STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL GEORGE, DEAN GEORGE and JACK GEORGE d/b/a VISTA VIEW FARMS

Plaintiffs

vs.

MEMORANDUM DECISION

Index No. 10023/03

ERIE AND NIAGARA INSURANCE ASSOCIATION, ALFRED W. DYE, INC. and JEFFREY E. DYE

Defendants

ERIE AND NIAGARA INSURANCE ASSOCIATION

Third Party Plaintiff

vs.

RONALD S. JONES and MICHAEL B. ACKERMAN d/b/a R&M CONSTRUCTION

Third Party Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **STANLEY J. COLLESANO, LLC**
Attorneys for Plaintiffs
Stanley J. Collesano, Esq., of Counsel
Jennifer S. Adams, Esq., of Counsel

MURA & STORM
Attorneys for Defendant and Third Party Plaintiff Erie and Niagara Insurance Association
Eric T. Boron, Esq., of Counsel

Domenic J. Migliaccio, Esq.
Attorney for Third Party Defendants Ronald S. Jones and Michael B. Ackerman d/b/a R&M Construction

CURRAN, J.

Before the Court are plaintiffs' motion for summary judgment and defendant Erie and Niagara Insurance Association's ("ENIA") cross-motion for summary judgment.

Procedural Background

Plaintiffs, members of the George family, own and operate a dairy farm in Erie County. In 2001, they contracted with R&M Construction Company ("R&M") to replace some shingles on their dairy barn that had been damaged during a wind storm. On the morning of October 11, 2001, the principals of R&M, Ronald Jones and Michael Ackerman, were smoking cigarettes while working on the barn roof. Michael Ackerman flicked a lit cigarette off the roof, and shortly thereafter, a fire ignited that destroyed plaintiffs' barn and all of its contents. R&M was insured by ENIA with a commercial general liability insurance policy.

On November 26, 2001, ENIA sent a Notice of Cancellation stating that effective December 28, 2001 the policy was cancelled (Justice Fahey's Memorandum Decision dated October 26, 2006, p. 3, attached as Ex. 12 to the June 12, 2008 Affidavit of Stanley J. Collesano, Esq.). Thereafter, on January 31, 2002, ENIA sent a letter to R&M disclaiming coverage for the fire loss, notifying the insured that it would neither defend nor indemnify them in relation to any such claims, rescinding the policy from its inception and enclosing a premium rebate check (Ex. 4 to the June 12, 2008 Collesano Affidavit).

On February 21, 2002, plaintiffs sued R&M in Wyoming County seeking to recover their losses associated with the fire. On March 14, 2002, R&M's attorney advised

ENIA in writing that R&M had been sued in Wyoming County for losses associated with that fire.

On September 24, 2002, plaintiffs moved for entry of default judgment against R&M for failing to answer the Wyoming County Complaint. On November 7, 2002, the date on which the motion was returnable, the principals of R&M were present in court and Justice Dadd granted them an additional seven (7) days to serve an answer. R&M again failed to serve an answer in the Wyoming County action, and after due consideration of the Complaint, the Supreme Court in Wyoming County entered a default judgment against R&M on December 12, 2002 (Ex. 5 to the June 12, 2008 Collesano Affidavit).

On April 7, 2003, a damages inquest was held before Justice Dadd. According to the transcript of that proceeding, Mr. Jones and Mr. Ackerman appeared at the inquest. They did not question any of the witnesses nor did they introduce any proof.

On July 25, 2003, a judgment was entered against R&M in the amount of $828,196.80 (Ex. 1 to the June 12, 2008 Collesano Affidavit). Thereafter, on October 10, 2003, plaintiffs commenced the present against ENIA and others. In its answer to the Complaint, ENIA raised an affirmative defense of lack of standing (Ex. 9 to the June 12, 2008 Collesano Affidavit). On April 12, 2004, plaintiffs obtained from R&M an assignment of all right, title and interest to any claims for defense and indemnification that R&M may have had against ENIA (Ex. 7 to the June 12, 2008 Collesano Affidavit). On April 23, 2004, plaintiffs amended their complaint as of right to allege additional causes of action based upon the assignment. On July 12, 2004, plaintiffs served ENIA with notice of entry of the default judgment (Ex. E to the July 2, 2008 Affidavit of Michael S. O'Shei).

