MVP Delivery & Logistics, Inc. v American Intl. Group
2017 NY Slip Op 32280(U)
October 23, 2017
Supreme Court, New York County
Docket Number: 650882/2016
Judge: Eileen Bransten

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

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MVP DELIVERY AND LOGISTICS, INC.,

Plaintiff,

-against-

Index No. 650882/2016

Motion Seq. Nos. 03, 04, 05

Motion Date: 11/13/16

AMERICAN INTERNATIONAL GROUP, AIG PROPERTY CASUALTY, INC., AIG DOMESTIC CLAIMS, INC., AIG CLAIMS, INC., NATIONAL UNION FIRE INSURANCE CO of PITTSBURGH, PA, AMERICAN ALTERNATIVE INSURANCE CO., DHL HOLDINGS (USA), INC., DHL WORLDWIDE EXPRESS, INC., DHL EXPRESS, INC., and AIRBORNE INC.,

Defendants.

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BRANSTEN, J.

This matter comes before the Court on three motions: (1) a motion to dismiss brought by Defendants DHL Holdings (USA), Inc., DHL Worldwide Express, Inc., DHL Express, Inc., Airborne, Inc. (collectively "DHL"), and Mark Dietz (Motion Sequence 003), (2) a motion to dismiss or stay brought by Defendants National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union"), American International Group, Inc., AIG Property Casualty Inc., and AIG Claims Inc. (collectively the "National Union Defendants") (Motion Sequence 004), and (3) a motion to disqualify the law firm of Hodgson Russ, LLP ("Hodgson Russ") as attorneys of record for National Union brought by Plaintiff MVP Delivery and Logistics, Inc. ("MVP") (Motion Sequence 005). For the reasons set forth below, Plaintiff's motion to disqualify counsel is denied and the National Union Defendants' motion to stay is granted.

I. Background[1]

Kevin Grupp ("Grupp") and Robert Moll ("Moll") founded MVP in 2000 to operate in New York as a delivery and logistics company. Compl. ¶ 36; Kern Affirm. in Supp. Pl.'s Mot. to Disqualify ("Kern Affirm.") ¶ 5. MVP obtained contracts to pick up and deliver parcels for Airborne Express, Inc., which was subsequently acquired by DHL on or about August 15, 2003. Compl. ¶ 36. On or about August 25, 2004, MVP entered into a cartage agreement with DHL (the "Cartage Agreement"), whereby MVP agreed to pick up and deliver parcels for DHL customers. *Id.*

A. The Carlson Wrongful Death Action

On July 7, 2004, a delivery van owned by MVP and driven by an MVP employee, William Porter ("Porter"), collided with another vehicle and fatally injured Claudia Carlson. *Id.* ¶ 76. At the time of the accident, Porter was on a lunch break and a personal errand. *Id.* Claudia Carlson's estate brought a wrongful death action against DHL, MVP, and Porter styled *Carlson v. Porter*, Index No. 121963/2005 (Sup. Ct., Niagara Cnty.) (the "Carlson Wrongful Death Action").

The Carlson Wrongful Death Action proceeded to trial and the Carlson estate obtained a $20 million judgment against Porter, MVP, and DHL. *Id.* ¶ 79. On appeal, the Fourth Department dismissed the action against DHL because it found Porter had been

[1] The allegations cited in this section are drawn from the Amended Verified Complaint, unless otherwise noted.

acting outside the scope of his employment at the time of the accident. *Id.* ¶ 80. The Fourth Department did not dismiss the action as to MVP, finding MVP was statutorily liable pursuant to Vehicle & Traffic Law § 388. *Id.* ¶ 81.

Thereafter, the Carlson estate, MVP, and Porter stipulated to reduce the judgment to approximately $7.3 million. *Id.* ¶ 83. The Second Amended Judgment was entered against MVP and Porter on May 12, 2009. *Id.* ¶ 84. A Third Amended Judgment was entered on October 22, 2015, to reflect the modification of the judgment pursuant to CPLR 5044, due to the failure of MVP or Porter to make payments under the judgment. *Id.* ¶ 85. To date, the judgment has not been satisfied.

On March 6, 2009, counsel for the Carlson estate wrote to both MVP and Porter, asserting that the judgment entered against them was covered by the insurance policies National Union had issued to DHL, as well as an intermediate excess policy that American Alternative Insurance, Co. ("AAIC") issued to DHL. On or about March 12, 2009, Porter's counsel wrote to National Union inquiring whether Porter was covered under the policies that National Union issued to DHL. In a letter dated April 10, 2009, National Union's counsel informed Porter's counsel that Porter was not an "insured" under the subject policies.

