SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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NATIONAL CASUALTY COMPANY, 10-12 COOPER SQUARE, INC.,COOPER SQUARE CONTRACTORS, LLC,TO BETTER DAYS, LLC,ATALNTIC DEVELOPEMENT GROUP, LLC

Plaintiff,

- v -

UTICA FIRST INSURANCE COMPANY, ALTIN BUNDO, FATBARDHA BUNDO,

Defendant.

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INDEX NO. 654376/2015

MOTION DATE 07/29/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Utica First Insurance Company (**Utica First**) moves pursuant to CPLR §§ 2221 (e) and 5015 (a) (2) for leave to renew its opposition to the prior motion for summary judgment brought by National Casualty Company (**National Casualty**) and nominal plaintiffs 10-12 Cooper Square, Inc., (**10-12 Cooper**), Cooper Square Contractors, LLC (**CSC**), To Better Days, LLC (**Better Days**), and Atlantic Development Group, LLC (**Atlantic**, and together with 10-12 Cooper, CSC, and Better Days, the **Nominal Plaintiffs**) and, upon renewal, to vacate the order (the **Prior Order**), dated November 14, 2018 granting summary judgment to National Casualty, and to deny the motion for summary judgment in its entirety. For the reasons set forth on the record (10/11/19) and as otherwise set forth below, the motion is granted to the extent that the Prior Order is vacated and the motion for summary judgment is denied.

The plaintiffs previously moved for summary judgment (mtn. seq. 001) in this action seeking a declaration that Utica First must indemnify the plaintiffs with regard to a then pending action (the **Bundo Action**) captioned *Bundo v 10-12 Cooper Square, Inc.* (Index No. 104843/2011) arguing that Utica First's failure to timely disclaim coverage directly to the Nominal Plaintiffs resulted in a waiver of its coverage defenses pursuant to Insurance Law § 3420 (d). The Bundo Action was commenced by defendants Altin and Fatbardha Bundo for bodily injuries sustained by Altin Bundo in an accident that allegedly occurred on July 22, 2010 at a construction site. The claims for Utica First to defend and indemnify were made under two policies of insurance: (i) ART 1370050, effective August 6, 2009, and (ii) ULC1383039, effective February 2, 2010 (collectively, the **Utica First Policies**).

In its opposition papers to National Casualty's motion for summary judgment, Utica First argued that the Utica First Policies' exclusionary provisions, including the Employee Exclusion, preclude coverage for the Nominal Plaintiffs. National Casualty argued that Utica First failed to timely disclaim coverage and therefore waived its coverage defenses. Pursuant to the Prior Order, the court granted the motion for summary judgment. Utica First now moves for relief from the court's Prior Order.

Pursuant to CPLR § 2221 (e),

> [a] motion for leave to renew: (1). shall be identified specifically as such; (2). shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ; and (3). shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion to renew "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). In addition, a party may move pursuant to CPLR § 5015 (a) (2) for an order vacating a prior judgment or order on the ground of "newly discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404."

Utica First argues that it is entitled to renewal and that summary judgment should be denied based on newly-discovered facts and evidence. To wit, Utica First claims that it recently learned that a Stipulation of Discontinuance, dated November 2, 2018, was filed by the parties in the Bundo Action indicating that the parties had reached a settlement in principal and confirming that the only party in interest was National Casualty which cannot avail itself of § 3420 (d). Because Utica First was not apprised of this information until after oral argument on the motion resulting in the Prior Order, Utica First alleges that it did not have an opportunity to raise this issue and the Prior Order must be vacated.

Utica First further claims that it has learned that (i) 10-12 Cooper Square, Inc. became inactive as a result of a merger in December 2006, (ii) CSC was dissolved in June 2013, and (iii) To Better Days, LLC was dissolved in March 2014. Utica First notes that, although the plaintiffs provided excerpts from a deposition transcript that referenced CSC's dissolution, such excerpts were included to prove the authenticity of the subcontract in dispute and the issue of CSC's dissolution was not otherwise discussed in the plaintiffs' reply papers or other submissions. In

other words, Utica First argues that to the extent that CSC's dissolution was referenced in a deposition transcript, there was nothing to draw Utica First's attention to that fact or its potential relevance.

The newly discovered facts submitted establish that, as a result of the settlement, National Casualty was the sole real party in interest in the Bundo Action and the defunct Nominal Plaintiffs had no stake in the Bundo Action. The Bundo Action was therefore, in reality, a lawsuit between two insurers, and therefore Insurance Law § 3420 (d) could not be invoked by National Casualty (*J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 271 [1st Dept 2009] ["Insurance Law § 3420 (d) does not apply to claims between insurers"]).

To the extent that National Casualty argues that Utica First's motion to renew should be denied because it fails to show a reasonable justification for failing to present the newly-discovered evidence on the prior motion, this argument is unavailing. First, with respect to the settlement of the Bundo Action, it is undisputed that Utica First did not learn of the Stipulation of Discontinuance until after oral arguments on the motion for summary judgment and could not have known about it through any amount of due diligence. The Stipulation of Discontinuance is dated November 2, 2018— 12 days prior to the Prior Order—but was not filed with the county clerk until January 9, 2019. Counsel to the plaintiffs in the Bundo Action advised Utica First by email, dated December 4, 2018, (*i.e.*, after the oral arguments on November 14, 2018) that the Bundo Action had settled, and that the settlement was fully funded by National Casualty and two other insurers, with no contribution by the Nominal Plaintiffs. Therefore, Utica First could not

reasonably have known about the settlement before the oral arguments on the prior motion for summary judgment.

In addition, with respect to the newly-discovered information regarding the dissolution of three of the four Nominal Plaintiffs, Utica First asserts that it only became aware of this information in May 2019 in the course of researching the background of the Bundo Action in preparing to perfect its appeal of the Prior Order. Utica First argues that the research regarding the corporate status of the Nominal Plaintiffs was not directly related to the insurance issues in dispute in the Bundo Action, thus it was reasonable that Utica First would not have learned of this information prior to the oral arguments on the prior motion for summary judgment. The court agrees that Utica First was reasonably justified in not presenting the information regarding the dissolution of three of the four Nominal Plaintiffs on the prior motion. In any event, even if this information could have been provided on the prior motion for summary judgment, the court exercises its discretion to relax this requirement in the interest of justice (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]).

Moreover, specifically with respect to Nominal Plaintiff Atlantic, Utica First argues that even if Insurance Law § 3420 (d) applies, there was nevertheless a timely and valid disclaimer. In its moving papers, Utica First clarifies that it timely served a disclaimer letter within 15 days of Atlantic's first tender. At oral argument on the motion to renew (10/11/19), counsel to National Casualty conceded that, assuming the representations of counsel to Utica First regarding the date of the disclaimer to be true, which representations counsel to National Casualty does not dispute, the disclaimer was timely and proper based on the Utica First Policies' Employee Exclusions.

To the extent that Utica First previously raised this argument in its opposition to National Casualty's motion for summary judgment, this argument was not clear from the papers. In any event, the court, for good cause shown and to avoid a substantially unjust result, grants Utica First's motion and vacates its prior order as it relates to Nominal Plaintiff Atlantic in the interest of justice (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003] ["In addition to the grounds set forth in section 5015 [a], a court may vacate its own judgment for sufficient reason and in the interests of substantial justice"]).

National Casualty argues that, notwithstanding the newly-discovered evidence presented by Utica First, the outcome of the prior summary judgment motion would not have changed. Relying on *Sierra v 3401 Sunset Park, LLC* (24 NY3d 514 [2014]), National Casualty argues that irrespective of whether the Bundo Action had already settled or the Nominal Plaintiffs were no longer in existence, Utica First waived the right to rely on any policy exclusions to deny coverage by failing to properly disclaim coverage directly to the Nominal Plaintiffs as additional insureds. National Casualty's reliance on *Sierra* is misplaced.

First, in *Sierra*, the Court of Appeals concluded that the additional insureds were entitled to notice delivered to them or their agents because the additional insureds had their own interests at stake in the outcome of the litigation separate from the interests of the liability carrier (*id.*, at 518-19). However, the Court of Appeals distinguished Sierra from the First Department case *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124 [1st Dept 1999]), observing that:

> *Excelsior* . . . may be distinguishable [because] in that case, as a result of a settlement, the insured had no real interest in the litigation, and the insurer to which the disclaimer was sent was the only real party in interest (*Sierra*, 24 NY3d at 519, citing *Excelsior*, 262 AD2d at 127).

Indeed, *Excelsior* compels the result as to the instant motion. In *Excelsior*, the First Department held that because the insured had no risk of loss as a result of a settlement of the underlying litigation, the insurers were the only real parties in interest (*Excelsior*, 262 AD2d at 127). The newly-presented evidence indicates that here, as in *Excelsior*, the Nominal Plaintiffs had no interest in the outcome at the time the oral arguments were heard on the prior motion for summary judgment because (a) they had no exposure as a result of the settlement reached in the Bundo Action and (b) at least three out of four Nominal Plaintiffs had been dissolved for several years. Accordingly, in this case, as in *Excelsior*, the insurer (*i.e.*, National Casualty) was the only real party in interest, and National Casualty therefore had no right to invoke Insurance Law § 3420 (d).

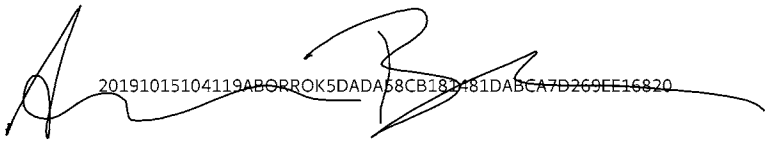
In addition, the Court in *Excelsior* observed that Insurance Law § 3420 (d) was intended "to protect the insured, the injured person, and any other interested party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage" and that "[i]t was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy" (*Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1st Dept 1999]). As the Court explained, "[t]he real question is whether Excelsior's noncompliance with the literal terms of section 3420 (d) was severe enough that it should be required to pay $1 million on a claim otherwise not covered by the policy" (*id.*). Likewise, even if Insurance Law § 3420 (d) did apply in this case, Utica First's alleged technical noncompliance was not so severe as to warrant forcing Utica First to pay $1 million on a claim for which it is undisputed that coverage was otherwise excluded under the Utica First Policies.

Accordingly, it is

ORDERED that the motion of defendant Utica First for leave to renew its opposition to the plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that, upon renewal, the Court vacates the Prior Order, and denies the plaintiffs' motion for summary judgment in all respects; and it is further

ORDERED that the parties are directed to appear for a status conference on December 5, 2019 @ 2:30 pm in Room 238, 60 Centre Street, New York, NY.



10/10/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE