

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

2022 NY Slip Op 32640(U)

August 3, 2022

Supreme Court, New York County

Docket Number: Index No. 652160/2021

Judge: Arlene Bluth

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

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

DYNAMIC EVENT GROUP, INC.,

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 652160/2021

MOTION DATE 07/29/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 181, 182, 183, 184, 185, 186, 187, 188, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 238, 239

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment is denied and the cross-motions by defendant Old Republic Insurance Company (“Old Republic”) for summary judgment and by defendant Penske Truck Leasing Co., L.P. i/s/h/a Penske Truck Leasing Corporation (“Penske”) for summary judgment are both granted.

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 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.

Plaintiff contends that New York law is well settled that car rental companies, such as Penske, must provide individuals or entities who rent vehicles from them with the mandatory minimum amount of insurance on a primary non-contributory basis. It argues that this obligation is imposed by statute. Specifically, plaintiff points to Vehicle and Traffic Law § 370. Plaintiff also argues that the applicable insurance statutes require that when Penske has insurance on its fleet of vehicles, the insurer (here, Old Republic) must provide the statutory minimum amounts of insurance to these renters. It argues that despite these requirements, defendants refused to provide the minimum coverage to plaintiff or to defend plaintiff in a separate action arising out of the use of a Penske rental vehicle (referenced above).

Plaintiff argues that Penske is trying to contract around the requirements of the Vehicle and Traffic Law with its Vehicle and Lease Service Agreement. It insists it is entitled to summary judgment for a declaration that defendants were obligated to provide plaintiff with the statutory minimum amounts of motorist coverage and had a duty to defend plaintiff. Plaintiff emphasizes that the amount in controversy was well within the coverage limits imposed by the Vehicle and Traffic Law and so defendants have no plausible argument for why they should not defend plaintiff. Moreover, plaintiff seeks a declaration that sections 9a, 9c and 10 of Penske's Vehicle Lease Service Agreement are void under New York Law because they violate the Vehicle and Traffic Law.

Plaintiff contends that the Graves Amendment (a law that bars vicarious liability against rental companies unless these entities are negligent or criminally liable) has no bearing on this case and argues that there is no case law holding that the Graves Amendment preempts the minimum insuring obligations under the Vehicle and Traffic Law.

In opposition and in support of its cross-motion, Old Republic argues that plaintiff admits it has suffered no damages and that the underlying action settled without plaintiff making any contribution. It argues that the instant case is moot and this Court has no power to render declaratory relief in a disposed case. Old Republic insists that this Court can no longer follow a Court of Appeals case from 2001 (*ELRAC Inc. v Ward*, 96 NY2d 58 [2001]) because the Graves Amendment was passed in 2005 and pre-empted this decision.

Old Republic maintains that Vehicle and Traffic Law § 370 requires that lessors of motor vehicles maintain insurance on their vehicles up to the minimum limit but the coverage only applies if the damage occurred as a result of the lessor's own negligence and any damages cause by the renter/lessee are not the responsibility of the lessor due to the Graves Amendment. It maintains that plaintiff does not allege that Penske was actively negligent in any way so plaintiff has no basis for the relief it seeks.

Penske also makes a cross-motion for summary judgment dismissing this case. It makes arguments similar to those imposed by Old Republic. Penske claims that the instant matter is moot because it paid the amount due in the underlying action and it reimbursed plaintiff (on June 21, 2022) for plaintiff's legal fees incurred in that case. Penske says it sent plaintiff a check for \$15,113.50 (the specific amount demanded by plaintiff for defense costs) and so plaintiff is no longer entitled to declaratory relief in a moot case.

Penske argues that the Graves Amendment preempts Vehicle and Traffic Law § 388 which held vehicle owners vicariously liable for the actions of individuals driving their vehicles. It argues that nothing within Section 370 requires that the minimum insurance coverage be primary and non-contributory and that the Graves Amendment bars plaintiff's case. Penske argues, as did Old Republic, that other jurisdictions considering these issues have found that the Graves Amendment prohibits imposition of judgments against rental car companies based on the negligence of their lessees.

In reply, plaintiff recounts that it tendered defense and indemnification to Penske in connection with the underlying action but that Penske failed to honor its obligations. It observes that it was forced to incur defense costs in that action and to pursue the instant action. Plaintiff points out that the settlement in the underlying action was reached with an express reservation of rights and so plaintiff is not precluded from pursuing declaratory relief here. It maintains that Penske's most recent settlement offer does not bar its motion because plaintiff is not required to settle this case. Plaintiff claims that even if the case were moot, the mootness exception applies because the issue presented is one that is likely to reoccur: Penske's efforts to contract around the requirements of Vehicle and Traffic Law § 370. With respect to the Graves Amendment, plaintiff maintains that Penske and Old Republic conflate vicarious liability with maintaining minimum insurance obligations under the applicable New York statutes.

In reply to its cross-motion, Old Republic argues that there cannot be any distinction between vicarious liability and an insurer's obligation. It insists that state law about minimum insurance requirements must yield to the Graves Amendment as long as the lessee (the renter) was solely at fault for the law.

Penske reasserts that its payment in June 2022 to plaintiff renders the case moot and plaintiff is not entitled to the declaratory relief it seeks.

Discussion

“A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor. Thus, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 NYS2d 86 [2014] [internal quotations and citations omitted]).

The Court grants the cross-motions on the ground that the instant action is now moot, given that Penske agreed to pay the amount demanded by plaintiff for the defense costs plaintiff incurred in the underlying case. Plaintiff sent a demand letter to Penske dated June 10, 2021 in which it sought \$15,113.50 for defense costs (NYSCEF Doc. No. 208). *After* the Court issued its decision denying defendants' motion to dismiss (NYSCEF Doc. No. 209), Penske offered to settle the case and pay the \$15,113.50 via an offer of compromise (NYSCEF Doc. No. 210).

Penske claims that plaintiff then refused to accept this offer and Penske later sent a check (NYSCEF Doc. No. 216) to plaintiff for the amount demanded by plaintiff as part of another effort to settle the case.

Based on this procedural posture, the Court finds that the instant matter is moot and grants the cross-motions for summary judgment dismissing the case. “Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties” (*Coleman ex rel. Coleman v Daines*, 19 NY3d 1087, 1090, 955 NYS2d 831 [2012] [citations omitted]). Here, Penske has twice tried to pay the amount that plaintiff specifically demanded.

As the Court noted in its decision denying Penske’s motion to dismiss, this case was not moot at that point because despite the fact that Penske had paid the settlement in the underlying case in Nassau County, the issue of the duty to defend remained open (NYSCEF Doc. No. 44 at 4). Now that issue is resolved because Penske has offered to pay the full amount arising out of the purported duty to defend. While the Court recognizes that plaintiff seeks declaratory relief, it is essentially asking this Court for an advisory opinion in a case where Penske has agreed to pay everything plaintiff seeks. In other words, in light of Penske’s offer of compromise, plaintiff is essentially seeking a decision about future interactions with Penske. That is no longer properly before this Court.

Moreover, the Court finds that the exception to the mootness doctrine does not apply to the present circumstances. A Court may not render a decision in a dispute that is moot “unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable” (*Hearst Corp. v Clyne*, 50 NY2d 707, 714, 431 NYS2d 400 [1980] [citation omitted]). The three factors a Court must consider when determining whether the exception to the doctrine of mootness applies includes “(1) a likelihood of repetition,

either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues” (*id.* at 714-15).

The instant dispute does not satisfy any of these factors. As Old Republic points out in reply, there have been very few cases that explore the interplay between the Graves Amendment and Vehicle and Traffic Law § 370. And plaintiff does not cite to a plethora of other cases involving this precise issue. The Court similarly finds that this is not the type of issue that typically evades review; clearly a renter (such as plaintiff) can attempt to tender to Penske if the renter is involved in an accident with one of Penske’s vehicles and then seek coverage from Penske. That will inevitably involve judicial review of the Graves Amendment’s effect on the Vehicle and Traffic Law should Penske (and its insurer) decide to contest the matter. And the Court finds that plaintiff did not meet its burden to show that the question presented involves substantial or novel issues. This case involved a settlement for about \$1,500 and defense costs of just over \$15,000. Penske agreed to pay this amount; therefore, the Court sees no reason to delve into the merits of the issue.


Summary

The Court recognizes that it previously denied Penske’s motion to dismiss. Of course, the motion to dismiss standard is different from a motion for summary judgment. A plaintiff need only state a cognizable cause of action to defeat a motion to dismiss. And, as stated above, the issue of whether the duty to defend applied remaining outstanding. Penske decided to subsequently offer the full amount of plaintiff’s demanded defense costs, thereby rendering the entire case moot.

The Court finds that it would be wholly inappropriate to offer a decision about future situations that might, or might not, occur involving whether Vehicle and Traffic Law § 370 is superseded or preempted by the Graves Amendment. Simply put, the Court finds that there is no longer a justiciable controversy under these circumstances.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied and the cross-motions by defendants are granted and the Clerk is directed to enter judgment accordingly in favor of defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

<u>8/3/2022</u> DATE	 ARLENE BLUTH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE