

Sinanaj v City of New York

2010 NY Slip Op 33797(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 117469/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

SINANAS, X, et al.

INDEX NO. 117469/08 E

- v -

CITY OF NEW YORK, et al.

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for

- Notice of Motion/Petition — Affidavits — Exhibits
Answering Affidavits — Exhibits (Memo)
Notice of Cross-Motion — Affidavits — Exhibits
Replying Affidavits (Reply Memo)

Table with 1 column: PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion

THIS IS FILED IN ACCORDANCE WITH THE APPLICABLE DECISION AND ORDER.

Dated: 1/14/10 4:00 pm

J.S.C. (Signature)

- Check one: FINAL DISPOSITION, NON-FINAL DISPOSITION, DO NOT POST, REFERENCE, Preliminary Conf., Compliance Conf.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
XHEVAHIRE SINANAJ and SELVI SINANOVIC
AS CO-ADMINISTRATORS OF THE ESTATE OF
RAMADAN KURTAJ, DECEASED, & SELVI
SINANOVIC, INDIVIDUALLY,

Plaintiffs,

Index Number 117469/2008

-against-

Mot. Seq. No. 006

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY,
DEPARTMENT OF BUILDINGS, MICHAEL
CARBONE, PATRICIA J. LANCASTER, ROBERT
LIMANDRI, CITY OF NEW YORK SCHOOL
CONSTRUCTION FUND, NEW YORK CITY
EDUCATIONAL CONSTRUCTION FUND, NEW
YORK CRANE & EQUIPMENT CORP., JAMES F.
LOMMA, LOMMA TRUCKING & RIGGING, J.F.
LOMMA INC., TES INC., JF LOMMA
TRUCKING & RIGGING, JF LOMMA RIGGING
AND SPECIALIZED SERVICES, JAMES F. LOMMA,
BRADY MARINE REPAIR CO., TESTWELL, INC.,
BRANCH RADIOGRAPHIC LABORATORIES, INC.,
CRANE INSPECTION SERVICES, LTD., SORBARA
CONSTRUCTION CORP., 1765 FIRST ASSOCIATES,
LLC, LEON D. DEMATTEIS CONSTRUCTION
CORPORATION, MATTONE GROUP CONSTRUCTION
CO. LTD., MATTONE GROUP LTD., MATTONE
GROUP LLC, HOWARD I. SHAPIRO & ASSOCIATES
CONSULTING ENGINEERS, P.C., NEW YORK
RIGGING CORP. TOWER RIGGING CONSULTANTS,
INC., TOWER RIGGING, INC., UNIQUE RIGGING
CORP., LUCIUS PITKIN, INC., MCLAREN
ENGINEERING GROUP, M.G., MCLAREN, P.C., &
"JOHN/JANE DOES" "1" though "10,"

Defendants.

-----X

For the Plaintiffs:
Michael G. O'Neill, Esq.
30 Vesey Street, 3rd Floor
New York, New York 10007
(212) 581-0990

For Defendant Leon D. Dematteis Construction Corp.:
Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C.
By: Mark D. Levi, Esq.
111 John Street, 20th Floor
New York, NY 10038
(212) 964-7400

For Plaintiff Kurtaj:
 Susan M. Karten & Associates, LLP
 By: Susan M. Karten, Esq.
 355 Lexington Avenue
 New York, NY 10017
 (212)826-3800

For Defendant Sorbara Construction Corp.:
 Cartafalsa, Slattery, Turpin & Lenoff
 By: Raymond F. Slattery, Esq.
 165 Broadway, 28th Floor
 New York, NY 10066
 (212) 225-7700

For Defendant Testwell, Inc.:
 Lawrence, Worden, Rainis & Bard, P.C.
 By: Jeffrey Bard, Esq.
 225 Broad Hollow Road, Suite 105E
 Melville, NY 11747-4701
 (631) 694-0033

Papers considered in review of this motion to restore:

| Papers | E-Filing Document Number |
|---|---------------------------------|
| Order to Show Cause | 108 |
| Affirmation in Support and Annexed Exhibits | 107 |
| Affirmation in Partial Opposition | 109 |
| Affirmation with Regard to Order to Show Cause | 110 |
| Affirmation in Opposition | 112 |
| Reply Affirmation in Further Support and Annexed Exhibits | 113 |

PAUL G. FEINMAN, J.:

Plaintiffs move, by order to show cause, to, among other things, vacate the stays issued by this court, entered September 23, 2009 and September 25, 2009, and restore this matter, along with certain motions which were sub judice at that time, to active status. Plaintiffs also seek an expedited discovery schedule. Defendant Dematteis Construction Corp. partially opposes. Defendant Testwell, Inc., the party whose voluntary bankruptcy resulted in the stay, opposes the unless ceratin recovery limitations are placed on co-defendants. Defendant Sorbara Construction Corp. opposes. For the reasons set forth below, the motion is granted in part and denied in part.

Defendant Testwell filed a voluntary petition for Chapter 11 Bankruptcy on May 13, 2009. By Orders entered September 23, 2009 and September 25, 2009, this court stayed this matter, pursuant to 11 USC § 362 (a) (1), and marked off motions bearing sequence numbers 001, 002, 004, and 005 as stayed (Aff. in Supp., Ex. B). On October 13, 2009, the United States Bankruptcy Court “so ordered” a stipulation between plaintiffs and Testwell, which lifted the

stay as to plaintiffs and provided that “[r]ecovery . . . shall be limited to the amount of coverage provided by [Testwell’s] insurance policy and [p]laintiffs shall have no other claim in the bankruptcy estate and forever waive the right to file a proof claim for any amount in excess of the insurance coverage” (Aff. in Supp., Ex. C ¶ 4). Paragraph one of the so ordered stipulation defines “[p]laintiffs” as “The Estate of Ramadan Kurtaj, et. al.” (Aff. in Supp., Ex. C ¶ 1). Consequently, on October 23, 2009, plaintiffs moved, by order to show cause to (1) vacate the stays issued by this court, entered on September 23, 2009 and September 25, 2009 and restore this matter to active status, (2) restore motions bearing sequence numbers 001 and 002 to the calendar, (3) have the court direct that discovery be expedited, and (4) for a case management order.

Here, plaintiffs have sufficiently demonstrated that they timely moved this court for restoration within less than two weeks after the bankruptcy stay was lifted, which was approximately two months after the matter was marked off the active calendar (Order to Show Cause; Aff. in Supp., Exs. B, C). Plaintiffs also presented evidence that each of the defendants were put on notice of plaintiff’s application to the bankruptcy court to lift the stay and that none of the defendants sought to join in that application (Order to Show Cause; Aff. in Supp., Ex. C). Plaintiffs could be prejudiced if this motion were denied because of defendants’ “lack of diligence in seeking and or joining in plaintiff[s’] bankruptcy [c]ourt applications for which they were fully on notice” (Reply Aff. ¶ 11). Accordingly, those branches of plaintiffs’ motion seeking to restore this matter and motions bearing sequence numbers 001, 002, 004 and 005 to active status is granted.

Plaintiffs also ask that this court sever the defendants’ cross-claims to facilitate discovery and prevent prejudice (Reply Aff. in Further Supp. ¶ 6). This court may sever claims “[i]n

furtherance of convenience or to avoid prejudice” (CPLR 604; *see* CPLR 1010). Thus, this court will sever all cross-claims against Testwell unless the cross-claimant has successfully lifted the bankruptcy stay as it pertains to its cross-claims against Testwell and serves a copy of such an order upon this court and all parties within 30 days of entry of this order. The court notes that the parties were put on notice of the court’s intention to so proceed at oral argument on October 30, 2009, so that by the time this 30 days elapse they will have had over three months to accomplish what plaintiff managed to accomplish relatively quickly after the stay came to the court’s attention.

Further, given this conditional severance, the complexity of this matter, and because motions bearing sequence numbers 001,002, 004 and 005 are hereby restored to the calendar, this court cannot find, at this time, that issuing an expedited discovery schedule is either called for by the parties’ conduct, nor that it would “facilitate the resolution of [this] case[.]” (*Brustowsky v Herbst*, 4 AD3d 220, 221 [1st Dept 2004]; *see* 22 NYCRR 202.19 [b] [2] [i]), nor that it would serve the interest of justice (*see* CPLR 3403 [a] [3]; *Matter of N.Y. County Diet Drug Litig.*, 262 AD2d 132, 132 [1st Dept 1999], *lv dismissed and denied* 94 NY2d 895 [2000]). The differentiated case management system currently employed by the Office of Court Administration envisions three tracks of cases: expedited; standard and complex. Currently, this action is deemed standard. While an argument could be made that the instant action should be deemed complex, due to the large number of ancillary litigations, a determination to conduct “expedited” discovery is not warranted. Such a determination is not a function of public or media interest, nor frankly, simply because plaintiffs desire such an approach. Rather, it is a function of analysis of balancing the prejudice to the parties and the potential effect on the resolution of the case’s merits if the court takes the case off the standard track.

Every plaintiff desires to have his or her case expedited. With literally over 700 cases in its inventory, over a thousand motions made a year, it is simply impossible for the court to accommodate every plaintiff's desire to have his or her case decided yesterday. Indeed, much of the wheel-spinning in this action is due simply to a lack of cooperation among counsel and what seems to the court to be inordinate effort to "short-circuit" the ordinary discovery process by both sides of the lawsuit. As the court urged the parties at the oral argument of this motion, the instant motion should have been resolved by stipulation. Litigants go in and out of bankruptcy on a regular basis; litigants die and need to have representatives appointed. Cases are stayed and stays lifted, all by the simple "so ordering" of a stipulation. The original order staying this action specifically advised that counsel could restore it by stipulation. Of course, when counsel do not cooperate, then motions are generated, causing unnecessary delay and expense to the litigants. The litigants and their counsel chart their own course.

Defendants also seek various forms of relief. Defendant Dematteis "has no opposition to vacating the stay" but asks this court to also "lift the stay in all 20 [related] cases pending before this" court without formally cross-moving for such relief (Aff. in Partial Opp., ¶ 6). Defendant Testwell "seek[s] clarification" because the so ordered stipulation seems to only limit Testwell's liability as to plaintiffs' claims and not as to the cross-claims commenced by co-defendants (Aff. with Regard to Order to Show Cause, at 3). Thus, Testwell "ha[s] no objection to the relief sought" so long as "all claims, cross claims and counterclaims for contribution and indemnification are limited to the available insurance proceeds of insurance maintained" (Aff. with Regard to Order to Show Cause, at 3). In essence, Testwell seeks a declaration of rights which necessarily turns on a substantive analysis of the so-ordered stipulation. Defendant Sorbara opposes the motion because "Sorbara has cross claim[s] against Testwell for

indemnification and contribution” and because Sorbara was not a party to the stipulation, and they argue that the stay should be lifted “only if, plaintiff[s] and all parties unconditionally agree that Sorbara will not be required to pay any party any part of Testwell’s liability” (Aff. In Opp, ¶¶ 5, 9). Despite their requests for these various forms of relief, none of the defendants has formally cross-moved.

If a party opposing a motion also affirmatively demands relief, that party must formally cross-move to demand such relief (*see* CPLR 2215; *see generally* 197 Siegel’s Practice Review, *Mere Mention of Request for Relief in Papers Opposing Main Motion Does No Satisfy “Cross-Motion”*; *Cross Relief Denied*, at 4 [May 2008]). Here, none of the defendants have filed cross-motions for the various forms of relief sought and in “the absence of a notice of cross motion,” this court is “without jurisdiction to grant the relief afforded to defendants” (*Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001]; *see* Siegel, NY Prac § 249, at 423 [4th ed] [“when the opposing party wants both to oppose the main motion as well as obtain affirmative relief of [his or] her own, [that opposing party] is to include a notice of cross-motion”]). Therefore, this court declines to address those improper requests (*see Guggenheim v Guggenheim*, 109 AD2d 1012, 1012 [3d Dept 1985] [“It is not as a rule sufficient to demand such relief in opposing affidavits or memoranda”], quoting Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2215:1).

Accordingly, it is

ORDERED that plaintiffs’ motion to vacate the stay of this matter and restore it to active status is granted to the extent that plaintiff’s claims against the defendants are restored to active status together; and it is further

ORDERED that plaintiffs are awarded \$100 costs pursuant to CPLR 8106 and CPLR 8202; and it is further

ORDERED that any cross-claims by any defendant against any other defendant *other than Testwell* are restored to active status; and it is further

ORDERED that the Clerk of Trial Support and Clerk of Motion Support are directed to restore motions bearing motion sequence numbers 001, 002 and 004 to the Motion Submissions Calendar, 60 Centre Street, Room 130 for February 1, 2010 at 9:30 a.m.; and it is further

ORDERED that the Clerk of Trial Support and Clerk of Motion Support are directed to restore motion bearing sequence number 005 to active status and it is decided in accordance with the separate decision and order of today's date; and it is further

ORDERED that plaintiffs' motion seeking to sever defendant Sorbara's cross-claims against defendant Testwell is granted, as are any other cross-claims against Testwell, *unless* Sorbara ,or any other cross-claimant against Testwell, successfully lifts the bankruptcy stay as to its cross-claims against Testwell and serves a copy of such an order upon this court and all parties within 30 days of entry of this order, in which event the motion for severance shall be deemed denied and it is further

ORDERED that plaintiffs' motion is denied in all other respects except to the extent set forth in a separately issued Case Management Order; and it is further

ORDERED that plaintiffs shall serve a copy of this order on all parties and third-parties, if any, and upon the Clerks of Trial Support and Motion Support.

This constitutes the decision and order of the court.

Dated: January 14, 2010
New York, New York

4:00 pm



J.S.C.