

Catlin Specialty Ins. Co. v Scottsdale Ins. Co.

2024 NY Slip Op 34205(U)

November 24, 2024

Supreme Court, New York County

Docket Number: Index No. 654219/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CATLIN SPECIALTY INSURANCE COMPANY, AS
ASSIGNEE OF 221 W 29 RESIDENTIAL, LLC AND CM &
ASSOCIATES CONSTRUCTION MANAGEMENT, LLC,
CATLIN SPECIALTY INSURANCE COMPANY, AS
SUBROGEE OF 221 W 29 RESIDENTIAL, LLC AND CM
& ASSOCIATES CONSTRUCTION MANAGEMENT, LLC,

INDEX NO. 654219/2021
MOTION DATE 04/01/2024
MOTION SEQ. NO. 002

Plaintiffs,

**DECISION + ORDER ON
MOTION**

- v -

SCOTTSDALE INSURANCE COMPANY, ALTERRA
AMERICAN INSURANCE COMPANY, KINGDOM
ASSOCIATES, INC., EVANSTON INSURANCE
COMPANY, AS SUCCESSOR BY MERGER TO
ALTERRA EXCESS & SURPLUS INSURANCE
COMPANY,

Defendants.

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KINGDOM ASSOCIATES, INC.

Third-Party
Index No. 595119/2022

Plaintiff,

-against-

PILORI ASSOCIATES, P.A, MUESER RUTLEDGE
CONSULTING ENGINEERS PLLC, GACE CONSULTING
ENGINEERS D.P.C., HAYWARD BAKER, INC.

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to CONSOLIDATE/JOIN FOR TRIAL/SEVER.

Catlin Specialty Insurance Company a/a/o 221 W 29 Residential, LLC (“Catlin”) moves for an order pursuant to CPLR 602 to consolidate the liability issues in this action with the related action, *Sompo Intl. Cos. v Kingdom Assocs., Inc.*, Index No. 654248/2020 [Sup Ct, NY

County] [the “*Sompo* Action”]), and pursuant to CPLR 603 to sever the coverage issues and sever bankrupt third-party defendant Gace Consulting Engineers, D.P.C. (“Gace”).

The two actions both involve property-damage and indemnification claims due to alleged property damage caused by the same construction project.¹ In this action, Catlin is assignee and subrogee of 221 W 29 Residential, LLC and CM & Associates Construction Management, LLC (CMA). Catlin seeks damages in subrogation against defendant Kingdom Associates Inc. (“Kingdom”) under theories of contractual and common-law indemnification and negligence (*see* NYSCEF 56 at 12-16 [amended complaint]). In the *Sompo* Action, Sompo International Companies, Inc. (“Sompo”) asserts subrogation claims against Kingdom for contractual/common-law indemnification and breach of contract (*see* Index No. 654248/2020, NYSCEF 1). Sompo, like Catlin, alleges that Kingdom’s actions in engaging in the underlying construction project caused damage to the adjoining premises for which Sompo had to pay. Catlin now moves to consolidate this action with the Sompo action with respect to the determination of liability on the claims against Kingdom.

Additionally, Catlin has asserted insurance-coverage related claims against defendants Evanston Insurance Company (“Evanston”) and Scottsdale Insurance Company (“Scottsdale”) that are not mirrored in the *Sompo* action. Catlin moves to sever those coverage claims from the (consolidated) subrogation/contractual claims against Kingdom. Evanston cross-moves for the same relief, and asks this court to direct that issues of coverage be tried after the subrogated indemnification/negligence/contract claims, because resolving whether (and to what extent)

¹ The *Sompo* Action was filed in September 2020, nearly a year before Catlin brought this action in July 2021.

liability exists on those claims will in turn affect the existence and scope of a duty by Evanston and Scottsdale's duty under their policies to indemnify Catlin.

Finally, Catlin moves to sever Kingdom's third-party claim against Gace because that claim has been stayed due to Gace declaring bankruptcy. Third-party defendant Mueser Rutledge Consulting Engineers, PLLC, cross-moves, seeking to compel Gace to disclose any applicable insurance policy and compel Kingdom to move to lift the bankruptcy stay.²

DISCUSSION

CPLR 602 provides that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion may order a joint trial of any or all the matters in issue [or] may order the actions consolidated.” This court agrees with Catlin that there are sufficient overlapping facts and points of law between the two cases that they should be joined for (further) discovery and trial. In particular, as noted above, both actions involve questions of Kingdom's negligence in performing the construction work and whether Kingdom is contractually obligated to indemnify Catlin/Sompo as subrogees of 221 W 29 and CMA (*see* NYSCEF 56 at 2; NYSCEF 65 at 3). No parties have opposed this branch of Catlin's request. Accordingly, the motion to consolidate this action with the *Sompo* Action is granted.

As to Catlin's and Evanston's³ request to sever the coverage issues, this request is granted. “In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue” (CPLR 603). CPLR 1010 provides, in relevant part, “[t]he court may ... order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its

² Mueser alternatively requests that this court join Gace's insurer as a necessary party.

³ Scottsdale supports Evanston's cross-motion but has not itself cross-moved.

discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party” (CPLR 1010).

Here, the Court agrees that “litigating an insurance coverage claim together with the underlying liability issues [would be] inherently prejudicial to the insurer” (*McGinty v Structure-Tone*, 140 AD3d 465, 466 [1st Dept 2016], citing *Kelly v Yannotti*, 4 NY2d 603, 607 [1958]). This is because “it would bring before the jury the fact of the existence of liability insurance coverage” (*Transamerica Ins. Co. v Tolis Inn, Inc.*, 129 AD2d 512, 512 [1st Dept 1987]). For this reason, the Court concludes that Catlin’s claims against Evanston and Scottsdale—which concern whether 221 W and CMA are additional insureds under Kingdom’s insurance policies—should be severed.

The Court also agrees with Evanston’s contention that the coverage claims should not be resolved until after the indemnity/negligence/contract claims have been determined. Evanston contends that its policy and Scottsdale’s policy both require “that the alleged damages must have been caused ‘in whole or in part’ by the named insured, Kingdom” for additional-insured coverage to exist (NYSCEF 91 at 4). As a result, determination of the indemnity/negligence/contract claims may well dispositively affect whether, and to what extent, additional-insured coverage exists (*see id.*). The latter set of claims should be tried (or otherwise resolved) second.

Finally, Catlin’s request that the court sever Gace from the action is granted. Kingdom’s third-party claims against Gace should be severed to “prevent any prejudice to plaintiff stemming from delay preceding termination of the . . . bankruptcy proceedings.” (*Kharmah v Metro. Chiropractic Ctr.*, 288 AD2d 94, 94 [1st Dept 2001]).

The Court declines at this time to consider Mueser's cross-motion because it is not properly before the court. Mueser's requests are rooted in requests for affirmative relief pertaining to Gace, a nonmoving party. And a "cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Mango v Long Island Jewish-Hillside Medical Center*, 123 AD2d 843, 844 [2d Dept 1986]; *accord Genger v Genger*, 120 AD3d 1102, 1103 [1st Dept 2014] [holding that a cross-motion for sanctions against nonmoving parties was improper]). Mueser's cross-motion is therefore denied.⁴ The Court expresses no opinion on the merits of Mueser's requests for relief, should they be raised in a procedurally proper fashion.

Accordingly, it is

ORDERED that the branch of Catlin Specialty Insurance Company's motion to consolidate this action (Index No. 654219/2021) with the *Sompo* action (Index No. 654248/2020) is **GRANTED** to the extent that the two actions are joined for discovery and trial purposes; and it is further

ORDERED that the branch of Catlin's motion to sever its additional insured claims against Evanston Insurance Company and Scottsdale Insurance Company is **GRANTED**; and it is further

ORDERED that the branch of Catlin's motion to sever the third-party claims against Gace Consulting Engineers, D.P.C. from the action is **GRANTED**, and the stay of this action is hereby lifted; and it is further

⁴ Moreover, Mueser's requests are untimely. The parties stipulated that the return date on Catlin's motion (and Evanston's cross-motion) was June 10, 2024 (*see* NYSCEF 84 [stipulation]). Catlin's motion required that answering affidavits be served at least seven days before the return date. Mueser was thus required to serve its cross-motion on or before June 3, 2024 (*see* CPLR 2214 [b]). It did not do so until June 5, 2024.

ORDERED that the cross-motion of Mueser Rutledge Consulting Engineers, PPLC's to compel Gace to identify applicable insurance policies and to compel Kingdom to move to lift the bankruptcy stay is **DENIED** without prejudice; and it is further

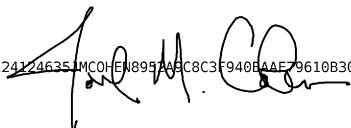
ORDERED that Evanston's cross-motion to sever Catlin's claims against Evanston and Scottsdale is **GRANTED** to the extent that those claims shall be resolved after trial or other resolution of Catlin's and Somp'o's claims against Kingdom, and otherwise denied as academic in light of the granting of Catlin's request for severance of its Evanston/Scottsdale claims; and it is further

ORDERED that Catlin serve a copy of this order with notice of its entry on all parties in this action and in Index No. 654248/2020; and serve notice of entry on the office of the General Clerk in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website), which shall update its records accordingly for this action and for Index No. 654248/2020, and upon the Trial Support Office who are directed to lift the stay in this action and have this action marked as "active;" and it is further

ORDERED that the parties in this action and the parties in Index No. 654248/2020 shall meet and confer and submit to the Court a combined discovery order consistent with the guidelines in the Part 3 model preliminary conference order, available online at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part3-Preliminary-Conference-Order.pdf>, within fourteen (14) days of the date of this Order.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

11/24/2024

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE