

**Southwest Mar. & Gen. Ins. Co. v Shell Bldrs. Corp.**

2021 NY Slip Op 33825(U)

March 11, 2021

Supreme Court, Westchester County

Docket Number: Index No. 65642/2020

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
SOUTHWEST MARINE AND GENERAL  
INSURANCE COMPANY,

Plaintiffs,

-against-

SHELL BUILDERS CORP., ARCADIA CUSTOM  
BUILDERS CORP., RONALD PARLATO and  
MICHAEL PARLATO,

Defendants.  
-----X

RUDERMAN, J.

Index No.: 65642/2020

DECISION AND ORDER

Motion Sequence Nos. 1&2

The following papers were considered in connection with the motion by plaintiff Southwest Marine and General Insurance Company for an order enjoining defendants Arcadia Custom Builders Corp., Ronald Parlato and Michael Parlato from proceeding with the prosecution of an insurance coverage declaratory judgment action they filed in the Superior Court of New Jersey, pending resolution of the instant action (sequence 1); and the motion by defendants, Shell Builders Corp., Arcadia Custom Builders Corp., Ronald Parlato, and Michael Parlato for an order pursuant to CPLR 3211(a)(4) to dismiss or stay this action, or to consolidate the two actions (sequence 2):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - N, and Memorandum of Law	1
Affirmation in Opposition, Memorandum of Law	2
Reply Affirmation	3

- Sequence 2

Notice of Motion, Affirmation, and Memorandum of Law	4
Affirmation in Opposition, Exhibits A - N, Memorandum of Law	5
Reply Memorandum of Law	6

In response to a lawsuit brought in New Jersey by homeowners George and Barbara Cacoulidis against the architect and contractor they hired to perform renovations on the home, that contractor, Arcadia Custom Builders Corp. ("Arcadia"), and its principals, Ronald Parlato and Michael Parlato, attempted to tender to their insurance carrier, Southwest Marine and General Insurance Company ("Southwest Marine"), their defense and indemnification. When Southwest Marine disclaimed coverage, acting through ProSight Specialty Insurance Group, Arcadia and the Parlatos commenced a declaratory judgment action in New Jersey Superior Court regarding coverage (*Arcadia Custom Builders Corp., Ronald Parlato and Michael Parlato v Southwest Marine and General Insurance Company, ProSight Specialty Insurance Group, Inc., George Cacoulidis and Barbara Cacoulidis*, Docket No.: MID-L-8082-20 (the "New Jersey Action"). That declaratory judgment action was filed on November 19, 2020.

The present declaratory judgment action was commenced by the filing of a summons and complaint on December 4, 2020 by the insurer, Southwest Marine, against Arcadia Custom Builders and the Parlatos, along with Shell Builders Corp.<sup>1</sup> This actions seeks "a declaration of no duty to further defend, indemnify or afford insurance coverage" to Shell, Arcadia, or the Parlatos under Southwest Marine's two policies, except to the extent of a declaration that Southwest Marine

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<sup>1</sup> Southwest Marine states in the complaint that it named Shell Builders as a necessary and otherwise proper party to this action, joined to bind Shell to all rulings rendered in this litigation. Defendants to this action acknowledge that Shell Builders Corp. is owned by Ronald and Michael Parlato and is an insured under the Southwest Marine policies, although they state that it was not involved with the construction of the Cacoulidis home. However, Shell Builders consents to jurisdiction in New Jersey, while reserving rights to substantively oppose any claims against it.

owes reimbursement of reasonable defense costs incurred by Arcadia and Parlato in the Cacoulidis Action solely confined to the period June 9, 2020 to October 9, 2020.

In seeking to enjoin the New Jersey declaratory judgment action, Southwest Marine contends that the present action is the more “comprehensive” of the two. It also reasons that although the New Jersey action was commenced earlier, Arcadia and the Parlato failed to timely serve it with process, instead belatedly serving Southwest Marine and ProSight on December 11, 2020. Meanwhile, it emphasizes, its effort to serve Arcadia on December 9, 2020 in this action was intentionally blocked by Ronald Parlato, who explicitly refused to open the gate to allow the process server entry (according to the process server).

For their part, Arcadia and the Parlato seek dismissal or a stay of this action in favor of the New Jersey action under CPLR 3211(a)(4), emphasize not only that the New Jersey action was “first-in-time,” but that New Jersey is the better forum for this dispute and that it has a more significant nexus to the controversy. They observe that the underlying Cacoulidis action is being litigated in New Jersey, and that Southwest Marine has an office address in Morristown, New Jersey. They assert that none of the conduct giving rise to the claims arose in New York or occurred in New York. They add that their New Jersey action is the more comprehensive of the two actions, as it also involves a claim of a breach of good faith and fair dealing against Southwest Marine and ProSight.

Both parties informed this Court, subsequent to the submission of the motions, that in the New Jersey action, the court denied Southwest Marine’s motion to dismiss based on late service, in an order dated January 22, 2021.

#### Discussion

“In the context of a motion to dismiss pursuant to CPLR 3211 (a) (4) on the ground of

another action pending, generally the courts of this state follow the first-in-time rule, meaning that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere” (*Seneca Specialty Ins. Co. v T.B.D. Capital, LLC*, 143 AD3d 971, 972 [2d Dept 2016] [citations and internal quotation marks omitted]). It appears from the history of the two cases that it is the New Jersey court that has first taken jurisdiction. Moreover, although special circumstances may warrant deviation from this rule where, for example, “the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage” (see *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007], citing *White Light Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 96-97 [1st Dept 1997] [internal quotations marks and citation omitted]; see also *Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005]), no such special circumstances have been presented here.

Even if the “first-in-time” rule were irrelevant due to the early stage of both actions, the relevant considerations weigh in favor of the New Jersey litigation. “Factors to be considered when determining whether to dismiss an action when a similar action is pending in another court include whether there is a substantial identity of parties and claims, whether one action is more comprehensive than the other, whether the actions were commenced reasonably close in time, and whether one court has a more significant nexus to the controversy” (*TIG Ins. Co. v Catholic Foreign Mission Socy. of Am., Inc.*, 69 Misc. 3d 1208(A) [Sup Ct Westchester County 2020 [Hon. Joan B. Lefkowitz, J.]]).

Southwest Marine’s arguments in favor of requiring the insurance coverage issues to be litigated in this jurisdiction instead of New Jersey are not convincing. Arcadia’s commencement of the first declaratory judgment action in New Jersey was appropriate and does not appear to have

been brought in bad faith, by duplicity or in an effort to gain a tactical advantage, given that the underlying litigation is taking place in New Jersey, and involves events that occurred in New Jersey, and that Southwest Marine has a New Jersey address. There is no argument that the assertion of jurisdiction over Southwest Marine and Prosgit by the New Jersey court is improper. Nor does it appear that the New York action is actually more comprehensive than the New Jersey action.

Because the New Jersey court is the one which first took jurisdiction, and because no particular circumstances weigh significantly in favor of the matter being litigated in New York, the New Jersey court "is the one in which the matter should be determined" (see *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 A.D.2d at 96-97).

Accordingly, it is hereby

ORDERED that the motion by plaintiff Southwest Marine and General Insurance Company for an order enjoining defendants Arcadia Custom Builders Corp., Ronald Parlato and Michael Parlato from proceeding with the prosecution of the declaratory judgment action they filed in the Superior Court of New Jersey, pending resolution of the instant action (sequence 1), is denied; and it is further

ORDERED that the motion by defendants, Shell Builders Corp., Arcadia Custom Builders Corp., Ronald Parlato, and Michael Parlato for an order pursuant to CPLR 3211 (a) (4) to dismiss or stay this action, or to consolidate the two actions (sequence 2), is granted to the extent that the present action is stayed, pending the resolution of the New Jersey action.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
March 11, 2021

  
HON. TERRY JANE RUDERMAN, J.S.C.