[* 1]

FILED Jul 24 2012 Bronx County Clerk

7/24/12

C

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 22

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

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

----------X

JACKSON,YVETTE

Index №. **0006355/2007**

-against-

Hon..**NORMA RUIZ** ,

THE ALBERT EINSTEIN

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **August 15 2011** and duly submitted as No. 10 on the Motion Calendar of 12-5-11

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion and cross motion is decided in accord with the annexed decision and order of the Court

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/06/12

Hon. _____
NORMA RUIZ, J.S.C.

FILED Jul 24 2012 Bronx County Clerk

C

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

YVETTE JACKSON

Plaintiff,

-against-

THE ALBERT EINSTEIN HOSPITAL OF MEDICINE and TISHMAN CONSTRUCTION CORORATION OF NEW YORK

Defendants..

ALBERT EINSTEIN HOSPITAL OF MEDICINE and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third Party Plaintiffs,

-against-

INTERSTATE INDUSTRIAL CORPORATION, DONALDSON ACOUSTICS COMPANY, and EMPIRE CITY IRON WORKS,

Third Party Defendant.

Index No. 6355/2007

Decision and Order
Present: HON. NORMA RUIZ

The following papers numbered 1 to 8 Read on this motion RRR
Noticed on 8/15/11 and duly submitted as No. 10 on the Motion Calendar of 12/15/11

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1- 2
Answering Affidavits.....	3-6
Replying Affidavits	7-8
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

FILED Jul 24 2012 Bronx County Clerk

Non-party Albert Einstein College of Medicine of Yeshiva University ("Yeshiva") moves to reargue its prior motion to dismiss the third party action pursuant to the leave it was granted in this Court's order dated and entered on March 31, 2011. Non-party Nova Casualty Company ("Nova") cross moves for leave to renew its prior motion to intervene and oppose Yeshiva's motion to dismiss which was denied by this Court's aforementioned order. Upon a review of the moving papers and opposition submitted thereto, the Court denies Yeshiva's motion and grants Nova's cross motion.

The Court, under the mistaken belief that Nova was adequately represented in this action, denied its prior motion to intervene. That portion of the March 31, 2011 decision which denied Nova's application for leave to intervene is vacated. Nova is given leave to intervene and the Court has considered its papers in opposition to Yeshiva's motion.

The first party action is a labor law action involving the construction of the Price Center at The Albert Einstein Hospital of Medicine ("AEHOM"). On November 6, 2006, plaintiff while employed by non-party Barth-Gross Electrical Company ("Barth-Gross") alleges she sustained personal injuries when she fell down a stairwell while working at the construction project. The owner of the property in question was defendant AEHOM and the general contractor was defendant Tishman Construction Corporation of New York ("Tishman").

Subsequent to the commencement of the main action, non-party Yeshiva commenced a third party action against Barth-Gross and Siemens. It also filed a declaratory judgment action against Nova. A settlement was reached in the declaratory action in which Nova agreed to defend and indemnify AEHOM and Tishman. Consequently, the third party action against Barth-Gross and Siemens was dismissed. In turn, Nova assigned the law firm of Smith, Mazure, to defend

AEHOM and Tishman.

Thereafter, AEHOM and Tishman, commenced a third party action against Interstate Industrial Corporation ("Interstate Industrial"), Donaldson Acoustics Company ("Donaldson Acoustics") and Empire City Iron Works ("Empire City") for indemnification.

Yeshiva contends that the Albert Einstein Hospital of Medicine s/h/a AEHOM is a division of Yeshiva University. Upon Yeshiva University's approval, contractors for the construction project participated in an Owner Controlled Insurance Program ("OCIP") which was maintained by Yeshiva University. AEHOM and Tishman was participants in the OCIP, as well as, the third party defendants Interstate Industrial, Donaldson Acoustics and Empire City. Yeshiva further contends that pursuant to the terms of the OCIP, it has to pay out the first one million dollars of damages on behalf of all program participants due to a self insured retention. All participants waived their right to subrogation. In addition, the OCIP prohibited program participants from suing one another. The plaintiff's employer Barth-Gross and Siemen's Building Technologies, Inc. ("Siemens")(the electrical subcontractor who hired Barth Gross) were not participants in OCIP. Instead, Barth-Gross and Siemens were insured by Nova.

In its prior motion, Yeshiva sought to dismiss the third party action on the grounds that: such action was without the knowledge and consent of Yeshiva; is in violation of the rule of subrogation and is in violation of the express terms of the OCIP. It further contends that the third party action exposes Yeshiva to the possibility of paying up to one million dollars to the plaintiff. Had the third party action not been commenced, any ultimate payment to the plaintiff would be borne by Nova and not by Yeshiva University. Hence, movant argues that the third party action is essentially a tender-back to Yeshiva University.

The Court, without ruling on the merits, denied Yeshiva's prior motion because it failed to annex any evidence to substantiate the claim that defendant AEHOM and Yeshiva were in fact one legal entity. In addition, it failed to submit any of the relevant contracts. Thus, it did not prove that the OCIP contained a self insured retention or deductible provision and that the third party defendants were participants in the OCIP. Contrary to Yeshiva's allegation, the Court did not in its prior order "acknowledge that the third party action is in essence a tender back to Yeshiva" (see Affirmation in Support of Motion of Fredrick M. Molod).

In this renewal motion Yeshiva annexed the Affirmation of Toby Stone, Esq., an Associate General Counsel of Yeshiva. He states in his affirmation that AEHOM and Yeshiva share the same tax identification number. In addition, Yeshiva annexed the by-laws of the Albert Einstein College of Medicine of Yeshiva University; a copy of the Wrap Up Insurance policy for the OCIP issued by Illinois National Insurance Company to show it had a one million dollar self insured retention; and a list of OCIP participants which include the third party defendants.

In opposition, defendant/third party plaintiff AEHOM contends that the Court mischaracterized its position when it stated that it would voluntarily discontinue the third party action upon presentation of proper papers. Instead, AEHOM contends that assuming Yeshiva does have a $ 1,000,000 self insured retention, any damages in excess of the amount that Yeshiva pays out of pocket for the self insured retention does not constitute a conflict. Thus, the motion to dismiss should be granted only to the extent of the monies that Yeshiva must pay out-of-pocket for its self insured retention (see Affirmation in Opposition of Andrew Funk, Esq. dated September 1, 2011). Notwithstanding this concession, AEHOM argues the motion to dismiss should be denied because Yeshiva has not established its obligation to pay a one million dollar

self insured retention. It notes that the declaration page of the subject policy does not contain any reference to a deductible or self insured retention. The only place a self retention obligation is referenced is the *Large Risk Rating Plan Endorsement, Section 4. Retained Amounts* (page six) which notes that for commercial general liability there is a $ 1,000,000 retained amount for each occurrence which is subject to a basket loss aggregate. AEHOM notes that "retained amount" means:

> 1. the amount that is specified as your Self Insured Retention or as the Loss Reimbursement amount of Deductible amounts applicable to an incurred loss in the applicable policy definition; or
>
> 2. if the foregoing does not apply, the largest part of any damages or benefits or payable under a policy because of any single accident, occurrence, claim or suit, that we will include in the computation of the subject premium.
>
> Such amount is shown in Section 4 of Part II for each type of insurance afforded under the policy...

(see Page 4 section L. of the Large Risk Rating Plan Endorsement). Relying on the insurance policy's multiple definition of the term "retained amount," coupled with the fact that the policy's declarations sheet does not indicate a $ 1,000,000 self insured retention, AEHOM argues that Yeshiva does not have to pay $ 1,000,000 for each occurrence as a self insured retention. Instead, the second definition of "retained amount" is applicable and the $ 1,000,000 retained amount referred to in the policy is a numerical value used in determining the policy's premium amount.

Nova opposed the motion on the same grounds, namely Yeshiva has yet to establish that a self insured retention exists. It explains that the OCIP is a complex insurance program that insured numerous contractors. Because of the significant amount of coverage provided, there was

an initial premium and a final premium which was calculated using the formula set forth in the *Large Risk Rating Plan Endorsement* which took into consideration various factors such as amounts paid in losses, expenses and retentions. Nova further contends that the $ 1,000,000 retained amount for commercial general liability noted in the *Large Risk Rating Plan Endorsement* was listed as one of the factors used in estimating the premiums to be paid by Yeshiva.

Alternatively, Nova argues that if there were a self insured retention, Yeshiva failed to establish that it would, in fact, be required to pay such retention in this case. It notes that all self insured retentions under the OCIP are subject to a *Basket Loss Aggregate.* According to Nova, that means that all of the self insured retentions under th OCIP are limited by an overall aggregate amount which, when reached, eliminates any further retentions on claims going forward. Nova points to a complete lack of evidence regarding the mount of the *Basket Loss Aggregate* that has been eroded and the amount of retention, if any, that remains.

In addition, Nova persuasively argues that the third party action is not barred by the anti-subrogation rule. The third party defendants are insured under the OCIP program. Nova states that the OCIP only applies to AEHOM and Tishman on an excess basis since AEHOM and Tishman are covered as additional insureds on a primary basis under the separate Nova policy issued to Barth-Gross. Since the third party defendants are not insured under the same Nova policy, the third party action is not barred by the anti-subrogation rule (Northstar Reinsurance Corp. v. Continental Ins. Co., 82 NY2d 281 [1993]; Federated Department Stores, Inc. v. Twin City Fire Ins. Co., 28 AD3d 32 [1st Dept 2006]). For the foregoing reasons the "waiver of subrogation" clause provided in the OCIP is not applicable and does not serve as a bar to the

third party action.

The Court notes that movant submitted a Reply Affirmation in response to opposition it apparently received from Tishman, however, the Court does not have such opposition papers.

In the Reply Affirmation, addressed to AEHOM movant annexed the affirmation of John Scarfone, Esq. ("ScarFone") dated July 20, 2011 (which was also annexed to the moving papers) which addresses this issue in the following three sentence paragraph:

> The purpose of this Motion is to answer the single request made by the Smith Mazure law firm regarding Yeshiva's self insured retention of one million dollars being subject to a basket loss aggregate. Since the construction of the Price Center at AEHOM, the basket loss aggregate has never exceeded Yeshiva University's one million dollar self insured retention. Accordingly, every dollar paid in first party claims arising out of the construction of the Price Center of AEHOM has come within Yeshiva University's self insured retention of the one million dollars and has been paid by Yeshiva University.

The Court finds that since Nova is the primary insurer for AEHOM and Tishman, the third party action is not barred by the anti-subrogation rule (*see Northstar Reinsurance, supra, Federated Dept. Stores, supra*).

The Court notes that at this juncture, no one is disputing that Yeshiva and AEHOM are one legal entity. Nor has any party disputed the contention that if there is a one million dollar self insured retention applicable to the OCIP policy covering the third party defendants, then the third party action would be adverse to AEHOM since it is Yeshiva that would pay AEHOM the first one million dollars in any recovery AEHOM may obtain from the third party defendants. Hence, the only remaining issue is whether or not Yeshiva has a self insured retention or,

whether the self retained amount of $ 1,000,000 referred to in the *Large Risk Rating Plan Endorsement* is a numerical factor the insurer worked into the calculation of the final insurance premium. The Court finds that the evidence submitted by Yeshiva fails to conclusively establish the former. The insurance policy declaration sheet did not include a self insured retention and/or deductible. This is of significance because the policy itself defines a "retained amount" as either a Self Insured Retention, the Loss Reimbursement amount or a Deductible amount. In the alternative, it is defined as a value used in calculating a premium. The scant affirmation of Scarfone did not state that he had personal knowledge of the facts regarding this insurance policy. Nor did he provide any documentary proof to substantiate his claim that Yeshiva has a one million dollar self insured retention and that every dollar paid in first party claims, arising out of the construction of the Price Center of AEHOM, has come within Yeshiva University's self insured retention of one million dollars and has been paid by Yeshiva University.

Accordingly, Nova is granted leave to intervene and oppose Yeshiva's motion. Yeshiva's motion to dismiss the third party action is denied.

This constitutes the decision and order of the Court.

Dated: 7/06/12
Bronx, New York

HON. NORMA RUIZ, J.S.C.