

**City of New York v Aspen Ins. UK Ltd.**

2015 NY Slip Op 31469(U)

July 29, 2015

Supreme Court, New York County

Docket Number: 150380/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

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THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and WDF INC.,

Index No. 150388/14

Plaintiffs,

-against-

ASPEN INSURANCE UK LIMITED and  
S & M MECHANICAL CORP.,

Defendants.

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JOAN A. MADDEN, J.:

Defendant S & M Mechanical Corp. (“S&M”) moves pursuant to CPLR 3211(a)(4) for an order dismissing the complaint as against S&M on the ground that there is a prior action pending asserting the same cause of action and seeking the same relief. Plaintiffs the City of New York (“the City”), New York City Department of Environmental Protection (“DEP”) (together “the City”), and WDF Inc. (“WDF”) oppose the motion.

Background

This action concerns the insurance coverage obligations of defendant Aspen Insurance UK Limited (“Aspen”) in connection with a personal injury action commenced in 2009, entitled Peter Larkin and Laura Larkin v. The City of New York, The New York City Department of Environmental Protection and WDF Inc., Index no. 113998/09 (“the underlying action”). The plaintiff in the underlying action was an employee of S&M, which was a subcontractor hired by WDF at a sewage treat plant located on Wards Island. The City, through DEP, holds a long term lease for the facility. It is alleged that pursuant to its contract with WDF, S&M agreed to procure insurance for plaintiffs as additional insureds (“the WDF Contract”).

On January 5, 2010, WDF commenced a third party action against S&M (hereinafter “the

third-party action”) which included a fourth cause of action for breach of contract based on S&M’s alleged failure to procure insurance. Discovery is complete in the underlying action, which is on the trial calendar.

Plaintiffs commenced this action in 2014. The complaint alleges that “Aspen afforded commercial general liability insurance policy to ...S&M bearing policy number CRA4MMF 08 effective October 1, 2008 through October 1, 2009, with limits of \$1 million per occurrence/\$2 million aggregate” (hereinafter the “Aspen policy). Complaint, ¶ 9. The Aspen policy allegedly “was to provide additional insured status where required by written contract, and specifically included the plaintiffs....” Id. The complaint further alleges that on or about December 14, 2009, the plaintiffs promptly and timely served a notice on S&M demanding defense and indemnification in the underlying action pursuant to the Contract and that, “in response to the tender, Aspen/S&M have failed to honor their obligations to provide a defense/indemnity and insurance coverage for plaintiffs....” Id. ¶¶ 13, 14.

The complaint asserts two causes of action against Aspen seeking defense and indemnification in the underlying action as well as reimbursement for any and all amounts expended, and a third cause of action against S&M seeking damages for breach of its obligation to procure insurance in the event it is found that the Aspen policy does not provide additional insured coverage to plaintiffs.

S&M moves, pursuant to CPLR 3211(a)(4), for an order dismissing the third cause of action against it for breach of contract, on the ground that WDF has asserted the same claim against it in its third-party action, which was commenced approximately four years before this action. By interim order dated October 6, 2014, this motion was held abeyance pending a decision on S&M’s motion for summary judgment dismissing certain of WDF’s third-party

claims against it in the underlying action, including the claim for breach of its obligation to procure insurance.<sup>1</sup> By decision and order dated July 24, 2015, this court, *inter alia*, denied S&M's motion to the extent it sought to dismiss the third-party claim for breach of contract to procure insurance, finding that there were triable issues of fact as to whether the additional insurance coverage obtained by S&M from Aspen complied with its obligation to procure insurance under the WDF Contract.

In opposition, plaintiffs argue that in this action, the first and second causes of action against Aspen address legal issues related to insurance coverage which are not at issue in the underlying action, and that since S&M is an insured under the Aspen policy, it has an interest in the outcome of these two causes of action asserted against Aspen. Plaintiffs also argue that as the determination of the claims against Aspen will affect S&M's potential liability for breach of its obligation to procure insurance, the complaint should not be dismissed against S&M, which should be bound by any order or judgment in this action regarding Aspen's coverage obligations.

In reply, S&M notes that it is not seeking to dismiss the claims against Aspen, and that contrary to plaintiffs' position, it does not claim that it would be inequitably affected by a judgment as to the rights of plaintiffs as additional insureds under the Aspen policy. Instead, it asserts that it "has no standing or interest, and takes no position with respect to plaintiffs' claims against Aspen." (Reply Aff., ¶8).

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<sup>1</sup>WDF's third-party complaint asserted claims against S&M for common law contribution and indemnification, contractual indemnification, and breach of its obligation to procure insurance. In addition, to the claim for breach of its obligation to procure insurance, S&M moved to dismiss the claims for common law contribution and indemnification since Larkin did not sustain a "grave injury" for the purposes of Workers' Compensation Law § 11. This aspect of the motion was granted without opposition.

## Discussion

CPLR 3211(a)(4) provides:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires...

To warrant dismissal under this provision, “the two actions must be ‘sufficiently similar’ and the relief sought must be the same or substantially the same.” Montalvo v. Air Dock Systems, 37 A.D.3d 567 (2d Dept 2007) (quoting Kent Dev. Co. v. Liccione, 37 N.Y.2d 899, 901 [1975]). There must also at least be a “substantial identity of parties ‘which generally is present when at least one plaintiff and one defendant is common in each action.’” Proietto v. Donohue, 189 A.D.2d 807 (2d Dept 1993) (citing Morgulus v. J. Yudell Realty, 161 A.D.2d 211, 213 [1<sup>st</sup> Dept 1990]).

The determination as to whether dismiss on the ground of another action pending is subject to the court’s broad discretion. Whitney v. Whitney, 57 NY2d 731 (1982). Furthermore, the court need not dismiss the action but may make such order as justice requires, including granting a stay instead of dismissal or granting relief with respect to the earlier commenced action. See SafeCard Services, Inc. v. American Exp. Travel Related Services, Co., Inc., 203 A.D.2d 65 (1<sup>st</sup> Dept 1994); Siegel, *Practice Commentaries*, McKinney’s Consol. Laws of NY, Book 6B, CPLR 3211; 3211:14, 3211:18, 3211:20 (2005); Zelin, 2A Carmody-Wait 2d, Another Action Pending § 12:2 (March 2014).

Here, the third cause of action in this action and the fourth cause of action in third party action are both premised on S&M’s alleged failure to provide the promised insurance under the

WDF Contract (See Complaint, ¶ 14; Third-Party Complaint, ¶28) and seek substantially the same relief (i.e. damages for defense and/or a declaration of liability in underlying action). See Complaint, ¶23; Third-Party Complaint, ¶30-32. Moreover, there is at least one plaintiff, i.e. WDF, and the same defendant, i.e. S&M, in common in this action and in WDF's third-party complaint.

In addition to involving identical claims by WDF against S&M for breach of its obligation to procure insurance, the actions give rise to overlapping legal and factual issues which should be determined at the same time to avoid inconsistent outcomes. The motion is thus granted to the extent of severing the third-party action, which is pending before this court, and consolidating it with this action. This remedy is appropriate since insurance issues should not be tried with the underlying action which seeks damages for personal injuries (Robles v. Microtech Contracting Corp., 90 AD3d 531 (1<sup>st</sup> Dept 2011)), and the City is not a party to the third-party action.

#### Conclusion

In view of the above, it is

ORDERED that defendant S&M Mechanical Corp.'s motion is granted to the extent of severing WDF Inc v. S&M Mechanical; Third-party Index No. 590012/10 from Peter Larkin and Laura Larkin v. The City of New York, The New York City Department of Environmental Protection and WDF Inc., Index no. 113998/09, and consolidating it with this action; and the consolidated action shall bear the following caption:

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
and WDF, INC,

Plaintiffs,  
- v -

Index No. 150380/14

ASPEN INSURANCE UK INSURANCE LIMITED,  
and S&M MECHANICAL CORP.,

Defendants

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and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark the Court's records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 17, 2015, at 9:30 am, in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: July 9, 2015

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**HON. JOAN A. MADDEN**  
**J.S.C.**