

**Allied World Assur. Co. (U.S.) Inc. v Aspen Specialty
Ins. Co.**

2020 NY Slip Op 31930(U)

June 18, 2020

Supreme Court, New York County

Docket Number: 655224/2017

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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ALLIED WORLD ASSURANCE COMPANY (U.S.)
INC. and M. CARY, INC.,

DECISION AND ORDER

Plaintiffs,

Index Number
655224/2017

-against-

ASPEN SPECIALTY INSURANCE COMPANY,
MERCHANTS MUTUAL INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
DIMENSIONAL DRYWALL & ACCOUSTICS LLC and
QUALITY CRAFT MARBLE TILE & STONE INC.

Defendants.

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FRANK P. NERVO, J.S.C.

Merchants Mutual Insurance Company (hereinafter “Merchants”) seeks an order vacating the Note of Issue. Alternatively, Merchants seeks to stay or dismiss the action against it pursuant to CPLR §§ 3211(a) and 2201. Aspen Specialty Insurance Company (hereinafter “Aspen”) joins in Merchants’ motion. Plaintiff Allied World Assurance Company (U.S.) Inc. (hereinafter “Allied”) cross moves for an order referring the claims for reimbursement of its defense costs of M. Cary Inc. to a special referee and opposes striking the Note of Issue, staying this matter, or dismissing it.

This insurance coverage dispute arises from an underlying personal injury action, the facts of which are discussed in mot. seq. 002. As relevant here, this Court issued a Decision and Order on September 11, 2019 (mot. seq. 002) granting plaintiff partial summary judgment and declaring that Aspen and Merchants are obligated to provide

primary defense coverage to M. Cary. Merchants contends a decision on a pending appeal may necessitate further discovery not yet identified.

A note of issue should be vacated where the certificate of readiness incorrectly states discovery is complete when discovery, in fact, remains outstanding (*Matos v. City of New York*, 154 AD3d 532 [1st Dept 2017]; *Nielsen v. New York State Dormitory Auth.*, 84 AD3d 519 [1st Dept 2011]).

Here, Merchants' and Aspen's contention that discovery remains outstanding amounts to speculation that the appellate process will result in further discovery becoming necessary in the instant matter (affirmation in support ¶ 7). Put another way, the discovery identified as outstanding does not yet exist. Mere hope or speculation of additional necessary discovery is insufficient to vacate a note of issue, as the certification accompanying it requires all *known* discovery be complete, not potential discovery. Consequently, the Court will not vacate the Note of Issue on this basis.

Similarly, Merchants alternatively seeks to stay this action based on the aforementioned pending appeal. Stays of enforcement of judgments or orders of this Court, based upon the filing of a notice of appeal, are governed by CPLR § 5519. Where the criteria of CPLR § 5519(a) are not met, an automatic stay does not lie. Furthermore, even where the criteria are met in a related matter, the "automatic stay does not extend to matters that are the 'sequelae' of granting or denying the relief" (*Tax Equity Now NY LLC v. City of New York*, 173 AD3d 464 [1st Dept 2019]). Notwithstanding, this Court has broad discretion to issue a stay, pending an appeal of its decision (CPLR § 5519[c]).

The appeal of this Court's September 11, 2019 order (mot. seq. 002) does not automatically stay this matter. That an appeal of a related matter may be pending is irrelevant to such determination. Turning to discretionary stays based on the pending appeal of a related matter, "[a] stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions" (*Somoza v. Pechnik*, 3 AD3d 394 [1st Dept 2004]; see also *Eisner v. Goldberger*, 28 AD3d 354 [1st Dept 2006]). While the issues are related, a disposition of the appeal in the related matter does not determine all questions in this matter (see generally *CT Chemicals (U.S.A) Inc. v. Vinmar Impex, Inc.*, 189 AD2d 727 [1st Dept 1993]). Consequently, the Court will not stay this matter, as a matter of discretion (see CPLR §§ 2201 and 5519[c]).

Likewise, dismissal under CPLR § 3211(a)(2) and (7) is inappropriate. Merchants' argument is an attempt at a second bite of the apple, as this Court already denied its prior motion to dismiss (NSYCEF Doc. No. 115, Decision and Order - mot. seq. 002). This Court's decision expressly found Merchants had a duty to indemnify its insured (*id.* at 6). As this Court held in its prior Decision and Order, and reiterates in this motion, the mere fact that an appeal is pending does not mean that a final determination as to liability has not occurred (*id.*). The Court in the underlying action directed verdict in favor of all defendants; the apparent decision by the plaintiff not to challenge the dismissal as to Quality Craft in that underlying action does not constitute evidence that Merchants has no duty to indemnify M. Cary.

Allied cross moves for an order pursuant to § 4317(b), setting the matter before a referee for a calculation of fees and costs due from Aspen and Merchants in defending the action against M. Cary. The Court finds, given the above-mentioned, calculation before a referee is warranted.

Accordingly, it is

ORDERED that Merchants' motion to vacate the Note of Issue is denied; and it is further

ORDERED that Merchants' motion to dismiss is denied; and it is further

ORDERED that Allied's cross-motion is granted to the extent below; and it is

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) determining the fees, costs, and disbursements due Allied from Aspen and Merchants in undertaking the same for M. Cary's defense.

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that plaintiff’s counsel shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff(s) shall serve a proposed accounting and pre-hearing memorandum within 24 days from the date of this order and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the

Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR § 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first decretal paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that portion of this decision and order setting the matter before a referee or JHO is stayed due to the Coronavirus/COVID-19 impact on Court functions, until such time that the Special Referee Clerk accepts new references and in accordance with 22 NYCRR 202.43.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 18, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.