

(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2008 WL 5562121 (N.Y.Sup.))

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NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Ulster County, New York.
COLONIAL COOPERATIVE INSURANCE
COMPANY and Stephen L. Muehlbauer, Plaintiffs,
v.
YORK CLAIMS SERVICE, INC., Defendant.
No. 08-3998.

Dec. 17, 2008.

Gleason Dunn Walsh and O'Shea, Richard C. Reilly, Esq., of counsel, Albany, for Plaintiffs.

Riker, Danzig, Scherer, Hyland & Perretti, LLP, J. Noah Schambelan, Esq., of counsel, Edwin F. Chociej, Jr., Esq., of counsel, New York, for Defendant.

HENRY F. ZWACK, J.

*1 In this declaratory judgment proceeding, plaintiffs move for summary judgment and a declaration that the Arbitrator's Award dated April 15, 2008 extinguished all rights of defendant to remedies against plaintiffs as related to transactions that were submitted to arbitration. Defendant cross-moves for summary judgment to dismiss this proceeding, or alternatively to stay this proceeding pending a decision from the Appellate Division in a related case.

Colonial Cooperative Insurance Company (Colonial) is an insurance company and York Claims Service, Inc. (York) previously provided claim adjusting services to Colonial. The parties entered into a Claims Services Agreement, dated February 4, 2005. Certain disputes then arose between the parties which has resulted in litigation

being commenced in New York and New Jersey courts.

York commenced an action against Colonial and Muehlbauer in New Jersey Superior Court in October 2006. Colonial and Muehlbauer then brought a separate proceeding in this Court to compel arbitration in November 2006. This Court held, in a February 5, 2007 Decision and Judgment, that the tortious interference claim against Muehlbauer was separate from any arbitrable claim and that that claim was not stayed in the New Jersey action, and that all other claims were required to be arbitrated pursuant to the Claims Services Agreement. The Appellate Division Third Department modified the February 5, 2007 Decision and Judgment, holding that York was not required to arbitrate any claims against Muehlbauer, and requiring a stay as to the claims against Muehlbauer in the New Jersey action, including the tortious interference claim, pending the outcome of the arbitration "because the issues in the civil case against Muehlbauer overlap the issues subject to arbitration by [York] and [Colonial]".

The parties proceeded to arbitration and the arbitration decision was moved to be confirmed, and was confirmed by this Court in a separate proceeding by an August 20, 2008 Order/Judgment. The New Jersey proceeding has been reinstated by that court with respect to only the tortious interference claims of York against Muehlbauer.

Plaintiffs Colonial and Muehlbauer now move in the present declaratory judgment proceeding for summary judgment and an order directing that the Arbitrator's Award dated April 15, 2008 extinguished all rights of York as against plaintiffs regarding all transactions or series of connected transactions that were submitted to arbitration. York cross-moves for summary judgment dismissing the complaint, or in the alternative, staying this action pending resolution of plaintiffs' appeal of this Court's August 20, 2008 Order/Judgment.

The parties disagree regarding whether the prior arbitration necessarily decided all outstanding matters between the parties, including the tortious interference claim of York against Muehlbauer. The Court notes that the parties sought clarification from the arbitrator, to no avail.

*2 Plaintiffs argue that the arbitration necessarily decided all the claims between the parties. Specifically, plaintiffs contend that all claims arising out of the same foundation facts decided by the arbitrator that could have been submitted to an arbitration are precluded in any subsequent proceeding, regardless of whether those claims were submitted to arbitration or not. Plaintiffs argue that York's claims cannot be split and adjudicated in different forums because they all arise out of the same foundation facts, which they contend were all before the arbitrator.

York argues that the arbitration was neither intended to address, nor did it address, all the claims between the parties. York also submits that the present proceeding must be dismissed because this Court already decided in its August 20, 2008 Order/Judgment that the New Jersey court should decide the issue of reinstatement of the tortious interference claim. York contends that its right to pursue the tortious interference claim was preserved by orders of the New Jersey court, the Appellate Division and this Court and that *res judicata* does not bar that claim. York requests summary judgment dismissing this proceeding, or in the alternative, a stay of this proceeding pending resolution of the pending appeal of this Court's August 20, 2008 Order/Judgment.

This Court notes that during the time when York's tortious interference claim was in the process of being reinstated in the New Jersey court proceeding, Muehlbauer made representations that directly contradict the representations made on the present motion. Muehlbauer, through New Jersey counsel, did not object to the reinstatement of the tortious interference claim against him in the New Jersey action in a letter to the New Jersey Court. On June 30,

2008, York submitted a proposed order to the New Jersey court, to reinstate the one claim against him, and he did not object to the order, which was signed on July 14, 2008. On the present motion however, Muehlbauer now objects to the reinstatement. Colonial, through New Jersey counsel, also did not object to reinstatement of the claim against Muehlbauer, and did object only to the extent that any claims against Colonial were sought to be reinstated.

The issue of reinstatement of the tortious interference claim of York against Muehlbauer has already been accomplished before the New Jersey Court, with the consent of Muehlbauer and Colonial at that time. A motion for reconsideration was filed by Colonial before that court, then joined by Muehlbauer who is now the only party defendant before that court, of the July 14, 2008 order and was returnable in October before the New Jersey Superior Court. The New Jersey Superior Court denied the motion on procedural grounds without reaching the merits.

This Court will entertain the present declaratory judgment proceeding for the following reasons: the New Jersey Superior Court does not presently have a pending motion on this issue before it; the New Jersey Superior Court did not address the substantive legal issues that are the basis of the present declaratory judgment proceeding; Colonial is no longer a party to the New Jersey Superior Court proceeding; a declaration of New York law is sought; and in the interests of judicial economy and with the hope of a resolution of the ongoing disputes between the parties ([CPLR 3001](#)).

*3 New York law supports a finding that the tortious interference claim against Muehlbauer by York may proceed in the New Jersey Superior Court because claim preclusion only applies to claims submitted to an arbitration proceeding (*Acosta v. Yale Club of New York City*, 261 A.D.2d 261, 262 [1st Dept 1999]; *Lopez v. Parke Rose Mgmt Systems, Inc.*, 138 A.D.2d 575 [2d Dept 1988]; *Concra v. Horowitz*, 105 A.D.2d 1024 [3d Dept 1984]). It appears clear here that the tortious inter-

ference claim against Muehlbauer was not intended to be submitted to the arbitrator on the merits by York, and this was made clear to the arbitrator, who gave plaintiffs time to respond to this issue. Additionally, the rule against splitting would not apply here, most compellingly because 1) it was made clear to all parties that the tortious interference claim was not being presented to the arbitrator on the merits; and 2) Muehlbauer consented to reinstatement of the tortious interference claim and it was reinstated by the New Jersey Superior Court (see, e.g., *Stoner v. Culligan, Inc.*, 32 A.D.2d 170, 173-74 [3d Dept 1969]; *Potomac Ins. Co. v. MacNaughton*, 191 Misc. 362, 364 [1948]). Waiver of the defense of splitting can be found by a party's conduct, including a party's conduct in failing to affirmatively assert the defense, or in expressly agreeing to the splitting of claims (see *id.*). The Court finds it compelling that Muehlbauer expressly consented, through New Jersey counsel, to reinstatement of the tortious interference claim against him in New Jersey Superior Court in May 2008 (Exhibit 42 to Atty Chociey Aff., sworn to October 27, 2008). Additionally, even Colonial did not object to the reinstatement of the claim against Muehlbauer. Colonial and Muehlbauer argue that despite knowledge that York was not intending to present the tortious interference claim to the arbitrator pursuant to a January 2008 letter of York's counsel to the arbitrator, they were not required to affirmatively object at that time and may now raise the defense that this constitutes improper splitting of claims. However, even ignoring the actions or lack of actions taken by plaintiffs prior to the arbitration commencing, it does not follow that Muehlbauer could later expressly consent to the reinstatement of the tortious interference claim in the New Jersey Superior Court proceeding, and then come to this Court after the claim is reinstated for a declaration that it cannot be reinstated.

Under all the circumstances, the Court does not give much weight to the fact that Colonial and Muehlbauer made general statements in their post-arbitration briefing to the arbitrator to the effect

that all claims against Colonial and Muehlbauer were sought to be dismissed. After the arbitrator heard from York that all claims but one were being sought to be arbitrated, these general references could clearly be thought to refer to those claims against Muehlbauer that were submitted for the arbitrator's determination, which did not include the tortious interference claim against Muehlbauer.

*4 In any event, the conduct by Muehlbauer in expressly consenting to the reinstatement of the claim before the New Jersey Superior Court mandates a finding that he has waived any defense of splitting. The Court finds that all the conduct and circumstances, as detailed above, support a finding that both plaintiffs waived any defense of splitting and that the tortious interference claim against Muehlbauer may proceed in New Jersey Superior Court.

Regarding the other actions involving the parties, the Court declines to find that York should be precluded from continuing those actions under the circumstances, for the reasons that follow. In two other actions that remain pending in some capacity, where York was sued by law firms for legal fees, York asserted third party claims against plaintiffs, including claims for indemnification. Plaintiffs argue that York should be precluded from continuing these third party claims.

In the Nicoletti action, York notes that it has an appeal pending (*Nicoletti, Gonson, Spinner & Owen LLP v. York, Supreme Court, New York County*, Index No. 604180/06). Apparently summary judgment was granted to plaintiff [Nicoletti] against York in that action and Colonial has since paid the amount awarded to the plaintiff in that case. However, York seeks on appeal to have a clarification that Colonial, and not York, paid the judgment, for the purpose of correcting public records. The Court also notes that the Appellate Division First Department already denied a cross-motion by Colonial in that case to dismiss York's appeal as moot. This Court declines to issue a declaratory judgment on this issue and will not intervene to preclude York from pursuing its appeal under the circum-

stances.

In the Bona action, the plaintiff law firm's case against York and the other defendants in that case was discontinued in May 2008 (*Thomas M. Bona PC v. York, Supreme Court, Westchester County*, Index No. 23328/06). The Stipulation of Discontinuance provided that defendants, which include York, were however not releasing their third party claims against third-party defendants. The Court notes that the defendants and third party plaintiffs in the Bona action are York, and also Thomas MacArthur and Gary Forthofer, President and District Manager of York, respectively. Only York is presently before this Court. While this Court is unaware why York or the other defendants would need to retain third party claims for indemnification or claims that were decided in the arbitration under the circumstances, this Court declines to issue a declaratory judgment with respect to this proceeding. Neither MacArthur nor Forthofer are parties to the present proceeding and the Court is also mindful that third-party claims may encompass claims that exceed a plaintiff's main claims against a defendant (*see, e.g., George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358 [1980]). Therefore, this Court finds that the trial court in the Bona proceeding is best suited to determine the issues that affect the parties to that proceeding, who are not all present in this action. Additionally, that court is the appropriate forum for a determination of which third party claims are properly dismissed in light of the discontinuation of the main action and the arbitrator's decision.

*5 Accordingly, it is

ORDERED, that the motion for summary judgment of plaintiffs is granted to the extent set forth above; and it is further

ORDERED, that the cross-motion for summary judgment of defendant is denied; and it is further

ORDERED, that York's tortious interference claim against Muehlbauer in New Jersey Superior Court

shall proceed.

This constitutes the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is returned to the attorneys for York. The signing of this Decision, Order and Judgment shall not constitute entry or filing under [CPLR 2220](#). Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

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Colonial Co-op. Ins. Co. v. York Claims Service, Inc.

Slip Copy, 22 Misc.3d 1116(A), 2008 WL 5562121 (N.Y.Sup.), 2008 N.Y. Slip Op. 52639(U)

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