To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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WEST STREET PROPERTIES, LLC.,

Plaintiff

-against-

AMERICAN STATES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE GROUP, SAFECO INSURANCE COMPANY of AMERICA and SCOTTSDALE INSURANCE COMPANY,

Defendants.

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DECISION and ORDER

Index # 54513/2012
Seq. No. 6
Motion Date: 7/8/13

LEFKOWITZ, J.

The following papers were read on this motion by defendant, American States Insurance Company (hereinafter to be referred to as American), for an order pursuant to CPLR 3124 and 3126, compelling plaintiff to produce Anthony Casterella for a deposition or, in the alternative, for an order precluding his testimony in this action.

Order to Show Cause-Affirmation in Support
Exhibits A-G
Affirmation in Opposition
Affidavit in Opposition
Exhibits A-B

Upon the foregoing papers and upon oral argument heard on July 8, 2013, this motion is determined as follows:

In an underlying action (*West Street Properties, LLC v A & A Industries, LLC,*

Anthony Casterella, Cast Construction, LLC and Cast Construction & Son, Inc., Index # 14364/09), plaintiff alleged that it hired Anthony Casterella and the companies he controlled, A& A Industries, LLC, Cast Construction, LLC, and Cast Construction & Son, Inc. (hereinafter to be referred to jointly as Casterella), to grade and landscape premises on which plaintiff was constructing a dwelling. Plaintiff claimed that between December 6, 2007, and December 14, 2007, Casterella negligently ruptured an oil line on the premises, spilling more than 200 gallons of fuel oil and contaminating nearby wetlands. Plaintiff alleged that because Casterella failed to report the oil spill and failed to act to minimize the damage it caused, plaintiff was required to clean the spill and remedy the resulting damage. Anthony Casterella and A& A Industries, LLC, were insured by defendant herein, American. The relevant policy placed a duty on the insureds to cooperate with American and its attorneys.

As a result of the oil spill, Casterella was indicted. In November, 2009, he pleaded guilty, both individually and on behalf of Cast Construction, LLC, to the felony of Endangering the Public Health, Safety and Environment under the Environmental Conservation Law. Casterella admitted to recklessly releasing more than 200 gallons of petroleum, a hazardous substance.

Lester Schwab Katz & Dwyer, LLP (hereinafter to be referred to as Lester Schwab), represented the interests of A&A Industries, LLC, in the underlying action. A& A Industries, LLC, and its owner, Anthony Casterella, repeatedly failed to cooperate with counsel in defending the underlying action. By order filed and entered March 1, 2011, this Court (Lefkowitz, J.), granted the motion of counsel to withdraw as counsel for Casterella ,upon the grounds that defendants failed to cooperate in their defense. Plaintiff moved for summary judgment in the underlying action and the unopposed motion was granted on September 26, 2011. Plaintiff entered judgment against Casterella in the underlying action in the sum of $ 2,000,000.

American commenced a separate declaratory judgment action against Casterella on or about May 10, 2011, seeking a declaration that it did not owe a defense or indemnification to the defendants in the underlying action. Its motion for a default judgment was granted by order of this Court (Colabella, J.), filed and entered on June 27, 2012. The Court noted that "defendants' failure to cooperate in the defense of the underlying action, as required by the subject policy, is a material breach of the policy's cooperation clause and precludes coverage under the policy".

In this action, commenced on or about March 27, 2012, plaintiff seeks an order pursuant to Insurance Law § 3420 (b)(1) for a judgment in the sum of the limits of the insurance policies issued by defendants up to a total of $ 2,000,000, in order to satisfy the judgment entered in the underlying action. Plaintiff moved for an order granting it summary judgment in lieu of a complaint and defendants cross-moved for an order dismissing the action. In support of its cross motion, American argued that it properly disclaimed coverage due to Casterella's failure to cooperate in the defense of the underlying action. The Court noted that two months after counsel for American moved for permission to withdraw as counsel, American issued a letter disclaiming

coverage (on March 18, 2011). However, American did not personally deliver the disclaimer letter to Casterella until one month later on April 26, 2011. The Court noted that since a disclaimer based upon lack of cooperation penalizes the injured party for the actions of the insured and frustrates the policy of the State that innocent victims be recompensed for the injuries inflicted upon them, an insurer seeking to disclaim for non-cooperation has a heavy burden of proof. The Court further noted that the timeliness of a carrier's disclaimer based on its insured's alleged violation of the policy's cooperation clause almost always presents a factual issue, requiring the assessment of all relevant circumstances surrounding the particular disclaimer. The Court stated that American failed to establish as a matter of law that it was entitled to disclaim coverage upon Casterella's non-cooperation. Even if it had, it failed to establish as a matter of law that it issued its disclaimer within a reasonable time after Casterella manifested their clear intention not to cooperate. By Decision and Order dated October 5, 2012, this Court (Lefkowitz, J.), denied the motion and denied the cross motions with leave to move for summary judgment after the completion of discovery.

American is presently moving for an order compelling plaintiff to produce Anthony Casterella for a deposition or, in the alternative, for an order precluding his testimony in this action. American asserts that in bringing this action, plaintiff has stepped into the shoes of the insured. American states that Casterella's non-cooperation constituted a material breach of the subject policy. American states that it does not have to defend or indemnify Casterella and thus, plaintiff in this case is also barred from recovery under the policy until and only when it successfully demonstrates that there is in fact a showing of cooperation. American asserts that this can only be established through the testimony of Casterella. Therefore, plaintiff is obligated to produce Anthony Casterella, owner of A&A Industries, LLC, for a deposition. American further seeks a conditional order of preclusion based upon the lack of effort by plaintiff to produce or to bring about the deposition of Casterella.

This motion is opposed by plaintiff. Plaintiff asserts that it is American that has the burden to show that it was entitled to disclaim coverage based upon Casterella's non-cooperation. It is American that must produce Casterella for a deposition and not plaintiff, the innocent victim in this matter. Plaintiff further notes that even if American had a valid basis to disclaim, waiting two months to send the disclaimer notice is not reasonable and no reasonable explanation was ever offered by American for its delay. Plaintiff further notes that Anthony Casterella's deposition testimony was not necessary in the underlying action since Anthony Casterella pleaded guilty in a criminal matter which refers to the exact act that is the subject of this litigation.

Pursuant to Insurance Law § 3420 (b)(1) an action may be maintained against the insurer upon any policy or contract of liability insurance to recover the amount of a judgment against the insured by any person who has obtained a judgment against the insured for damages for injury sustained or loss or damage occasioned during the life of the policy. In this action, plaintiff is that entity that, having recovered a judgment in the sum of $ 2,000,000 against Casterella, now seeks to recover against American, the insurer who had insured Casterella for the damages it suffered. The only question presently is whether plaintiff is obligated to produce

Anthony Casterella for a deposition.

The non-cooperation of an insured party in the defense of an action is a ground upon which an insurer may deny coverage and may be asserted by the insurer as a defense in an action on a judgment by an injured party (*compare Van Gordon v Ostego Mut. Fire Ins. Co.*, 232 Ad2d 405 [2d Dept 1996]; *Wallace v Universal Ins. Co.*, 18 AD2d 121 [1st Dept 1963]affd 13 NY2d 978 [1963]). This Court previously denied a cross motion by American to dismiss the action on the basis of its proper disclaimer of coverage (due to Casterella's failure to cooperate in the defense of the underlying action) noting that American had failed to demonstrate that it was entitled to disclaim coverage upon Casterella's non-cooperation and that even if it had, it failed to demonstrate that it issued its disclaimer within a reasonable time after Casterella manifested their clear intention not to cooperate. In this action American's defense is that Casterella did not cooperate in the underlying action so that it has no obligation to Casterella or plaintiff. It is America's responsibility to show non-cooperation and not plaintiff's to show cooperation. It is improper to require plaintiff to produce Casterella for a deposition whether to testify about his non-cooperation or his responsibility regarding the underlying facts of this matter. Another key concept here is control and whether Casterella is under plaintiff's control. Since control does not exist, American's motion is inappropriate (see generally Connors, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, 2005, CPLR 3126 at 455).

American's reliance on *D'Arata v New York Mut. Fire Ins. Co.* (76 NY2d 659 [1970]) is unavailing to it. In that case, plaintiff was a shooting victim who sought to recover from the insurer of the assailant the amount of a default judgment obtained against the assailant who had been convicted for first degree assault for the incident resulting in plaintiff's injuries. The subject insurance policy expressly excluded recovery for bodily injury expected or intended by the insured. The issue in that case was whether the insurer could use the insured's criminal judgment of conviction as a collateral bar to plaintiff's attempt to relitigate the issue of assailant's intent to injure. The Court of Appeals stated that plaintiff was collaterally estopped and therefore found that the action properly had been dismissed. The *D'Arata* Court concluded that plaintiff, in suing defendant on the judgment he recovered against the assailant, was in privity with the assailant for the purpose of the application of collateral estoppel. What is involved presently is a discovery issue. Nothing on the present record suggests that plaintiff is seeking to relitigate a substantive issue that has already been decided. Accordingly, it is:

ORDERED that the motion by defendant American States Insurance Company is denied in its entirety; and it is further,

ORDERED that defendant American States Insurance Company serve upon all parties a copy of this order within ten (10) days of entry; and it is further,

ORDERED that the parties are directed to appear in the Compliance Part, Room

800, on August 6, 2013, at 9:30 A.M., as they were previously directed in the Compliance Conference Order dated June 20, 2013.

Dated: White Plains, New York
July 8, 2013

HON. JOAN B. LEFKOWITZ, JSC

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