

**S.T.A. Parking Corp. v Lancer Ins. Co.**

2016 NY Slip Op 30979(U)

May 26, 2016

Supreme Court, New York County

Docket Number: 108091/2008

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
S.T.A. PARKING CORP.,

Plaintiff,

- against -

LANCER INSURANCE COMPANY,

Defendant.  
-----X

Index Number: 108091/2008

Sequence Number: 005

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendant's motion in limine:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits .....	1
Affirmation in Opposition - Exhibits .....	2
Reply .....	3

Upon the foregoing papers, the motion is granted in part and denied in part.

Background

For eight years the parties – plaintiff S.T.A. Parking Corp. (“STA”) and its insurer, defendant Lancer Insurance Company (“Lancer”) – have been litigating in this, and Lancer’s insurance declaratory judgment action (Lancer Ins. Co. v STA Parking Corp., Index No. 401599/09), at the trial and appellate levels, the issue of whether Lancer’s policy provides coverage (i.e., a defense and indemnity) for lawsuits brought against STA for property damage caused by construction work at STA’s premises. On December 22 2011, the court (Edmead, J.) found that the policy did not provide such coverage, but directed Lancer to pay STA’s attorney’s fees in the defense of the underlying property damage actions through the date of the coverage determination. The issue before this Court (on remand from the Appellate Division, First Department by Decision and Order dated May 14, 2015) is the amount of reasonable attorney’s fees, if any, due to STA over and above the \$180,000 Lancer already paid for such fees.

When the parties appeared for the attorney’s fees hearing on September 30, 2015, they took vastly different positions about the evidence to be presented under the Appellate Division’s May 14, 2015 Decision and Order, as well as other prior orders issued by the trial court. In view of the long and complicated history of the case, and in the absence of all of the pertinent orders, the Court could not render a determination about the scope of admissible evidence at trial and invited the parties to make appropriate motions in limine.

Lancer now moves for an order limiting STA’s proof in support of its attorney’s fees claim, asking the Court to preclude STA from submitting proof of (1) attorney’s fees incurred in the defense of Lancer’s declaratory judgment action because “it has been decided and affirmed that

STA” is not covered under the policy for the underlying actions (in other words, STA did not prevail in the declaratory judgment action); and (2) attorney’s fees billed at more than \$150 per hour, because that is the hourly rate that STA agreed to, and did accept; Lancer already paid \$180,000 in defense costs; and “Lancer was never obligated to defend and indemnify STA” in the underlying actions. STA opposes the motion, arguing that (1) by Decision and Order dated March 22, 2010 (Edmead, J.), the court found that STA is entitled to recover its defense costs in the declaratory judgment action, and said finding constitutes the law of the case; and (2) notwithstanding its agreement with Lancer to bill at \$150 per hour, it is entitled to recover attorney’s fees at the rate of \$375 per hour.

#### Underlying Facts

A brief examination of the facts and prior orders is necessary, and follows. In the fall of 2004, STA, the owner of a parking garage at 434 East 77<sup>th</sup> Street in Manhattan, commenced construction work at its garage. Soon after the work started, the neighboring buildings at 430 East 77<sup>th</sup> Street (“430”), 435 East 77<sup>th</sup> Street (“435”), and 436 East 77<sup>th</sup> Street (“436”), sustained property damage as a result of the work, and the building owners notified STA of the damages and claims. Lancer insured STA under a Garage Non-Dealer’s Liability policy, effective February 14, 2005 through February 14, 2006 (the “Policy”), which excepted from coverage property damages, and claims therefor, which were known by STA to have occurred prior to the policy period (February 14, 2005). In its application for insurance, STA did not advise Lancer of the property damages to 430, 435, and 436, or claims arising therefrom. To the contrary, STA represented that it was not aware of any liability or claims against STA for three years prior to the Policy.

Sometime after February 14, 2005, STA submitted to Lancer claims for property damage at 430, 435, and 436. A total of seven lawsuits resulted from the damages claims: four related to 430, one related to 435, and two related to 436. Lancer initially denied coverage for the lawsuits, then subsequently assumed the defense of STA in the 430 lawsuits *only*, pursuant to an agreement in which STA billed defense costs at the rate of \$150 per hour. Lancer also made remediation (indemnity) payments in the 430 lawsuits totaling \$84,365.88. In January 2008, however, Lancer notified STA it would no longer defend STA in the 430 lawsuits and ceased paying STA’s legal bills. In early June 2008, STA commenced the instant action seeking a declaration that the Policy provides coverage for STA in the underlying property damage lawsuits. In late June 2008, Lancer commenced its own action seeking a declaration that its Policy did not provide such coverage. In March of 2009, the declaratory judgment actions were consolidated for trial.

#### The Prior Orders

In July of 2009, Lancer moved for a default judgment against all of the defendants, except STA. Although discovery had not been complete, STA cross-moved for summary judgment dismissing Lancer’s complaint and compelling Lancer to pay defense costs in the underlying property damage actions and in Lancer’s declaratory judgment action. By Decision and Order dated March 22, 2010, the Court (Edmead, J.) held that (1) in view of the well-settled rule that an insurer’s duty to defend is broader than its duty to indemnify, Lancer was obligated to defend STA, and to pay its defense costs, in the 430, 435 and 436 property damage actions (with the exception of STA’s cross-claims in those actions, for which Lancer had no obligation); and (2) because Lancer had placed STA in a defensive posture in the declaratory judgment action, Lancer was obligated to reimburse STA for “its reasonable costs and attorneys fees incurred in defending claims for which it is successful ... thus far.” The court declined to find that Lancer is obligated to indemnify STA in the underlying actions, noting sharp questions of fact as to STA’s

knowledge, at the time it applied for insurance, of the 430, 435, 436 property damages and claims, requiring depositions and further discovery. Lancer filed a notice of appeal from the March 22, 2010 Order, but did not perfect the appeal.

The parties' promptly disagreed about the reasonable hourly rate of STA's attorney's fees due under the March 22, 2010 Order. Thus, by Order dated May 12, 2010, Justice Edmead directed Lancer to either move for a stay of the March 22 Order, or pay defense costs to STA in the 430, 435 and 436 actions at the "previously agreed to Lancer/STA rate of \$150/hr with adjustment, if any, to be determined at subsequent hearing." It is undisputed that, following the May 12, 2010 Order, Lancer paid STA's legal bills in the underlying actions at the rate of \$150 per hour, and STA accepted those payments under reservation of its right to seek additional fees. It is further undisputed that, all told, Lancer paid STA's defense costs in the underlying actions in the sum of approximately \$180,000, and that Lancer did not reimburse STA for any defense costs it incurred in the declaratory judgment action.

Upon completion of discovery herein, Lancer moved and STA cross-moved for summary judgment on their respective complaints. Lancer requested a declaration that, under the known loss exception to coverage, its Policy does not provide coverage to STA for the underlying actions, and for an order directing STA to reimburse Lancer for the defense costs and indemnity payments made therein. STA requested a declaration that it is entitled to coverage under the Policy for the underlying actions, and that Lancer must pay all defense costs therein, as well as in the declaratory judgment action. By Decision and Order dated December 22, 2011, Justice Edmead found that STA knew about the damages and claims prior to the inception of the Policy, thereby triggering the known loss exception to coverage. Thus, the court denied STA's cross-motion and granted Lancer's motion to the extent of (1) declaring that the Policy "does not provide coverage to" STA for the underlying property damage lawsuits; Lancer is not obligated to defend or indemnify STA "in any of the underlying actions"; and Lancer may "recover [from STA] monies it expended as remediation" payments in the 430 actions; and (2) awarding judgment in favor of Lancer against STA in the sum of \$84,365.88, plus statutory interest, as and for reimbursement of the remediation (indemnity) payments.

As for Lancer's duty to defend STA (and its concomitant obligation to pay attorney's fees), the December 22, 2011 Order addresses such duty in the underlying actions only. The Order does not contain a declaration that Lancer must reimburse STA for attorney's fees incurred in the declaratory judgment action and, instead, is silent on such fees. Indeed, as to the precise scope of Lancer's duty to defend and pay attorney's fees, and STA's claim of law of the case on this issue, the court held, in pertinent part:

In the March 2010 Decision, this court held that, under the insurance policy, **Lancer was obligated to defend STA in the underlying lawsuits**, based on the recognized law that the duty to defend is broader than the duty to indemnify (*see Federal Insurance Company v Kozlowski*, 18 AD3d 33 [1st Dept 2005]) (March 2010 Decision, at 22) [emphasis added]. This holding is indeed, as STA contends, law of the case, as, "when an issue is once judicially determined, that should be the end of the matter ..." (*Carbon Capital Management, LLC v American Express Co.*, 88 AD3d 933, 935-936 [2d Dept 2011]).

Lancer argues that, as an “insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision” (*Allstate Insurance Company v Zuk*, 78 NY2d 41, 45 [1991]), Lancer should receive recompense of all legal costs it has already expended in defense of STA in the underlying actions should it be relieved of the duty to indemnify by a decision in this motion. However, even if Lancer is relieved of further obligation to defend STA, it was still obligated to defend STA up until the question of indemnity was resolved, as established in the March 2010 Decision, and Lancer is not entitled to the return of monies already spent on STA’s defense.

STA appealed the December 22, 2011 Order, and, on October 17, 2013, the Appellate Division First Department unanimously affirmed the December 22, 2011 Order, with costs. S.T.A. Parking Corp. v Lancer Ins. Co., 110 AD3d 512 (1<sup>st</sup> Dep’t 2015).

Prior to perfecting its appeal, STA moved to reargue the December 22, 2011 Order, requesting a hearing on the amount of its reasonable attorney’s fees recoverable from Lancer in the underlying actions and declaratory judgment action. Lancer opposed the motion in its entirety. By Order dated March 13, 2012, the court granted STA’s motion to reargue “to the extent of” setting the matter down for a hearing to determine the reasonable attorneys’ fees” to which STA is entitled.

In November 2012, JHO Ira Gammerman conducted an attorney’s fees hearing, during which he accepted evidence on STA’s defense costs in the underlying actions and in the declaratory judgment action, and, upon such evidence, recommended that STA be awarded \$196,273.33 in attorney’s fees. This Court accepted JHO Gammerman’s recommendation, and, on May 13, 2013, signed an Order and Judgment awarding STA such sum.

Lancer appealed the Order and Judgment. By Decision and Order dated May 14, 2015, the Appellate Division First Department, reversed and vacated the Order and Judgment, and remanded the matter to this Court for a new hearing. S.T.A. Parking Corp. v Lancer Ins. Co., 128 AD3d 479, 479-480 (1<sup>st</sup> Dep’t 2015). The Appellate Division rejected Lancer’s argument that it is not obligated to pay *any* defense costs for STA based upon the finding of no coverage under the Policy. Instead, the court made clear that, under the December 22, 2011 Order, Lancer must pay STA’s defense costs in the underlying property damage actions – not the declaratory judgment action – up to the date of the coverage determination:

On a prior appeal, this Court affirmed an order, entered December 27, 2011, which, to the extent appealed from, declared that a policy issued by defendant Lancer did not provide coverage to plaintiff STA in **certain underlying property damage actions** against it (110 AD3d 512, 972 NYS2d 896 [1st Dept.2013], *lv. denied* 23 NY3d 902, 2014 WL 1776001 [2014] ) [emphasis added]. Lancer did not appeal from the portion of the December 27, 2011 order which held that, pursuant to the law of the case established by an earlier order issued in March 2010 (from which an appeal was

noticed but eventually withdrawn), Lancer was obligated to provide a defense for STA **in those actions** until the date the issue of coverage was determined [emphasis added]. ...

Thus, the only issue presented by this appeal is the propriety of Supreme Court's determination of the amount of attorneys' fees incurred in plaintiff's defense up to the date of the coverage determination. S.T.A. Parking Corp. v Lancer Ins. Co., 128 AD3d 479, 479-480 (1<sup>st</sup> Dep't 2015).

As noted above, the Appellate Division remanded the matter to this Court for a "new hearing ... to develop the record as to the reasonableness of the attorney's fees charged by [STA's] counsel." S.T.A. Parking Corp. v. Lancer Ins. Co., 128 AD3d 479, 480 (1<sup>st</sup> Dep't 2015). The Court now determines Lancer's instant motion regarding the proof to be submitted at the new hearing.

### Discussion

Although not expressly styled as such, Lancer's motion is in the nature a motion in limine, in that Lancer asks this Court to exclude or limit the evidence STA may offer at the attorney's fees hearing. See State v Metz, 241 A.D.2d 192, 198 (1<sup>st</sup> Dept 1998) ("Generally, the function of a motion *in limine* is to permit a party to obtain a preliminary order before or during *trial* excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use.").

Lancer's request to preclude STA from offering proof of its attorney's fees incurred in the declaratory judgment action is granted. The December 22, 2011 Order (Edmead, J.) conclusively determined that STA is entitled to recover defense costs in the underlying actions *only*; STA is not entitled to defense costs in the declaratory judgment action, and there is no fair reading of the Order that supports such conclusion. The court's analysis of Lancer's duty to defend focuses entirely and exclusively on Lancer's "obligat[ion] to defend STA in the **underlying lawsuits**, based on the recognized law that the duty to defend is broader than the duty to indemnify [emphasis added]." Absolutely no mention is made in the decision of any obligation on the part of Lancer to pay STA's defense costs in the declaratory judgment action, an obligation that is vastly different, separate and apart from, Lancer's duty to defend in the underlying actions. Compare Federal Ins. Co. v. Kozlowski, 18 AD3d 33, 40 (1<sup>st</sup> Dep't 2005) ("The rule is well settled that the duty to defend is broader than the duty to indemnify.") and Mighty Midgets, Inc. v. Centennial Ins. Co., 47 NY2d 12, 21 (1979) (insured entitled to recover attorney's fees from insurer "when he has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations."). Thus, under the doctrine *expressio unius est exclusio alterius*, the court's finding that Lancer must "defend STA up until the question of indemnity was resolved, as established in the March 2010 Decision," refers solely to STA's defense of the underlying actions, and not its defense of the declaratory judgment action. See generally Hasselback v. 2055 Walden Ave., Inc., \_\_ AD3d \_\_ [2016 WL 2602569] (4<sup>th</sup> Dep't 2016) ("Under the standard canon of contract construction *expressio unius est exclusio alterius*, that is, that the expression of one thing implies the exclusion of the other").

Indeed, under well-settled law, because STA did not prevail in the declaratory judgment action, it is not entitled to recover attorney's fees in the defense thereof. See Mighty Midgets, Inc. v. Centennial Ins. Co., *supra*, 47 NY2d at 22 (1979) (explaining that "it is not inherently unfair to

disallow” attorney’s fees to an “unsuccessful” insured). The court’s finding in the March 22, 2010 Order (Edmead, J.) that STA could recover its attorney’s fees in the declaratory judgment action, does not change this result: the court issued the March 22 Order prior to a final determination of the prevailing party in Lancer’s declaratory judgment action, which is the time to award STA attorney’s fees, if appropriate; and, in any event, the December 22, 2011 Order abrogated the March 22, 2010 Order. The December 22, 2011 Order was unanimously affirmed by the Appellate Division, and, thus, the finding limiting Lancer’s duty to defend to the underlying actions constitutes the law of the case. See Morrison Cohen, LLP v Fink, 92 AD3d 514, 515 (1<sup>st</sup> Dep’t 2012) (“[a]n appellate court’s resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court”).

The court’s March 13, 2012 Order granting STA’s motion also does not change the result. The motion granted re-argument only to the extent of setting STA’s attorney’s fees down for a hearing; the court did not change, or modify in any way, its finding limiting the scope of recoverable fees to those incurred in the underlying actions. Unfortunately, however, at the first hearing in November 2012, JHO Gammerman incorrectly accepted STA’s proof of attorney’s fees incurred in the declaratory judgment action (for that reason alone, this Court should not have confirmed said award). In any event, Lancer timely appealed the Order and Judgment arising from the first hearing, and, in its May 14, 2015 decision and order, the Appellate Division made clear that, under the December 22, 2011 Order, STA is entitled to attorney’s fees only in the defense of “certain underlying property damage actions ... up to the date of the coverage determination.” S.T.A. Parking Corp. v Lancer Ins. Co., 128 AD3d 479, 479-480 (1<sup>st</sup> Dep’t 2015). Remarkably absent from the Appellate Division decision is any mention of the declaratory judgment action, and there is no fair reading of the decision which lends itself to the conclusion that STA is entitled to be reimbursed for its attorney’s fees incurred therein. Accordingly, STA is hereby precluded from offering evidence at the attorney’s fees hearing of defense cost it incurred in the declaratory judgment action.

However, Lancer’s request to preclude STA from offering proof of its attorney’s fees incurred in the underlying actions, above the \$180,000 Lancer paid, is denied. As this Court sees it, the prior trial court and Appellate Division orders leave open for determination at the new attorney’s fees hearing the following issues, for which all relevant proof may be submitted: whether STA is entitled to collect attorney’s fees at more than the agreed upon \$150 per hour, and, if so, how much more than \$150 per hour and from what point in time. Of course, if STA is entitled to more than \$150 per hour, the Court will take into consideration the standard factors, such as time, labor and skill required, difficulty of the matter, etc. (see Matter of Freeman, 34 NY2d 1, 9 (1974); Solow Mgt. Corp. v. Tanger, 19 AD3d 225, 226 (1<sup>st</sup> Dep’t 2005).

#### Conclusion

Lancer’s motion is granted in part and denied in part. The parties are directed to call Chambers, via conference call to (646) 386-3181, to schedule the attorney’s fees hearing.

Dated: May 26, 2016




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Arthur F. Engoron, J.S.C.