

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32747
W/mv

_____AD3d_____

Argued - October 3, 2011

PETER B. SKELOS, J.P.
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2011-01157

DECISION & ORDER

South Hylan, LLC, et al., respondents, v CNA Insurance Company, defendant, National Fire Insurance Company of Hartford, appellant.

(Index No. 101522/10)

Colliau Elenius Murphy Carluccio Keener & Morrow, New York, N.Y. (Marian S. Hertz of counsel), for appellant.

Howard M. File, Esq., P.C., Staten Island, N.Y., for respondents.

In an action for a judgment declaring that the defendant National Fire Insurance Company of Hartford is obligated to defend and indemnify the plaintiffs in an underlying action entitled *Snyder v Getty Petroleum Marketing, Inc.*, pending in the Supreme Court, Richmond County, under Index No. 102382/08, the defendant National Fire Insurance Company of Hartford appeals from an order of the Supreme Court, Richmond County (Ajello, J.H.O.), dated December 14, 2010, which denied its motion for summary judgment declaring that it is not so obligated, and granted the plaintiffs' cross motion for summary judgment on the complaint declaring that it is so obligated.

ORDERED that the order is reversed, on the law, with costs, the motion of the defendant National Fire Insurance Company of Hartford for summary judgment is granted, the plaintiffs' cross motion for summary judgment is denied, and the matter is remitted to the Supreme Court, Richmond County, for the entry of a judgment declaring that the defendant National Fire Insurance Company of Hartford is not obligated to defend and indemnify the plaintiffs in the underlying action.

November 1, 2011

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SOUTH HYLAN, LLC v CNA INSURANCE COMPANY

The defendant National Fire Insurance Company of Hartford (hereinafter National Fire) demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it is not obligated to provide coverage to the plaintiffs in an underlying personal injury action, as the plaintiffs are not named insureds in the subject insurance policy (*see Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 1197-1198). In opposition, the plaintiffs failed to raise a triable issue of fact as to whether reformation of the subject insurance policy is necessitated by mutual mistake as to the identity of the actual insureds (*see Pascal v Nova Cas. Co.*, 226 AD2d 688, 690). Accordingly, the Supreme Court should have granted National Fire's motion for summary judgment declaring that it is not obligated to defend and indemnify the plaintiffs in the underlying action. For the same reasons, the plaintiffs' cross motion for summary judgment should have been denied.

Since this is a declaratory judgment action, we remit the matter to the Supreme Court, Richmond County, for the entry of a judgment declaring that National Fire is not obligated to defend and indemnify the plaintiffs in the underlying action (*see Lanza v Wagner*, 11 NY3d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901; *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021).

SKELOS, J.P., CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court