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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT J. McDONALD IA Part 34
Justice

HOWARD & NORMAN BAKER, LTD.

-against-

AMERICAN SAFETY INSURANCE SERVICES, INC.

Index Number 27527 2007

Motion Date January 15, 2009

Motion Cal. Number 14

Motion Seq. No. 2

The following papers numbered 1 to 18 read on this motion by defendant American Safety Insurance Services, Inc. (ASIS) for an order pursuant to NYCRR § 202.21(e) vacating the note of issue and certificate of readiness for trial dated September 3, 2008 or in the alternative compelling the plaintiff Howard & Norman Baker, Ltd. (H&N Baker) to supply all outstanding discovery, staying trial of this matter until the completion of discovery, precluding the plaintiff from offering at the time of trial evidence as to matters of discovery that have been sought but not provided; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment for a declaration that H&N Baker is an additional insured under a policy of liability insurance issued by ASIS in connection with an underlying personal injury lawsuit commenced against H&N Baker, entitled Roberto Ruiz v Howard and Norman Baker II, LLC, Index No. 14240/2007, in Supreme Court, Queens County, a declaration that ASIS has a duty to defend and indemnify H&N Baker in connection with the underlying action, and must reimburse H&N Baker for the defense costs it has incurred and will incur as a result of ASIS's breach of its duty to defend H&N Baker; pursuant to CPLR 304(c) substituting American Safety Insurance Services, Inc. with defendant American Safety Casualty Indemnity Company; and a declaration that the note of issue and certificate of readiness were properly filed and that discovery is complete.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	1-5
Notice of Motion - Affidavits - Exhibits.....	6-9
Notice of Cross Motion - Affidavits - Exhibits...	10-12
Answering Affidavits - Exhibits.....	13-18

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this action, the plaintiff, H&N Baker seeks a declaration that it is an additional insured under a policy issued by American Safety Casualty Insurance Company (ASCIC) to Point Recycling Ltd. (Point Recycling). The plaintiff is the owner of the premises located at 686 Morgan Avenue, Brooklyn, New York. In October 1987, the plaintiff and Point Recycling entered into a lease for warehouse and office space at the premises. The lease was renewed in July 1993, November 1995, and again in October 2000. The October 2000 lease renewal extended the lease until October 2010. In August 2005, ASCIC issued policy number ENV 010591-05-01 to Point Recycling to insure the premises. In April 2006, Seneca Insurance Company (Seneca Insurance) issued a commercial general liability policy to H&N Baker, policy number SCC 2025952.

Roberto Ruiz alleges that on or about June 4, 2006, he was injured during the course of his employment with Point Recycling. In June 2007, Ruiz commenced a lawsuit entitled Roberto Ruiz v Howard and Norman Baker II, LLC, Index No. 14240/2007 in Supreme Court, Queens County. In his verified complaint, Ruiz alleged that H&N Baker was negligent in its maintenance of the premises. In this case, H&N Baker seeks reimbursement of any and all costs it has or will incur in connection with claims made by Mr. Ruiz as a result of injuries he sustained at the premises during the course of his employment with Point Recycling. In a letter dated February 13, 2007, Seneca Insurance tendered a defense of the underlying action to ASIS, the program administrator for ASCIC. By letter dated May 7, 2007, ASIS declined coverage.

By letter dated August 1, 2008, the defendant requested that the plaintiff provide the defendant with a certified copy of the insurance policy issued by Seneca Insurance, along with a copy of the Seneca Insurance underwriting and claims file. The defendant further requested a deposition of a representative of Seneca Insurance claiming, from the exchange of correspondence, it was clear that Seneca Insurance was the real party of interest.

The defendant now moves to strike the note of issue and certificate of readiness. The note of issue and certificate of readiness, both dated September 3, 2008, were filed on September 5, 2008. The defendant argues that the plaintiff's representations in the note of issue and certificate of readiness that discovery proceedings are completed are false. The defendant argues that the plaintiff has failed to provide a copy of the insurance policy issued by Seneca Insurance, along with a copy of the Seneca underwriting and claims file. A court may strike the note of issue and vacate the case from the trial calendar if it appears that a material fact in the certificate of readiness is incorrect and that all discovery proceedings have not been completed (see Ferreira v Vil. of Kings Point, 56 AD3d 718 [2008]; Brown v Astoria Fed. Sav., 51 AD3d 961 [2008]; Gregory v Ford Motor Credit

Co., 298 AD2d 496 [2002]). In response to the letter requesting discovery from Seneca Insurance, the plaintiff informed the defendant in a letter that Seneca Insurance is not a party to this action and, therefore, the defendant should take appropriate steps to obtain nonparty discovery. The defendant has not undertaken any measures to obtain discovery directly from nonparty Seneca Insurance. The plaintiff, however, has in its cross motion attached a certified copy of policy number SCC 2025952 from Seneca Insurance. The plaintiff has complied with all relevant discovery requested by the defendant and is not obligated to produce documents for a nonparty. Therefore, the note of issue and certificate of readiness should not be vacated.

The defendant also argues that the plaintiff sued the wrong party as it named ASIS, which is the program manager for ASCIC, as the defendant and ASIS did not issue the insurance policy. In response, the plaintiff, by cross motion, seeks leave to amend the complaint to substitute American Safety Casualty Indemnity Company as a defendant. While in its motion the plaintiff seeks to replace ASIS with American Safety Casualty Indemnity Company, the plaintiff is actually seeking to replace ASIS with American Safety Casualty Insurance Company. CPLR 305(c) gives the court the authority to allow a summons to be amended, as long as no substantial rights of a party against whom the summons is issued are prejudiced (see Willoughby v Yu Fashion Deli, 278 AD2d 316 [2000]). This provision has been applied to allow a plaintiff to cure a misnomer in the naming of a defendant if there is evidence that the intended but misnamed defendant was properly served and that defendant would not be prejudiced by the granting of the amendment(see Kingalarm Distribs. v Video Insights Corp., 274 AD2d 416 [2000]; Ober v Rye Town Hilton, 159 AD2d 16 [1990]). This substitution is proper under CPLR 305(c) as American Safety Casualty Insurance Company has been fairly apprised that it is the party that the plaintiff intended to sue and will not be prejudiced by the substitution. Accordingly, the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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HOWARD & NORMAN BAKER, LTD.,

Plaintiff, Index No. 27527/07

-against-

AMERICAN SAFETY CASUALTY
INSURANCE COMPANY,

Defendant.
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Finally, the cross motion by the plaintiff for summary judgment must be denied. A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]. Here, the plaintiff failed to make a prima facie showing of entitlement to judgment as a matter of law. ASCIS denied coverage based on the fact that the Employer's Liability exclusion precluded coverage for the claim against the plaintiff because Ruiz was an employee of the insured, Point Recycling. This argument is without merit as the Separation of Insureds requires ASCIS to treat each insured separately. Since Ruiz is not an employee of the plaintiff, the exclusion is not applicable to the claim against the plaintiff. Additionally, the argument that coverage should be denied as it is excess to coverage provided by Seneca Insurance is also without merit. Both the policy issued by Seneca Insurance and ASCIS state that they are excess over any other insurance. Thus, the two provisions cancel each other out. Inasmuch as additional insured coverage is primary unless unambiguously stated otherwise, coverage under the ASCIS policy cannot be denied on the grounds that it is excess to coverage under the policy issued by Seneca Insurance (see Pecker Iron Works of New York v Traveler's Ins. Co., 99 NY2d 391 [2003]). The plaintiff, however, is not entitled to summary judgment as under the terms of the policy, coverage would be extended to the plaintiff as an additional insured only if the claim or suit for bodily injury arises out of the negligence of the insured, Point Recycling. Here, the plaintiff has not offered proof in its cross motion that the damage to the stairs was caused by Point Recycling.

Accordingly, the motion to vacate the note of issue is denied. The branch of the plaintiff's cross motion for summary judgment in its favor is denied. The branch of the cross motion to amend the summons and complaint is granted. The plaintiff is directed to file and serve an amended summons and amended complaint on the defendant within 30 days from the date of this order. All other requests for relief are denied.

Dated: May 8, 2009

J.S.C.