Amerra Capital Mgt., LLC v Berkshire Hathaway Specialty Ins. Co.
2026 NY Slip Op 30501(U)
February 9, 2026
Supreme Court, New York County
Docket Number: Index No. 652101/2024
Judge: Anar R. Patel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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AMERRA CAPITAL MANAGEMENT, LLC,

Plaintiff,

- v -

BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants.

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INDEX NO. 652101/2024

MOTION DATE 10/27/2025

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 224–29 were read on this motion to/for STAY.

Relevant Factual and Procedural History

The Court incorporates, by reference, the factual and procedural summary from the Decision and Order on Motion Sequence Number 006. NYSCEF Doc. No. 211.

In this action, Plaintiff Amerra Capital Management, LLC ("Plaintiff") seeks declaratory and compensatory relief against Defendants Berkshire Hathaway Specialty Insurance Company and Travelers Casualty and Surety Company of America ("Defendants"). Plaintiff alleges that Defendants refused to pay for Plaintiff's "Defense Costs" in two underlying lawsuits in violation of excess insurance policies that Defendants issued to Plaintiff. As relevant here, these costs include fees paid to non-party Selendy Gay, PLLC ("Selendy").

On April 17, 2025, Defendants issued a subpoena to Selendy, seeking, *inter alia*, several types of documents related to Selendy's use of contract attorneys in the underlying lawsuits. NYSCEF Doc. No. 192. Selendy objected to the subpoena, leading Defendants to file a motion to compel, which Selendy opposed. NYSCEF Doc. Nos. 191, 196. Pursuant to this Court's Order referring discovery in this case to Judicial Hearing Officer ("JHO") Alan C. Marin, NYSCEF Doc. No. 164, JHO Marin ruled on Defendants' motion on August 4, 2025. NYSCEF Doc. No. 183 (the "Report"). In the Report, JHO Marin modified the relevant request, thereby directing Selendy to produce to Defendants "the hourly rates charged to or paid by Selendy for" the contract attorneys. NYSCEF Doc. No. 183 at 4. Selendy then filed a motion for the Court to review the Report.

On September 25, 2025, the Court confirmed the Report, finding that the Report was not "clearly erroneous or contrary to law" in determining that the rates Selendy paid to its contract attorneys were relevant to the analysis of whether the rates it then charged to clients for those attorneys' services were reasonable. NYSCEF Doc. No. 211 (the "Decision and Order"). Selendy subsequently appealed this Decision and Order. NYSCEF Doc. No. 222. Selendy then filed the instant motion, seeking to stay the Decision and Order pursuant to CPLR § 5519(c) pending the resolution of its appeal (Mot. 007).[1] Defendants oppose the motion.

Legal Analysis

CPLR § 5519(c) provides as follows:

> The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

"[T]he granting of stays pending appeal" pursuant to CPLR § 5519(c) "is, for the most part, a matter of discretion." *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dept. 1986). "[T]here is no single factor in determining whether to grant a stay"; rather, the determination "will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." *Schaffer v. VSB Bancorp, Inc.*, 68 Misc. 3d 827, 834 (N.Y. Sup. Ct. Richmond Cnty. 2020) (citation omitted).

New York courts addressing motions to stay pursuant to CPLR § 5519(c) have found these two factors to be the most fundamental. Thus, "the proponent of the stay [must] demonstrate the merits of the appeal." *Colt v. New Jersey Transit Corp.*, 86 Misc. 3d 1272(A) (N.Y. Sup. Ct. N.Y. Cnty. 2025) (citing *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990)); *see also Herbert v. City of New York*, 126 A.D.2d 404, 407 (1st Dept 1987) (stays pending appeal "will not be granted . . . in cases where the appeal is meritless"). Similarly, a stay "cannot be obtained absent a showing that prejudice or irreparable damage will result from a denial of the stay." *Kobrick v. New York State Div. of Hous. & Cmty. Renewal*, 37 Misc. 3d 1224(A) (N.Y. Sup. Ct. N.Y. Cnty. 2012) (citing *Robert Stigwood Org., Inc. v. Devon Co.*, 44 N.Y.2d 922 (1978)).

Merits of the Appeal

Selendy contends that its appeal "presents a matter of first impression for the Appellate Division," which "militates strongly in favor of granting a stay" pending resolution of its appeal. NYSCEF Doc. No. 225 ¶ 15. To be sure, as this Court observed in ruling on Selendy's underlying

[1] The Court notes that Selendy filed an affirmation in lieu of a memorandum of law. As Selendy's attorneys are aware, argument is to be presented in a memorandum of law. The affirmation is neither a replacement for a memorandum of law nor a place to submit additional argument. *See* Part 45 Practices at Section VIII.F; *Response Personnel, Inc. v. Aschenbrenner*, No. 106509/2008, 2014 WL 3670670, at *5 n.3 (N.Y. Sup. Ct. N.Y. Cnty. July 17, 2014).

motion, there is an "absence of binding authority" concerning whether "the fees paid to contract attorneys are . . . relevant to the reasonable fee analysis." NYSCEF Doc. No. 211 at 8; *see also In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 527 (N.D. Cal. 2020), *aff'd*, 845 F. App'x 563 (9th Cir. 2021) (observing that "[t]he courts have not spoken with one voice concerning the proper treatment of contract attorney costs" when calculating reasonable attorneys' fees). Selendy cites two cases in which New York courts have found that such circumstances warrant a stay pending appeal. *See Linnekin v. Linnekin*, 96 Misc. 56, 59–60 (N.Y. Sup. Ct. Spec. Term Kings Cnty. 1916); *Pierne v. Valentine*, 179 Misc. 114, 116, 37 N.Y.S.2d 519 (N.Y. Sup. Ct. Spec. Term Kings Cnty. 1942), *rev'd on other grounds*, 266 A.D. 70, 42 N.Y.S.2d 404 (2d Dept. 1943). Nevertheless, the fact that this issue is a matter of first impression does not obviate the primacy of the factors cited above, *i.e.*, the merits of Selendy's appeal and a showing of prejudice resulting from the denial of a stay.[2]

Accordingly, Selendy also argues that a stay is warranted because its appeal has merit. In support of this claim, Selendy raises substantially the same arguments that this Court rejected in addressing Selendy's underlying motion. For example, Selendy contends that, in examining whether its fees were reasonable, the "relevant market for similar services" is "the market in which law firms like Selendy Gay provide services to clients and the fees those firms charge"—not "the market in which firms compete to hire contract attorneys"—as the billing rate for contract attorneys incorporates overhead costs. NYSCEF Doc. No. 225 ¶¶ 17, 18. In support, Selendy cites several cases that this Court previously distinguished. *See* NYSCEF Doc. No. 211 at 7 (citing *In re Anthem, Inc. Data Breach Litig.*, Case No. 5:15-MD-02617-LHK, 2018 WL 3960068 (N.D. Cal. 2018); *In re AOL Time Warner S'holder Derivative Litig.*, No. 02 CIV. 6302 (CM), 2010 WL 363113 (S.D.N.Y. Feb. 1, 2010); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400 (D. Conn. 2009), *aff'd*, 335 Fed. Appx. 523 (2d Cir. 2009)). The Court again finds this argument unpersuasive. Selendy does not explain why multiple markets could not be relevant for the various fees at issue in this case, nor does it address the fact that this Court explicitly left open the possibility of allowing for a markup of contract attorneys' fees to account for overhead costs. *See* NYSCEF Doc. No. 211 at 9–10.

The same conclusion applies to Selendy's other arguments that this Court has already rejected: *e.g.*, that federal class action caw law is inapplicable to the present dispute, or that the rates Selendy pays to contract attorneys are trade secrets. The fact that the rates at issue here were, in the first instance, negotiated by Plaintiff does not change the fact that the relief sought by Plaintiff (*i.e.*, for Defendants to pay Selendy's fees) would entail a conflict of interest comparable to that present in the class action context. Indeed, the very existence of the instant dispute—in

[2] Defendants contest whether this is a matter of first impression, arguing that the standards for a reasonable fee analysis "are not at issue" because the instant dispute instead concerns whether a mark-up of the fees paid to contract attorneys is "reasonable *and necessary*—as required by the specific contract language here." NYSCEF Doc. No. 229 at 7 (emphasis in original). The Court is not persuaded. As this Court observed in the underlying Decision and Order, "Defendants themselves cited to the 'reasonable' fee analyses in *Wells Fargo* and *Beacon* in support of their motion to compel," rendering the "reasonable and necessary" versus "reasonable" framing "a distinction without a difference." NYSCEF Doc. No. 211 at 4 n.1. Defendants also failed to meaningfully distinguish the "necessary" element from the "reasonable" fee analysis in their underlying briefing on Selendy's motion to review the Report. *See generally* NYSCEF Doc. No. 206. Defendants' attempt to do so now merely invokes the elements of the reasonable fee analysis—in this case, by referring to what is "common practice" for counsel in regard to charging clients for the work of contract attorneys. NYSCEF Doc. No. 229 at 7. Defendants' argument is, consequently, unavailing.

which Plaintiff asserts that Defendants are obligated to pay Selendy's fees pursuant to insurance policies in effect at the time of Selendy's services—suggests that Plaintiff may have expected some or all of Selendy's fees to be covered by insurance, undermining Selendy's contention that Plaintiff's negotiation efforts were sufficient to protect Defendants' interests. *See* NYSCEF Doc. No. 225 ¶ 22. As for Selendy's arguments regarding trade secret protection, Selendy once again only presents conclusory assertions that the rates it pays, and its efforts to keep those rates secret, entitle Selendy to trade secret protection.[3] The Court therefore refers to its prior holding.

Selendy's attempt to distinguish the cases relied upon by this Court are similarly unavailing. Selendy argues that the court in *Wells Fargo*:

> (i) acknowledg[ed] that "no court has required" contract attorneys' fees to be paid at cost; (ii) observ[ed] that awarding contract attorney fees at-cost was among a list of "deficien[t]. . . approaches" to lodestar analysis; (iii) order[ed] the parties to produce evidence on 'a true market rate for contract attorneys' with the "goal . . . to determin[e] what actual clients typically pay for contract attorney services when a law firm utilizes those contract attorneys' services on behalf of that paying client"; and (iv) [found] that lead counsel had failed to adduce sufficient evidence to that effect.

NYSCEF Doc. No. 225 ¶ 20 (quoting *Wells Fargo*, 445 F. Supp. 3d 508 at 528–29, 531). However, Selendy neglects to mention that the *Wells Fargo* court *praised* both of the approaches that incorporate the rates paid to the contract attorneys, observing that these approaches "ha[ve] much to recommend" them.[4] *Wells Fargo*, 445 F.Supp.3d at 528–29. Furthermore, the "deficiencies" identified in these approaches go to weight, not admissibility: *i.e.*, that "no court has required" the first approach, while the second approach would be "speculative" without "good evidence concerning overhead rates." *Id.*

To be sure, the *Wells Fargo* court suggested that the ideal approach may be to "determine a true market rate," based on "what actual clients typically pay for contract attorney services when a law firm utilizes those contract attorneys' services on behalf of that paying client." *Id.* at 529. Nevertheless, in the absence of such data, the court ultimately deferred to setting the rates for these attorneys at the rate that they were actually paid—which, again, indicates that the court found the underlying rates relevant to its analysis. *See id.* at 529–31. While the relevance was predicated, in part, on the limited nature of the available factual record, this qualifier is insufficient to withhold from Defendants here a meaningful opportunity to argue that the underlying rates should be incorporated into the ultimate reasonable fee analysis, especially where the nature of the full factual record is not yet before this Court. *See, e.g.*, *Graphic Offset Co. v. Torre*, 78 A.D.2d 788,

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[3] Selendy also rehashes its earlier arguments regarding the insufficiency of the protective order entered in this proceeding, asserting that "Defendants' stated purpose [is] to use that information to argue that Selendy Gay unreasonably marks up its fees." NYSCEF Doc. No. 225 ¶ 23. As this Court previously observed, such a conclusory assertion "fails to explain how the confidentiality order here is insufficient." NYSCEF Doc. No. 211 at 9 n.4.

[4] These approaches entail either "allow[ing] the actual cost of the contract attorneys . . . only as a cost item," or including "the hourly rate actually paid to contract attorneys" in the lodestar and increasing it "by a certain amount to account for overhead." *Wells Fargo*, 445 F.Supp.3d at 528–29. The court found that the former approach, for example, "reap[s] cost savings for the clients[ ] and promotes judicial efficiency by avoiding a judicial determination of fees." *Id.* at 528 (quotations and citation omitted).

788 (1st Dept. 1980) ("Evidence and records pertaining to the amount of damages caused by the alleged breach are an integral part of the case and are discoverable.").

Selendy's attempt to distinguish *In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 CM, 2013 WL 2450960 (S.D.N.Y. May 9, 2013) also fails. In *Beacon*, the court observed that, "[h]ad I thought ahead to the end of the case at the beginning, I would have included in my order appointing Lead Counsel specific directives about how much this court was prepared to authorize in terms of an hourly rate for document reviewers," given that "there is absolutely no excuse for paying those temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes." *Id.* at *18. The court only declined to impose such a limitation on the markup of the pay for contract attorneys because it "did not include any such limitation" in its order appointing lead counsel for the class, and it would be "unfair to impose such a rule *ex post facto*." *Id.* at *19. Thus, contrary to Selendy's argument, this case does "speak to how the appropriate, reasonable attorney fee for those [contract] attorneys would have been determined in the first place." NYSCEF 225 ¶ 21. The court's holding in *Beacon* may not conclusively establish the precise formula for such fees, but it clearly contemplates the possibility of examining the rates paid to contract attorneys, to ensure that their fees are not then "mark[ed] up . . . ten times for billing purposes." *Beacon*, 2013 WL 2450960, at *19.

In any case, the question at issue here is not whether the Court is bound by the standard set in *Wells Fargo* or *Beacon*, but whether the Report was "clearly erroneous or contrary to law" in finding contract attorneys' costs relevant to the calculation of reasonable attorneys' fees. *See* NYSCEF Doc. No. 211 at 3. As both JHO Marin and this Court previously observed, courts have adopted a range of different approaches to the treatment of contract attorney costs in this analysis—several of which explicitly account for the rates paid to the contract attorneys. NYSCEF Doc. No. 183 at 5; NYSCEF Doc. No. 211 at 6–8; *see also Wells Fargo*, 445 F.Supp.3d at 527–29 (collecting cases). As this Court previously held, given "the absence of binding authority establishing that the fees paid to contact attorneys are *not* relevant to the reasonable fee analysis, and relevant case law justifying several approaches to the inclusion of these fees in the analysis, JHO Marin reasonably relied upon the scant authority available to support his determinations." NYSCEF Doc. No. 211 at 8. Selendy fails to raise any argument contradicting this conclusion, much less any argument indicating that its appeal has sufficient merit to warrant a stay.[5]

Altogether, then, Selendy has "failed to address [its] likelihood of success on the appeal . . . as required under CPLR § 5519(c), and instead merely set forth the basis for [its] appeal – regurgitating the arguments [it] made in [its] original motion . . . and therefore, the application would fail under section 5519(c)." *Colt*, 86 Misc. 3d 1272(A).

[5] This is particularly true given the deferential standards of review applicable here, which further impair Selendy's likelihood of success on appeal. The standard of review applicable to the Report establishes that the Report "shall be confirmed" so long as "the findings contained therein are supported by the record and the [JHO] has clearly defined the issues and resolved matters of credibility." *Nager v. Panadis*, 238 A.D.2d 135, 135–36 (1st Dept. 1997). The standard of review applicable to the Decision and Order confirming the Report is similarly deferential: "Generally, the trial court 'is afforded broad discretion in supervising disclosure and its determinations will not be disturbed unless that discretion has been clearly abused.'" *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008) (citation omitted).

Prejudice Resulting from Denial of a Stay

Selendy asserts that it will incur harm from a failure to issue a stay "because once the information is released it can never be recovered"—that upon disclosure, the parties in this case "will have seen the information and may even have included it (expressly or by implication) in public filings." NYSCEF Doc. No. 225 ¶ 25. Thus, Selendy argues that even if the Decision and Order is reversed on appeal, this harm could not be reversed.

Selendy raised substantially similar arguments in its underlying motion, which this Court rejected. *See* NYSCEF Doc. No. 211 at 8–9. Selendy does not contest this determination, nor does it explain how the protective order in this case is insufficient, as noted above. *See supra* note 3. Selendy fails to acknowledge that, pursuant to the terms of the protective order, its disclosure would be limited to the parties (or to their counsel, depending on how Selendy designates the information at issue), it would be given the opportunity to move to seal any filings incorporating its information, and its disclosure would not be deemed to waive any privilege recognized by law. *See* NYSCEF Doc. No. 82 ¶¶ 3–6, 14, 21. Given these protections, and the thin basis that Selendy has set forth for trade secret protection (as addressed *supra*), Selendy fails to allege the type of harm that would warrant delaying the prosecution of this case.[6] *See Grisi*, 119 A.D.2d at 421 ("[I]f the trial and disposition of cases were to be deferred routinely pending appellate review of interlocutory orders the system would collapse of its own weight.").

Conversely, imposing a stay may prejudice the parties, as—given this Court's determination that the contract attorneys' fees are relevant to the reasonable fee analysis—the parties require this information to effectively prepare for both settlement discussions and trial. Thus, as Defendants point out, any delay in Selendy's disclosure would "potentially necessitat[e] adjournment of the pre-trial conference, which could not go forward" without this information, until after resolution of Selendy's appeal—which could take several months. NYSCEF Doc. No. 229 at 5, 9–10. In sum, Selendy has "failed [to] assert any exigency or hardship [it] may confront if a stay is not granted," and has "failed to establish any undue prejudice if a stay is denied." *Colt*, 86 Misc. 3d 1272(A). Selendy therefore fails to demonstrate that a stay is warranted.

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[6] As Defendants observe, the fact that the information, once disclosed, "can never be recovered" is "present in the case of any order compelling disclosure." NYSCEF Doc. No. 229 at 9. Thus, finding that the contemplated disclosure constitutes sufficient harm on this basis alone "would effectively mean that *every* order compelling disclosure must be stayed pending appeal." *Id.* (emphasis in original).

Accordingly, it is

ORDERED that non-party Selendy Gay PLLC's Motion to Stay Order Pending Appeal (Mot. 007) is DENIED.

The foregoing constitutes the Decision and Order of this Court.

February 9, 2026
DATE

ANAR R. PATEL, A.J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	X **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**