

Kaplan v Atlantic Specialty Ins. Co.,
2019 NY Slip Op 32034(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 652860/2016
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48EFM

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HOWARD KAPLAN, MICHELLE RICE
Plaintiff,

- v -

ATLANTIC SPECIALTY INSURANCE COMPANY,
Defendant.

INDEX NO. 652860/2016
MOTION DATE _____
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 120, 122

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121

were read on this motion to/for DISCOVERY

Plaintiffs Howard Kaplan and Michelle Rice initiated this action pursuant to CPLR 3213, summary judgment in lieu of complaint, on May 27, 2016 seeking an order directing defendant Atlantic Specialty Insurance Company (Atlantic) to pay Arkin Kaplan Rice LLP (AKR) \$513,147.16 and pay plaintiffs \$847.72 in costs. (NYSCEF Doc. No. [NYSCEF] 2). After converting this CPLR 3213 motion into a complaint and answer, this action was stayed until December 20, 2017 when the referee's May 26, 2017 report was confirmed in part and rejected in part in the accounting action (Index No. 652316/2012). (NYSCEF 46, Justice Oing's October 17, 2016 decision). Justice Oing explained that this issue would be resolved in the accounting proceeding. (*Id.*).

In motion sequence number 002, defendant moves for summary judgment dismissing this action and sanctions. (NYSCEF 50). In motion sequence number 003, plaintiffs move for discovery. (NYSCEF 74).

The background of this action is set forth in Justice Oing's October 17, 2016 decision, with which familiarity is presumed, and will not be repeated here. (NYSCEF 46).

Motion sequence number 002 is granted, and the action is dismissed. On December 3, 2012, Justice Sherwood ordered Arkin to return \$513,146.16 (the Amount) to AKR. (NYSCEF 6). Arkin appealed and, consistent with CPLR 5519, posted an appeal bond, dated December 5, 2012, issued by Atlantic in the Amount. (NYSCEF 7). The appeal bond provided that "if the [December 2012 Order] ... is affirmed, or the appeal is dismissed, [the AKR Parties] shall pay the sum directed to be paid by the [December 2012 Order] plus interest and costs or the part of it as to which said Decision and Order is affirmed." On March 2, 2016, M&T issued a Final Accounting concluding that \$311,902 of the Amount was "returned" to AKR years ago (by virtue of sub-tenant payments made to AKR post dissolution, a credit from Ladenberg, and payments from third-parties for legal services). (NYSCEF 38). Arkin transferred an additional \$201,245.69 to AKR on May 20, 2016. (NYSCEF 61, Chris Collins February 16, 2017 testimony before referee, tr. at 376:4-377:26).

In the accounting action, this court found that these financial transactions satisfied the December 3, 2012 order. (NYSCEF 1799). While it certainly would have been easier to trace if Arkin had simply transferred the full Amount to AKR, Justice Sherwood's order has instead been satisfied in bits and pieces. (See NYSCEF 24, 25,

26, 27, 28, 29). Indeed, this court so found when it modified that part of the referee's report in the accounting action on December 20, 2017. (NYSCEF 1799, p. 6). Plaintiffs did not appeal the December 20, 2017 decision. Plaintiffs refusal to withdraw this action at that point was definitively frivolous. (22 NYCRR §130-1.1 [c]).

Instead, plaintiffs proceeded with this action for which they have no standing. (Partnership Law §66). They withdrew from the partnership on May 17, 2012. Arkin is the winding up partner. Arkin was the party directed to pay the Amount to AKR, not plaintiffs. Plaintiffs insistence in proceeding with this action is frivolous and their conduct merits sanctions. (*Levy v Carol Mgt. Corp.*, 260 AD2d 27 [1st Dept 1999])

The purpose of the undertaking was to secure the payment of the Amount to AKR. (CPLR 2501). Arkin paid the Amount, and thus, the undertaking was not triggered. The "required amount" and "required condition" are determined by the statute, rule, or order which authorizes or requires the undertaking. (David L. Ferstendig (ed.), 5 New York Civil Practice: CPLR P 2501.08 [LexisNexis 2019]). Contrary to plaintiffs' opinion, Atlantic's Appeal Undertaking does not create an obligation to pay interest. To the extent that plaintiffs now frame this case as one to collect interest on the Amount, such interest would be payable to AKR, not plaintiffs. Moreover, this change in position does not resuscitate plaintiffs' frivolous action, but it evidences plaintiffs' knowledge that its prior position was unsustainable.

For the above reasons, Atlantic's motion for sanctions is also granted. Accordingly, plaintiffs shall pay Atlantic's attorneys' fees in this action. (*Jong An Sul v Ladds*, 269 AD2d 162 [1st Dept 2000]). If the parties cannot agree to an amount within 10 days of this decision, then the issue of attorneys' fees shall be determined at a

hearing and shall include an award for Atlantic's cost to prosecute the attorneys' fees hearing.

Accordingly, it is

ORDERED that Atlantic's motion for summary judgment (seq 002) and for sanctions is granted, and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

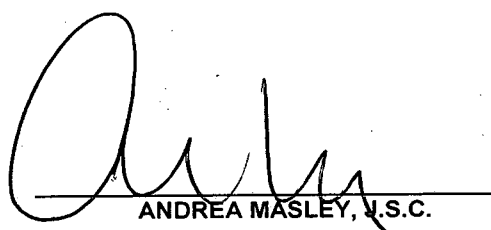
ORDERED that the issue of attorneys' fees is severed, and the parties shall appear for an inquest in Part 48, Room 242, on Monday, August 12, 2019 at 10 a.m. if they cannot reach a resolution within 10 days of the court's entry of this decision on NYSCEF; and it is further

ORDERED that plaintiffs' motion to compel discovery (seq 003) is denied as moot; and it is further

ORDERED that Clerk is directed to enter judgment dismissing the complaint.

Motion Seq. No. 002

7/3/19
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER

- SUBMIT ORDER

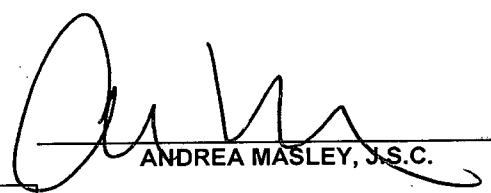
CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN

- FIDUCIARY APPOINTMENT REFERENCE

Motion Seq. No. 003

7/3/19
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER

- SUBMIT ORDER

CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN

- FIDUCIARY APPOINTMENT REFERENCE