

Kinnally v Perlman

2019 NY Slip Op 34406(U)

June 20, 2019

Supreme Court, Westchester County

Docket Number: Index No. 58591/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
MARK RAYMOND KINNALLY, by the co-guardians of his Person & Property, MARK KINNALLY and LISA KINNALLY and MARK KINNALLY and LISA KINNALLY, Individually,

DECISION & ORDER
Motion Date: June 17, 2019
Seq#6

INDEX NO. 58591/2016

Plaintiffs,

ACTION NO. 1

-against-

ALEXANDER H. PERLMAN, DIANNE PERLMAN, as The Administratrix of the Estate of RICHARD I. PERLMAN, SUSAN L. LAMOREAUX, IRON MOUNTAIN INFORMATION MANAGEMENT SERVICES, INC., IRON MOUNTAIN INFORMATION MANAGEMENT, LLC, IRON MOUNTAIN INFORMATION SERVICES, INC., IRON MOUNTAIN, INC. and ARI FLEET, LT.,

Defendants.

----- X
SUSAN LAMOREAUX,

INDEX NO. 58422/17

Plaintiff,

ACTION NO. 2

-against-

ALEXANDER H. PERLMAN and RICHARD I. PERLMAN,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on motion sequence 6 by defendants, Alexander H. Perlman and Dianne Perlman, as the Administratrix of the Estate of Richard I. Perlman, to stay the trial of this action in Supreme Court, Westchester County against them pending the

hearing and determination of the relief sought in the Third-Party Summons and Complaint, for a declaratory judgment holding that New York State, the State of New York, State University of New York at New Paltz and the State University of New York are required to defend and indemnify Alexander H. Perlman and Dianne Perlman, as the Administratrix of the Estate of Richard I. Perlman, pursuant to demands made on August 17, 2017 and March 20, 2019, and pursuant to the Decision and Order of the Honorable Christopher J. McCarthy, Judge of the Court of Claims, electronically filed on March 19, 2019, along with such other and further relief as this Court may deem just and proper.

Order to Show Cause; Affirmation in Support;
Exhibits A-E
Affirmation in Support; Exhibits A-C

Upon the foregoing papers and the proceedings held on June 17, 2019, this motion is determined as follows:

Plaintiff commenced this action by the filing of a summons and verified complaint on June 20, 2016. In his complaint, plaintiff asserts that he was a front-seat passenger in a vehicle operated by defendant Alexander Perlman and owned by defendant Richard Perlman ("Perlmans"), that collided with a vehicle operated by defendant Susan Lamoreaux ("Lamoreaux") in the course and scope of her employment with defendants Iron Mountain Information Management Services, Inc., Iron Mountain Information Management, LLC, Iron Mountain Information Services, Inc., Iron Mountain, Inc. And Ari Fleet, LT (collectively, "Iron Mountain") on December 29, 2015. Plaintiff alleges that the vehicle operated by defendant Alexander Perlman skidded across the roadway over a double yellow line into the path of the truck operated by Lamoreaux. Plaintiff sustained multiple fractures and brain damage rendering him permanently disabled. In addition to this action, a companion case was instituted against the State of New York in the Court of Claims for the alleged negligent actions of the State University of New York, New Paltz ("SUNY"), based upon claims of vicarious liability for directing Alexander Perlman to drive his own vehicle, acting as an agent of SUNY, to transport his fellow students, including plaintiff to a scheduled practice.

In the present action, following completion of discovery, by Decision and Order entered on December 3, 2018, the Court granted the motions of Lamoreaux and Iron Mountain to dismiss the claims against them. Following the completion of discovery in the Court of Claims action, the State of New York moved for summary judgment dismissing the claims against it. By Decision and Order of Justice Christopher J. McCarthy dated March 19, 2019, the motion was denied.

The Perlmans now move to stay this action. The Perlmans contend that they have requested that the State of New York defend and indemnify them in this action and are prepared to file an action for declaratory judgment. Attached to their moving papers is a copy of the proposed third-party summons and third-party complaint. The Perlmans contend that the declaratory judgment action would seek a declaration with respect to the rights and duties of the parties pursuant to a declaratory judgment between the Perlmans and the State of New York and whether the Perlmans

are owed a defense and indemnification in the instant matter. The Perlmans complain that they cannot proceed to the Court of Claims, as the Court of Claims, upon information and belief, does not have jurisdiction to hear the declaratory judgment action. The Perlmans also assert that the determination of the State's vicarious liability has significant repercussions for any trial conducted in the Supreme Court concerning their liability. Plaintiff joins in the application and argues inter alia that the relief requested will prejudice no party and will serve judicial economy and the ends of justice.

A court may grant a stay of proceedings upon such terms as may be just pursuant to CPLR §2201. The court has broad discretion to grant a stay to "avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*HSBC Bank USA v Despot*, 130 AD3d 783 [2d Dept 2015]). The Court notes that the affirmation submitted in support of Perlman's application states that "while previous applications have been made for a stay of trial in the Appellate Division upon the ground that an appeal is pending, no application has been made for a stay based upon the grounds set forth herein." At oral argument on June 17, 2019, the Court requested that the parties confirm that the arguments raised in this application were not previously addressed by the Appellate Division, Second Department and required that the parties provide copies of any applications made to the Appellate Division for a stay. On June 18, 2019, plaintiff's counsel complied with the directive. A review of plaintiff's application to the Appellate Division by Order to Show Cause returnable March 29, 2019 reveals that counsel's representation to this Court was misleading and disingenuous at best. Indeed, plaintiff moved for leave to reargue and renew the prior denial by the Appellate Division Second Department based upon the March 19, 2019 Decision and Order of Justice McCarthy. Plaintiff argued that the determination of the State's vicarious liability has significant repercussions for any trial conducted in the Supreme Court concerning liability and that the Supreme Court action should be stayed until the conclusion of the Court of Claims action. This second application for a stay was denied on April 25, 2019. Thus, Perlman's creative argument that the trial should be stayed because they intend to file a declaratory judgment action now that Justice McCarthy has denied summary judgment is nothing more than a transparent attempt to reargue an issue which the Appellate Division, Second Department has previously addressed and properly denied. Therefore, this subsequent application should also be denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that the motion to stay the trial in this matter is denied in its entirety; and it is further

ORDERED that any applications not decided are herewith denied; and it is further

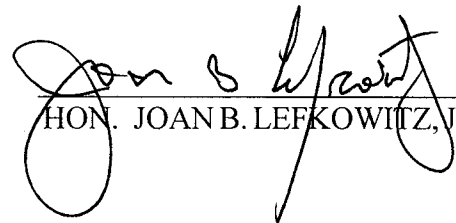
ORDERED that the parties shall appear for a conference in the Settlement Conference Part,

Courtroom 1600, on July 29, 2019 at 9:15 a.m. to schedule the trial; and it is further

ORDERED that movant shall serve a copy of this decision and order with notice of entry upon all parties within two (2) days of entry and shall file proof of service within five (5) days of service to the NYSCEF website.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 20, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk