Assenzio v A.O. Smith Water Prod.
2015 NY Slip Op 31647(U)
August 28, 2015
Supreme Court, New York County
Docket Number: 190008/12
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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INDEX NOS 190008/12
190026/12, 190200/12,
190183/12; 190184/12

SANTOS ASSENZIO and
ANNITOLIA ASSENZIO,
ROBERT BRUNCK, PAUL LEVY,
ROSLYN LEVY
CESAR O. SERNA
RAYMOND VINCENT,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS, ET AL.,

Defendants.

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JOAN A. MADDEN, J:

In this consolidated action, plaintiffs move, by order to show cause, to enlarge the time that they may stipulate to a reduction in verdict pursuant to the court's decision and order dated February 5, 2015, and entered February 9, 2015 (hereinafter "the Decision"), to a date on or before fourteen days following the decision to be rendered by the Appellate Division, First Department, in the appeal currently pending, entitled *In re New York City Asbestos Litigation: Peraica v. A.O. Water Products, Co.*; Index No. 190339/11 (hereinafter "*Peraica").* Defendants Cleaver-Brooks, Inc. and Burnham, LLC jointly oppose the motion.

In *Peraica,* the jury awarded Peraica's estate $35 million for Mr. Peraica's two years of past pain and suffering from his mesothelioma. Justice Martin Shulman remitted the award to $18 million. Defendant Crane appealed, and plaintiffs requested that the damage award be sustained.

Plaintiffs previously moved for an enlargement of time in light of the appeal in *Peraica,* and, by decision and order dated June 30, 2015 ("the June 30 decision"), the court granted this

relief to the extent of extending the time in the Decision to stipulate to a reduced damage award from 30 days of service of a copy of the Decision with notice of entry to 60 days from the date of the June 30 decision.

On this motion, plaintiffs argue that their request for a further enlargement of time is meritorious as a "principal issue [before the First Department on the *Peraica* appeal] concerned the methodology by which the Court evaluates a jury damages assessment." Plaintiffs further state that "[i]n other respects, the *Peraica* appeal presented the First Department with issues it had just decided in *Dummitt,* and therefore the Appellate Division will likely await a Court of Appeals ruling [in *Dummitt*] probably to be issued in 2016, before returning to those issues in *Peraica*." According to plaintiffs, the related issues in *Dummitt* and *Peraica* involve principals of forseeability and duty in asbestos litigation.

Defendants oppose the motion, arguing that motion should be denied, as it seeks renewal of the June 30 decision, and fails to raise new facts that were not known at the time of the original motion. Defendants further argue that a stay is unwarranted as a decision by the Appellate Division is not imminent, as the determination of *Peraica* may well depend on the Court of Appeals determination of the appeal in *Dummitt/Konstantin,* which has not been calendared for argument in September or October of this year, and that a decision therefore will not be rendered for months in the future.

As a threshold issue, with respect to defendants' argument that this motion should be denied on the grounds that it seeks renewal, the court notes that the motion seeks a further extension of time and thus, is not categorically one for renewal. However, defendants are correct that the motion seeks the same relief as sought in the original motion, i.e. an extension of time

until fourteen days after the Appellate Division decision in *Peraica*. Even if the motion is considered one for renewal, that the Appellate Division has not yet issued its decision in *Peraica*, is a factor to be weighed in deciding whether to grant a stay. Significantly, in granting an extension of time for 60 days from the date of the June 30 decision, the court noted that the determination of "the *Peraica* appeal may assist both sides in determining whether to stipulate as to the reduction of the award." Thus, implicit in the June 30 decision was that the stay was granted in expectation of an Appellate Division decision in the *Peraica* appeal during the 60 day period.

