Santa v Azure Nightclub Inc.
2015 NY Slip Op 30175(U)
January 5, 2015
Supreme Court, Bronx County
Docket Number: 20850-2005
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART IAS4

HERNAN SANTA JR., ISRAEL ERNESTO LUGO, ALEXANDER SANTANA, and FREDDY ALVAREZ JR.

Plaintiffs,

-against-

AZURE NIGHTCLUB INC. d/b/a PLAID CLUB

Defendant

Index No. 20850-2005

Decision/Order

Present:
Hon.Howard H. Sherman
J.S.C.

HON. HOWARD H. SHERMAN:

This motion by the Plaintiffs for declaratory relief and for an immediate hearing pursuant to Article 50-B of the CPLR, and cross-motion by the Defendant for an order granting a stay of proceedings, and the motion by Havkins Rosenfeld Ritzert & Varriale LLP for an order permitting it to withdraw as counsel for Defendant, are consolidated for purposes of disposition and decided as follows:

The plaintiffs Hernan Santa Jr, Israel Ernesto Lugo, Alexander Santana and Freddy Alvarez Jr. have moved for an order seeking a declaration that an Order of Rehabilitation dated November 7, 2013 issued by the Court of Chancery of the State of

Delaware pertaining to the rehabilitation of Indemnity Insurance Corporation RRG does *not* stay proceedings in the instant action, and for an order setting this matter down for an immediate hearing pursuant to CPLR Article 50-B. The Defendant Azure Nightclub Inc. d/b/a Plaid Club has cross-moved for a stay of these proceedings based on §7804 of the New York Insurance Law and the Uniform Insurers Liquidation Act, or in the alternative granting a stay pursuant to the Full Faith and Credit Clause of the Constitution, or under principles of comity, or in the interest of judicial economy. The Court issued an order on March 21, 2014 declining to grant this motion and cross motion, restoring them to the calendar, and directing that additional notice be provided to the Receiver for the Insurer in the Court of Chancery of the State of Delaware. This motion and cross-motion were submitted on May 12, 2014.

NOTICE

Unfortunately, proof of the additional notice which the Defendant was directed to provide by this Court has not been substantiated. Instead of an affidavit of service, the Defendant's counsel sent a letter to the Court by Federal Express

dated May 8, 2014 which states in pertinent part as follows:

"In accordance with Your Honor's March 21, 2014 order, we served copies of the order and the papers served in connection with the motions by both counsel for plaintiff's and defendant. These documents were served by regular and certified mail return receipt request on March 31, 2014. To date, we have no response to our mailings.

In the interim, the Court of Chancery of the State of Delaware, issued an order, a copy of which we transmit herewith, placing Indemnity Insurance Corporation, RRG ...into Liquidation. Because of the terms of this order, we anticipate moving to withdraw as counsel for defendant in the near future..." [sic].

The Court has received no objection by Plaintiffs to the manner in which notice was allegedly provided to the Receiver, or to the proof submitted by Defendant. It would appear that the Plaintiffs seek to proceed immediately to a hearing pursuant to CPLR Article 50-B, even though their prospects for recovery on any prospective judgment are open to question.

WITHDRAWAL AS COUNSEL

The law firm of Havkins Rosenfeld Ritzert & Varriale LLP ("HRRV") has now moved by order to show cause dated October 23, 2014 for leave to withdraw as counsel for Defendant Azure Nightclub Inc., d/b/a Plaid Club. This order to show cause was served upon an individual named David Marvisi, and to the address

of the Azure Nightclub in care of David Marvisi, as well as upon the Plaintiffs' counsel. Mr. Marvisi, who executed the corporate verification for the Defendant's answer on April 9, 2010, is alleged to be the Principal of Defendant Azure Nightclub Inc. No answer has been received with respect to this motion.

In moving to withdraw, counsel relies on two orders issued by the Delaware Court of the Chancery: the Rehabilitation and Injunction Order dated November 7, 2013 enjoining any proceedings which the said insurer is legally obligated to defend, and a Liquidation Order dated April 10, 2014, continuing this injunction for an additional period of 180 days.

However, as previously noted in this Court's decision and order dated March 21, 2014, counsel for Defendant has not conclusively substantiated its claim that IICRRG, the Insurer now in Liquidation, is identical to the Insurers whose interest counsel has represented, both in this action and in a corresponding Declaratory Judgment action, or that the injunctions issued by the Delaware Court apply to the alleged insurers of this Defendant i.e. Capitol Specialty Insurance LTD and Redland Insurance LTD.

