

**Dynamic Event Group, Inc. v Penske Truck Leasing
Co., L.P.**

2022 NY Slip Op 31237(U)

April 12, 2022

Supreme Court, New York County

Docket Number: Index No. 652160/2021

Judge: Arlene Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip
Op 30001(U), are republished from various New York
State and local government sources, including the New
York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

DYNAMIC EVENT GROUP, INC.,
Plaintiff,

INDEX NO. 652160/2021

MOTION DATE 4/08/2022

MOTION SEQ. NO. 004 and 005

- v -

PENSKE TRUCK LEASING CO., L.P., PENSKE TRUCK
LEASING CORPORATION, OLD REPUBLIC INSURANCE
COMPANY

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004 and 005) 136-175 were read on this motion to/for STAY.

Motion Sequence Numbers 004 and 005 are consolidated for disposition. The motion (MS004) by defendant Old Republic Insurance Company (“Old Republic”) for a stay of discovery pending appeal and for a protective order is denied. The motion (MS005) by defendant Penske Truck Leasing Co., LP (“Penske”) for a stay pending appeal and for a protective order is denied.

Background

Plaintiff brings this declaratory judgment action arising out of a truck rental on June 16, 2017. Plaintiff claims that it rented the truck for ten days. On June 22, 2017, an employee of plaintiff was driving the truck when he hit a parked car owned by defendant Justine Swotkewicz. Plaintiff alleges that under Vehicle and Traffic Law § 370, Penske was required to provide primary insurance for its vehicles, including a duty to defend. It seeks a declaration that Penske is obligated to provide insurance to plaintiff.

In connection with the accident, a separate action was commenced by defendant Mapfre (as subrogee of the car owner) to recover damages against Penske, plaintiff, and the driver (plaintiff's employee) in Nassau County. That case settled on May 14, 2021 for \$1,482.76 and Penske paid the settlement.

Defendants both move to stay this case pending Penske's appeals of decisions by this Court. Old Republic complains that plaintiff has served voluminous discovery demands and it does not want to respond in light of its appeal. So it seeks a protective order alleviating it from having to respond to the demands. It points out that Penske filed a notice of appeal on July 29, 2021 and has obtained extensions of time to perfect the appeal through May 1, 2022.

Penske also seeks a protective order and a stay pending appeal. It makes arguments previously rejected by this Court in connection with earlier motion practice. Penske claims that First Department's decision on the appeal will be outcome determinative for the issues raised herein. It emphasizes that the discovery plaintiff seeks is completely irrelevant.

In opposition, plaintiff argues that Penske waived its right to a protective order by not moving for a protective order within 20 days of plaintiff's July 6, 2021 notice of discovery and inspection. It details how both Penske and Old Republic made representations about doing discovery for months only to suddenly ask for a stay of all discovery pending the appeals. Plaintiff also argues that Penske failed to establish its right to a protective order and it is not entitled to a stay. Plaintiff argues that Penske's appeals are simply delay tactics.

With respect to Old Republic's motion, plaintiff makes similar arguments. It claims that a stay is not appropriate under these circumstances.

Stay Pending Appeal

CPLR 2201 provides that “Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Upon a motion to stay pending an appeal, the Court should consider “the goals of judicial economy, orderly procedure and the prevention of inequitable results” (*Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322, 837 NYS2d 154 [1st Dept 2007]).

The Court denies the branch of the motion that seeks a discretionary stay pending Penske’s appeals of this Court’s decisions. The Court observes that, according to defendants, Penske filed an initial notice of appeal on July 29, 2021 and *still has not perfected that appeal* as of the date of this decision. While this Court is unable to make a finding as to why it has taken so long, the fact is that this Court declines to grant a stay where the defendant seeking to appeal seems to have no interest in timely pursuing that appeal. At this rate, there will not be a decision on the appeals until potentially next year. The Court will not permit defendants to drag this case along forever and avoid participating in discovery. Plaintiff is entitled to pursue discovery it has been seeking for nearly a year at this point. Delay tactics are not a reason to stay discovery pending an appeal and, of course, defendants can seek a stay before the First Department.

Protective Order

“For a protective order to be issued, the party seeking such an order must make a factual showing of ‘unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery.... This discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind” (*Cascardo v Cascardo*, 136 AD3d 729, 729-30, 24 NYS3d 742 [2d Dept 2016] [internal quotations and citations omitted]).

As an initial matter, the Court observes that neither Old Republic nor Penske demonstrated that they made a good faith effort to resolve discovery disputes with plaintiff before seeking a protective order. Old Republic's affirmation in good faith claims that a stay was sought pending Penske's appeals during a phone conversation with counsel for plaintiff on March 10, 2022. That is not a good faith effort to resolve a discovery dispute that would entitle Old Republic to a protective order. Of course, Old Republic was entitled to seek a stay pending the appeals but it is not a reasonable position to resolve a discovery dispute by asserting that nothing was going to happen. Penske's affirmation in good faith details a similar effort—that the “good faith” effort to resolve the dispute was to suggest that Penske did not have to respond until after the appeals, appeals which (as described above) have yet to be perfected.

The Court also observes that the demands were served on Penske in July 2021 and it entered into a discovery stipulation with plaintiff regarding the demands in October 2021 (Old Republic was not in the case yet). That October 2021 order required Penske to respond by November 3, 2021 and it did not comply. This is yet another reason why a protective order is not appropriate. This is not a situation where either defendant provided responses (which could have included objections) and the parties have legitimate disputes about the discoverability of certain requests.

Although both defendants raise specific objections to some of the demands in connection with this motion, they do not attach a timely served response identifying those objections. Rather, Penske and then Old Republic (once it was added to this case) seem to have taken the position that they did not need to do any discovery because Penske was appealing certain Court decisions. That strategy successfully delayed discovery in this case to the point that neither defendant has responded. That time ends now and defendants are directed to respond to

plaintiff's discovery demands on or before May 6, 2022 (as directed in the previous discovery order [NYSCEF Doc. No. 167]). The Court also finds that because defendants did not timely raise objections, they have waived their right to raise any objections other than those based on privilege or that the demand is palpably improper (*Saratoga Harness Racing Inc. v Roemer*, 274 AD2d 887, 889, 711 NYS2d 603 [3d Dept 2000]).

Accordingly, it is hereby

ORDERED that the motion (MS004) by defendant Old Republic Insurance Company and the motion (MS005) by defendant Penske Truck Leasing Co., LP for a stay pending appeal and for protective orders is denied.

Next Conference: Already Scheduled for May 23, 2022 and the parties must upload a discovery update by May 16, 2022 (NYSCEF Doc. No. 167).



<u>4/12/2022</u> DATE					<hr/> ARLENE BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE