

Kram Knarf, LLC v Djonovic

2009 NY Slip Op 33478(U)

May 6, 2009

Supreme Court, Bronx County

Docket Number: Index No. 20347/08

Judge: Nelson S. Roman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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KRAM KNARF, LLC, MARK GJONAJ, AND FRANK S.
MILLER,

DECISION AND ORDER

Plaintiff(s), Index No: 20347/08

- against -

VALENTIN DJONOVIC, AND ZADRIMA, DJONOVIC &
GOJCAJ, LLP.,

Defendant(s).
-----X

Defendants move seeking an Order pursuant to CPLR §§2201 and 5519(c), staying all action in the instant action during the pendency of an appeal. Defendants aver that a stay is warranted insofar as the appeal has merit and because plaintiffs will suffer no prejudice thereby. Plaintiffs oppose the instant application averring that defendants have failed to establish circumstances warranting the relief sought, namely that the pending appeal will be resolved in defendants' favor.

For the reasons that follow hereinafter, defendants' motion is hereby granted.

The instant action one for legal malpractice.

In support of the within motion, defendants submit a copy of this Court's Decision and Order dated November 17, 2008, wherein this Court denied defendants' pre-answer motion seeking dismissal of the instant action. The decision

was voluminous and speaks for itself. However, the crux of the Court's decision was defendants' failure to establish entitlement to the relief sought.

Defendants submit a Notice of Appeal dated January 9, 2009, evincing that defendants were and are appealing this Court's Decision and Order.

In opposition to the instant motion, plaintiffs submit no evidence.

Discretionary Stays Pending Resolution of an Appeal

CPLR §§5519(a) and (b) prescribe circumstances under which an appeal gives rise to an automatic appeal, such as when the order appealed from directs the payment of money or when the judgment appealed from order an insured to pay more than the inure's policy. When an order appealed from does not give rise to an automatic stay, a stay may nevertheless be prayed for pursuant to CPLR §5519©. Dworetzky v. Ball, 50 A.D.2d 615 (3rd Dept. 1975). CPLR §5519(c) reads

(c) Stay and limitation of stay by court order. 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).

Whether to grant a stay pursuant to CPLR §5519(c) is purely within the court's sound

discretion. Grisi v. Shainswit, 119 A.D.2d 418 (1st Dept. 1986). In deciding whether to grant a discretionary stay pending an appeal, courts often require that the pending appeal have merit. Petkovsek v. Snyder, 251 A.D.2d 1088 (4th Dept. 1998) (Court denied application for a discretionary stay pending petitioner's appeal when said appeal lacked merit.); Wilkinson v. Sukiennik, 120 A.D.2d 989 (4th Dept. 1986) (Court granted stay enjoining compliance with a prior order because the appeal sought had merit. Contention that order directing that plaintiff pay use and occupancy of a certain premises was improper had merit, insofar as plaintiff had title of said premises.); Rosenbaum v. Wolff, 270 A.D. 843 (2nd Dept. 1946). Whether the appellant stands to suffer injury in the absence of a stay is yet another factor considered by the court. Rosen v. Baer, 3 A.D.2d (4th Dept. 1957) (Court denied application seeking stay pending an appeal when it was clear that appellant would suffer no harm in the absence of stay.).

CPLR §2201 and Stays

CPLR §2201, the provision governing discretionary stays, reads

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

An application for stay is directed to the court's sound discretion. Britt v. International Bus Services, Inc., 255 A.D.2d 143 (1st Dept. 1998); v. Korman & Stein, P.C., 33 A.D.3d 898 (2nd Dept. 2006). A court is empowered to issue a stay on its own initiative. Halloran v. Halloran, 161 A.D.2d 562 (2nd Dept. 1990); Sternberg v. New

York Water Service Corporation, 94 A.D.2d 723 (2nd Dept. 1983). Discretionary stays have been issued for a host reasons. Courts have often issued stays where absent a stay halting proceedings in one action, a party would be prejudiced thereby. Britt v. International Bus Services, Inc., 255 A.D.2d 143 (1st Dept. 1998) (Court stayed civil action pending resolution of a criminal trial in order to avoid prejudice to the defendant.); Sternberg v. New York Water Service Corporation, 94 A.D.2d 723 (2nd Dept. 1983) (Court stayed civil action pending the resolution of related administrative proceeding to avoid prejudice to the plaintiff.). Where the resolution of one proceeding resolves all questions in another, thereby effectively resolving the other proceeding, a stay is appropriate. Eisner v. Goldberger, 28 A.D.3d 354 (1st Dept. 2006); Somoza v. Pechnik, 3 A.D.3d 394 (1st Dept. 2004); Pierre Associates, Inc. V. Citizens Casualty Company of New York, 32 A.D.2d 495 (1st Dept. 1969). When the issues in a declaratory action remain unresolved, a stay of the underlying tort proceeding is appropriate pursuant to CPLR §2201. Dionisio v. Auto Hire Inc., 67 A.D.2d 996 (2nd Dept. 1979). In such cases, the Court in recognition that a stay necessarily hinders the prosecution of the underlying tort action, should direct all parties to try the declaratory action with all due dispatch. Id. It is well settled that when a stay is sought, the proper procedure is to apply for the same in the action which is sought to be stayed. Grammar v. Greenbaum, 146 A.D. (1st Dept. 1911); Modernismo Publications, Ltd. v. Tenney, 104 A.D.2d 271 (4th Dept. 1984).

Discussion

Defendants' motion seeking a stay of all proceedings in the instant action pending the determination of the pending appeal is hereby granted.

Whether to grant a stay pursuant to CPLR §5519(c) is purely within the court's sound discretion. In deciding whether to grant a discretionary stay pending an appeal, courts often require that the pending appeal have merit. Whether the appellant stands to suffer injury in the absence of a stay is yet another factor considered by the court. An application for stay pursuant to CPLR §2201 is also directed to the court's sound discretion. Discretionary stays pursuant to CPLR §2201 have been issued for a host reasons, such as where absent a stay halting proceedings in one action, a party would be prejudiced thereby.

In this case, while it is true that defendants scarcely, if at all, articulate the merits of the pending appeal, such a failure, contrary to plaintiffs' contention, is not dispositive. In determining whether to grant a stay pursuant to CPLR §5519(c) prejudice to the appellant absent the granting of a stay is equally dispositive and such a factor is equally dispositive in determining whether to grant a stay pursuant to CPLR §2201. Insofar as the appeal herein has the potential to, if decide in defendants' favor, obviate the need for further action by defendants, denial of the instant application seeking a stay prejudices them insofar as it forces them to litigate an action which might very well be dismissed. Accordingly, the instant motion is hereby granted. It is hereby

ORDERED that the all proceedings in the within action be hereby stayed until such time as the Appellate Division, First Department decides defendants' appeal of this Court's Decision and Order. It is further

ORDERED that defendants serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : May 6, 2009

Bronx, New York


05/06/09

Nelson S. Roman, J.S.C.