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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of

BENJAMIN LAWSKY, Superintendent of
Financial Services of the State of New York,
for an Order of Appointment as
Ancillary Receiver of,

RECEIVED
JUN 11 2013
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NYS SUPREME COURT-CIVIL

INDEX NUMBER 400534/13
MOTION DATE 05-22-2013
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

LUMBERMANS MUTUAL CASUALTY COMPANY.

The following papers, numbered 1 to 5 were read on this petition and Order to Show Cause to/for New York Insurance Law Article 74 relief, based on appointment of ancillary receiver:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED
1 - 3
4 - 5

Cross-Motion: Yes No

Benjamin Lawsky in his capacity as Superintendent of Financial Services of the State of New York (hereinafter referred to as "Superintendent"), brings this Order to Show Cause and Petition seeking an Order pursuant to New York Insurance Law Article 74, appointing him and his successors in office, as ancillary receiver of Lumbermans Mutual Casualty Company (hereinafter referred to as "Lumbermans"); directing the Superintendent to immediately take possession of such property and recover such other assets of Lumbermans; injunctive relief; a bar date for the submission of claims; and extending immunity to the Superintendent as ancillary receiver.

Lumbermans is a property and casualty mutual insurance company organized under the laws of the State of Illinois, with its principal office located at one Corporate Drive, Suite 200, Long Grove, Illinois 60049. Lumbermans was authorized to do business in, and maintained its principal office in the State of New York at, 30 Rockefeller Plaza, New York, N.Y. 10112.

On July 2, 2012, an Agreed Order of Rehabilitation was entered against Lumbermans in Illinois. Effective May 10, 2012, the Circuit Court of Cook County Illinois, County Department, Chancery Division, under #12 CH 24227, entered into an Order of Liquidation with a finding of insolvency (hereinafter referred to as the Illinois

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

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Order of Liquidation"). Pursuant to subsection (G) of the Illinois Order of Liquidation, mandatory and prohibitive injunctions were issued (pages 7-8 of 11). These injunctions included,

"(iv) The officers, directors, agents, servants, representatives and employees of Lumbermans, and all other persons and entities having knowledge of this Order are restrained from bringing or further prosecuting any claim, action or proceeding at law or in equity or otherwise, whether in this state or elsewhere, against Lumbermans, or its property or assets...or from obtaining, asserting or enforcing preferences, judgments, attachments or other like liens or including common law retaining liens, or encumbrances or the making of any levy against Lumbermans, or its property or assets...until further order of this Court."

The Director of Insurance of the State of Illinois, Andrew Boron (hereinafter referred to as "liquidator"), was appointed as liquidator. Pursuant to New York Insurance Law §7408(b)[6], Illinois is a reciprocal state. The Domiciliary Receiver has requested the appointment of an ancillary receiver for Lumbermans. The Superintendent in this Article 74 proceeding, is seeking the appointment as ancillary receiver.

In accordance with the "full faith and credit clause" of the Constitution, a stay of proceeding pending appointment of a receiver, or judgment in another state, has the same, "credit, validity and effect" in New York (A.J. Pegno Constr. Co. v. Highlands Ins. Co., 39 A.D. 3d 273, 834 N.Y.S. 2d 109 [N.Y.A.D. 1st Dept., 2007]). Liquidation proceedings commenced in another state on behalf of an insurer domiciled in that state, permits New York residents to file their claims either with the ancillary receiver or the domiciliary receiver. Secured claimants are required to either file their claims with the ancillary receiver or prove their claims to the domiciliary receiver. Secured creditors cannot maintain actions independent from liquidation proceedings because that would permit them to receive benefits to the detriment of other claimants (G.C. Murphy Co. v. Reserve Ins. Co., 54 N.Y. 2d 69, 429 N.E. 2d 111, 444 N.Y.S. 2d 592 [1981]).

