

Jerusalem Ave. Taxpayer, LLC v Liberty Mut. Ins. Co.
2018 NY Slip Op 33371(U)
December 28, 2018
Supreme Court, New York County
Docket Number: 159842/13
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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JERUSALEM AVENUE TAXPAYER, LLC and
CASTLEPOINT INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 159842/13

LIBERTY MUTUAL INSURANCE COMPANY,
BEST YET MARKET, INC. and BEST YET OF
HICKSVILLE, INC.

Defendants.

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CAROL R. EDMEAD, J:

Plaintiffs Jerusalem Avenue Taxpayer, LLC (Jerusalem) and CastlePoint Insurance Company (CastlePoint) move, pursuant to CPLR 3217, to discontinue their claims, and, pursuant to CPLR 3211(a) (2) and (5), to dismiss the counterclaim of defendant Liberty Mutual Insurance Company (Liberty Mutual). That motion is unopposed. Liberty Mutual cross-moves, pursuant to CPLR 5015 and 5523, for an order directing Jerusalem to pay \$375,000, plus interest, in restitution to Liberty Mutual, or, in the alternative, pursuant to CPLR 3025, for leave to file an amended answer to the second amended complaint, raising a counterclaim for such restitution.

This action arises out of a now-settled action, in which Jerusalem was the defendant in a personal injury case. In a decision and order, dated January 14, 2015, this court held that Liberty Mutual was required to defend and indemnify Jerusalem in the underlying case. After Liberty Mutual filed its notice of appeal from this court's order, Liberty Mutual and Castle Point, for their own prudential reasons, entered into an "Interim Fronting Agreement" (Agreement), dated June 16, 2014, pursuant to which those parties agreed equally to fund a

\$750,000 fund, with which to settle the Jerusalem action. *See* Gershweir, aff, exhibit D. The Agreement also provides that:

“Should either party be required, based on the final determination of the Coverage Action, to reimburse the other for all or part of the other’s contribution to the settlement, statutory interest . . . shall be added.”

Id. at 2. Thus, at the time that they entered into the Agreement, Liberty Mutual and CastlePoint expressly recognized that they were under no compulsion to do so. By order, entered on March 22, 2016, the Appellate Division, First Department reversed this court’s order, on the ground that defendants Best Yet Market, Inc. and Best Yet of Hicksville, Jerusalem’s tenants, in the premises of which the underlying accident occurred, were necessary parties. *Jerusalem Avenue Taxpayer, LLC v Liberty Mutual Ins. Co.*, 137 AD3d 600 (1st Dept 2016). Finally, insofar as is relevant here, by order of the Superior Court of California, dated March 30, 2017, CastlePoint was placed in liquidation, with the California Insurance Commissioner appointed as Liquidator. The liquidation order bars all persons “from instituting prosecuting, or maintaining any action at law or suit in equity . . . against CastlePoint or against the Liquidator.” *See* NYSCEF Doc, No. 83.

CPLR 5523 provides, in relevant part, that:

“A court reversing or modifying a final judgment or order . . . may order restitution of property or rights lost by the judgment or order.”

CPLR 5015 (d) provides, in relevant part, that:

“Where a judgment is set aside or vacated, a court may direct and enforce restitution in like manner . . . as where a judgment is reversed on appeal.”

Thus, an insurer was granted restitution of the sum it paid on behalf of its insured while judgment against the insured was pending on appeal, when that judgment was subsequently reversed. *Polipo v Sanders*, 245 AD2d 2 (1st Dept 1997). Here, by contrast, there was no

judgment against Jerusalem, and the Agreement was expressly entered into for the purpose of bringing about a settlement of that underlying case. Statutory restitution is appropriately ordered where the return of “funds paid pursuant to a[n] [order] set aside on appeal” is sought. *Gaisi v Gaisi*, 108 AD2d 687, 688 (2d Dept 2013) (internal quotation marks omitted). Like common law restitution, statutory restitution is intended to restore parties to the positions they were in. *Id.* Here, statutory restitution would be inappropriate, because the funds that Liberty Mutual contributed, pursuant to the Agreement, were not “paid pursuant to a[n] [order] set aside on appeal.” Common-law restitution would also be inappropriate, because requiring Jerusalem to pay Liberty Mutual the amount that the latter contributed to settle the action against Jerusalem would put Jerusalem in a worse position than it was in, prior to the settlement of the case against it. After all, Jerusalem purchased insurance. The facts that: (1) Liberty Mutual believes that this court’s order, requiring it to defend and indemnify Jerusalem, was wrongly decided; and (2) Liberty Mutual can have no recourse against CastlePoint, because of the latter’s insolvency, are no justification for penalizing Jerusalem.

Because Liberty Mutual’s proposed counterclaim against Jerusalem, alleging restitution, would be “clearly devoid of merit,” there is no reason to grant Liberty Mutual leave to assert such a counterclaim. *Perrotti v Becker, Glynn, Melamed & Muffly LLP.*, 82 AD3d 495, 498 (1st Dept 2011), quoting *Lama Holding Co. v Smith Barney*, 88 NY3d 413, 421 (1996).

Accordingly, it is hereby

ORDERED that the motion of plaintiffs Jerusalem Avenue Taxpayer, LLC and CastlePoint Insurance Company to withdraw their claims and to dismiss defendant Liberty Mutual’s counterclaim is granted and said claims are withdrawn with prejudice; and it is further

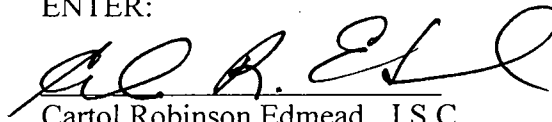
ORDERED that the cross motion of defendant Liberty Mutual Insurance Company is denied; and it is further

ORDERED that the Clerk of the Court shall enter Judgment Accordingly; and it is further

ORDERED thaty Plaintiffs shall serve a copy of this Order with Notice of Entry with twenty (20) days of entry on all counsel.

Dated: December 28, 2018

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMED
J.S.C.