allegation that she believes that she is the subject of an ongoing investigation by the Office of the Nassau County District Attorney (“District Attorney”), LaMere provides a letter dated August 13, 2009 from counsel for Foa & Son Corp. (“Foa”) to the Court (“Letter”). In that Letter (Ex. A to LaMere Order to Show Cause), counsel for Foa referred to a subpoena that Plaintiff issued to Foa in the instant matter. Counsel for Foa stated in the Letter, *inter alia*, that 1) he previously advised Plaintiff’s counsel that Foa is cooperating with the District Attorney’s investigation of LaMere Associates, and that Foa would be providing documents and testimony pursuant to an agreement with the District Attorney;<sup>2</sup> 2) during the District Attorney’s investigation, any witnesses subpoenaed would invoke their Fifth Amendment privilege and could not be compelled to testify; and 3) Foa would be producing documents to the District Attorney, whose production was not protected under the Fifth Amendment, and therefore “Foa would be willing to agree to produce documents in conjunction with Foa’s criminal counsel as those documents become available.”

Counsel for LaMere affirms that LaMere is the one hundred percent (100%) shareholder of the shares of LaMere Associates. He affirms, further, that he has spoken with the District Attorney, as well as counsel for the parties in this action, who have confirmed that the District

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<sup>2</sup> In the Letter, counsel stated that Foa is an insurance broker who discovered financial irregularities in the course of its dealing with LaMere Associates, and reported the matter to the State Department of Insurance.

Attorney is investigating LaMere and LaMere Associates regarding matters arising out of the same facts and circumstances set forth in the Complaint. He avers that LaMere intends to invoke her privilege against self-incrimination in the manner she outlined in her Affidavit in support of this application.

C. The Parties' Positions

LaMere submits that she cannot adequately prepare a defense in this matter and, at the same time, preserve her privilege against self-incrimination in the Parallel Criminal Matter. Thus, she submits that the Court should stay the instant action in light of the Parallel Criminal Matter.

Plaintiff's counsel opposes LaMere's application. He affirms, *inter alia*, that 1) LaMere and LaMere Associates have refused to comply with the discovery demands that Budget served on them in June of 2009; 2) this matter has been "systematically delayed" by the withdrawal of counsel for LaMere Associates, and LaMere's promises of a forthcoming settlement; 3) the District Attorney has not presented the Parallel Criminal Matter to the grand jury, and LaMere remains free to dispose of assets that could be used to satisfy any judgment that Plaintiff may obtain; 4) LaMere provides no documentation from the District Attorney regarding the nature of the criminal investigation, and whether, and if so when, the matter will be presented to a grand jury; 5) LaMere has not demonstrated how her privilege against self incrimination would be compromised by her responding to Plaintiff's discovery requests; and 6) LaMere has not demonstrated how her privilege against self incrimination would be compromised by Foa's responding to Plaintiff's discovery requests.

Defendant Seneca also opposes LaMere's application on the grounds that 1) granting the relief that LaMere seeks would "indefinitely stall the instant civil lawsuit" based on LaMere's purely subjective belief that she will be the subject of a criminal proceeding; 2) LaMere provides no information regarding whether a criminal prosecution is imminent, or whether LaMere is cooperating with the District Attorney; and 3) Seneca requires discovery to defend this lawsuit, in which Plaintiff has asserted claims against LaMere in her alleged capacity as Seneca's agent.

## RULING OF THE COURT

### A. The Court's Declines to Stay the Instant Action

Pursuant to CPLR § 2201, 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. The issuance of a stay pursuant to CPLR § 2201 is in the discretion of the trial court. *Research Corporation v. Singer-General Precision, Inc.*, 36 A.D.2d 987, 988 (3d Dept. 1971). Although the pendency of a criminal proceeding does not give rise to an absolute right to a stay of a related civil proceeding, the court may exercise its discretion to stay proceedings in a civil action until the resolution of the related criminal dispute. *Matter of Astor*, 62 A.D.3d 867, 868-869 (2d Dept. 2009), citing *DeSiervi v. Liverzani*, 136 A.D.2d 527 (2d Dept. 1988), quoting *Klitzman, Klitzman & Gallagher v. Krut*, 591 F. Supp. 258, 269-270 n. 7 (D.N.J. 1984), *aff'd* 744 F.2d 955 (3d Cir. 1984).

While courts have recognized the difficulty that defendants face in choosing between presenting evidence in their own behalf and asserting their Fifth Amendment rights, a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated. *Matter of Astor* at 62 A.D.3d at 869, quoting *Steinbrecher v. Wapnick*, 24 N.Y.2d 354 (1969). Granting a stay of a civil proceeding to await the outcome of a pending parallel investigation is appropriate when the interests of justice seem to require such action. *U.S. v. Private Sanitation Industry*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992), citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986), quoting *U.S. v. Kordel*, 397 U.S. 1, 12 (1970). In making this determination, the court should balance: 1) the private interest of the plaintiff in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiff is delayed, 2) the private interests of and burden on the defendant, 3) the convenience to the courts, 4) the interest of persons who are not parties to the civil litigation, and 5) the public interest. *Private Sanitation*, 811 F. Supp. at 805.

These factors warrant in favor of the Court not staying the instant action. Among the reasons a stay is inappropriate are 1) Plaintiff's interest in proceeding with this litigation, in which little, if anything, has happened since the matter was first assigned to this Court, 2) the absence of documentation from the District Attorney or other law enforcement agency reflecting an ongoing investigation, the filing of criminal charges or the District Attorney's intention to present the case to a grand jury, 3) this Court's desire to resolve this litigation in a timely

fashion, and 4) the limited burden on LaMere given her ability to assert a privilege in the context of the civil litigation.

