Fireman's Fund Ins. Co. v Murphy-Clagget
2019 NY Slip Op 32334(U)
August 1, 2019
Supreme Court, New York County
Docket Number: 650546/2019
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

FIREMAN'S FUND INSURANCE COMPANY and THE AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

MARY MURPHY-CLAGGET, as Temporary Administrator for the Estate of PIETRO MACALUSO, and THE PARTIES LISTED ON EXHIBIT A,

Defendants.

INDEX NO. 650546/2019
MOTION DATE 07/25/2019
MOTION SEQ. NO. 003
MOTION CAL. NO. ______

The following papers, numbered 1 to 10 were read on plaintiff's motion to deposit funds into the Court and to stay the litigation:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 4
Answering Affidavits — Exhibits	5-6, 7-9
Replying Affidavits	10

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion for an Order providing a declaration in connection with their interpleader action; expenses incurred in defense of asbestos bodily injury claims asserted against Peerless Industries, Inc. (hereinafter "Peerless); and staying all claims instituted in this Court by any defendant against Peerless until further Order of this Court, is denied. Defendants' joint motion filed under Motion Sequence 007, seeking an Order pursuant to CPLR § 3211(a)(7) dismissing the plaintiffs' interpleader complaint with prejudice for failure to state a cause of action is granted. Defendant Burnham LLC's motion filed under Motion Sequence 008, seeking an Order pursuant to CPLR § 3211(a)(7) dismissing the plaintiffs' interpleader complaint with prejudice for failure to state a cause of action is granted.

Plaintiffs, Fireman's Fund Insurance Company (hereinafter "FFIC") and The American Insurance Company (hereinafter "TAIC"), are insurance companies that issued second-layer excess liability policies to Peerless, a company that manufactures boilers and is a defendant in asbestos-related personal injury and wrongful death actions in New York State and across the country.

A lawsuit was filed in the United States District Court for the Eastern District of Pennsylvania to resolve coverage disputes between Peerless and a

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

group of different insurers that included FFIC and TAIC. Plaintiffs entered into a confidential settlement agreement with their insured Peerless, that resolved the litigation. The agreement, entered into on September 25, 2012, settled and resolved coverage disputes on a compromise basis, with indemnity payments made under FFIC and TAIC policies after the lower-layer policies issued by other insurers had been exhausted, pursuant to the terms of the agreement. The September 25, 2012 settlement agreement also reduced the limit for the combined FFIC and TAIC policies to $39.5 million, to be allocated evenly with a reservation of rights over plaintiffs' obligation to defend Peerless (Mot. Exh. D).

In 2016, a new dispute arose between Peerless and the plaintiffs about the implementation of the September 25, 2012 settlement agreement. The parties negotiated to avoid costly litigation, and on February 4, 2016 entered into second confidential agreement. At the time the parties entered into the second confidential agreement, the lower layer policies with payment obligations were either exhausted, or about to be exhausted. The February 4, 2016 agreement resulted in additional compromises, specifically: (1) a further $2 million reduction in the limits of the plaintiffs' combined policies, allocated evenly across the policies, making a total of $37.5 million available, with $12.5 million available per occurrence and in the aggregate for asbestos claims; (2) In accordance with the September 25, 2012 agreement the plaintiffs agreed to make indemnity payments and defense costs upon the exhaustion of lower-layer insurance; (3) the parties agreed to count defense costs towards the exhaustion of the aggregate limits of the policies, with Peerless agreeing to waive and release any reserved claims of plaintiffs' duty to defend or pay costs; and (4) all of the defense expenses and indemnity payments were to be allocated evenly across all of the plaintiffs' policies (Mot. Exh. E, pgs. 8-10 and 15).

Defendants in this interpleader action are the plaintiffs or their estates who have filed lawsuits alleging personal injury or wrongful death from exposure to asbestos in Peerless' products, and Peerless' co-defendants in those asbestos actions. These asbestos lawsuits include, *Mary Murphy-Clagett, as temporary administrator for the estate of Pietro Macaluso v. A.O. Smith Corp. et al.*, Supreme Court of New York, New York County, index number 190311/2015 (hereinafter "*Macaluso*").

