

Praetorian Ins. Co. v DMHZ Corp.

2011 NY Slip Op 31305(U)

May 16, 2011

Supreme Court, New York County

Docket Number: 101469/2010

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PRESENT.

PART 12

Index Number : 101469/2010

PRAETORIAN INS. CO.

vs
DMHZ CORP.

Sequence Number : 003

OTHER

INDEX NO.

101469/2010

MOTION DATE

5

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4, 5

6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision settle order.*

Dated: 5/16/2011

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

-----X
PRAETORIAN INSURANCE COMPANY,
Interpleader Plaintiff,

-against-

Index No. 101469/2010

DMHZ CORPORATION, YOU QUN LIU, MAN HENG
ZHENG, WEI LIN, an infant by his father and natural
guardian, QI MAN LIN, QUI MAN LIN, individually,
DONG YONG QI, JIN RU LIN, SAI ZHU DONG, XIAO
RONG, FEI ZHOU, JIN YUN LIN, JACQUELYN GALLO,
NICHOLAS FRIEDMANN, ERIN SPADOLA, THOMAS
PASTRO, JOSEPH TIRABASSI, ANJA DORNIEDEN,
ANNIE LING, ANNA MY LUU, deceased by ANNIE LUU
and ANNETTE PITTMAN as Co-Administratrixes of the
Estate of ANNA MY LUU; TONY WONG, deceased by
LUCKIE KO, as Administratrix of the Estate of TONY
WONG and LUCKIE KO, individually, TRAVELERS
INSURANCE GROUP, as subrogee of MATTHEW
GROS-WERTER, ZHEN GUANG LIN, JANE DOE(S),
JOHN DOE(S) AND DOE COMPANY(IES), the latter three
parties being fictitious and intended to name all other
claimants yet unknown.

Mot. Seq. No. 003

Interpleader Defendants.

-----X

<p>Appearances: Interpleader Plaintiff White Fleischner & Fino, LLP By: Benjamin A. Fleischner, Esq. 61 Broadway New York NY 10006 (212) 487-9700</p>	<p>Interpleader Defendants Luu, Pitman, Wong and Ko Sullivan Papain Block McGrath & Cannavo, P.C. By: Marie Ng, Esq. 120 Broadway New York NY 10271 (212) 732-9000</p>
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Interpleader Defendant DMHZ Corporation
Jones Hirsch Connors & Bull, P.C.
By: Michael R. Manarel, Esq.
Rita W. Gordon, Esq.
One Battery Park Plaza
New York NY 10004
(212) 527-1000

Papers considered on review of this motion:

Interpleader Plaintiffs' Notice of Motion, Affs., Exhibits	1, 2
Defs. Luu, Pitman, Wong and Ko Aff. in Opposition, Exhibits	3

PAUL G. FEINMAN, J.:

This interpleader action arises from a \$1 million liability insurance policy issued by plaintiff Praetorian Insurance Company (Praetorian) to defendant DMHZ Corporation (DMHZ), covering premises DMHZ owns at 22 James Street (a/k/a 45 St. James Place), New York, New York (Premises) for the period August 18, 2008 to August 18, 2009 (Policy). On February 24, 2009, a fire occurred at the Premises, resulting in deaths and personal injuries. Three lawsuits were commenced against DMHZ by those injured or, in the case of those who perished in the fire, by their estates, under Index Numbers 118010/09, 107464/90 and 104930/09 (Underlying Actions). Praetorian's interpleader action seeks an order determining the distribution and priority of settlement of the insurance funds available under the Policy. Various individual interpleader defendants assert counterclaims, seeking to hold Praetorian liable for the full amount of any judgments obtained against DMHZ in the Underlying Actions.

Praetorian now moves for an order: (1) permitting it to pay into the Court, or to deliver to a person designated by the Court, or to retain to the credit of this action, the \$1 million proceeds of the subject Praetorian Policy; (2) discharging Praetorian from liability as to the interpleader defendants and any other potential claimants with respect to this matter; (3) dismissing all counterclaims against Praetorian; and (4) directing payment to Praetorian of its costs, disbursements, and expenses, including attorneys' fees, charged against the amount deposited.

