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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12

Justice

Index Number : 101469/2010
PRAETORIAN INS. CO.
vs.
DMHZ CORP.
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. 101469/10

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1, 2, 4

Answering Affidavits — Exhibits ____ No(s). 3, 5

Replying Affidavits ____ No(s). 6

Upon the foregoing papers, it is ordered that this motion is

FILED
DEC 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/19/12
DEC 19 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

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PRAETORIAN INSURANCE COMPANY,

Interpleader Plaintiff,

-against-

DMHZ CORPORATION, YOU QUN LIU, MAN HENG ZHENG, WEI LIN, an infant by his father and natural guardian, QI MAN LIN, QI MAN LIN, individually, DONG YONG QI, JIN RU LIN, SAI ZHU DONG, XIAO RONG, FEI ZHOU, JIN YUN LIN, JACQUELINE GALLO, NICHOLAS FRIEDMANN, ERIN SPADOLA, THOMAS PASTRO, JOSEPH TIRABASSI, ANJA DORNIEDEN, ANNIE LING, ANNA MY LUU deceased, by ANNIE LUU and ANNETTE PITTMAN as Co-Administratrixes of the Estate of ANNA MY LUU, TONY WONG deceased, by LUCKIE KO, as Administratrix of the Estate of TONY WONG and LUCKIE KO, individually, TRAVELERS INSURANCE GROUP, as subrogee of MATTHEW GROS-WERTER, ZHEN GUANG LIN, Jane Doe(s), John Doe(s) and Doe Company(ies), the latter three parties being fictitious and intended to name another claimants yet unknown,

Interpleader Defendants.

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Index No. 101469/10

Mot. seq. no. 004
Argued: 5/30/12

BARBARA JAFFE, JSC:

For interpleader plaintiff:
Benjamin A. Fleischner, Esq.
White Fleischner & Fino, LLP
61 Broadway
New York, NY 10006
212-487-9700

For interpleader defendants Luu, Pittman, Wong and Ko:
Marie Ng, Esq.
Sullivan Papain, Block McGrath & Cannavo, PC
120 Broadway
New York, NY 10271
212-732-9000

For interpleader defendant DMHZ Corp.:
Michael R. Manarel, Esq.
Rita W. Gordon, Esq.
Jones Hirsch Connors & Bull, PC
One Battery Park Plaza
New York, NY 10004
212-527-1000

By notice of motion dated January 31, 2012, interpleader defendant DMHZ Corporation

(DMHZ) moves pursuant to CPLR 2221(d) for an order granting it leave to reargue the May 16, 2011 decision and September 6, 2011 order of the justice previously assigned to this action and, upon reargument, for an order denying interpleader plaintiff Praetorian Insurance Company (Praetorian) costs, disbursements, and attorney fees attributable to this action. That branch of DMHZ's motion seeking leave to reargue the May 16, 2011 decision and September 6, 2011 order requiring notice to the tenants of 22 James Street, New York, New York, was withdrawn at oral argument. (*See* DMHZ Reply Aff., ¶ 3; Tr., at 3). Praetorian otherwise opposes.

Praetorian cross-moves for an order directing it to retain to the credit of this action the $1 million proceeds of the subject Praetorian policy, less the amount of reasonable costs and fees, discharging it from liability as to the interpleader defendants and any other potential claims with respect to the instant matter, and dismissing all counterclaims against it. DMHZ and interpleader defendants Luu, Pittman, Wong, and Ko oppose.

I. BACKGROUND

Familiarity with the previously assigned justice's prior decision, dated May 16, 2011, as amended by decision dated September 2, 2011, and order dated September 6, 2011 (motion sequence 003) is presumed. On or about October 17, 2012, I was assigned to Part 12 where this action pends.

Praetorian issued a $1 million per occurrence liability insurance policy, no. H543002984, to DMHZ, effective from August 18, 2008 to August 18, 2009, covering an apartment building owned by DMHZ and located at 22 James Street, a/k/a 45 St. James Place, New York, New York. On February 24, 2009, a fire occurred at the premises, resulting in deaths, personal injuries, and property damage to tenants and occupants of the premises. The victims of the fire or their estates

commenced three lawsuits against DMHZ in Supreme Court, New York County, now consolidated under *You Qun Liu v DMHZ Corp.*, index no. 104930/09. Praetorian brings this interpleader action seeking an order determining the distribution and priority of settlement of the insurance funds available under the policy.

Relying on CPLR 1006(f), the previously assigned justice, in his May 16 decision, authorized Praetorian to retain the $1 million to the credit of the action, and held that Praetorian was entitled to costs and fees charged against the $1 million, noting that Praetorian had no independent liability and that although it had not been "forced" to commence an interpleader action, its commencement of the action "comports with the spirit and intendment of CPLR 1006," which is to protect stakeholders from multiple adverse claims to funds in issue. He also held that Praetorian is entitled to costs, disbursements, and reasonable attorney fees for prosecuting the interpleader action. The decision granting the motion was conditioned on Praetorian notifying the tenants of the premises that an action had been commenced.

By order dated September 2, 2011 and entered September 9, 2011, the May 16, 2011 decision was amended to the extent that Praetorian was permitted to serve the tenants with notice of the action after entry of the order. In that order, dated September 6, 2011, Praetorian was ordered, among other things, to also notify all persons who may have been tenants or occupants of the premises that the action had been commenced, and then move for an order discharging it from liability as to the interpleader defendants and any other potential claimants with respect to the incident, and awarding it costs and fees, the amount of which was to be determined by the court, charged against the $1 million.

II. DISCUSSION

A. Motion to reargue

A motion for leave to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 435-436 [2d Dept 2005]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). Nor may the movant advance new arguments not previously presented. (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

DMHZ maintains that the prior justice overlooked or misapprehended authority for the proposition that an award of litigation costs and fees to a stakeholder is inappropriate where such costs and fees are part of the ordinary cost of doing business and where an interpleader action is brought in the stakeholder's own self-interest. It relies primarily on federal case law. (Affirmation of Michael R. Manarel, Esq., dated Jan. 31, 2012).

Praetorian denies that it commenced the interpleader action in the usual course of its business or in its own self-interest. Rather, it maintains that it did so out of a concern that the policy limit and number of potential and serious claims would force it to pay out insurance proceeds to the first-in-time claimants in a manner that could deprive later claimants of any recovery. (Affirmation of Janet P. Ford, Esq., dated Feb. 13, 2012).

As the previously assigned justice does not mention in his order the federal case law cited

by DMHZ in its original opposition papers, DMHZ has established that there exist matters of law overlooked by the court. Leave to reargue on this issue is thus granted.

Federal case law on interpleader relies on and interprets the federal interpleader statute, 28 USC 1335, which is silent on the issue of litigation expenses (*see e.g. Travelers Indem. Co. v Israel*, 354 F2d 488, 490 [2d Cir 1965]; *Commercial Union Life Ins. Co. v Almonor,* 1999 WL 292562, *1, 1999 US Dist LEXIS 6857, *3-4 [SD NY 1999]), and federal courts have disallowed litigation expenses on the rationale that they are part of an insurance company's ordinary cost of doing business (*see e.g. Travelers*, 354 F2d at 490; *Feehan v Feehan*, 2011 WL 497852, *7, 2011 US Dist LEXIS 14047, *19 [SD NY 2011]). Federal case law, however, is not binding on this court. (*See Swezey v Lynch*, 87 AD3d 119 [1st Dept 2011], *affd* 19 NY3d 543 [2012] [observing that decision rendered by U.S. Supreme Court which applied federal procedural rule not binding on appellate division of state court in interpreting state procedural rule]).

In contrast, our state interpleader statute, CPLR 1006(f), not only permits a court to award attorney fees and costs in an interpleader action., but provides that the court "shall" impose fees and costs "as may be just." (*See eg Boris v Flaherty,* 242 AD2d 9, 14 [4th Dept 1998]).

Here, on two prior occasions, justices previously assigned to this case approved the bringing of this action in order to: (a) distribute the limited funds available in an equitable manner; and (b) protect against likely bad-faith claims by claimants if Praetorian were to pay claims on the first-in-time, first-in-right basis. (Decision and order, dated June 17, 2010 [mot. seq. numbers 001 and 002] [Diamond, J.]).

Moreover, it is undisputed that the individual defendants suffered significant injuries and

damages, and that their claims in total will likely exceed the $1 million policy limit. Thus, while Praetorian may not have been forced to interplead here, it acted prudently in doing so as it cannot be disputed that there will be competing claims to the insurance proceeds and that pursuant to the first-in-time, first-in-right rule, the proceeds may be depleted by payment to only one or two claimants, potentially causing other claimants difficulty in obtaining recovery for their injuries. The responsibility for these circumstances lies solely with DMHZ.

Therefore, under the circumstances presented, Praetorian ought not be penalized for having taken the more prudent and diligent course rather than waiting for a dispute to arise. (*See Rice v Chanas*, 191 Misc 2d 813 [Sup Ct, New York County 2002] [attorney entitled to costs, fees, and expenses for bringing interpleader action to resolve competing claims to settlement funds]).

DMHZ and the individual defendants observe that awarding fees against the $1 million will deplete the funds available to the individual defendants. Having failed to interpose this argument in the prior motion, defendants are not entitled to its consideration now. In any event, they have not established a basis for departing from the general rule that costs and fees for an interpleader be taken from the insurance fund. (CPLR 1006[f] [costs and fees may be charged against subject matter of interpleader action]; *see BNP Paribas v Wayzata Opportunities Fund II, LP*, 2010 WL 1875716 [SD NY 2010]; *Croskey v Ford Motor Co. - UAW*, 2002 WL 974827 [SD NY 2002] [observing that interpleader costs and fees are generally awarded against interpleader fund absent misconduct by party that suggests that party should bear costs]).

Moreover, most of the attorney fees and costs incurred by Practorian result from its obligation to litigate the interpleader action and oppose DHMZ's opposition as well as the instant

motion to reargue, and it was DHMZ's failure to procure sufficient insurance to cover the incident at issue that led Praetorian to commence the interpleader. Thus, the equities here, if any, weigh in favor of Praetorian and against DMHZ.

DMHZ's other arguments were either argued previously or raised for the first time in reply, neither of which is permitted on a motion to reargue. (*Foley*, 68 AD2d at 567-568 [purpose of motion to reargue is not for unsuccessful party to argue again issues already decided or to set forth new arguments]).

B. Praetorian's cross motion

1. Notice

As a condition of the granting of costs, the previously assigned justice directed Praetorian, within 30 days of service of the September 6, 2011 Order with notice of entry, to provide notice of this action to all the tenants of the premises who lived there on the day of the incident (September 6, 2011 Order, at 2). He also ordered that notice be provided in a specific form and given to specific individuals and an entity. (*Id.*).

Praetorian now provides a copy of a notice of entry of the September 6, 2011 Order, which was served on January 9, 2012 (Ford Aff., dated Feb. 13, 2012, exh. A, B), along with copies of notices mailed to the specified individuals and the entity on or about December 21, 2011, and stamped envelopes, certified mail receipts, and return receipts. (*Id.*, exh. C). DMHZ and the individual claimants do not challenge Praetorian's service. Having complied with the conditions set forth by the previously assigned justice, Praetorian is now entitled to consideration of its cross motion.

2. Costs and fees

Praetorian seeks an award of $58,096.39 in costs and fees (Ford Aff., dated Feb. 13, 2012. ¶ 9; exh. D) and, acknowledging that this amount is higher than what was originally anticipated, attributes it to motion practice, numerous discovery requests, and the need to retain an investigator to identify the tenants and occupants who lived at the premises on the day of the incident as well as their last known addresses.

In opposition, DMHZ argues that the amount sought is unreasonable as numerous billing entries are for tasks that are non-billable or unnecessary, such as "research on basic principles of interpleader; numerous interoffice discussions, memos and correspondence; efforts to obtain joinder of the underlying lawsuits, and preparation of litigation budgets and reports," and work on the discharge motion, which DMHZ claims could have been resolved by stipulation (Manarel Aff., dated Feb. 23, 2012, ¶¶ 45-46). It also asserts that the amount of costs and fees should be determined at a hearing.

As a hearing may increase Praetorian's attorney fees and further deplete the funds available to the claimants who suffered substantial injuries as a result of the incident, DMHZ is directed, within 30 days of the date of this order, to review Praetorian's billing records and provide a list of items it finds objectionable and provide Praetorian with the list for its review. Praetorian is then directed to review the list and, within 30 days of their receipt, communicate with DMHZ in an effort to resolve the fees.

If the parties are unable to agree on an amount of attorney fees to be awarded to Praetorian, then the issue of Praetorian's costs, disbursements, and reasonable attorney fees, which Praetorian may deduct from the $1 million, is referred to a Special Referee to hear and

determine (*see* CPLR 4317 [b]; *see also Vermylen v Genworth Life Ins. Co. of N.Y.*, 28 Misc 3d 1236[A] [Sup Ct, NY County 2010]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of interpleader defendant DMHZ Corporation for leave to reargue is granted; it is further

ORDERED, that, upon reargument, the motion is denied; it is further

ORDERED, that the cross motion of interpleader plaintiff Praetorian Insurance Company is granted as follows:

(1) Praetorian is directed to retain the sum of $1 million ($1,000,000) to the credit of all actions arising from the February 24, 2009 fire at 22 James Street, New York, New York, and, upon the retention of said sum, Praetorian is discharged from any and all further liability as to the interpleader defendants named in this action and any other potential claimants with respect to the February 24, 2009 fire at 22 James Street, New York, New York;

(2) all counterclaims asserted against Praetorian are dismissed; and

(3) no part of this Order affects Praetorian's obligation to defend DMHZ, as provided under policy No. H543002984, until such policy's $1 million limit, less the above-stated deduction for costs, disbursements, and attorney fees, is exhausted by either settlement or judgment;

it is further

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ORDERED, that the determination of the issue of Praetorian's costs, disbursements, and reasonable attorney fees is held in abeyance pending either receipt of the stipulation by the parties, as stated in the body of the court's decision, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED, that if the parties fail to stipulate to Praetorian's costs, disbursements, and reasonable attorney fees, then counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

ENTER:

Barbara Jaffe, JSC

DATED: December 19, 2012
New York, New York

[1] Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.