The domiciliary state and its receiver are recognized in New York as having authority over all of a liquidated insurer's assets. Pursuant to Insurance Law §7410 the Court shall appoint the Superintendent of Financial Services, to act as ancillary receiver for an insurer not domiciled in New York State and to exercise control over certain assets located within New York State (Levin v. National Colonial Ins. Co., 1 N.Y. 3d 350, 806 N.E. 2d 473, 774 N.Y.S. 2d 465 [2004]).

Article 74 of the New York Insurance Law applies after an insurer is liquidated, to create a single integrated administration for the equitable treatment of its creditors and to avoid preferences. The Supreme Court has jurisdiction concerning claims for and against the insurer and assets available for distribution (Cocoran v. Frank B. Hall & Co., Inc., 149 A.D. 2d 165, 545 N.Y.S. 2d 278 [N.Y.A.D. 1st Dept., 1989]). The

court has discretion and broad authority to issue injunctions it deems necessary, to prevent interference with liquidation proceedings or the waste of an insurer's assets. The Court in its discretion can modify injunctive relief in the "interest of justice," as a means to assist or aid in bringing about a result after the correct application and consideration of, "...the interests of both the litigants and society" (In Re Liquidation of Midland Insurance Company, 87 A.D. 3d 487, 929 N.Y.S. 2d 116 [N.Y.A.D. 1st Dept., 2011]). The Court can abuse its discretion by staying pending actions involving policies, claims and issues unrelated to the bankruptcy proceedings because it promotes delay over efficiency (Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D. 3d 51, 818 N.Y.S. 2d 73 [N.Y.A.D. 1st Dept., 2006]).

Century Indemnity Company (hereinafter referred to as "Century"), has submitted a Limited Answer to the Petition, opposing the injunctive relief sought by the Superintendent. Century is a co-defendant of Lumbermans in a declaratory judgment action, *Mt. McKinley Ins. Co., et al. v. Corning, Incorporated, et al.*, pending before the Honorable Eileen Bransten, in Supreme Court, New York County, under index number 602454/02, arising from a mass asbestos tort liability action. The declaratory judgment action commenced on July 2, 2002, is over a decade old. Century does not oppose the appointment of the Superintendent as ancillary receiver, but opposes any injunction or stay of their pending action.

Century contends that the declaratory judgment action is in the late stages with discovery almost complete. Unsuccessful attempts were made to resolve the disputes between the parties at mediation. The declaratory judgment action has been stayed by Justice Bransten, pursuant to a Decision and Order dated May 6, 2013, but only as to Lumbermans. Century claims that there would be no dissipation of Lumbermans' assets or interference with the rehabilitation process because a money judgment is not being sought in the declaratory judgment action. The possibility of inconsistent rulings would emerge if the proofs of claims against Lumbermans from the declaratory judgment action end up having to be filed with the Illinois Court. The triggering of obligations of the other insurers to the declaratory judgment action would not be consistently resolved. There is also an appeal pending on Lumbermans' motion for summary judgment that will not be heard if a permanent stay is granted.

The attorneys for, Kenneth Halvorsen, (hereinafter referred to as the "Attorneys"), a plaintiff in an personal injury action based on injuries sustained when he was crushed by a refrigeration unit while he was employed on a construction project at a new Waldbaums store in Commack, New York, oppose the relief sought by the Superintendent. The Attorneys brought an action titled, *Kenneth Halvorsen v. Bayrent Construction Corp. et al.*, pending in Supreme Court, Suffolk County, under index number 08721/02, two additional third-party actions were brought under index numbers, 23-0125 and 2737, and a fourth-party action was also brought under index number 270232. Great Atlantic & Pacific Tea Company (hereinafter referred to as "A&P") was named as a second third-party defendant and is the fourth-party plaintiff. It is alleged that A&P is contractually held to indemnify the landlord against any recovery arising from negligence. The Attorneys claim that Lumbermans is A&P's

insurer, and is not an actual party to any of the actions. The personal injury action was certified trial ready by the Hon. Joseph C. Pastoressa in 2009, but stayed because A& P filed for bankruptcy. The Attorneys have attempted mediation with the defendants and applied for a lift of the bankruptcy stay.

The Attorneys do not oppose the appointment of the Superintendent as ancillary receiver, but oppose any injunction or stay of their pending action. They information from Lumbermans, it appears there is no obligation for it to defend Waldbaums Inc.. The Attorneys claim that their clients would be prejudiced by any lengthy stay of their action. Any additional lengthy delay based on a second bankruptcy will prevent them from obtaining a judgment.

Upon review of all the papers submitted, this Court finds that, the Superintendent of Financial Services to act as an ancillary receiver, requires sufficient time and opportunity to obtain the relevant information and documentation concerning Lumbermans' assets located in New York State. The Superintendent will also need to coordinate with the Illinois domiciliary liquidator.

To accommodate the relief sought by Century in the action pending before Justice Eileen Bransten, and the Attorneys in the action titled, *Kenneth Halvorsen v. Bayrent Construction Corp. et al.*, pending in Supreme Court, Suffolk County, under index number 08721/02 and related actions, this Court will partially modify the injunctive relief sought by the Superintendent, in the "interest of justice." The modification, after a brief stay, will permit the pending declaratory judgment action to proceed to resolution. A pending trial will not interfere with the liquidation process, result in the waste of the insurer's assets, or create a preference.

Accordingly, it is ORDERED and [REDACTED], that the petition for an order of ancillary receivership is granted, as follows:

(1) The Superintendent and his successors in office are appointed Ancillary Receiver of LUMBERMANS MUTUAL CASUALTY COMPANY and are: (A) authorized and directed to immediately take possession of LUMBERMANS MUTUAL CASUALTY COMPANY's property and recover such other assets of LUMBERMANS MUTUAL CASUALTY COMPANY that are located in the State of New York; (B) vested with all powers and authority expressed or implied under Insurance Law Article 74, and as set forth in this Order, and (C) authorized to pay such claims against LUMBERMANS MUTUAL CASUALTY COMPANY, or its policy holders, that are covered by New York Security funds.

(2) The Ancillary Receiver may deal with the property and business of LUMBERMANS MUTUAL CASUALTY COMPANY, in its name or in the name of the Ancillary Receiver.

(3) The officers, directors, shareholders, trustees, depositories, policyholders, agents, servants, attorneys, managers and employees of LUMBERMANS MUTUAL CASUALTY COMPANY and all other related persons are permanently enjoined and

restrained from: (A) transacting LUMBERMANS MUTUAL CASUALTY COMPANY business, except as authorized by the Ancillary Receiver; (B) wasting or disposing of the property or assets of LUMBERMANS MUTUAL CASUALTY COMPANY that are located in the state of New York; (C) interfering with the Ancillary Receiver in the possession, control or management of LUMBERMANS MUTUAL CASUALTY COMPANY's property or in the discharge of his duties.

(4) All persons are permanently enjoined and restrained from commencing any actions, lawsuits or proceedings against LUMBERMANS MUTUAL CASUALTY COMPANY, and all persons are permanently enjoined and restrained from commencing any actions, lawsuits or proceedings against the Superintendent as Ancillary Receiver or the New York Liquidation Bureau, its employees, attorneys or agents, with respect to this proceeding or in the discharge of their duties under Insurance Law Article 74.

(5) All persons are permanently enjoined and restrained from obtaining preferences, judgments, attachments or other liens, or making any levy against LUMBERMANS MUTUAL CASUALTY COMPANY's property located in the State of New York or any part thereof.

(6) The parties to *Mt. McKinley Ins. Co., et al. v. Corning, Incorporated, et al.*, pending before the Honorable Eileen Bransten, in Supreme Court, New York County, under index number 602454/02, are enjoined and restrained from proceeding with any court proceedings or other litigation related tasks or procedures, including but not limited to, conferences, trials, applications for judgment or proceedings on settlement or judgment, for a period of 60 days from the date of Entry of this Order.

(7) The parties to the action titled, *Kenneth Halvorsen v. Bayrent Construction Corp. et al.*, pending in Supreme Court, Suffolk County, under index number 08721/02, two additional third-party actions brought under index numbers, 23-0125 and 2737, and the fourth-party action brought under index number 270232; are enjoined and restrained from proceeding with any court proceedings or other litigation related tasks or procedures, including but not limited to, conferences, trials, applications for judgment or proceedings on settlement or judgment, for a period of 60 days from the date of Entry of this Order.

(8) Parties to all actions, lawsuits and special or other proceedings other than, *Mt. McKinley Ins. Co., et al. v. Corning, Incorporated, et al.*, pending before the Honorable Eileen Bransten, in Supreme Court, New York County, under index number 602454/02 and the action titled, *Kenneth Halvorsen v. Bayrent Construction Corp. et al.*, pending in Supreme Court, Suffolk County, under index number 08721/02, two additional third-party actions brought under index numbers, 23-0125 and 2737, and the fourth-party action brought under index number 270232, in which LUMBERMANS MUTUAL CASUALTY COMPANY, its policyholders or insureds, are obligated to defend a party or to provide a defense of any matter against an insured pursuant to an insurance policy, bond, contract or otherwise, are enjoined and restrained from proceeding with any discovery, court proceedings or other litigation tasks or

procedures, including, but not limited to, conferences, trials, applications for judgment or proceedings on settlement or judgment, for a period of 180 days from the date of Entry of this Order.

(9) All persons or entities having property located in the State of New York and/or information belonging or related to LUMBERMANS MUTUAL CASUALTY COMPANY, including but not limited to, insurance policies, underwriting data, claims files (electronic or paper) and/or software programs owned by, belonging to or relating to LUMBERMANS MUTUAL CASUALTY COMPANY shall preserve such property and/or information, and immediately, upon the Ancillary Receiver's request and direction, assign, transfer, turn over and deliver such property and/or information to the Ancillary Receiver.

(10) Any bar date for the submission of claims that is established in the domiciliary liquidation proceeding shall also be effective in the ancillary receivership proceeding upon notice, as this Court shall, at the time of establishment of the bar date, determine to be proper and sufficient.

(11) Immunity is extended to the Superintendent in his capacity as Ancillary Receiver of LUMBERMANS MUTUAL CASUALTY COMPANY, and his successors in office and their agents and employees, for any cause of action of any nature against them, individually or jointly, for any act or omission when acting in good faith, in accordance with the orders of this Court, or in the performance of their duties pursuant to Insurance Law Article 74.

(12) The Ancillary Receiver shall serve a copy of this Order on Andrew Boron, Director of Insurance of the State of Illinois as Special Deputy Receiver of LUMBERMANS MUTUAL CASUALTY COMPANY, 222 Merchandise Mart Plaza, Suite 960, Chicago Illinois, 60654, by certified mail.

(13) The Ancillary Receiver shall provide notice of this Order to all creditors, claimants and interested persons located in the State of New York by: (A) publication of the notice of this Order in *Business Insurance*, or a publication of similar circulation, once a week for two consecutive publications, commencing within four weeks of entry of this Order in a form substantially similar to the one attached hereto; and (B) posting this Order on the Internet web page maintained by the Bureau at <http://www.nyib.org> within 15 days after entry of this Order.

(14) The notice of this Order shall inform all creditors, claimants and other interested persons that this Order has been entered and shall be sufficient notice to all persons interested in LUMBERMANS MUTUAL CASUALTY COMPANY.

(15) LUMBERMANS MUTUAL CASUALTY COMPANY's license to do business in the State of New York is hereby revoked.

(16) This Court shall retain jurisdiction over this matter for all purposes.

(17) The caption of this proceeding is amended to read as follows:

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

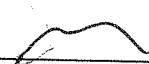
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In the matter of

The Ancillary Receivership of

LUMBERMANS MUTUAL CASUALTY COMPANY
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(18) The Superintendent shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry, upon the respondents, the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) who are then directed to amend their records to reflect the above amended caption of this proceeding.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

Dated: June 6, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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