

Zurich Am. Ins. Co. v Burlington Ins. Co.

2018 NY Slip Op 32699(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 651383/2014

Judge: Kelly A. O'Neill Levy

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NYSCEF DOC. NO. 125

RECEIVED NYSCEF: 10/22/2018

KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ZURICH AMERICAN INSURANCE COMPANY,	INDEX NO. <u>651383/2014</u>
Plaintiff,	
- v -	MOTION DATE <u>09/05/2018</u>
THE BURLINGTON INSURANCE COMPANY,	MOTION SEQ. NO. <u>003, 004</u>
Defendant.	

DECISION AND ORDER

-----X

THE BURLINGTON INSURANCE COMPANY,

Third-Party Plaintiff.

- v -

ACHILLES CONSTRUCTION CO., INC.

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105 were read on this motion to/for DISCONTINUE

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an insurance coverage action related to the duty to defend and indemnify in an underlying action. Plaintiff Zurich American Insurance Company (hereinafter, Zurich) moves for an order (mot. seq. 003), pursuant to CPLR § 3217(b), directing that the present action be discontinued without prejudice. Defendant The Burlington Insurance Company (hereinafter,

Burlington) opposes and moves for an order (mot. seq. 004) vacating the note of issue. Zurich opposes. Third-Party Defendant Achilles Construction Co., Inc. (hereinafter, Achilles) cross-moves for an order (mot. seq. 004) striking the note of issue, or alternatively, pursuant to CPLR § 603, severing the third-party action. Zurich opposes the portion of the cross-motion seeking to strike the note of issue.

BACKGROUND

On May 5, 2014, Zurich filed a complaint for declaratory judgment seeking a declaration that Burlington has a duty to defend and a duty to indemnify Zurich's insured, CCA Civil – Halmar International, LLC (hereinafter, CCA) in the underlying Labor Law action titled, *Luigi Cappellino v. MTA, et al.*, Index No. 150143/2013, in New York Supreme Court, New York County (hereinafter, the underlying action), pursuant to the terms of Burlington's insurance policy issued to Achilles. Burlington issued a commercial general liability policy to Achilles (hereinafter, the Burlington policy) stating that for there to be liability under the policy, the bodily injury must have been caused "in whole or in part" by the acts or omissions of Achilles. On December 9, 2010, CCA and Achilles entered into a subcontract agreement (hereinafter, the subcontract), under which Achilles would be liable for indemnification if the bodily injury was caused by an act or omission of Achilles.

On April 5, 2016, this court granted Zurich's motion for partial summary judgment and ordered that Burlington has a duty to defend CCA as an additional insured in the underlying action on a primary and non-contributory basis and that Zurich was entitled to recoup its costs and fees in defending CCA in the underlying action. The only remaining issue in the present action is related to indemnity obligation.

On November 17, 2017, a third-party defendant in the underlying action, Navillus Tile, Inc. (hereinafter, Navillus) filed a Notice of Suggestion of Bankruptcy indicating that on

November 8, 2017, it filed a voluntary petition seeking bankruptcy protection and that the filing of a bankruptcy petition operates as an automatic stay of the underlying action. Navillus was identified as a subcontractor that may be potentially liable for the underlying plaintiff's injuries. There is presently a stay on the underlying action.

On January 5, 2018, Burlington filed a third-party complaint naming its insured, Achilles, as a third-party defendant in this action. On May 7, 2018, David Braunstein, the principal of Achilles, testified that Achilles could not have been responsible for the injuries sustained in the underlying action. On May 29, 2018, Zurich filed a note of issue, certifying that all necessary discovery is complete. Burlington seeks additional discovery to bolster its position that Achilles is not liable in the underlying action. Since the underlying action is stayed, the court cannot determine Achilles' liability, which precludes a determination on whether Zurich is entitled to indemnification.

DISCUSSION

Motion for Discontinuance (Mot. Seq. 003)

Zurich moves for an order, pursuant to CPLR § 3217(b), directing that the present action be discontinued without prejudice.

CPLR § 3217(b) states in part, “[A]n action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.” CPLR § 3217 (Voluntary Discontinuance). Since a party may not ordinarily be compelled to litigate, a discontinuance should generally be granted. *Tucker v. Tucker*, 55 N.Y.2d 378, 383 (1982). A motion for voluntary discontinuance should only be denied where special circumstances, such as prejudice to a substantial right of the defendant or other improper consequences are shown to exist. *Expedite Video Conferencing Servs., Inc. v. Botello*, 67 A.D.3d 961, 961 (2d Dep’t 2009). Delay, frustration, and expense in preparation for a contemplated

defense do not constitute prejudice warranting denial of a motion for voluntary discontinuance. *Eugenia VI Venture Holdings, Ltd. V. Maplewood Equity Partners, L.P.*, 38 A.D.3d 264, 265 (1st Dep't 2007).

Burlington asserts that special circumstances are present and that it would suffer prejudice if the motion was granted, in that the underlying action that would determine Achilles' liability has been stayed. Burlington argues that for CCA to be an additional insured under the Burlington policy, the act or omission that caused the bodily injury must have been caused in whole or in part by Achilles, and for Burlington to be liable for indemnification under the subcontract, Achilles must have been negligent in causing the alleged injuries in the underlying action. Burlington raises concerns regarding delay and costs. Burlington seeks discovery that it contends is material and necessary for its defense, and argues that it would suffer prejudice if it were deprived of the opportunity to conduct this discovery.

Zurich asserts that the discontinuance of this matter would not only conserve judicial resources, but it would also lessen the burden and expense of protracted litigation for all parties. Zurich contends that the determination on whether Achilles caused the bodily injury in the underlying action cannot be litigated in this action.

For the first time during oral argument, Burlington raises the issue that it has the right to pursue its counterclaim against Zurich in light of changed law over the past year and six months. Burlington also raises for the first time during oral argument that it wishes to conduct further depositions of Zurich and Zurich's insured. Achilles also asserts for the first time during oral argument that if the action is not stayed and a bench trial occurs, there could be a collateral estoppel effect on the underlying action, which raises new issues. None of these arguments appear in the motion papers. The court will not consider these new issues raised for the first time

during oral argument, as the other parties were not provided adequate time to prepare and submit responses to these new issues presented.

Burlington fails to demonstrate that a special circumstance such as prejudice to a substantial right or an improper consequence exists. Burlington's concerns regarding delay and expense do not constitute prejudice to its substantial rights. A discontinuance is appropriate because neither Zurich nor Burlington can seek a judgment on the remaining indemnity issues until there has been a determination in the underlying action as to the cause of the underlying plaintiff's bodily injury and the amount of any judgment or settlement rendered in the underlying action. Without a determination in the underlying action, there would be no indemnity obligation on behalf of CCA for which either Zurich or Burlington would be responsible.

Thus, the court grants Zurich's motion for a discontinuance of this action without prejudice. As such, all current case deadlines for this action are vacated.

Motion to Vacate Note of Issue (Mot. Seq. 004)

Burlington moves and Achilles cross-moves for an order vacating or striking the note of issue. Achilles, alternatively, cross-moves for an order, pursuant to CPLR § 603, severing the third-party action.

Zurich asserts that Achilles' cross-motion is untimely, as any cross-motions were to be served by July 13, 2018 and Achilles' cross-motion was filed on July 17, 2018. Despite the cross-motion being untimely, the court will consider its merits.

22 NYCRR § 202.21(e) (Note of issue and certificate of readiness) states in part:

(e) *Vacating note of issue.* Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Burlington asserts that this case is not ready for trial because depositions of witnesses who can testify about Achilles' involvement in the underlying action is crucial to the determination of Burlington's liability in this matter. Zurich asserts that all outstanding discovery in the so-ordered stipulation dated April 26, 2018 has been completed, that Burlington has not sought any additional discovery, and that Burlington's arguments are meritless in that discovery regarding Achilles' role in the underlying action is inappropriate in the present action, as it needs to be sought in the underlying action. Achilles asserts that it has not been afforded the opportunity to conduct any discovery in this action and that the parties have yet to have responded to its July 13, 2018 demands. Achilles' demands include a Notice of Deposition of a representative of Burlington for October 19, 2018 and a Notice to Produce Documents to Burlington.

For Achilles to be afforded the opportunity to conduct discovery, and since this matter is discontinued as stated above, the court will sever the third-party complaint in this action. Since the present action has been discontinued, the motion and cross-motion to vacate or strike the note of issue are moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that plaintiff Zurich American Insurance Company's motion for an order (mot. seq. 003), pursuant to CPLR § 3217(b), directing that the present action be discontinued is granted without prejudice; and it is further

ORDERED, that the present action is hereby discontinued without prejudice; and it is further

ORDERED, that defendant The Burlington Insurance Company's motion for an order (mot. seq. 004) vacating the note of issue is moot; and it is further

ORDERED, that third-party defendant Achilles Construction Co., Inc.'s cross-motion for an order (mot. seq. 004) striking the note of issue is moot; and it is further

ORDERED, that third-party defendant Achilles Construction Co., Inc.'s cross-motion for an order (mot. seq. 004), pursuant to CPLR § 603, severing the third-party action is granted; and it is further

ORDERED, that defendant The Burlington Insurance Company's third-party complaint against third-party defendant Achilles Construction Co. is hereby severed and shall continue.

This constitutes the decision and order of the court.

10-22-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE