

**Colony Ins. Co. v Danica Group, LLC**

2014 NY Slip Op 30347(U)

February 6, 2014

Sup Ct, New York County

Docket Number: 116200/10

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

COLONY INSURANCE COMPANY,

Plaintiff,

- against -

Index No.  
116200/10

DANICA GROUP, LLC, ZURICH AMERICAN  
INSURANCE COMPANY, and PAV-LAK INDUSTRIES,

Defendants.

ZURICH AMERICAN INSURANCE COMPANY, AG  
WEST 22<sup>ND</sup> STREET REALTY, LLC, ASCEND GROUP  
LLC, KAL INDUSTRIES, INC., and PAV-LAK  
INDUSTRIES, INC.,

Plaintiffs,

- against -

Index No.  
155729/12

Motion Sequence No.  
001

COLONY INSURANCE COMPANY, DANICA GROUP,  
LLC, and COPPER PLUMBING AND HEATING, LLC,  
[Pertaining to the underlying personal  
injury action entitled *Abramov v. AG West  
22<sup>nd</sup> Street Realty, LLC, et al.*, and  
related actions, Index No. 11452/09, N.Y. Sup.  
Ct., Nassau Co.],

Defendants.

ZURICH AMERICAN INSURANCE COMPANY, BBD  
DEVELOPERS LLC, 17<sup>TH</sup> STREET DEVELOPMENT  
NY CORP., METRO CONSTRUCTION ENTERPRISES,  
INC. and PAV-LAK INDUSTRIES, INC.,

Plaintiffs,

- against -

Index No.  
155725/12

Motion Sequence No.  
001

COLONY INSURANCE COMPANY, DANICA GROUP, LLC, and COPPER PLUMBING AND HEATING, LLC, [Pertaining to the underlying personal injury action entitled *Draper v. Danica Group LLC, et al.*, and third-party actions, Index No. 23502/08, N.Y. Sup. Ct., Queens Co.],

Defendants.

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ZURICH AMERICAN INSURANCE COMPANY, ALLEN/ ORCHARD, LLC, S&H EQUITIES (NY) INC., CONSTRUCTION MANAGEMENT INDUSTRIES, INC., and PAV-LAK INDUSTRIES, INC.,

Plaintiffs,

Index No.  
155726/12

- against -

Motion Sequence No.  
001

COLONY INSURANCE COMPANY, DANICA GROUP, LLC, and COPPER PLUMBING AND HEATING, LLC, [Pertaining to the underlying personal injury action entitled *Failace v. Allen/ Orchard, LLC et al.*, and third-party actions, Index No. 39569/08, N.Y. Sup. Ct., Suffolk Co.],

Defendants.

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ZURICH AMERICAN INSURANCE COMPANY, 123 WEST 22<sup>ND</sup> STREET HOLDING, LLC, and PAV-LAK INDUSTRIES, INC.,

Plaintiffs,

Index No.  
155730/12

- against -

COLONY INSURANCE COMPANY, DANICA GROUP, LLC and COPPER PLUMBING AND HEATING, LLC, [Pertaining to the underlying personal injury action entitled *Garcia v. Calabrese, Inc.*

Motion Sequence No.  
001

et al., and third-party actions,  
Index No. 23208/07, N.Y. Sup. Ct.,  
Kings Co.],

Defendants.

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**DONNA M. MILLS, J.:**

Having previously granted a motion to consolidate the above five declaratory judgment actions for the purposes of discovery and trial, the instant motions (all sequenced 001) are consolidated for disposition.

In each of the instant motions, defendant Colony Insurance Company (Colony) moves for dismissal of plaintiffs' complaints (CPLR 3211 [a] [1], [4], and [7]). Alternatively, Colony seeks a stay of the instant actions (CPLR 2201) pending the final adjudication of the action entitled *Colony Ins. Co. v Danica Group*<sup>1</sup> (the rescission action).

For the reasons stated below, the instant motions are granted only to the extent of staying these actions pending the Colony action, and are otherwise denied.

#### **Factual Background**

Plaintiffs allege that these actions arise out of several contracts between owners, a construction manager and two subcontractors engaged in construction projects between 2006 and 2009 in New York, New York. The various owners of the properties

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<sup>1</sup>The action denominated *Colony Ins. Co. v. Danica Group*, has an index number of 116200/10 in Supreme Court, New York County.

engaged Pav-Lak Industries, Inc. (Pav-Lak) to serve as construction manager at the various construction sites. Pursuant to the contracts between such owners and Pav-Lak: (1) Pav-Lak held the owners harmless as respects Pav-Lak's work, (2) Pav-Lak agreed to indemnify and defend the owners, and (3) Pav-Lak was required to procure liability insurance, naming the owners as additional insureds.

Plaintiffs further allege that plaintiff Zurich American Insurance Company (Zurich) issued a comprehensive general liability (CGL) insurance policy (number GLO 5916101) to Pav-Lak for the period that covered all the incidents from which these actions arose, and that the CGL limits of policy number GLO 5916101 were \$2 million per occurrence and \$5 million in the aggregate.

According to the plaintiffs, in each instance at issue herein, Pav-Lak subsequently entered into a contract with Danica (the Danica subcontracts) to perform certain construction duties at each site. See Janet P. Ford (Ford) affirmation in opposition, exhibit U. Plaintiffs allege that, pursuant to the Danica subcontracts, Danica was required to assume all the obligations of Pav-Lak's contract with the owners, and, in addition, to procure \$6 million of GCL coverage, naming Pav-Lak and the owners as additional insureds on a primary basis.

It is further alleged that, subsequent to the execution of

the Danica subcontracts, Danica entered into a "Master Subcontract Agreement" with defendant Copper Plumbing and Heating, LLC (Copper) for plumbing work at certain construction sites. See Ford affirmation, exhibit T.

Pursuant to the Master Subcontract Agreement proffered to this court, Copper was required to procure liability insurance providing \$2 million of coverage, naming the owners and others specifically identified by Danica as additional insureds. *Id.* Additionally, the Master Subcontract Agreement required Copper to defend, indemnify and hold Danica and the owners harmless from claims arising out of Copper's work.

It is uncontested that Danica procured commercial general liability (CGL) policies and excess policies with Colony, during the period from July 19, 2006 through July 19, 2009. See Ford affirmation, exhibit V. The CGL insurance policies that were issued were numbered AR3360115, AR3360115A, and AR3360115B (the Danica CGL policies).<sup>2</sup> The Danica CGL policies each had a one-year term and liability limits of \$1,000,000 per occurrence and \$2,000,000 aggregate. See Ford affirmation, exhibit V.

In addition, Colony issued a CGL policy to Copper, with a term of June 9, 2007 through June 9, 2008, with \$1 million/\$2

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<sup>2</sup>It appears that the named insured on policy number AR3360115A, in force from July 19, 2007 through July 19, 2008, is "Epsilon Heating & Plumbing, Inc.," however, neither plaintiffs nor defendants have raised this issue.

million limits. *Id.*

Finally, Colony also issued an excess policy to Danica, numbered AR3460588, with a term of July 19, 2007 through July 19, 2008. The limits were \$5,000,000 excess of the underlying CGL coverage.

According to Colony's complaint in the rescission action, prior to its issuance of any of the above five policies, Danica completed an insurance application. Colony alleges that several of Danica's responses to those questions were incorrect and represented material misrepresentations and concealments, upon which Colony relied when it agreed to issue the four CGL policies and one excess policy.

#### **Procedural Background**

After Colony commenced the rescission action, by motion both Zurich Pav-Lak sought to intervene as defendants. This court granted their motion, however, after Danica failed to timely answer Colony's complaint in the rescission action, this court granted a default judgment to Colony. Such order has been appealed and, on November 18, 2013, the Appellate Division, First Department, granted an interim stay of this court's order to rescind the five policies. Therefore, the rescission action is stayed at this time.

During the pendency of the rescission action, Zurich and its policyholders commenced the four actions upon which the instant

motions are based. Colony, Danica and Copper seek to dismiss based upon documentary evidence, an action pending between the same parties in another jurisdiction, and for failure to state a cause of action. Alternatively, defendants seek to have this action stayed pending complete resolution of the rescission action.

### **Discussion**

#### *Application for a Stay*

Movants seek a stay of the instant actions until the final resolution of the rescission action. On November 18, 2013, the Appellate Division, First Department, filed an application for an interim stay, pending decision on the appeal of this court's order granting a default judgment to Colony. The title of the matter subject to that application is "*Colony Ins. v Danica v Zurich/Pav-Lak & Five Consolidated Actions.*" The disposition "INTERIM STAY GRANTED" was determined on the same date. The order was then filed with the Clerk of this court on December 13, 2013.

There is no question that the disposition of the application before the Appellate Division, i.e., the stay, applies to the instant actions.

Therefore, the instant motions are held in abeyance during the duration of the stay ordered on November 18, 2013, by the Appellate Division, First Department.

SO ORDERED.

Dated:

A handwritten signature in cursive script, appearing to read "D.M. Mills", is written over a horizontal line.

J.S.C.

**DONNA M. MILLS, J.S.C.**