While the absence of a decision on the appeal in *Peraica* is technically not a new fact, it is well established that "[t]he requirement that a motion for leave to renew must be based on new facts is a flexible one." Rakha v. Pinnacle Bus Services, 98 AD3d 657, 658 (2d Dept 2012). Thus, renewal "may be granted in the court's discretion, in the interest of justice, even on facts that were known to the movant at the time of the original motion [and]...so as not to defeat substantial fairness" Cruz v. Bronx Lebanon Hosp. Center, 73 AD3d 597, 598 (1st Dept 2010). Likewise, the court has discretion to modify its prior order. See Goldman v. Cotter, 10 AD3d 289, 292 (1st Dept 2004)(noting that a court retains authority to vacate or modify its own judgment or order "for sufficient reason and in the interests of substantial justice"); see generally, CPLR 5015(a). Moreover, as the court found in its June 30 decision, the court has discretionary authority to grant a stay of proceedings. See generally, Estate of Salerno v. Estate of Salerno, 154 AD2d 430 (2d Dept 1989); CPLR 2201 (providing that "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").

Under these circumstances, the court finds that defendants' arguments with respect to

renewal do not bar consideration of the motion, and the court exercises its discretion and will consider it. A court's inherent power to modify its prior orders, substantial fairness and the interest of justice support consideration, where, as here, the potential prejudice to plaintiffs, as discussed below, is significant, particularly as the court substantially reduced awards to the plaintiffs.[1] Specifically, there is a direct relationship between the appellate issue with respect to damages in *Peraica*, i.e. the methodology of evaluating jury damage assessments and its impact on remittitur, and plaintiffs' potential prejudice if plaintiffs are required to decide whether to stipulate to the remitted amounts prior to the determination of plaintiffs' arguments as to methodology to be used in such calculation.

As for defendants' argument that a stay should not be granted as a decision on the *Peraica* appeal is not imminent, such argument is unpersuasive. See Reynders v. Conway, 79 AD2d 863 (4th Dept 1980)(holding that court had power to stay class action until an appeal was argued in the Court of Appeals). In support of their position, defendants cite Miller v. Miller, 109 Misc2d 982, 983 (Sup Ct Suffolk Co. 1981), in which the trial court denied a stay of divorce proceedings pending a determination by the Court of Appeals in another case, noting "only a motion for leave to appeal had been made with no decision thereof." While the court in Miller v. Miller, stated that a stay should not be granted pending an appeal in another action unless the

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[1]The court remitted the amount of damages as follows:

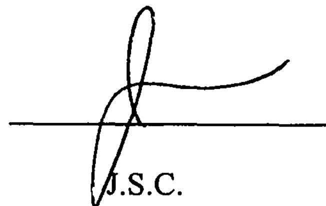
In *Assenzio,* from $20 million for past pain and suffering to $5.5 million, and for loss of consortium from $10 million to $500,000;
In *Brunck*, from $20 million for past pain and suffering to $3.2 million;
In *Levy*, from $50 million for past and future pain and suffering to $7.5 million, and for loss of consortium from $10 million to $650,000;
In *Serna*, from $60 million for past and future pain and suffering to $7.5 million; and
In *Vincent*, from $20 million for past pain and suffering to $5 million.

appellate decision is "imminent," it acknowledged that the determination as to whether to grant a stay depends other circumstances including "when was the appeal taken, when arguments are to be heard, and when a decision is forthcoming" Id., citing Practice Commentary, McKinney's CPLR § C2201.11 . Here, the court recognizes defendants' interest in knowing whether plaintiffs will stipulate to the remitted amounts, and defendants' argument that the decision on the *Peraica* appeal may not be imminent and may depend on a decision by the Court of Appeals in *Dummitt.* Nonetheless, the court finds that a stay is appropriate under the circumstances here, as the outcome of the *Peraica* appeal may have a significant impact on plaintiffs' decision as to whether to stipulate to a reduction of the damage awards. Additionally, of significance is that while defendants have an interest in knowing whether plaintiffs will stipulate to the remitted amounts, such interest is outweighed by the potential prejudice to plaintiffs if the enlargement of time is denied.

In view of the above, it is

ORDERED that plaintiffs' motion is granted so that the time to stipulate to a reduced damage award set forth in the Decision is extended from 60 days of the date of the June 30 decision to a date on or before fourteen days following the decision to be rendered by the Appellate Division, in the *Peraica* appeal.

DATED: August 28 2015



J.S.C.

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