CPLR 1006(f) provides that a "stakeholder may move for an order discharging him from

liability in whole or in part to any party,” once “the time for all parties to plead has expired.”

The Practice Commentary to section 1006(f) notes that, “[w]hen the stakeholder acknowledges the debt or obligation at issue and seeks only a determination as to whom the obligation is owed, the stakeholder may move for an order of discharge, either in whole or part, pursuant to CPLR 1006(f),” thereby permitting “the stakeholder to withdraw from the litigation and provid[ing] protection against any further liability to the claimants with respect to the obligation at issue.” Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C1006:4. “A prerequisite to discharge, of course, is the stakeholder’s surrender to the court of the relevant property or funds so that delivery can be made to the prevailing claimant,” and “[t]he discharge does not become effective until the stakeholder has complied with the terms of the court’s order.”

Id.

Praetorian’s request for discharge is based upon section I-1.a. of the Policy, which the court must construe as it would any other contract. *Teichman v Community Hosp. of Western Suffolk*, 87 NY2d 514, 520 (1996) (“[a]s in the construction of contracts generally, including insurance contracts particularly, we give unambiguous terms their plain and ordinary meaning”); *F.S. Royster Guano Co. v Globe & Rutgers Fire Ins.*, 252 NY 75, 84 (1929) (“insurance policies are merely contracts to be interpreted like any other contract”); *Exchange Mut. Ins. v Geiser*, 130 Misc 2d 959, 960 (Sup Ct, Albany County 1986) (“[a]n action to declare rights under a policy of liability insurance must begin with analysis of the language of the policy”).

Section I-1.a. provides that Praetorian “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies,” and that Praetorian “will have the right and duty to defend the insured against

any 'suit' seeking those damages." Policy, Fleischner Aff., Ex. A. This provision also states that Praetorian "may, at [its] discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result. But: ... (2) [Praetorian's] right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements" *Id.*

DMHZ's primary opposition argument is that Praetorian's duty to defend cannot be discharged until judgment or settlement. However, Praetorian's reply papers represent that "Praetorian will pursuant to the Policy continue to defend DMHZ in the present underlying actions now pending until the Policy's \$1 million limit is exhausted by settlement or judgment." Beckman Reply Aff., ¶ 4; Fleischner Reply Aff., ¶¶ 4-7. Praetorian also represents that it will defend DMHZ against "any additional claims filed against DMHZ ... until the Policy's limit is exhausted either by settlement or judgment." *Id.* Thus, there is no dispute concerning Praetorian's continuing duty to defend.

DMHZ next argues that Praetorian cannot be discharged until "the time for all parties to plead has expired" (CPLR 1006[f]) which, according to DMHZ, is not until the three-year statute of limitations runs against DMHZ, on February 24, 2012 (that is, three years from the date of the fire). In support of this argument, DMHZ cites *Venetian v Prudential Ins. Co. of Am.* (2009 NY Misc LEXIS 5462, 2009 NY Slip Op 32460[U] [Sup Ct, NY County 2009]) and *Abegg v People's Trust Co.*, 58 App Div 611 [1st Dept 1901]). However, neither case supports DMHZ's argument.

Venetian was an action to recover life insurance proceeds. The court denied the insurer's motion for discharge under CPLR 1006(f), because the court had granted the plaintiff-beneficiary additional time to serve one of the named defendants, thereby giving rise to that defendant's time

to answer and the court's conclusion that the time for the defendant to plead had not expired. Nothing contained in *Venetian* suggests that the time for parties to plead, under CPLR 1006(f), refers to the time for all potential claimants to file suit, as is argued by DMHZ. Rather, *Venetian* supports the conclusion that the time for all parties to plead, under CPLR 1006(f), refers to the parties' time to respond to existing pleadings in the action.

In *Abegg*, the plaintiff appealed an order granting the defendant trust leave to deposit funds in court. The First Department reversed, reasoning that "it does not appear that all of the parties who have made claims to, or are interested in, the fund held by the [trust] are parties to the action, or had notice of the application." 58 AD at 611. The Court held that "the trust company could not, in the absence of notice to all parties claiming the fund, relieve itself from the liability to pay to the proper one by making the deposit as here sought." *Id.* However, *Abegg* predates the enactment of CPLR 1006. In any event, *Abegg* does not support the conclusion that the time for parties to plead refers to the statute of limitations on the underlying claim. Rather, *Abegg* suggests that any discharge in the instant action should be conditioned upon Praetorian notifying all tenants of the Premises of this action. This is consistent with the public policy of distributing insurance proceeds "in an equitable manner, rather than simply paying judgment creditors in the order that the judgments are entered until coverage is exhausted." *Boris v Flaherty*, 242 AD2d 9, 14 (4th Dept 1998).

DMHZ next argues that Praetorian is not entitled to costs, disbursements, or attorneys' fees incurred in this interpleader action. CPLR 1006(f) provides that "[t]he court shall impose such terms relating to payment of expenses, costs and disbursements as may be just and which may be charged against the subject matter of the action."

The two cases cited by Praetorian awarded attorneys' fees and costs to the insurer-stakeholder, because it was "forced to participate" in a dispute among parties claiming entitlement to an annuity. *Sun Life Ins. and Annuity Co. of N.Y. v Braslow*, 38 AD3d 529, 530 (2d Dept 2007); *American Intl. Life Assur. Co. of N.Y. v Ansel*, 273 AD2d 421, 422 (2d Dept 2000). Here, however, Praetorian was not forced to commence the interpleader action. In fact, Praetorian was not named as a defendant in any action relating to the dispute between DMHZ and the various individual plaintiffs in the Underlying Actions.

In any event, there is no issue of Praetorian's independent liability.¹ Moreover, Praetorian's commencement of this interpleader action "comports with the spirit and intent of CPLR 1006 that an interpleader action by a stakeholder is to be encouraged in order to protect such a party from multiple adverse claims to the fund[s]" at issue. *Merrimack Mut. Fire Ins. Co. v Moore*, 91 AD2d 759, 761 (3d Dept 1982). Therefore, Praetorian is entitled to costs, disbursements and reasonable attorneys' fees for bringing and prosecuting this interpleader action.

The court has reviewed the additional arguments raised by the individually named interpleader defendants. These arguments relate to discovery issues that are irrelevant to the interpleader action and Praetorian's motion for discharge.

¹ The court notes the opposition affirmation of counsel for various individual defendants in this action who are plaintiffs in the Underlying Actions. Counsel's affirmation states that Praetorian's "position as a 'neutral stakeholder with no interest' is belied by its response to the specific Supplemental Notice of Discovery and Inspection" Ng Aff., ¶ 7. However, nothing contained in counsel's affirmation or the documents annexed thereto raise an issue concerning Praetorian's independent liability. Moreover, the counterclaim asserted by these individual defendants merely seeks to obligate Praetorian "to pay the full judgment" in the event that DMHZ is held liable under Index Number 118010/09. None of the counterclaims in the Underlying Actions plead Praetorian's independent liability or open this interpleader action to matters beyond the scope of Praetorian's coverage and liability under the Policy.

Accordingly, Praetorian's motion is granted conditioned upon Praetorian notifying all tenants of the Premises of this action. Upon providing such notice, Praetorian shall be entitled to an order directing it to, pursuant to CPLR 1006(f), to retain the \$1,000,000.00 to the credit of the action. Thereafter, Praetorian shall be discharged from liability as to the interpleader defendants named in this action and any other potential claimants with respect to this matter; all counterclaims asserted against Praetorian shall be dismissed; and Praetorian shall be entitled to payment of costs, disbursements and reasonable attorneys' fees, charged against the amount deposited with the court.

This is the decision of the court. Settle order.

Dated: May 16, 2011



J.S.C.