[* 1] INDEX NO. 403485/06 5/22/2007

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

PRESENT: **HON. CAROL EDMEAD** PART 35

Justice

Health + Hospitals

- v -

Insurance

INDEX NO. 403485/06

MOTION DATE 3/23/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Accordingly, it is hereby

ORDERED that the motion of plaintiff New York City Health and Hospitals Corporation for summary judgment against defendant KNS Building Restoration, Inc. on the third cause of action for breach of contract damages (motion sequence number 001) is denied; and it is further

ORDERED that the motion of defendant Insurance Corporation of New York for summary judgment dismissing both the complaint and all cross claims of co-defendant KNS Building Restoration, Inc. (motion sequence number 003) is denied.

This constitutes the decision and order of the court.

FILED

MAY 22 2007

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/18/07

HON. CAROL EDMEAD **HON. CAROL EDMEAD J.S.C.**

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiff,

-against-

Index No. 403485/06

INSURANCE CORPORATION OF NEW YORK and KNS BUILDING RESTORATION, INC.,

Defendants,

----------X

KNS BUILDING RESTORATION, INC.,

Third-Party Plaintiff,

-against-

Index No. 59[illegible]45/07

GROBER-IMBEY AGENCY, INC.,

Third-Party Defendant.

----------X

CAROL R. EDMEAD, J.:

Motion sequence numbers 001 and 003 are consolidated herein for disposition. This is an action for: (i) a declaration that defendant Insurance Corporation of New York (Inscorp) has a duty to defend and indemnify plaintiff New York City Health and Hospitals Corporation (HHC) in an action entitled Kales v New York City Health and Hospitals Corporation and the City of New York, Index No. 112216/02, Supreme Court, New York County (the Kales Action); or, in the alternative, (ii) breach of contract damages for the failure of defendant, KNS Building Restoration, Inc. (KNS), to procure insurance with HHS named as an additional

insured.

In motion sequence number 001, HHS moves, pursuant to CPLR 3212, for summary judgment against KNS on the third cause of action for failure to procure insurance in breach of contract. In motion sequence number 003, Inscorp moves, pursuant to CPLR 3212, for summary judgment dismissing both the complaint and KNS's cross claims as against Inscorp.

In 2001, KNS was awarded two bids to perform construction and repair work at Metropolitan Hospital in New York, New York (the Bids). As a condition of receiving the Bids, KNS agreed to comply with HHC Terms and Conditions Forms 110-29 and 110-96.

Form 110-29 provides that KNS "shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of this Contract by [KNS], its agents, representatives, employees or subcontractors...." In apparent fulfillment of its obligations under the Bids, KNS procured Inscorp Policy Number IGL013841 (the Policy), effective June 2, 2001 through June 02, 2002. In December of 2001, KNS's broker, third-party defendant, Grober-Imbey Agency Inc. (GIA), issued a certificate of insurance listing HHS as an additional insured under the Policy.

The Kales Action ostensibly arose from injuries to an employee of KNS sustained while he was working at or on the site

connected to the Bids on September 24, 2001. On June 11, 2002, HHC was served in the Kales Action. On March 5, 2003, the New York City Law Department tendered defense in the matter to Inscorp. Allegedly, on March 20, 2003, Inscorp disclaimed coverage on the bases that: (i) HHS is not a named insured under the Policy; and (ii) the notice of claim was untimely.

According to the complaint, if HHC was named as an insured, then Inscorp had a duty to defend HHC in the Kales Action, and HHC is entitled to a declaration of that duty, and recovery for the costs incurred by HHC in defending the Kales Action. The complaint claims that in the alternative, if HHC was not named in the Policy, then KNS breached its obligation under the Bids (and Forms 110-29 and 110-96, which were incorporated into the acceptance of the Bids), and KNS is liable for that breach in an amount no less than the cost of defense of the Kales Action.

In February of 2007, KNS filed a third-party complaint against its broker, GIA. According to the third-party complaint, if HHS is not listed as an additional insured, then GIA breached its agreement with KNS to procure such insurance, negligently and/or intentionally misrepresented to KNS that such insurance had been procured, and is required to indemnify KNS for such breach of contract or misrepresentation.

Summary judgment will be granted only if each movant establishes that there are no triable issues of fact (Andre v

Pomeroy, 35 NY2d 361 [1974]), and each movant makes a prima facie showing of entitlement to judgment as a matter of law. Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

If each movant satisfies their respective burden, in order to forestall summary judgment, each non-movant must come forward with proof in proper evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman, 49 NY2d at 563; Davenport v County of Nassau, 279 AD2d 497 (2nd Dept 2001).

Upon a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must afford the non-moving party all of the reasonable inferences which can be drawn from the evidence. Negri v Stop & Shop, Inc., 65 NY2d 625 (1985); Louniakov v M.R.Q.D. Realty Corp., 282 AD2d 657 (2nd Dept 2001).

HHS has submitted Forms 110-29 and 110-96, which required that KNS procure insurance on behalf of HHS, proof that KNS had notice of that requirement, an affirmation of an attorney presenting a certified copy of the Policy which does not list HHS as an additional insured, and evidence of the Kales Action for which HHS seeks indemnification.

In response, KNS argues that: (i) the affirmation of the attorney for HHS is insufficient to support an award of summary

judgment; (ii) a triable issue of fact remains as to whether the plaintiff in the Kales Action suffered injuries arising from the work of KNS; and (iii) the copy of the Policy submitted by HHS is affirmed as a true copy only by the attorney for HHS, who has no personal knowledge of the contents.

As it is HHS that seeks summary judgment, HHS bears the burden of coming forward with evidence that there is no extant policy issued to KNS in relation to this matter upon which HHS is listed as an additional insured. The efficacy of the attorney affirmation in establishing this evidence is indeed open to question: an attorney for HHS cannot plausibly affirm that there is no such policy without knowledge of Inscorp's business practices.

Here, HHS simply relies on a copy of the Policy, presented by its attorney, and stamped as certified. There is no indication from an employee of Inscorp that the Policy is complete, and the certification stamp on the Policy does not indicate how many pages follow it. Further, there is no particular indication, save the insufficient implications given by attorneys, that a true and correct copy of the Policy has been presented. See Zuckerman, 49 NY2d at 563 (conclusory allegation insufficient to support summary judgment); see also Matter of Peerless Ins. Co. v Milloul, 140 AD2d 346, 347-348 (2nd Dept 1988) (admission of documents into evidence without testimony

establishing authenticity or accuracy in error); O'Connor v Incorporated Vil. of Port Jefferson, 104 AD2d 861, 862 (2nd Dept 1984) (testimony must show authenticity or that document was prepared in the ordinary course of business).

Moreover, as a matter of law, especially in light of an outstanding discovery request, acceptable evidence that no policy was issued with HHS as an additional insured requires evidence, at a minimum, that searches of Inscorp's files and records have been conducted. See Matter of Hartford Ins. Co. v Nunez, 226 AD2d 639 (2nd Dept 1996); NY Jur 2d, Insurance, §2377 (proof of no policy requires evidence that an exhaustive search of files and records failed to disclose that a policy was ever issued); see also Matter of Allstate Ins. Co. (Holmes), 173 AD2d 260, 261 (1st Dept 1991); Matter of General Acc. Ins. Co. (LaMotta), 149 AD2d 322, 324 (1st Dept 1989).

By way of comparison, for medical records, even testimony containing the proper allegations submitted by a "corporate officer" may fail to establish the requisite personal knowledge of office practices and procedures so as to lay a foundation for the admission of annexed documents as business records. CPLR 4518(a); Insurance Co. of N. Am. v Gottlieb, 186 AD2d 470, 471 (1st Dept 1992) (merely obtaining the records from another entity that actually generated them, is an insufficient foundation for introduction into evidence); Hefte v Bellin, 137 AD2d 406, 408

(1st Dept 1988); Dan Med., P.C. v New York Cent. Mut. Fire Ins. Co., 14 Misc 3d 44, 46 (App Term, 2nd Dept 2006).

Similarly, CPLR 3122-a requires that non-party business records submitted as evidence be accompanied by "a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records" stating that the affiant: (i) is the duly authorized custodian and has authority to make the certification; (ii) the records or copies thereof are accurate versions of the documents described; and (iii) the records or copies produced were made by the personnel or staff of the business in the regular course of business.

Here, none of the regular and expected affirmations are provided. There is no evidence that anyone ever searched Inscorp's records. As such, HHS has failed to demonstrate entitlement to judgment as a matter of law, and the application for summary judgment is denied.

Inscorp's motion for summary judgment dismissing all claims against it is also denied. Inscorp, like HHS, seeks summary judgment dismissing the action without ever having submitted any admissible proof that there was not coverage provided to HHS. Inscorp's attorney simply notes that HHS has placed a certified copy of the Policy into evidence. This is insufficient, as a matter of law, to demonstrate that no policy was ever issued with

HHS as an additional insured.

Summary judgment is a drastic remedy which will be granted only when the movant properly establishes that there are no triable issues of fact. Andre, 35 NY2d at 361. Here, although it appears that there may have been no policy issued with HHS as an additional insured for the applicable period, summary judgment cannot be granted based solely upon the opinion and credibility of the movants' attorneys. S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974).

Finally, KNS' statements that a policy may have been issued are not without support. To wit, although insufficient standing alone to establish coverage, KNS has submitted a certificate of insurance from GIA listing HHS as an additional insured under the Policy. This raises an issue of fact as to whether such a policy had actually been issued. DiMaggio v Chase Manhattan Bank, 266 AD2d 89, 89 (1st Dept 1999) (certificate of insurance in opposition to summary judgment raises an issue of fact). This unconfuted evidence, which, given the lack of evidence that Inscorp's records have been searched, is not inherently incredible (Di Sabato v Soffes, 9 AD2d 297, 300 [1st Dept 1959]), and must be given a favorable inference (Patrolmen's Benevolent Assn. v City of New York, 27 NY2d 410, 415 [1971]).

Accordingly, it is hereby

ORDERED that the motion of plaintiff New York City Health

and Hospitals Corporation for summary judgment against defendant KNS Building Restoration, Inc. on the third cause of action for breach of contract damages (motion sequence number 001) is denied; and it is further

ORDERED that the motion of defendant Insurance Corporation of New York for summary judgment dismissing both the complaint and all cross claims of co-defendant KNS Building Restoration, Inc. (motion sequence number 003) is denied.

Dated: May 18, 2007

Enter:

J.S.C.

HON. CAROL EDMEAD

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE