

**Cassity v Wrynn**

2011 NY Slip Op 30061(U)

January 5, 2011

Supreme Court, New York County

Docket Number: 106474/2010

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

BRENT D. CASSITY, JAMES DOUGLAS CASSITY  
and BAYSIDE CAPITAL MANAGEMENT LLC,

INDEX NO. 106474/2010

Petitioners,

- v -

MOTION DATE 11/3/10

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

JAMES J. WRYNN, SUPERINTENDENT OF  
INSURANCE OF THE STATE OF NEW YORK,

Respondent.

**UNFILED JUDGMENT**

The following papers, numbered 1 to 6 and notice of entry, were read on this Article 78 petition and based hereon. To obtain entry, counsel or representative must appear in person at the Judgment Clerk's Desk (Room 11B) Papers Numbered

Order to Show Cause— Verified Petition  
—Affidavit— Exhibits A-D

1-3

Notice of Cross Motion; Affidavit— Exhibits A-C

4: 5

Reply Affirmation — Exhibits A-D

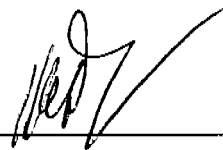
6

Cross-Motion:  Yes  No

Upon the foregoing papers, this petition and cross motion are decided in accordance with the annexed memorandum decision, order, and judgment.

**HON. MICHAEL D. STALLMAN**

Dated: 1/5/11  
New York, New York

  
\_\_\_\_\_, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----X  
BRENT D. CASSITY, JAMES DOUGLAS CASSITY and  
BAYSIDE CAPITAL MANAGEMENT LLC,

Petitioners,

Index No. 106474/2010

- against -

Decision, Order, and  
Judgment

JAMES J. WRYNN, SUPERINTENDENT OF INSURANCE  
OF THE STATE OF NEW YORK,

Respondent.  
-----X

HON. MICHAEL D. STALLMAN, J.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry counsel must appear in person at the  
Superintendent of Insurance's Office. Petitioner must  
appear in person at the Judgment Clerk's Desk (Room  
11B).

Petitioners seek a writ of mandamus to be issued to the  
Superintendent cross-moves to dismiss the petition.

**BACKGROUND**

Article 15 of the Insurance Law regulates insurance companies and their "holding companies," which Insurance Law § 1501 defines as "any person (or entity) who directly or indirectly controls any authorized insurer." For example, Article 15 establishes registration and reporting requirements upon the "controlled insurer" (see Insurance Law §§ 1503, 1504) and imposes requirements, such as the prior approval of the Superintendent, for transactions within a "holding company system" to which a "controlled insurer" is a party. See Insurance Law § 1505.

Insurance Law § 1501(a) (2) defines "control," which "shall be presumed to exist if any person directly or indirectly owns, controls or holds with the power to vote [10%] or more of the voting securities of any other person." Pursuant to Insurance Law § 1501 (c), the Superintendent may determine, "upon application that any person does not or will not upon the taking of some

proposed action control another person.” The statute requires the Superintendent to make the determination within 30 days “or such further period as the superintendent may prescribe.” The statute also provides that “The superintendent may prospectively revoke or modify his determination, after notice and opportunity to be heard, whenever in his judgment revocation or modification is consistent with [Article 15].”

By letter dated June 22, 2009, the Superintendent of Insurance directed Brent Douglas Cassity, Rhonda L. Cassity, and J. Tyler Cassity (the Cassitys) to submit to the Department of Insurance a request for a determination of non-control of Professional Liability Insurance Company of America (PLICA), pursuant to Insurance Law § 1505. Verified Petition, Ex A. It is undisputed that the Cassitys are beneficiaries of the PLICA Equity Trust (PET), which owns 78% of the shares of PLICA. James Douglas Cassity is the alleged grantor of PET. *See* Verified Petition, Ex C at 1. The letter also directed Howard Nathans and Howard Wittner, who, the letter indicated, were then respectively the President and General Counsel of PLICA, to submit requests for determination of their non-control of PLICA. *Id.*

The letter further instructed PLICA “not to make any further payments to any entities owned or controlled by the Cassitys, Mr. Nathans, or Mr. Wittner until such request is submitted to this Department and resolved.” *Id.* It appears that, at the time that the Superintendent’s letter was issued, PLICA had entered into an Administrative Agreement dated July 1, 2004 with Bayside Capital Management, LLC (Bayside). Verified Petition, Ex B. It is undisputed that J. Douglas Cassity and Brent D. Cassity own Bayside.

By letter dated June 29, 2009, Nathans submitted to the Insurance Department statements for himself, Wittner, and the Cassitys in regard to the issue of their control of PLICA. Verified

[\* 4]  
Petition, Ex C.

By an email dated July 1, 2009, the Assistant Chief Examiner, Property Bureau of the Insurance Department purportedly wrote,

“PLICA is granted approval to make payments to Bayside to cover normal employee salaries. All other payments to Bayside by PLICA, including other forms of compensation, expenses, costs, sales, exchanges, etc., shall be held in abeyance until the Department has resolved the determination of control of PLICA, as provided for in Article 15 of the Insurance Law.”

Petition, Ex D.

Meanwhile, on April 28, 2010, this Court granted the Superintendent’s application to place PLICA into rehabilitation, appointing the Superintendent as rehabilitator of PLICA. The order of rehabilitation provides, in pertinent part: “All persons are permanently enjoined and restrained from commencing or prosecuting any actions or proceedings against PLICA, the Rehabilitator or the New York Liquidation Bureau . . . with respect to any claims against PLICA.”

On May 17, 2010, Brent D. Cassity, James Douglas Cassity, and Bayside commenced this Article 78 proceeding against the Superintendent of Insurance. The verified petition “for writ of mandamus” seeks:

(1) an order directing the Superintendent to respond to the Cassitys’, Nathan’s, and Wittner’s joint request for a determination of control of PLICA, as the Superintendent had directed, with “notice and an opportunity to be heard”;

(2) an order directing the Superintendent “cause immediate payment to Bayside” for amounts due from June 22, 2008 [*sic*] to date that, but for the Superintendent’s illegal Non-payment Order, would have been paid by PLICA”; and

(3) a finding that, under New York Insurance Law, Bayside “is relieved of any obligation

or liability under Article 15 [of the Insurance Law] in relation to the Administrative Agreement until such time as the Superintendent has heard and determined Petitioners' application for determination of non-control of PLICA."

The Superintendent cross-moves to dismiss the petition as moot, submitting a letter dated June 18, 2010 (almost a year after the Cassitys', Nathan's and Wittner's joint request for a determination of non-control). *Bienskie Aff., Ex B.* In the letter, the Department of Insurance concluded that, based on the Superintendent's examination of PLICA and on their statements, Nathan, Wittner, Brent Cassity, Rhonda Cassity, and Tyler Cassity are presumed to control PLICA, and the presumption was not rebutted. The Department of Insurance applied the presumption of control based on findings of the ownership of PLICA voting shares as follows:

Nathans	10%
Wittner	12%
PET	78%

The Department of Insurance applied the presumption to the Cassitys, reasoning that, because of their beneficiary interests in PET, they therefore "indirectly" own more than 10% of the voting shares of PLICA.

This proceeding was initially assigned to another justice (now retired), who referred the petition to this Court on November 1, 2010 as a matter related to PLICA's rehabilitation proceeding, which is assigned to this Court. This Court received the papers on November 3, 2010.

**DISCUSSION**

"Article 78 relief in the form of mandamus to compel may be granted only where a petitioner establishes a 'clear legal right' to the relief requested." *Matter of Council of City of New York v Bloomberg*, 6 NY3d 380, 388 (2006). In addition, "there must exist a corresponding

nondiscretionary duty on the part of the administrative agency to grant that relief.” *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 757 (1991).

Mandamus to Compel the Superintendent “to follow the process proscribed as in New York Insurance Law § 1501 (b) and (c) to provide Bayside, Brent D. Cassity and James Douglas Cassity with notice and an opportunity to be heard on the issue of whether they or any of them ‘control’ [PLICA]”

Petitioners apparently sought to compel the Superintendent to issue a determination as to the joint request of the Cassitys, Nathans, and Wittner regarding their control, if any of PLICA. As discussed above, Insurance Law § 1501 (c) requires the Superintendent to make such a determination “within thirty days or such further period as the superintendent may prescribe.” It is undisputed that when this petition was commenced, almost a year had passed since the joint request had been submitted to the Superintendent.

However, the Superintendent correctly indicates that the Department of Insurance’s determination by letter dated June 18, 2010 renders this branch of the petition academic.

In reply, petitioners challenge the Superintendent’s determination, arguing that they were never given “notice and an opportunity to be heard” on the issue of control. It appears that petitioners were expecting trial-type hearings. *See* Verified Petition ¶ 18.

The Superintendent’s determination of control was based, in part, on a Report of Examination of PLICA dated December 31, 2008 (Report). *See* Bienskie Aff., Ex A. The bulk of petitioners’ reply arguments is that they were never given notice and an opportunity to be heard on the findings and conclusions of the Report, which petitioners had challenged. *See* Higgins Reply Affirm., Ex A.

Insurance Law § 311 (b) (1) provides that, “Before adopting any such report [a report on

[\* 7] .  
examination] and filing it for public inspection, the superintendent shall notify the insurer or other person examined of its contents and shall afford such insurer or other person of a reasonable opportunity to obtain further details and to demand a hearing with reference to facts, conclusions, or recommendations therein contained.”

However, the instant petition is not an Article 78 petition in the nature of mandamus to review the Department of Insurance’s determination of control, which was issued after the proceeding was commenced. Neither does the petition seek to compel the Superintendent to give notice and a hearing with respect to the Report.

The remaining branches of the petition

The Court agrees that the Superintendent’s determination of control renders academic the second branch of the petition, which sought an order directing the Superintendent to cause immediate payment to Bayside “of all amounts due from June 22, 200[9] to date . . .” This branch of the petition apparently concerns the Superintendent’s directive of non-payment contained in the Superintendent’s letter dated June 22, 2009. The directive was in effect “until such request [for a determination of control] is submitted to this Department and resolved.” The Superintendent takes the position that the determination of control “supersedes the Non-Payment Directive,” and therefore acknowledges that the non-payment directive is no longer in effect.

In any event, as the Superintendent indicates, this branch of the petition not only contends that the non-payment directive as illegal, but also asks the Court to direct the Superintendent to pay Bayside immediately. However, petitioners have not demonstrated a “clear right” to such a relief—petitioners are essentially asking that Bayside be paid. Insofar as Bayside is pressing a claim as a creditor of PLICA, PLICA was a necessary party to this relief, and PLICA was not joined as a

party.<sup>2</sup> Although the Superintendent is the court-appointed rehabilitator of PLICA, the verified petition states, "the Petition is for a writ of mandamus to the Superintendent in his capacity as regulator and is not directed to the Superintendent as rehabilitator of PLICA, no[r] is it directed against PLICA." Verified Petition ¶ 7.

As to the third branch of the petition, petitioners seeks a determination that Bayside is "relieved of liability under Article 15 [of the Insurance Law] in relation to the Administrative Agreement until such time as the Superintendent has heard and determined Petitioners['] application for a determination of non-control of PLICA . . ." To the extent that petitioners sought a determination from the Superintendent that Bayside would not be found liable for violations of Article 15 of the Insurance Law, petitioners have not demonstrated a "clear right" to such mandamus relief. To the extent that petitioners sought a declaration from the Court as to Bayside's liability, such an advisory opinion would be beyond the scope of an Article 78 petition.

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that the cross motion to dismiss the petition is denied and the proceeding is dismissed.

**ADJUDGED** that the petition is denied and the proceeding is dismissed.

**UNFILED JUDGMENT**  
his judgment has not been entered by the County Clerk and notice of entry has not been served based hereon. obtain entry, counsel or other interested representative must appear in person at the Judgment Clerk's Desk (Room 11B)

Dated: January 5, 2011  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

**HON. MICHAEL D. STALLMAN**

<sup>2</sup> The Superintendent points out that PLICA cannot be joined as a party to this petition by virtue of the rehabilitation order, which permanently enjoined the commencement and prosecution of all actions against PLICA.