Plaintiffs put the matter succinctly in their motion seeking a declaration that a stay is not in effect: "..there is no documentation that demonstrates that Capitol Specialty Insurance LTD, which became known as Indemnity Reinsurance Corporation of DC, which merged with Indemnity Insurance Corporation of DC, Risk Retention Group, ever merged with or became known as Indemnity Insurance Corporation, RRG". The gap in the 'paper trail' of insurance entities is detailed in this Court's decision and order dated March 21, 2014.

Plaintiffs also have observed that the counsel for Defendant, in a corresponding declaratory judgment action, submitted an answer verified pursuant to 22 NYCRR § 130-1.1a and CPLR §3020(d)(3) which averred that Capitol Special LTD ("Capitol") was authorized to conduct business in the State of New York, and that Redland Insurance LTD ("Redland") was a duly organized foreign company authorized to conduct business in the State of New York. In that corresponding proceeding, Santa v. Capital Specialty Insurance LTD, 96 A.D.3d 638, 949 N.Y.S. 2d 15 (1st Dept 2012) the Appellate Division affirmed a lower Court determination which, inter alia, granted plaintiffs' motion for summary judgment declaring that defendant Redland Insurance LTD must make the entire limits of its excess policy in the amount of

$4 million available to plaintiffs, and denying defendants' cross-motion for summary judgment declaring that no coverage was available under the Redland excess policy. It is now asserted that neither of the alleged insurers in this matter -- neither the primary insurer Capitol nor the excess carrier Redland -- were licensed to conduct business in the State of Maryland, where both were allegedly incorporated, and that there never existed an entity known as Redland Insurance LTD. Notably, the Answer to Verified Amended Complaint filed in that proceeding commences with the words "Defendants, Capitol Specialty Insurance LTD, n/k/a Indemnity Insurance Corp/ ("Capitol"), Redland Insurance LTD n/k/a Indemnity Insurance Corp. ("Redland") and Azure Nightclub Inc., d/b/a Plaid i/s/h/a Azure Nightclub Inc., d/b/a Club Plaid ("Azure") by their attorneys Havkins Rosenfeld Ritzert & Varriale LLP...."

In its prior decision and order dated March 21, 2014, this Court found that it had not been provided with sufficient evidence to resolve the issue of whether there was identity of parties between the ostensible insurers of the defendant in this case, Capitol and Redland, and the insurer under rehabilitation, - now liquidation -- in Delaware, IICRRG. The Court also found that a necessary party, the Receiver for IICRRG, had not been

served.

In the wake of these judicial findings, and upon restoration of this motion and cross motion, the Court has been provided with no more relevant evidence than it had in its possession previously.

The burden of establishing entitlement to a stay must be upon the proponent of it. As ths Court has previously found, the Defendant's cross-motion seeking a stay is not supported by conclusive evidence in admissible form, and it must be denied. The motion by the Plaintiffs is accordingly granted to the extent of setting this matter down for a hearing pursuant to CPLR Article 50-B.

The Court is also compelled to deny the motion by HRRV for leave to withdraw as counsel, without prejudice to renewal upon submission of proof that the Defendant's insurer was indeed IICRRG. An attorney does not have an unfettered right to unilaterally withdraw from representation. Good cause is determined ultimately by the Court. For example, the court may require proof that an attorney has made diligent efforts to remain in contact with his client, and to deny withdrawal where such proof has not been furnished. Benefield v. City of New York, 14 Misc 3d 603, 824 N.Y.S.2d 889 (Sup Ct. Bronx, 2006). Cf.

Cullen v. Olins Leasing Inc., 91 AD 2d 537, 457 N.Y.S 2d 9 (1st Dept 1982) [actual proof that carrier had been found insolvent sufficient to permit withdrawal of counsel].

In moving to withdraw, NRRV relies on the identical arguments and premises previously asserted, which were found to be inadequate by this Court. Instead of furnishing an explanation of the anomalies in its prior representations of Defendant, including its conduct on behalf of various insurance carriers real and imagined, counsel for Defendant merely requests different relief based on the same unproven factual premise, and seeks to be excused from further involvement in this matter. However, as no other probative proof has been furnished by Defendant's counsel, the motion to withdraw is denied.

The Plaintiffs' counsel is directed to settle an order settling this matter down for a CPLR Article 50-B hearing before this Court.

This will constitute the order of this Court.

DATED: 1/5/15

HOWARD H. SHERMAN