SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A, JAMES **PART 59**
Justice

NYAT OPERATING CORP. f/k/a NEW YORK APPLE TOURS, INC.,

Plaintiff,

- v -

GAN NATIONAL INSURANCE COMPANY and RAMPART INSURANCE COMPANY,

Defendants.

Index No.: 600462/02
Motion Date: 01/07/04
Motion **Seq.** No.: 03
Motion Cal. No.: 96

The following **papers,** numbered 1 to 5 were read on this motion to intervene.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2 - 4
Replying Afffidavits - Exhibits	5

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing **papers,**

In this action seeking a declaratory judgment that defendant insurers are obliged to defend and indemnify plaintiff NYAT in the action Cabrera V New **York Apple** Tours, Inc. **(Supreme** Court, New York County, Index No.: 109513/1998, hereinafter the "Cabrera action") under **the** terms of a commercial general liability insurance policy issued by defendants to plaintiff NYAT, the plaintiff in the underlying action Renata Cabrera (hereinafter the "movant") now moves to intervene as a plaintiff in this action pursuant to CPLR 1012 and 1013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One: ☐ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

The Cabrera action arose out of a May 31, 1997 incident in which Harry Grant, an employee of NYAT, assaulted and battered Kenata Cabrera. Sometime in 1998, Harry Grant pled guilty in Queens County Criminal Court to assaulting Renata Cabrera. Following a jury trial on damages in November 2002, judgment was rendered in favor of Renata Cabrera against plaintiff NYAT on February 13, 2003 in the present value amount of $2,497,448.00 comprised of past and future pain and suffering damages and punitive damages.

Movant argues that this court should grant the motion for intervention pursuant to CPLR 1012 *(a)* which states that "upon timely motion, any person shall be permitted to intervene in any action: (1) when a statute of the state confers an absolute right to intervene." Movant avers that Insurance Law § 3420 (a) (2) and (b) (1) is such a statute. "Section 3420 **(b)** (1) permits the bringing of an action against an insurer by one who has a judgment against the insured, provided the judgment remains unsatisfied for 30 days after a copy thereof with notice of entry is served on the insured and the insurer. Compliance with the statute gives the injured party the right to litigate coverage issues as though he or she were a third-party beneficiary under the contract." Clarendon Place Corp. v Landmark Ins. Co., 182 AD2d 6, 9 (1st Dept 1992).

NYAT and defendants oppose the motion. Defendants argue that movant possesses no claim against them under Insurance Law § 3420 because such a claim does not accrue until 30 days after the service *of* a copy of the notice of entry of the judgment upon the insurer and movant has not submitted such proof. See Clarendon Place, supra; Roldan v Allstate Ins. Co., 149 AD2d 20, 36 (2d Dept 1989) ("Pursuant to Insurance Law § 3420 (a) (2), such a cause of action does not accrue until 30 days after a copy of notice of entry of the judgment in the underlying personal injury action is served on both the insured (or his attorney) and the insurer."). Defendants claim they had not been served with a copy of the entered judgment at the time of this motion, and that the movant's failure to provide proof of such service prevents accrual of the claim.

Movant submits with its reply papers proof of service upon defendants on December 4, 2003, of a copy of the judgment in the Cabrera action with notice of entry. While such proof should have been submitted on the initial motion papers, the court shall consider such service, made more than 30 days before the submission date of this motion, as sufficient to satisfy the prerequisites of Insurance Law § 3420 (a) (2) and (b) (1).

Defendants further argument that this court should deny movant's application as untimely also lacks merit. As defendants concede by their first argument above, movant's claim did not

accrue until 30 days after defendants were served with the judgment. Therefore, movant has initiated this motion within days of its accrual and the motion is timely. The timeliness of this motion must be measured from the time when the movant's claim accrued, not from the time when this action was commenced because movant had no right to intervene until the claim accrued. B.U.D. Sheetmetal, Inc. v Massachusetts Bay Ins. Co. (248 AD2d 856, 857 [3d Dept 1998]) cited by the defendants, is inapplicable to the present motion because in that case the motion to intervene was not made until after the declaratory judgment action had been dismissed and the movant had waited nearly two years after he had notice of the action.

In any event, granting movant's application will conserve judicial resources and streamline this litigation. Defendants do not disagree that the movant could commence a separate action on her Insurance Law § 3420 claim. That action would necessarily involve the same issues of law and fact as are presented in this action. Having two ongoing duplicative actions would not only incur unnecessary cost and expense, both to the judicial system and the parties, it would also risk conflicting adjudications. Allowing movant to intervene in this proceeding avoids these consequences.

Finally, this litigation is still in the discovery phase and the defendants in fact have pending before this court a discovery

motion, Therefore, allowing intervention will not unduly delay this action.

The court however will direct that the movant must serve an amended complaint in this action adding movant's claims to the NYAT's original complaint rather than serving a separate complaint as movant proposes. Of course, defendants shall be permitted to serve an amended answer to this new pleading.

Accordingly, it is

ORDERED and ADJUDGED that the motion is GRANTED, and that movant Renata Cabrera is permitted to intervene in the above-entitled action as a party plaintiff upon service by movant on all parties of an amended complaint adding movant's claims *to* NYAT's current complaint within 30 days *of* the date of this ORDER or movant's motion will otherwise be deemed denied; and it is further

ORDERED that defendants be and are hereby permitted to serve answers or otherwise move with respect to the aforementioned amended complaint in the above-entitled action, within 20 days from service *of* the amended complaint and a copy of this order with notice of entry; and it is further

ORDERED that the caption in the above-entitled action be amended by adding Renata Cabrera thereto as a party plaintiff; and it is further

ORDERED that the attorney for the movant shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the parties are hereby directed to attend a status conference on July 16, 2004, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York, and that the submitted discovery motion brought by defendants (Motion Sequence No. 4) pending in this action is adjourned for oral argument on the same date and time.

This is the decision and order of the court.

Dated: May 17, 2004

ENTER:

DEBRA A. JAMES J.S.C.

J.S.C.

FILED

JUN 25 2004

COUNTY CLERK'S OFFICE