

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AMERICAN RISK ASSOCIATES, LTD.,	:	January Term, 2001
Plaintiff	:	
	:	No. 3373
v.	:	
	:	Commerce Case Program
EMPLOYERS REINSURANCE	:	
CORPORATION	:	Control No. 071706
Defendant	:	

ORDER

AND NOW, this 14th day of September, 2001, upon consideration of the Preliminary Objections of Defendant Employer Reinsurance Corporation (“ERC”) to the Amended Complaint of Plaintiff American Risk Associates, Ltd (“ARAL”) and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objection asserting pendency of a prior action is OVERRULED;
2. The Preliminary Objection requesting that this action be stayed is GRANTED.

BY THE COURT:

JOHN W. HERRON, J.

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CORPORATION	:	Control No. 071706
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MEMORANDUM OPINION

Defendant Employers Reinsurance Corp. (“ERC”) has filed preliminary objections (“Objections”) to the Amended Complaint (“Complaint”) of Plaintiff American Risk Associates, Ltd (“ARAL”). For the reasons set forth in this Opinion, the Objection based on pendency of a prior action is overruled but the request for a stay is granted.

BACKGROUND

This case involves a dispute over whether ERC, a professional liability insurer, has a duty to provide coverage to ARAL under an Errors and Omissions Policy (“E&O Policy”). On January 19, 2001, ERC commenced an action for declaratory judgment in the Circuit Court of Cole County, Missouri¹ (“Missouri action”), asking the court to determine the parties’ rights and responsibilities pursuant to the E&O Policy. Immediately thereafter, on January 24, 2001, ARAL filed its declaratory

¹This action was later transferred to the Circuit Court of Jackson County, Missouri.

judgement action in this Court seeking the same relief. ERC has filed timely objections to the Complaint of ARAL.

DISCUSSION

I. Pendency of a Prior Action Is Not Grounds for Dismissal

Pennsylvania Rule of Civil procedure 1028(a)(6) allows a party to raise preliminary objections based on “pendency of a prior action or agreement for alternative dispute resolution.” This protects “a defendant from harassment by having to defend several suits on the same cause of action at the same time.” Penox Techs., Inc. v. Foster Med. Group, 376 Pa. Super. 450, 453, 546 A.2d 114, 115 (1988). However, pendency of a prior *in personam* action in a foreign court is not a defense in a subsequent action in Pennsylvania. Thompson v. Fitzgerald, 329 Pa. 497, 505, 198 A. 58, 62 (1938); Singer v. Dong Sup Cha, 379 Pa. Super. 556, 550 A.2d 791, 792 (1988). Under Pennsylvania law, the question of a pending prior action is “purely a question of law determinable from an inspection of the pleadings.” Davis Cookie Co. v. Wasley, 389 Pa. Super. 112, 121, 566 A.2d 870, 874 (1989) (quoting Hessenbruch v. Markle, 194 Pa. 581, 592, 45 A. 669, 671 (1900)).

To sustain a preliminary objection based on a pending prior action, “the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same.” Virginia Mansions Condominium Ass’n v. Lampl, 380 Pa. Super. 452, 456, 552 A.2d 275, 277 (1988). See also, Norristown Auto. Co. v. Hand, 386 Pa. Super. 269, 274, 562 A.2d 902, 904 (1989); Davis Cookie Co. 389 Pa. Super. at 120, 566 A.2d at 874 (requiring that the parties be “acting in the same legal capacity” in both actions). But see, Hessenburch, 194 Pa. at 594, 45 A. at 671 (while a plaintiff in the first suit may be a defendant in the second suit, the fact that the same persons are present in both suits allows a court “with perhaps some liberality of construction, [to]

assume that the parties are the same.”). The three-pronged test must be applied strictly when a party is seeking dismissal under the doctrine of prior pending action. Hand, 386 Pa. Super. at 274, 562 A.2d at 904.

Here, ERC’s request for a dismissal under the doctrine of prior pending action is overruled for two reasons. First, since the foreign Missouri action is a prior pending *in personam* action, the defense of prior pending action is unavailable in Pennsylvania. Second, although the present action involves the same rights as the Missouri action, namely the rights of ARAL and ERC rights under the E&O Policy, and the present action involves the same relief sought as in Missouri, declaratory judgment action, the parties are not the same. In the Missouri action, ERC, acting as plaintiff, is seeking a declaratory judgement against not only ARAL, but also Lockton², Day & Zimmerman³, and Allianz⁴. In the present case, however, ERC is the only defendant and ARAL the only plaintiff. Applying the rule in Hand strictly, the parties are not acting in the same legal capacity in both actions, therefore ERC’s request for a dismissal is overruled.

II. The Pending Missouri Action Is Grounds for a Stay

The court has discretion to stay its jurisdiction pending the outcome of proceedings in another court where the litigation of two suits would create a duplication of effort on the part of the parties, waste judicial resources and “create the unseemly spectacle of a race to judgment.” Id at 276-77, 562 A.2d at 905. See also, Singer, 379 Pa. Super. 556, 560, 550 A.2d 791, 793 (1988) (“while the

²Lockton Companies, Inc is the alleged parent corporation and the successor in interest of ARAL.

³Day & Zimmerman is the client for whom ARAL procured the insurance from Allianz Insurance Company (“Allianz”).

⁴Allianz is the insurance company for Day & Zimmerman’s construction project.

pendency of a foreign action does not serve as a bar to an action in a Pennsylvania court, the court has the inherent, equitable power to stay the proceedings in the second suit during the pendency of the prior suit”). Here, according to both parties there exist conflicting proceedings awaiting outcomes in Missouri. Specifically, ARAL argues that there are pending motions to dismiss, and requests for summary judgment. Pl. Mem.of Law, at 3, Exh 1-3. ERC argues that the Missouri action has proceeded to the discovery phase. Def. Mem of Law, at 6. Although this Court has overruled ERC’s Objection arguing dismissal based on pendency of a prior action, ERC’s request for a stay is granted pending the outcome of the Missouri action.

CONCLUSION

For the reasons set forth in this Opinion, the Objection based on a pending prior action is overruled. However, the Court is ordering a stay on the current action pending the outcome of the Missouri action.

BY THE COURT

JOHN W. HERRON, J.

Dated: September 14, 2001