The *Macaluso* lawsuit had three remaining defendants: Peerless, A.O. Smith Water Products Company, and Burnham LLC (hereinafter referred to jointly as the "*Macaluso Defendants*"). On April 13, 2018 a jury verdict was entered that found each of the three *Macaluso Defendants* liable for 25 percent, and unnamed defendants liable for the remaining 25 percent, of damages totaling $60 million. On January 9, 2019, after post-trial motions, the court reduced the *Macaluso* judgment to $29 million total; after discounting by 25 percent for the "other fault sharers," the three defendants were liable for $21.75 million; with costs, interest, and after an offset for survival benefits, the judgment totaled $22,566,514 (Mot. Exh. I). The judgment was subsequently amended to comply with CPLR §50-B, filed and docketed with the New York County Clerk's Office on January 30, 2019

(Mot. Exh. J). On February 24, 2019, Peerless filed an appeal with the Supreme Court, Appellate Division, First Department (Mot. Exh. K).

On January 28, 2019 plaintiffs filed the instant interpleader action, alleging that Peerless had almost exhausted the available coverage, with $3,946,154.62 in coverage remaining under the FFIC policy, and $1,946,154.62 remaining under the TAIC policy, and stating "upon information and belief" that Peerless has no other insurance for any remaining asbestos claims. Plaintiffs also asserted that, in light of the *Macaluso* judgment, the number of outstanding potentially compensable claims against Peerless clearly exceeded the remaining coverage, and sought this Court's approval to pay the remaining insurance proceeds into the Court for a determination of which claimants were entitled to those proceeds, together with an award of all of the plaintiffs' costs and legal expenses related to bringing this action (see NYSCEF Doc. #1, and Defendants' Joint Opp. Exh. 2). Defendants filed Answers to the Complaint on February 22, 2019 and March 11, 2019 (Defendants' Joint Opp. Exh. 3).

On April 5, 2019 plaintiffs filed this motion seeking an Order: (1) declaring that they were jointly authorized to pay $301,539.17 in connection with expenses incurred in defense of asbestos bodily injury claims asserted against Peerless; (2) authorizing plaintiffs to pay into Court the sums of $3,952,249.63 for FFIC and $1,976,124.82 TAIC, respectively by paying same to the County Treasurer of New York County, to be disposed of in accordance with the further Order or final judgment of this Court; (3) declaring that, upon the payment of those amounts into the Court that plaintiffs are discharged from liability to all defendants who have appeared and/or acknowledged service of the Complaint up to $4,153, 275.74 for FFIC and $2,076,637.87 for TAIC; and (4) staying all claims instituted in this Court by any defendant against Peerless until further Order of this Court.

The defendants listed in Exhibit 1 of the complaint (hereinafter the "joint defendants") opposed the relief sought in this motion arguing that the declarations sought are not appropriate relief in a mass tort action involving potentially hundreds of claims. They oppose the declarative relief because discovery is still pending that might demonstrate Peerless has other potential coverage. The joint defendants further argue that after having received the benefits of a reduction in their overall obligations through the settlement agreements with Peerless, plaintiffs should not now be entitled to seek to retain those benefits while disavowing their obligations. The joint defendants oppose any stay arguing that it will not resolve the other pending claims against Peerless but it will place the other litigants that are already sick and dying in a worse position. The joint defendants claim that plaintiffs are misinterpreting and misapplying CPLR §1006 (c) stating it only applies where the stakeholder and claimant have the same claim, and Peerless is not even a party to this case.

The defendants listed in Exhibit 1 that are represented by the law firm of Simmons Hanly Conroy and the *Macaluso* defendants, partially opposed the motion. They opposed granting plaintiffs the payment of defense expenses arguing that there was no itemization of expenses and CPLR §1006(f) does not

permit any payment once the funds are deposited with the Court. They also argued against any stay for the same reasons as the joint defendants and added that plaintiffs do not have standing to seek a stay. They did not object to the remainder of the relief.

Oral argument on this motion was scheduled for July 3, 2019, but the motion was adjourned and finally heard on July 25, 2019.

On June 18, 2019, the New York Supreme Court, Appellate Division, affirmed the jury's underlying findings of fact in *Macaluso* but reduced the total award, finding that the prior judgment "deviates materially from what would be reasonable compensation" (Mot. Seq. 007, Exh. 4 at 25). The reduced award totaled $4 million for decedent's pain and suffering and $1 million for loss of parental services to each of Mr. Macaluso's two children, for a total judgment of $6 million (Mot. Seq. 007, Exh. 4 at 23). The Appellate Court provided the plaintiffs in *Macaluso* the option to seek a new trial on damages within 30 days, or to stipulate to the reduced award (Mot. Seq. 007, Exh. 4). The plaintiffs in *Macaluso* have stipulated to accept the reduced award pursuant to the terms stated by the Appellate Division, First Department.

On June 28, 2019, all of the joint defendants listed filed Motion Sequence 007, a joint motion pursuant to CPLR §3211(a)(7) seeking to dismiss the interpleader complaint for failure to state a cause of action. The joint defendants argue that interpleader is an inappropriate mechanism to resolve complex mass tort litigation. The joint defendants further argue that the resolution of the *Macaluso* judgment eliminated the looming circumstances that threatened to absorb all of the plaintiffs' available insurance. The joint defendants claim that under the changed circumstances there is no longer a basis to sustain this interpleader action, and it should be dismissed.

On July 17, 2019, defendant, Burnham LLC (hereinafter "Burnham) filed a separate motion under Motion Sequence 008, pursuant to CPLR §3211(a)(7) seeking to dismiss the plaintiffs' interpleader complaint with prejudice for failure to state a cause of action. Burnham argued that pursuant to CPLR §1006, plaintiffs are not stakeholders because they do not face multiple liability, only some other potential "future liabilities." Burnham states that the reduced settlement of the *Macaluso* judgment after offsets is approximately $3.6 million, and Peerless is only obligated for a third of that amount. Burnham argues that the millions remaining for other claimants, together with the lack of any other current liability in *Macaluso,* renders the basis for plaintiffs' claims a nullity and subjects this interpleader action to dismissal.

Plaintiffs oppose both motions to dismiss arguing that their interpleader action states a claim upon which relief may be granted, regardless of the June 18, 2019 Appellate Division First Department decision in *Macaluso,* and any acceptance of a reduced award.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (Simkin v. Blank, 19 N.Y. 3d 46, 968 N.E. 2d 459, 945 N.Y.S. 2d 222 [2012]).

There is no state caselaw precedent specifically addressing the arguments raised by the defendants that interpleader is inappropriate in mass tort litigation. The Federal Courts have limited the application of impleader in mass tort litigation involving, as in this case, litigants located in other states or jurisdictions.

The U.S. Supreme Court has remarked that federal interpleader devices were not designed to rid parties of all the burdens associated with multiparty mass tort litigation by offloading those burdens onto the state and federal court systems. "Interpleader actions were never intended to perform such a function, to be an all-purpose 'bill of peace.'" Furthermore, interpleader is not meant to be "capable of sweeping dozens of lawsuits out of the various state and federal courts in which they were brought into a single interpleader proceeding" (*see State Farm Fire & Cas. Co. v Tashire*, 386 U.S. 523, at pgs. 535-37, 18 L.Ed. 2d 270, 87 S. Ct. 1199, at pgs. 1206-07 [1967]).

Plaintiffs are seeking to have a large number of claims against the excess insurance policies they issued adjudicated by this Court. They also, inappropriately, seek to have this Court distribute funds to litigants with claims located in various courts in multiple states located outside of the jurisdiction of New York, without establishing jurisdiction over those claims or stating a basis for the distribution of funds to those claimants under New York's impleader statutes (See Mot. Hardin Aff., Exh. H, and Mot. Seq. 007, Exh. 1).

Additionally, in New York, CPLR §1006 allows a stakeholder that may be exposed to multiple liabilities, as a result of adverse claims, to commence an action for interpleader. CPLR §1006(a) defines a stakeholder as a person who may be exposed to multiple liability as the result of adverse claims. "In order to qualify as a stakeholder . . . and thus be eligible for discharge, it is . . . necessary to show that there is exposure to double or multiple liability as a result of adverse claims. These adverse claims, therefore, must rest on some reasonable basis" (Nelson v. Cross & Brown Co., 9 AD2d 140, 192 N.Y.S.2d 335 [1st Dept., 1959]). The existence of multiple adverse claims does not necessarily expose the interpleader to multiple liabilities. An interpleader is only a stakeholder under CPLR §1006(a) if there exists actual liabilities (Royal Bank of Canada v. Weiss, 172 A.D. 2d 167, 567 N.Y.S. 2d 707 [1st Dept. 1991]).

At this point, the *Macaluso* judgment has been reduced to a total of $6 million, out of which Peerless is only responsible for paying a maximum of $2 million or $1.5 million if one accounts for the amounts attributable to "other fault sharers" (*see* Mot Seq. 007, Exh. 3 at 2). This leaves them with a remainder of at

least $4 million on their policy (*see* Mot. Seq. 007, in Supp., Exh. 4 at 23) which may, in turn, be used to compensate any other mass tort claimants that might arise for a yet to be determined amount of money. Therefore, it is not even clear yet that the pool of insurance funds available to these mass tort litigants is too limited to accommodate their respective claims. Plaintiffs have not shown that the mere existence of multiple adverse claims will lead to multiple liabilities now that *Macaculso* is being resolved.

Discharge of an interpleading stakeholder is also improper where it is shown that the stakeholder has some independent liability (see Birnbaum v. Marine Midland Bank, 96 AD2d 776, 465 N.Y.S.2d 725 [1st Dept. 1983]; Inovlotska v Greenpoint Bank, 8 A.D.3d 623, 780 N.Y.S.2d 358 [2nd Dept., 2004]).

Plaintiffs obtained concessions from Peerless in exchange for reducing the limits of coverage under their policies. To the extent that plaintiffs now seek discharge of funds into this Court, they have not shown that they are totally free of liability and proper stakeholders.

Pursuant to CPLR §1006 (f) the Court in its discretion may award attorney fees to an insurer that is a neutral stakeholder and prompted to commence an interpleader action and order a framed issue hearing to determine the claim for costs, expenses and attorneys fees. Any award of attorneys fees should be limited (New York Life Insurance Co. v. Lowy, 40 AD 3d 295, 836 NYS 2d 78 [1st Dept. 2007] and Lincoln Life and Annuity Co. of New York v. Caswell, 31 AD 3d 1, 813 NYS 2d 385 [1st Dept. 2006]).

Attorney fees may not be awarded to insurance companies as the stakeholder "where minor problems that arise in the payment of insurance policies must be expected in the ordinary course of business...We are not impressed with the notion that whenever a minor problem arises in the payment of insurance policies, insurers may, as a matter of course, transfer part of their ordinary cost of doing business of their insureds by bringing an action for interpleader" (New York Life Insurance Co. v. Apostolidis, 841 F. Supp. 2d 711 [U.S. Ct. EDNY, 2012] citing to Travelers Indem. Co. v. Isreal, 354 F. 2d 488 [U.S. Ct. of Appeals, 2nd Circuit, 1965]).

The joint defendants have established that plaintiffs are not entitled to a declaration of expenses in connection the defense of asbestos bodily injury claims asserted against Peerless in this interpleader action. To the extent the federal standard is applied, plaintiffs have not shown that they have done more than the cost of doing business or any entitlement to expenses.

The Joint Defendants and Burnham (Mot. Seq. 007 and 008) have stated grounds for dismissal of this action. Plaintiffs have not stated a basis to sustain this interpleader action, or to obtain the declaratory relief sought on this motion. The dismissal of the declaratory relief sought renders any stay unnecessary, and

there is no need to address plaintiffs' arguments on that issue. This motion is denied in its entirety.

Accordingly, it is ORDERED that plaintiffs' motion for an Order: (1) declaring that they were jointly authorized to pay $301,539.17 in connection with expenses incurred in defense of asbestos bodily injury claims asserted against `Peerless Industries, Inc.; (2) authorizing plaintiffs to pay into Court the sums of $3,952,249.63 for Fireman's Fund Insurance Company and $1,976,124.82 for The American Insurance Company, respectively by paying same to the County Treasurer of New York County, to be disposed of in accordance with the further Order or final judgment of this Court; (3) declaring that, upon the payment of those amounts into the Court that plaintiffs are discharged from liability to all defendants who have appeared and/or acknowledged service of the Complaint up to $4,153, 275.74 for Fireman's Fund Insurance Company and $2,076,637.87 for The American Insurance Company; and (4) staying all claims instituted in this Court by any defendant against Peerless Industries, Inc. until further Order of this Court, is denied, and it is further,

ORDERED that defendants' joint motion filed under Motion Sequence 007, seeking an Order pursuant to CPLR § 3211(a)(7), dismissing the plaintiffs' interpleader complaint with prejudice for failure to state a cause of action, is granted, and it is further,

ORDERED that defendant Burnham LLC's motion filed under Motion Sequence 008, seeking an Order pursuant to CPLR § 3211(a)(7), dismissing the plaintiffs' interpleader complaint with prejudice for failure to state a cause of action, is granted, and it is further,

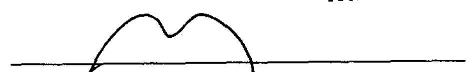
ORDERED that this interpleader action is dismissed with prejudice, and it is further,

ORDERED that the moving defendants, pursuant to e-filing protocol, serve a copy of this Order with Notice of Entry on all remaining parties, on the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk (Room 141B), who shall mark their records accordingly, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.



Dated: August 1, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
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