The Court is not persuaded by LaMere's attempt to rely on then-United States District Judge McLaughlin's decision in *Brock v. Tolkow*, 109 F.R.D.116 (E.D.N.Y. 1985). *Brock* involved a civil action initiated by the Secretary of Labor against defendants, for violation of fiduciary obligations under the Employee Retirement Income Security Act of 1974 ("ERISA"). The defendants, who were trustees of an employee benefit plan ("Fund"), sought a protective order staying all discovery pending the outcome of any criminal actions that might be instituted as the result of an investigation conducted by the United States Department of Justice ("Justice Department"). *Id.* at 117. The Justice Department had served grand jury subpoenas on the Fund which demanded the production of a variety of documents. The Trustee defendants argued that these subpoenas revealed the government's intention to prosecute some or all of them under a section of ERISA that authorizes criminal penalties. *Id.* at 118.

The trustee defendants argued that, because the subpoena requests suggested that the criminal prosecution would be based on the same facts as the complaint in the civil case, any deposition testimony they provided would be used against them in a criminal case. *Id.* They argued, further, that repeated invocation of their privilege against self-incrimination would interfere with their ability to defend the civil suit. Thus, they sought a protective order staying all discovery in the civil action until the completion of criminal proceedings against the Trustee defendants. *Id.*

Judge McLaughlin's observations of why a stay was warranted in *Brock* demonstrate precisely why a stay is not appropriate here. As Judge McLaughlin stated, a stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter, and is even more appropriate when both actions are brought by the government. *Id.* at 119. The *Brock* court also noted, however, that the Trustee defendants were not seeking a stay of the civil case, but rather a deferral of discovery pending the outcome of the criminal investigation. The *Brock* court ultimately granted a stay of civil discovery, based on its conclusion that the risk of harm to the public interest did not outweigh the distinct possibility that defendants would be unable to defend both actions to the fullest. *Id.* at 121.

This Court finds *Brock* distinguishable from the present case. In *Brock*, 1) the

government had issued grand jury subpoenas that demonstrated the parallels between the civil action and the contemplated criminal action; and 2) it was the government that had both instituted the civil action, and was contemplating a related criminal proceeding. Here, on the other hand, 1) the government did not file the instant action; and 2) there is no documentation from the District Attorney's office reflecting the service of grand jury subpoenas, or demonstrating the District Attorney's intention to present this case to the grand jury in the foreseeable future.

Accordingly, the Court denies LaMere's application for a stay of this matter, and vacates the stay issued on October 20, 2009..

**B. Discovery Shall Proceed and LaMere Shall Provide a Privilege Log**

The fact that the witness may invoke the privilege against self-incrimination is not necessarily a basis for precluding civil discovery. *Matter of Astor*, 62 A.D.3d at 869, quoting *State of New York v. Carey Resources*, 97 A.D.2d 508, 509 (2d Dept. 1983). Moreover, the Fifth Amendment privilege only protects a person from being incriminated by his own compelled testimonial communication. *Id.* at 870, quoting *United States v. Doe*, 465 U.S. 605, 611 (1984).

*Matter of Astor* involved an appeal of the Surrogate Court's orders 1) denying appellant's motion to stay discovery pending resolution of a related criminal proceeding against him; 2) denying appellant's motion for a protective order; and 3) directing appellant to turn over to the court all documents responsive to the discovery demands regarding which appellant asserted a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question. 62 A.D.3d at 867-868. In affirming the Surrogate Court's decision, the Appellate Division in *Matter of Astor* held that, absent unique circumstances, a defendant may not assert a blanket refusal to answer questions based upon the Fifth Amendment privilege against self incrimination, and may only assert the privilege where there is reasonable cause to apprehend danger from a direct answer. *Id.* at 869, quoting *Chase Manhattan Bank, Nat'l Ass'n v. Federal Chandros, Inc.*, 148 A.D.2d 567 (2d Dept. 1989). The witness is, of course, uniquely qualified to determine whether an answer may tend to be incriminating. Nevertheless, when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate. *Id.*, quoting *State of New York v. Carey Resources*, *supra*, at 509. In such a case, to invoke effectively the protections of the Fifth Amendment, a party must make a particularized

objection to each discovery request. *Id.*, quoting *Chase Manhattan Bank, supra*, at 568.

The court in *Matter of Astor* concluded that, as appellant was not being compelled to create the documents in question, there would not be a Fifth Amendment violation merely because the documents, on their face, might incriminate him. 63 A.D.3d at 870, quoting *U.S. v. Doe* at 611. Rather, appellant was required to show that the very act of producing the documents, if compelled by the court, would have testimonial aspects and an incriminating effect. *Id.*, quoting *U.S. v. Doe* at 612. The Second Department concluded that, as it was not readily apparent whether production of the documents in question would be testimonial, the procedure that the Surrogate Court ordered was proper. *Id.*

This Court will follow a similar procedure. The Court directs LaMere, LaMere Associates and Seneca to respond to Budget's pending discovery requests within forty five (45) days of this decision. The Court further directs any Defendant wishing to invoke a privilege with respect to those discovery requests to provide the Court with all documents responsive to the discovery demands regarding which Defendant asserts a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question.

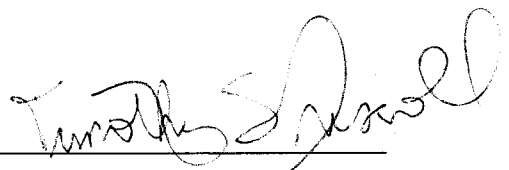
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a conference on January 14, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY  
December 17, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

DEC 21 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**