In 2006, the parties argued various summary judgment motions before Justice Fahey. On October 26, 2006, Justice Fahey issued a Memorandum Decision deciding those motions, in relevant part, as follows: the Court granted partial summary judgment to plaintiffs dismissing ENIA's third affirmative defense based upon the "roofing operations" exclusions; denied ENIA's summary judgment motion to confirm their purported recision of the policy and to dismiss plaintiffs' claims; deemed ENIA's purported recision of the policy a nullity; and ordered ENIA to move to vacate the default judgment against R&M in Wyoming County after which the Court would schedule further proceedings concerning damages. On December 13, 2006, an order was entered on Justice Fahey's decision.

Notably, in its cross-motion for summary judgment before Justice Fahey, ENIA sought the following relief: "(a) rescinding the subject Artisans ProPac policy of insurance, policy no. AP 0002973, *ab initio*, and declaring that Erie and Niagara Insurance Association be discharged from and all liability (sic) to the plaintiffs and any subrogees, and the third-party defendants and any assigns, with regard to that Artisans ProPac policy of insurance, including, but not necessarily limited to, the alleged losses of October 11, 2001; (b) determining and declaring that the subject Artisans ProPac policy of insurance, policy no. AP 0002973, has been previously rescinded by agreement and acknowledgment by and between the parties to the said policy of insurance; and (c) dismissing the complaints in each of the respective Action No. 1 and Action No. 2 as against Erie and Niagara Insurance Association, and permanently restraining the respective plaintiffs, as well as the third-party defendants, from prosecuting any action or proceeding on account of, or under, by virtue of the terms of the subject policy of insurance" (See the April 18, 2006 Affidavit of James M. DeVoy, Esq., attached to the July 10,

2008 Affidavit of Stanley J. Collesano, Esq. as Ex. 14). Within that prior motion, in addition to urging the Court to confirm its purported rescission based upon the theory that R&M made material misrepresentations in its application for insurance coverage, ENIA also argued that the acceptance and cashing of the premium rebate check constituted a "rescission by agreement and acknowledgment."

On March 14, 2008, Justice Fahey's decision was unanimously affirmed by the Fourth Department.

On June 23, 2008, ENIA moved for permission to intervene and to vacate the default judgment in Wyoming County based upon the alleged misrepresentations by the plaintiffs at the April 7, 2003 damages inquest which allegedly resulted in a greatly inflated damages award (¶ 33 of the July 3, 2008 Affirmation of Eric T. Boron, Esq.).

At the initial return of the present motions on August 7, 2008, the parties agreed to adjourn the pending summary judgment motions in order to await a decision from Justice Dadd on ENIA's motion to intervene and to vacate the default judgment in Wyoming County. The consent to adjourn was given in court on that date, and then also subsequently confirmed in correspondence.

On December 15, 2008, plaintiffs' counsel provided the Court, with a copy to all counsel, a copy of Justice Dadd's decision on the motion to intervene and to vacate the default judgment. According to Justice Dadd's December 3, 2008 Decision and Order, of which this Court takes judicial notice, a hearing was conducted before Justice Dadd on September 17, 2008 and October 7, 2008 to determine whether modification of the damage award would be warranted on those grounds if the default judgment was vacated.

Justice Dadd found that ENIA did not meet its burden of establishing grounds for relief from the default judgment. Specifically, Justice Dadd noted: "The 2003 judgment was based upon the plaintiffs' proof of their reconstruction costs. E&NIA has correctly pointed out that recovery for such property damage would normally be limited to the lesser amount of restoration costs or the diminution in the property's market value. However, plaintiffs were certainly entitled to present its cost of restoration as a legal measure of damages. Any claim that the diminution in market value could have been less should have been presented as a defense in mitigation of damages. The absence of such a defense was at least partly attributable to the E&NIA's disclaimer of coverage under the defendants' general liability policy. The grounds for this disclaimer have been found to be meritless in the Erie County Supreme Court action. Thus, the plaintiffs' proof of restoration costs provided a legal basis for calculating damages and not a misrepresentation." Justice Dadd further held that ENIA had failed to prove that plaintiffs made significant misrepresentations of its restoration costs in order to obtain a windfall and ENIA's motion was denied in all respects.

The Pending Motions

Plaintiffs seek summary judgment against ENIA for the amount of the default judgment with interest from December 12, 2002. The Amended Complaint contains two causes of action against ENIA: Count 1 is for a breach of contract, within which plaintiffs seek to recover both as additional insureds under the policy and as assignees of the rights of R&M; and Count 2 for indemnification of judgment, both as the assignees of the rights of R&M and as additional insureds under the policy.

ENIA opposes plaintiffs' motion and cross-moves for summary judgment primarily based on plaintiffs' alleged lack of standing to bring the action.

On a motion for summary judgment, until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]; *Seefeldt v Johnson*, 13 AD3d 1203, 1204 [4th Dept 2004]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]).

Plaintiffs have met their burden on this motion of establishing their right to judgment as a matter of law. Plaintiffs submitted evidence that a judgment was entered in Wyoming County against ENIA's insured, that there was an assignment of rights by ENIA's insured to plaintiffs, and that the judgment remains unpaid. Thus, the burden shifts to ENIA to establish the existence of issues of material fact precluding judgment in plaintiffs' favor.

In opposition, ENIA does not dispute that an assignment took place or that the judgment remains unpaid. Rather, ENIA asserts a number of "defenses" and also cross-moves for summary judgment dismissing plaintiffs' claims on the basis of plaintiffs' alleged lack of standing.

ENIA asserts that plaintiffs lack standing to bring this action because: (1) they are not an insured or in privity with ENIA; (2) they did not commence this action properly pursuant Insurance Law § 3420 (a) (2) in that they did not serve the judgment with notice of

entry upon ENIA prior to commencing the action; and (3) they commenced the action six months before they received the assignment of rights from R&M.

It is undisputed that, by virtue of the assignment, plaintiffs stand in the shoes of ENIA's insured, R&M. Accordingly, based upon that assignment, plaintiffs have standing to assert their claims as the assignees of the insured, thereby resolving the alleged lack of privity issue raised by ENIA. Likewise, ENIA provides no legal support for its claim that plaintiffs were somehow precluded from amending their complaint upon receipt of the assignment. Therefore, ENIA has failed to meet its burden on its cross-motion of establishing its right to judgment as a matter of law on these grounds.

In its cross-motion, ENIA also asserts that this action must be dismissed for plaintiffs' failure to comply with the requirements of Insurance Law § 3420 (a) (2). First, plaintiffs' complaint does not allege a cause of action pursuant to Insurance Law § 3420, nor does the complaint allege sufficient facts upon which this Court could construe such a claim. Further, in opposition to the cross-motion, plaintiffs specifically disavow any reliance on the Insurance Law for their claims: "The Plaintiffs' First Amended Complaint asserts causes of action against ENIA pursuant to the rights assigned by the contractors [R&M] to the Georges for breach of contract and indemnification. These contractual rights are properly brought by the Plaintiffs as assignees and not under Insurance Law § 3420" (See ¶ 5 of the July 10, 2008 Collesano Affidavit). Nevertheless, at oral argument, and to some degree in their opposition papers, plaintiffs seem to assert that even if Insurance Law § 3420 applies, they have somehow complied with its terms.

It is well settled that "[s]ince a direct action against an insurer is created by statute, the specifics of the statute must be complied with to state a viable cause of action" *(Manshul Constr. Corp. v State Ins. Fund*, 118 AD2d 983 [3d Dept 1986]). "There are at least four conditions to be met before the insurer may be sued. First, judgment against the insured, which (2) shall remain unsatisfied at the end of 30 days from (3) the serving of notice of entry of judgment upon (a) the attorney for the insured, or upon the insured and (b) upon the insurer and (4) the absence of any stay or limited stay of execution against the insured" (*McNamara v Allstate Ins. Co.*, 3 AD2d 295, 298 [4th Dept 1957]).

In *Manshul*, the plaintiff's claim was filed on May 10, 1982, but service of the judgment with notice of entry on the defendant insurer was not made until October 23, 1983. Thus, when the claim was filed, the requisite statutory condition precedent of service with notice of entry upon defendant had not been met. Accordingly, since no cause of action existed, the claim was dismissed as a nullity (*Manshul*, 118 AD2d at 983; *see also McNamara*, 3 AD2d at 298). Similarly, plaintiffs commenced the present action on October 10, 2003 but did not serve ENIA with notice of entry of the default judgment against R&M (its insured) until July 12, 2004. As was the case in *Manshul*, plaintiffs' failure to comply with the specifics of the statute precludes them from seeking any relief pursuant to Insurance Law § 3420. Accordingly, to the extent plaintiffs may be seeking relief under Insurance Law § 3420, a proposition which is belied by the record, ENIA's motion for summary judgment dismissing any claim insofar as it is predicated on that statute is granted.

In opposition to plaintiffs' summary judgment motion, ENIA also attempts to assert a "defense" based upon R&M's cashing of the premium refund check without a

reservation of rights approximately one year before the assignment to plaintiffs. According to ENIA, R&M's cashing of the refund check constitutes either an accord and satisfaction or a question of fact as to what rights, if any, the insured could have assigned to plaintiffs. As referenced above, this issue has been fully litigated in this case previously before Justice Fahey, whose decision rejecting those arguments was affirmed by the Fourth Department. Specifically, in its cross-motion for summary judgment before Justice Fahey, ENIA sought an order confirming its rescission of the subject Artisans ProPac policy of insurance, *ab initio*, based upon both the "roofing exclusion" and on the theory that the policy had been previously rescinded by agreement and acknowledgment by and between the parties (see DeVoy Affidavit, attached to the July 10, 2008 Collesano Affidavit as Ex. 14). Within that prior motion, ENIA clearly argued to Justice Fahey that the acceptance and cashing of the premium rebate check constituted a "rescission by agreement and acknowledgment" (See ¶ 12 DeVoy Affidavit, attached to the July 10, 2008 Collesano Affidavit as Ex. 14).

In opposition to the current motion, ENIA now seeks to cast that very same argument as an "accord and satisfaction" (See ENIA's July 3, 2008 Memorandum of Law at Point V, p. 13). This attempt must fail for two reasons. First, Justice Fahey clearly decided the rescission arguments against ENIA on the prior summary judgment motions. Indeed, in considering virtually the same arguments, Justice Fahey's decision recounted the fact that R&M cashed the refund premium check, yet found that ENIA's "purported rescission of the policy is a nullity." Second, nowhere in its answer does ENIA assert an Affirmative Defense of accord and satisfaction, nor does it plead any facts upon which to base such a defense.

Further, although ENIA argues that plaintiffs are not entitled to summary judgment because there are material questions of fact, no material questions of fact are actually raised by defendant. ENIA asserts that the issue of whether it waived its right to raise other policy defenses when it issued its January 31, 2002 disclaimer letter is a material question of fact, yet it fails to set forth any additional defenses which it could or would raise which might alter the outcome of this motion. The only purported additional defense raised by ENIA in its papers is whether the "express terms of the insurance policy in question . . . require ENIA to pay the full judgment amount because the insurance policy does not provide payment for property that was not injured/destroyed in the fire" (O'Shei affidavit, ¶ 4). However, ENIA's belated attempt to assert such a defense fails to take into account well settled law which provides that, if an insurer disclaims and declines to defend the insured in the underlying lawsuit without seeking a declaratory judgment concerning its duty to defend and indemnify, the insurer's position of having had damages fixed without its participation will be the consequence of its own unwarranted refusal to assume its obligation to defend (*see Gallivan v Pucello*, 38 AD2d 876, 876 [4th Dept 1972]; *see also Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]; *Zeldin v Interboro Mut. Indem. Ins. Co.*, 44 AD3d 652 [2d Dept 2007]).

Likewise, ENIA's purported "defense" concerning the issue of whether plaintiffs' judgment was greatly inflated as a result of misrepresentations made to the Supreme Court in Wyoming County at the April 7, 2003 damages hearing has recently been fully considered and rejected by the very court that issued the judgment, and this Court cannot allow ENIA to attempt to relitigate that issue again here.

Based upon the foregoing, plaintiffs have met their burden on the motion and ENIA has failed to raise a material triable issue of fact sufficient to prevent plaintiffs from obtaining judgment. Accordingly, plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment dismissing the complaint is denied.

Settle order.

DATED: June 18, 2009

_____

HON. JOHN M. CURRAN, J.S.C.