B. The Carlson Insurance Action

After the judgment was rendered in the Carlson Wrongful Death Action, Porter assigned his potential right to insurance coverage to the Carlson estate. Szczepanski

Affirm. in Supp. National Union's Mot. to Dismiss ("Szczepanski Affirm.") ¶ 29. In 2011, the Carlson estate brought an action styled *Carlson v. American International Group, Inc., et al.*, Index No. 143033/2011 (Sup. Ct., Niagara Cnty.) (the "Carlson Insurance Action"), against National Union, American International Group, Inc., AIG Claims, Inc., AAIC, and DHL seeking a declaration that Porter was entitled to coverage under the subject policies. *Id.* ¶ 30. The Carlson estate also alleged DHL entered into a conspiracy with AIG to misrepresent the amount of available insurance coverage in the underlying personal injury action. *See id.* MVP was not a party to the Carlson Insurance Action.

DHL moved to dismiss the conspiracy claim for failure to state a cause of action. Simultaneously, National Union moved to dismiss the complaint, arguing Porter and MVP were not "insureds" entitled to coverage under the subject policies. In an order dated June 25, 2014, the Supreme Court, Niagara County, granted DHL's motion to dismiss and denied National Union's motion to dismiss. *Id.* ¶ 32.

National Union appealed the denial of its motion to dismiss and the Carlson estate cross-appealed the dismissal of the conspiracy claim against DHL. In 2014, National Union asked Hodgson Russ, LLP to represent it on the appeal to the Fourth Department in the Carlson Insurance Action. Kearney Affirm. in. Opp. Pl.'s Mot. to Disqualify ("Kearney Affirm.") ¶ 17. Prior to 2014, Hodgson Russ were not involved in the Carlson Wrongful Death Action or the Carlson Insurance Action. *Id.*

In an order dated July 2, 2015, the Fourth Department affirmed the dismissal of the Carlson estate's conspiracy claim and granted National Union's motion to dismiss the

complaint. Kern Affirm. ¶ 33. In dismissing the complaint, the Fourth Department concluded that the Cartage Agreement did not show that DHL had sufficient control over the MVP van, and therefore the van was not a "hired" vehicle under the National Union Policies. *See Carlson v. American Int'l Grp., Inc.*, 130 A.D.3d 1479, 1481 (4th Dep't 2015).

Subsequently, the Carlson estate moved for leave to appeal the Fourth Department's July 2, 2015 decision, which was denied by the Fourth Department on October 2, 2015. *See* 132 A.D.3d 1331 (4th Dep't 2015). On February 18, 2016, the Court of Appeals granted the Carlson estate leave to appeal and heard oral argument on March 28, 2017. *See* 26 N.Y.3d 918 (2016). By order dated April 4, 2017, the Court directed the case to be reargued before the Court of Appeals and invited amicus curiae participation. *See* 29 N.Y.3d 962 (2017). As of the date of this Decision, the Carlson Insurance Action is still pending before the Court of Appeals.

C. The Erie County Action

On November 11, 2015, MVP delivered a notice of claim to National Union, which notified National Union of the entry of the Third Amended Judgment against MVP and requested a decision on the satisfaction of the judgment within thirty days. The letter also stated in the event the judgment is not satisfied, MVP would commence suit to enforce the judgment. On December 11, 2015, National Union disclaimed coverage to MVP.

On December 16, 2015, National Union brought an action in Supreme Court, Erie County styled *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Delivery and Logistics, Inc.*, Index No. 814289/2015 (Sup. Ct., Erie Cnty.) (the "Erie County Action"). National Union sought a declaration that it had no duty to indemnify MVP for Carlson's judgment because MVP was not an "insured" under the National Union policies. Szczepanski Affirm. ¶ 38. On February 10, 2016, MVP answered the complaint. The action is currently stayed pending the appeal of the Fourth Department's July 2, 2015 decision in the Carlson Insurance Action.

D. This Action

On February 19, 2016, MVP commenced this action against DHL and the National Union Defendants by Summons and Complaint. Plaintiff alleges eight causes of action for declaratory judgment, breach of contract, bad faith, tortious interference with contract, civil conspiracy, fraudulent concealment, civil RICO, and reformation of contract. Defendants filed motions to dismiss on April 15, 2016. On June 24, 2016, MVP moved to disqualify counsel for National Union, Hodgson Russ, due to the firm's representation of MVP's principals, Kevin Grupp and Robert Moll, in prior actions against DHL.

E. Grupp and Moll's FCA Cases Against DHL

In 2008, Grupp and Moll retained Hodgson Russ to represent them as "relators" in several False Claims Act ("FCA") cases against DHL. Sinatra Affirm. in Opp. Pl.'s Mot.

to Disqualify ("Sinatra Affirm.") ¶ 1. MVP was not a named party in any of the FCA cases. *See id.* ¶ 3. The FCA cases concerned DHL's fuel surcharge practices and its contractual relationships with its governmental customers. *Id.* ¶ 4. Grupp and Moll asserted DHL had been defrauding federal and state governments by charging a "jet fuel surcharge" on shipments that travelled only by truck. Kearney Affirm. ¶ 2. In the course of representation, Hodgson Russ received background information about MVP's business and its contractual relationship with DHL. Sinatra Affirm. ¶ 4. Hodgson Russ represented Grupp and Moll until 2015. Kearney Affirm. ¶ 11.

II. MVP's Motion to Disqualify Hodgson Russ

MVP now moves to disqualify National Union's counsel, Hodgson Russ, pursuant to New York Code of Professional Conduct Rule 1.7. MVP argues Hodgson Russ' representation of Grupp and Moll in the FCA cases created a conflict of interest that merits Hodgson Russ' disqualification from this action. The alleged conflict of interest arose in 2014, when Hodgson Russ began representing National Union on the appeal of the Carlson Insurance Action at the same time Hodgson Russ was representing Grupp and Moll in the FCA cases against DHL.

A. Legal Standard

The provisions of the Code of Professional Conduct establish important "ethical standards that guide attorneys in their professional conduct." *S & S Hotel Ventures Ltd.*

P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443 (1987). Nevertheless, when Code provisions are raised in the context of a motion to disqualify counsel, they are not to be applied rigidly as if they were "controlling statutory or decisional law." *Id.* Accordingly, in applying the Code of Professional Conduct, courts must weigh the important ethical standards represented by the Code against other interests implicated in a motion to disqualify counsel, including a litigants' rights to be represented by counsel of their choice and the possibility that the motion to disqualify is a litigation tactic. *See Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 638 (1998).

A party seeking disqualification of its adversary's lawyer must prove (1) the existence of a prior attorney-client relationship, (2) the matters involved in both representations are substantially related, and (3) the interests of the present client and former client are materially adverse. *Tekni–Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131 (1996). "Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification." *Id.*

B. Existence of Attorney-Client Relationship

The threshold issue on this motion to disqualify is whether MVP establishes that it had a prior attorney-client relationship with Hodgson Russ. There is no question Grupp and Moll were former clients of Hodgson Russ. MVP argues Hodgson Russ also represented MVP through its representation of Grupp and Moll, who were principals of

MVP.[2] However, MVP does not provide any case law supporting its assertion that representation of an entity's principals is the same as representing the entity itself.

The burden is on MVP to prove the existence of its attorney-client relationship with Hodgson Russ. *See Campbell v. McKeon*, 75 A.D. 3d 479, 480 (1st Dep't 2010). "[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task." *Pellegrino v. Oppenheimer & Co.*, 49 A.D.3d 94, 99 (1st Dep't 2008). MVP has submitted no evidence to demonstrate Hodgson Russ agreed to or acted as its attorney in any action or legal matter. Moreover, MVP was not listed as a party in the captions of the FCA cases and Grupp and Moll signed the engagement letter with Hodgson Russ in their individual capacities, not as officers of MVP. *See* Kearney Affirm. ¶¶ 4, 9, Ex. A. Finally, John Sinatra, an attorney at Hodgson Russ who worked on the FCA cases, denies that MVP was Hodgson Russ' client. *See* Sinatra Affirm. ¶ 3. Although the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based solely on his own beliefs or actions. *See Pellegrino*, 49 A.D.3d at 99.

MVP also argues Hodgson Russ' December 2008 engagement letter to Grupp and Moll serves as an admission that it was advising Grupp, Moll *and* MVP regarding their

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[2] Hodgson Russ concedes it represented MVP in a small matter involving invoices from Crowne Collision Service that concluded in 2009. *See* Sinatra Affirm. ¶ 6. Hodgson Russ states the dispute had nothing to do with the FCA cases, DHL, the Carlson matters, or insurance coverage. *See id.* Plaintiff does not raise the Crowne Collision matter in its motion and thus the Court's analysis is limited to the FCA cases.

litigation and dispute with DHL. *See* Kern Affirm. ¶ 44. In the last paragraph of the letter, Daniel Oliverio warned Grupp and Moll of a risk "that DHL may find out about [the New York FCA case] before making its termination payments to independent contractors like MVP." *See* Kern Affirm., Ex. C. Despite MVP's contention, Mr. Oliverio clearly made this statement to apprise Grupp and Moll of collateral business risks associated with revealing their identities as relators after the complaints were unsealed. The statement was neither an admission that Hodgson Russ represented MVP nor an expansion of the scope of representation to matters other than the FCA cases.

Therefore, MVP fails to establish a prior attorney-client relationship with Hodgson Russ. *See Campbell*, 75 A.D. 3d at 480-81 (dismissing motion to disqualify for failure to establish attorney-client relationship).

C. Substantially Related Actions

Notwithstanding MVP's failure to establish the existence of an attorney client relationship with Grupp and Moll, the Court also finds MVP fails to establish the FCA cases are substantially related to this action. "In order to show that the matters are 'substantially related,' [movants] must show that the issues in the matters are identical or essentially the same." *Becker v. Perla*, 125 A.D.3d 575, 575 (1st Dep't 2015).

MVP argues this action and the FCA cases pertain to MVP's relationship with DHL and MVP's knowledge of DHL's operations. The FCA cases concerned DHL's fuel surcharge practices and its contractual relationships with its governmental customers. This

action concerns the Cartage Agreement between DHL and MVP and, specifically, the insurance policy associated with that agreement. Although MVP's daily operations and its work with DHL as a subcontractor are at issue in this case, MVP fails to establish the facts or issues raised in the FCA cases are *identical* or *essentially the same* as those raised in this action. *See Becker*, 125 A.D.3d at 575 (dismissing motion to disqualify where movant failed to show matters were "substantially related") (emphasis added). Absent a substantial relationship between the FCA cases and this action, disqualification would be warranted only upon a showing that Hodgson Russ obtained specific confidential information substantially related to this action. *See Lightning Park, Inc. v. Wise Lerman & Katz, P.C.*, 197 A.D.2d 52, 55 (1st Dep't 1994).

Furthermore, MVP contends Grupp and Moll provided confidential information to Hodgson Russ in connection with the FCA cases. *See* Kern Affirm. ¶ 56. "A party seeking disqualification of an attorney based on the disclosure of confidential information previously made to the attorney . . . has the burden of identifying the specific confidential information imparted to the attorney." *Muriel Siebert & Co. v. Intuit Inc.*, 32 A.D.3d 284, 286 (1st Dep't 2006) (internal quotation marks omitted), *aff'd*, 8 N.Y.3d 506 (2007). Here, MVP fails to specify what confidential information was shared with Hodgson Russ or provide any evidence that Hodgson Russ obtained privileged material during the FCA cases. MVP's conclusory statement that it provided details about "MVP's mode of operation" make it difficult, if not impossible, for a court to determine whether the alleged

information was in fact a "confidence" or whether the information was generally known. *See Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 638 (1998).

Therefore, there is no basis for disqualification and Plaintiff's motion to disqualify Hodgson Russ as counsel of record for National Union is denied. *See Muriel Siebert*, 32 A.D.3d at 287 (finding disqualification inappropriate where movant failed to demonstrate privileged material was disclosed).

III. Defendants' Motions to Dismiss

Defendants now move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1), (4), (5), and (7). In addition, the National Union Defendants move for a stay pursuant to CPLR 2201. The Court will address this argument first.

A. Stay Proceedings

Pursuant to CPLR 2201, the Court may grant a stay "in a proper case, upon such terms as may be just." It is a well-settled rule that an action may be stayed pending resolution of a prior action between the same parties where there are overlapping issues and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action. *Buzzell v. Mills*, 32 A.D.2d 897, 897 (1st Dep't 1969). Where there is a substantial identity of parties, claims and relief sought between the two actions, a stay may be warranted upon "due consideration of issues of comity, orderly procedure, and judicial economy." *Asher v. Abbott Labs.*, 307 A.D.2d 211, 211-12 (1st

Dep't 2003). Here, the National Union Defendants argue this action is should be stayed because the Court of Appeals will determine the appeal of the Fourth Department's July 2015 decision in the Carlson Insurance Action.

