SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 150402/2017

CHELSEA PIERS L.P. and CHELSEA PIERS MANAGEMENT INC.,

MOTION DATE 11/01/2019, 11/01/2019

Plaintiffs,

MOTION SEQ. NO. 004 005

- v -

COLONY INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, and EPS IRON WORKS, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 91, 93, 94, 96, 100, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 87, 88, 89, 90, 92, 95, 97, 101, 111, 112, 113, 114

were read on this motion for LEAVE TO RENEW AND REARGUE.

Monteiro & Fishman, LLP, New York City (Michael N. Fishman of counsel), for plaintiffs.
Melito & Adolfsen P.C., New York City (Michael F. Panayotou of counsel), for defendant Colony Insurance Company.

Gerald Lebovits, J.:

This motion arises out of a dispute regarding insurance coverage in connection with an underlying personal-injury action involving a construction site.

Background

Plaintiffs Chelsea Piers L.P. and Chelsea Piers Management, Inc. (Chelsea Piers), brought an action for a judgment declaring that defendants Colony Insurance Company and Endurance American Specialty Insurance Company had a duty both to defend and to indemnify Chelsea Piers as an additional insured on policies issued by those defendants to defendant EPS Iron Works, Inc.

As relevant here, Colony moved, and Chelsea Piers cross-moved, for summary judgment on the issues of the duty to defend and the duty to indemnify (motion sequence 001). In December 2018, this court denied in full Colony's motion for summary judgment, granted

Chelsea Piers summary judgment as to Colony's duty to defend (and to reimburse for past defense costs), and denied Chelsea Piers' summary judgment as to Colony's (asserted) duty to indemnify. (*See Chelsea Piers L.P. v Colony Ins. Co.*, 2018 NY Slip Op 33043 [U] [Sup Ct, NY County Dec. 4, 2018].) Colony appealed. In October 2019, the Appellate Division, First Department, affirmed. (*See Chelsea Piers L.P. v Colony Ins. Co.*, 176 AD3d 506 [1st Dept 2019].)

After Colony noticed its appeal from this court's December 2018 order, Chelsea Piers moved to extend the deadline for filing the note of issue (motion sequence 003). Chelsea Piers argued that the extension was necessary to permit the parties and this court to resolve outstanding discovery disputes and to enable Chelsea Piers to complete taking discovery to which it was entitled. Colony opposed, arguing that the issue of the duty to indemnify would be decided solely by the negligence findings in the underlying action.

This court concluded that because the negligence findings in the underlying action would at the very least substantially shape any remaining inquiry about the duty to indemnify (and thus affect the scope of the discovery remaining in the coverage action, if any), the proper course was to stay this action pending resolution of the underlying action. The court issued an order in July 2019 staying the action and providing that the action could be restored by motion or order to show cause once the underlying action was resolved.[1] (*See* NYSCEF No. 79.)

Discussion

Chelsea Piers now moves for leave to reargue or renew this court's July 2019 stay order (motion sequence 005) and to lift the stay and hold Colony in contempt for its alleged failure to comply with this court's December 2018 order to cover Chelsea Piers' defense costs (motion sequence 004). Motion sequences 004 and 005 are consolidated for disposition.

With respect to Chelsea Piers' motion for leave to renew or reargue, this court is unpersuaded that it overlooked or misapprehended any matters of fact or law when the court stayed the present action—whether or not Colony had formally cross-moved for a stay. Nor does the court believe that it would have reached a different result on the prior motion had the court been aware that Chelsea Piers believed Colony to be flouting this court's December 2018 defense-costs order. Chelsea Piers' request for leave to renew and reargue in motion sequence 005 is denied.

That said, this court must address whether Colony is, in fact, failing to comply with the court's December 2018 defense-costs order (as Chelsea Piers contends in motion sequence 004). Although the court is not minded at this time to hold Colony in contempt, the court agrees with Chelsea Piers that Colony is not meeting its obligations under the December 2018 order.[2]

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[1] As of the date of this order, the underlying action remains pending in this court before Justice Kathryn Freed.

[2] This court disagrees with Colony's assertion (*see* NYSCEF No. 93, at ¶¶ 20-22) that Chelsea Piers' motion to lift the stay and hold Colony in contempt is premature because the underlying action remains ongoing. The language from this court's July 17, 2019, order on motion

Colony does not dispute that the order requires it to reimburse Chelsea Piers for past defense costs or to cover Chelsea Piers' costs going forward. Nor does Colony appear to challenge the reasonableness of the hours and tasks billed by Chelsea Piers' defense counsel (the Rivkin Radler law firm) in the underlying action. Rather, Colony contests only the reasonableness of Rivkin Radler's hourly rates. (*See* NYSCEF No. 94, at 2.)

Colony has not, however, moved in this court at any time for a reasonableness hearing on Rivkin Radler's rates. Even on the present motions, Colony simply says in passing that it is "entitled to a reasonableness hearing on the defense costs," without formally requesting such a hearing. (NYSCEF No. 93, at ¶ 17.) And Colony does not put forward any evidence that might warrant a hearing on whether Rivkin Radler's hourly rates are unreasonably high—not merely higher than Colony would prefer to pay.

Nor does Colony explain why its disagreement with Chelsea Piers about the appropriate hourly rate justified Colony's refusal over the past year to pay *anything* to Chelsea Piers to cover defense costs.[3] At most, Colony now points to language from a decision of the Appellate Division, Second Department, indicating that the trial court in that case erred by "award[ing] defense costs to the plaintiffs without first conducting a hearing to determine the reasonableness of the attorneys' fees involved." (*Catchpole v U.S. Underwriters Ins. Co.*, 250 AD2d 566, 568 [2d Dept 1998].)

But if Colony believed that this court's December 2018 order erred by directing Colony to pay Chelsea Piers' defense costs without a reasonableness hearing, the proper course would have been to move in this court for leave to reargue—or at least to raise this issue as an argument in the alternative on Colony's appeal from the December 2018 order. Colony did neither. Nor did Colony move (either here or in the First Department) for a stay pending appeal.[4] And Colony did not attempt in some other manner to make this court aware of Colony's concerns over the rates charged by Rivkin Radler.[5]

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sequence 003 on which Colony now relies was intended simply to address the issue then before the court—*i.e.*, when it would make practical sense for the parties again to contest (and for the court again to consider) the discovery and merits-related issues implicated by motion sequence 003. The July 17 order did not wholly foreclose Chelsea Piers (or indeed Colony) from moving to lift the stay for some other necessary purpose.

[3] For example, even if Colony were not (yet) willing to pay the full amount of the bills submitted by Rivkin Radler, it could have agreed at least to pay a portion of the bill based on the hourly rate that Colony thought reasonable, while submitting the parties' dispute over the remainder to this court for judicial determination. Colony did not do so.

[4] At a minimum, Colony could have sought a stay limited to the defense costs stemming from the increment of Rivkin Radler's rates that Colony believed to be excessive. Colony did not do so.

[5] For that matter, Colony does not attempt to identify any effort to make *Chelsea Piers* aware of Colony's concerns between December 2018 and June 2019. (*See* NYSCEF No. 93, at ¶¶ 8-12 [describing communications between Colony and Chelsea Piers beginning in June 2019].)

Instead, Colony simply did not pay up. But Colony was not entitled to disregard a court order from which it never sought a stay—let alone to do so on a ground that Colony had never raised with this court before and for which Colony provides no evidentiary support now.

This court is doubtful that Colony's actions with respect to this court's December 2018 order are contumacious—as opposed to merely ill-advised. Chelsea Piers' request for contempt therefore is denied. But this court concludes that Colony has waived any challenge to the reasonableness of Chelsea Piers' defense costs incurred up to the date of this order.

Chelsea Piers' motion to lift the stay in this action therefore is granted to the extent that this court directs Colony by December 20, 2019, to pay all defense costs that Chelsea Piers has incurred prior to the date of this order and for which Chelsea Piers has already provided Colony with proper documentation. Colony must pay the remaining previously incurred defense costs within 14 days of Colony's receipt of documentation of those costs.[6]

Going forward, under the circumstances of this case and the underlying action, it seems most appropriate for Chelsea Piers to continue to be represented by Rivkin Radler. If Colony wishes to challenge the reasonableness of Chelsea Piers' defense costs incurred after the date of this order, it may do so by moving in this court by notice of motion or order to show cause. The filing of any such motion will stay only Colony's obligation to pay the increment of defense costs challenged by the motion. And absent such a motion, Colony must pay the full amount of Chelsea Piers' properly documented defense costs going forward within 14 days of receipt of documentation.

Accordingly, it is

ORDERED that Chelsea Piers' motion to lift the stay previously entered in this action is granted only to the extent described above, and is otherwise denied.

11/25/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[6] Colony argues that Chelsea Piers has not yet adequately documented its defense costs. (*See* NYSCEF No. 93, at ¶ 18.) But Chelsea Piers' motion papers do not merely attach the bills prepared by Rivkin Radler in the underlying action, but give detailed lists of payments broken out by year, including payees, dates, amounts, and *check numbers*. (*See* NYSCEF No. 83, at 1-4.) Colony does not explain why Chelsea Piers was obligated also to provide check images or the like to prove payment.