STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

RICHARD K. KENDALL and HOLLY M. KENDALL,

Plaintiffs,

-against-

AMICA GENERAL AGENCY, INC.,

Defendant.

DECISION and ORDER
RJI NO. 01-12-107042
INDEX NO. 2319-11

ACTION # 1*

RICHARD K. KENDALL and HOLLY M. KENDALL,

Plaintiffs,

-against-

AMICA MUTUAL INSURANCE COMPANY,

Defendant.

DECISION and ORDER
INDEX NO. 4363-11

ACTION # 2*

RICHARD K. KENDALL and HOLLY M. KENDALL,

Plaintiffs,

-against-

USA DECON; ROBERT DEMARET;
DUCT AND VENT CLEANING OF AMERICA, INC.;
COLONIAL CLEANERS, LLC and
AMICA MUTUAL INSURANCE COMPANY,

Defendants.

DECISION and ORDER
INDEX NO. 1982-12

ACTION # 3*

Supreme Court Albany County All Purpose Term, June 22, 2012
Assigned to Justice Joseph C. Teresi

* Each separately captioned action will be referred to individually according to its above "Action #" designation.

APPEARANCES:
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TERESI, J.:

Plaintiffs commenced Action #1 seeking to recover the damages they allegedly sustained by Amica General Agency, Inc.'s (hereinafter "General Agency") breach of their insurance contract. Issue was joined by General Agency and discovery is ongoing. General Agency now moves for summary judgment. Plaintiffs opposed the motion by cross-moving to amend Action #1's caption and to consolidate Action #1 with Action #2.[1] General Agency opposes Plaintiff's cross motion. Because General Agency demonstrated its entitlement to summary judgment dismissing Action #1 against it, such motion is granted. Plaintiffs, however, failed to demonstrate their entitlement to the relief they seek.

Considering General Agency's summary judgment motion, as the movant it "bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contacting, Inc., __AD3d__ [3d Dept 2012]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). If General Agency establishes its

[1] By letter dated June 18, 2012 Plaintiffs withdrew only that portion of their motion that sought to join for trial the consolidated Action #1 / #2 and Action #3. As this portion of Plaintiffs' motion has been withdrawn, it will not be further addressed.

right to judgment as a matter of law, the burden then shifts to Plaintiffs to demonstrate the existence of a genuine issue of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Here, General Agency is entitled to summary judgment. Upon the sworn affidavit of its Senior Vice President, General Agency established that it has entered into no contract with Plaintiffs. Thus, General Agency demonstrated its entitlement to judgment as a matter of law dismissing Plaintiffs' breach of contract claim. Then, with the burden shifted, Plaintiffs conceded that General Agency was "mistakenly named" and raised no issue of material fact.

Accordingly, General Agency's motion is granted and Plaintiffs' Action #1 claim is dismissed.

Turning to Plaintiffs' motion to amend, they failed to proffer sufficient evidentiary proof to demonstrate their entitlement to amend the Action #1 Defendant's name.

As is applicable here, CPLR §305(c) provides a basis "to cure a misnomer in the description of a party defendant ... as long as the intended party defendant has been served with process and will not be prejudiced by the amendment." (Dunn v Pallett, 42 AD3d 807, 809 [3d Dept 2007], quoting Potamianos v Convenient Food Mart, 197 AD2d 734 [3d Dept. 1993]). "[W]hile CPLR 305(c) may be utilized to correct the name of an existing defendant (see Benware v Schoenborn, 198 AD2d 710, 711-712 [1993]), it cannot be used by a party as a device to add or substitute a party defendant (see Security Mut. Ins. Co. v Black & Decker Corp., 255 AD2d 771, 773 [1998])." (Hart v Marriott Intern., Inc., 304 AD2d 1057, 1059 [3d Dept 2003]; Smith v Garo Enters., Inc., 60 AD3d 751 [2d Dept 2009]).

On this record, Plaintiffs failed to establish that the intended but misnamed entity was served with Action #1's summons and complaint. As set forth above, Plaintiffs now readily

admit their error in commencing Action #1 against General Agency. They claim that the mistake was a mere misnomer, and seek to correct the error by amending the Action #1 Defendant's name to Amica Mutual Insurance Company (hereinafter "Mutual Insurance"). Conspicuously absent from Plaintiffs' proof, however, is an affidavit of service alleging that Mutual Insurance was served with Action #1's summons and complaint. Instead, Plaintiffs proffered a NYS Secretary of State receipt, which shows General Agency being served with process in Action #1. Such receipt neither alleges service on Mutual Insurance nor compliance with Insurance Law §1212's service provision. Moreover, Plaintiffs' attorney's allegations of General Agency and Mutual Insurance's business relationships and service of process connections are of no probative value because they are not based upon "personal knowledge of the operative facts." (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]). Similarly unavailing is Plaintiffs' attorney's delivery of Action #1's process to General Agency by certified mail return receipt requested. Such mailing neither alleges service on Mutual Insurance nor complies with CPLR §312-a's service provisions. Lastly, Plaintiffs reliance on a NYS Insurance Department acknowledgment of service, which indicates Action #2's index number, is wholly misplaced to prove service of Action #1's summons and complaint.

In addition, this portion of Plaintiffs' motion is procedurally deficient.[2] CPLR §3025(b)

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[2] Contrary to Mutual General's contention, Plaintiffs' cross motion was not untimely because the amended submission and return dates herein were agreed to by all counsel, as set forth in Plaintiffs' attorney's letter dated June 6, 2012. Nor was a "cross motion" an improper means to make this motion to amend, as it seeks relief against the moving party in Action #1. (CPLR §2215). Plaintiffs's sur-reply, however, is not considered because it is not an authorized motion paper. (CPLR §2214).

specifically commands that "[a]ny motion to amend... shall be accompanied by the proposed amended... pleading clearly showing the changes or additions to be made to the pleading." (emphasis added; *see also* Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351 [1st Dept 1994]; Fernandez v HICO Corp., 24 AD3d 110, 111 [1st Dept 2005]). Here, because Plaintiffs initially submitted no proposed amended complaint and cannot cure such defect with an unauthorized sur-reply (CPLR §2214[b], *see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:10), their motion to amend is procedurally flawed.

Accordingly, Plaintiffs motion to amend is denied.

Due to the foregoing, Plaintiffs motion to consolidate Action #1 and Action #2 is denied as moot because Action #1 is dismissed and no longer pending.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 10, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 23, 2012; Affidavit of Panagiota Hyde, dated May 23, 2012, with attached Exhibits A -C; Affidavit of Robert Suglia, dated May 22, 2012.
2. Notice of Cross-Motion, dated June 13, 2012; Affirmation of Shawn May, dated June 13, 2012, with attached Exhibits A-I.
3. Affidavit of Panagiota Hyde, dated June 20, 2012, with attached Exhibit 1; Affidavit of Jessica Desany, dated June 21, 2012, with attached Exhibit 1.
4. Affirmation of Shawn May, dated June 21, 2012, with attached Exhibit A.