1. *Identical Issues*

Both the National Union and DHL Defendants argue the Fourth Department necessarily decided identical issues in the Carlson Insurance Action. Identity of issues exists where the legal theory in both actions is the same and there are no significant factual differences between them. *See Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (1985) (applying collateral estoppel analysis).

Here, the underlying facts in this action are identical to the Carlson Insurance Action. The actions arise from the same accident, the same insurance policies are at issue, and the same claims are alleged. In the Carlson Insurance Action, the Fourth Department held "the cartage agreement does not show that DHL had sufficient control over the MVP vehicle for it to be deemed a 'hired' automobile." *Carlson v. American Int'l Grp., Inc.*, 130 A.D.3d 1479, 1481 (4th Dep't 2015). In addition, the Fourth Department found, "inasmuch as DHL did not have control over MVP vehicle, it cannot be said in any realistic sense that DHL could grant MVP permission to use it." *Id.* (internal quotation marks omitted). Thus, the issue of whether MVP was an "insured" under the insurance policy was decided by the Fourth Department in the Carlson Insurance Action. The identical issue is being raised by MVP in this action.

Furthermore, the MVP and the Carlson Estate both seek identical relief: a declaration that Porter was an "insured" under the National Union insurance policy. Although MVP alleges additional claims against Defendants in this action, all the claims hinge on the determination that Porter was an "insured." Therefore, Defendants have established the issues and claims in this action and the Carlson Insurance Action are identical.

2. *Substantial Identity of Parties*

There must be a substantial identity of parties between the two actions to warrant a stay; complete identity of the parties is not required. *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 652 (1st Dep't 2012). National Union and DHL were parties to the Carlson Insurance Action. While MVP was not a party to the Carlson Insurance Action, National Union argues MVP's interests and rights were represented by the Carlson Estate.

Courts have held that a nonparty is in privity with a party where it has a relationship with a party to the prior action such that its rights are "conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation," *D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664 (1990), or where the non-party's "interests [were] represented by a party to the [prior] action." *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277 (1970). When a plaintiff maintains a direct action against an insurer pursuant to Insurance Law § 3420(b)(1), the plaintiff "stands in the shoes" of the insured and can have

no greater rights than the insured. *See D'Arata*, 76 N.Y.2d at 665. The Carlson estate was a judgment creditor of MVP and "stood in the shoes" of MVP during the Carlson Insurance Action. Thus, the Carlson estate was in legal privity with MVP.

MVP argues there is no privity because the Fourth Department's decision in the Carlson Insurance Action occurred after the relationship between the Carlson estate and MVP was formed. In support of its argument, MVP relies on *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979). In that case, the Court of Appeals found that plaintiff Gramatan was not bound by the terms of a prior judgment because, "[i]n the assignor-assignee relationship, privity must have arisen after the event out of which the estoppel arises." *Gramatan*, 46 N.Y.2d at 486-87. However, *Gramatan* is inapposite, as the relationship between the Carlson estate and MVP did not arise out of an assignment. Therefore, this Court finds there was a substantial identity of parties to merit granting a stay of this action.

3. *Comity, Orderly Procedure, and Judicial Economy*

Finally, the interests of comity, orderly procedure and judicial economy weigh in favor of a stay. As noted above, the Fourth Department decided the issue of whether Porter was an "insured" under the National Union policies in the Carlson Insurance Action. Thus, the Court of Appeals' decision in the Carlson Insurance Action would necessarily dispose of or the limit the issues in this action. *See Buzzell v. Mills*, 32 A.D.2d 897, 897 (1st Dep't 1969). Moreover, a different determination in this action would potentially impair the

rights established by the Carlson Insurance Action. *See Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500-01 (1984).

The Fourth Department's decision is currently on appeal in the Carlson Insurance Action. Therefore, this action is stayed pending the Court of Appeals' decision in the Carlson Insurance Action. The Court need not address Defendants other grounds to dismiss the Verified Complaint pursuant to CPLR 3211(a)(1), (4), (5), and (7) at this time.

IV. Conclusion

Accordingly, it is hereby

ORDERED MVP's motion to disqualify Hodgson Russ as counsel for National Union is DENIED; it is further

ORDERED the National Union Defendants' motion is GRANTED IN PART to the extent this action is stayed pending the Court of Appeals' decision in *Carlson v. American International Group, Inc., et al.*, Index No. 143033/2011.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 23, 2017

ENTER:

Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN
J.S.C.