SHORT FORM ORDER

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INDEX No. 06-30838

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-26-07
ADJ. DATE 1-24-08
Mot. Seq. # 001 - MD
002 - MG; CASEDISP

STEVEN J. KEEFE, Plaintiff,	MAFFEI & CONDON, LLP Attorneys for Plaintiff 25 Candee Avenue Sayville, New York 11782
- against -	DAVIS & HERSH, LLP Attorneys for Defendants The Hanover Insurance Group, Peter and Peggy Knudsen 1345 Motor Parkway Islandia, New York 11749
THE HANOVER INSURANCE GROUP, RLI INSURANCE CO., PETER J. KNUDSEN and PEGGY KNUDSEN, Defendants.	GOLDBERG SEGALLA, LLP Attorneys for Defendant RLI Insurance Co. 665 Main Street, Suite 400 Buffalo, New York 14203

Upor the following papers numbered 1 to 14 read on this motion for summary judgment and cross motion to discontinue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers 6 - 8; Answering Affidavits and supporting papers 9 - 10; 11 - 12; Replying Affidavits and supporting papers 13 - 14; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by defendant, RLI Insurance Company (s/h/a RLI Insurance Co.), for summary judgment dismissing the plaintiff's complaint in this declaratory judgment action is considered under CPLR 3212 and is denied; and it is further

ORDERED that the cross motion (#002) by the plaintiff for an order permitting him to discontinue this action against all parties without prejudice is considered under CPLR 3217 and is granted.

Plaintiff commenced this action for a judgment declaring, *inter alia*, that the moving defendant, RLI Insurance Company (hereinafter RLI), is obligated to defend and indemnify the plaintiff in connection with the claims asserted against him in a separate, personal injury action commenced in this court by co-defendants, Peter and Peggy Knudsen. The plaintiff's demand for said defense and

indemnity is predicated upon the issuance of a personal liability umbrella insurance policy by RLI which afforded insurance coverage to the plaintiff against certain liability claims by third parties on March 18, 2005. On that date, at approximately 2:00 a.m., the plaintiff was involved in an altercation with defendant, Peter Knudsen, who was on duty as a highway patrol officer with the Suffolk County Police. After the altercation, the plaintiff was arrested and charged with driving while intoxicated and with second degree assault pursuant to §120.05 of the New York State Penal Law. On January 6, 2006, the plaintiff entered a plea of guilty to the driving while intoxicated charge and to assault in the second degree pursuant to Penal Law § 120.05(3).

After the plaintiff's arrest, officer Knudsen sought treatment from a local hospital for injuries to his legs, back and shoulder which he claims to have sustained in the altercation with the plaintiff on March 18, 2005. Those personal injuries are the subject of the separate, personal injury law suit commenced by officer Knudsen and his wife against the plaintiff. Moving defendant RLI declined to defend or indemnify the plaintiff in said action as it disclaimed coverage under the terms of the liability umbrella policy it issued to the plaintiff pursuant to letter dated April 25, 2006.

The plaintiff then commenced this action for a judgment declaring that defendant RLI was obligated to the defend and indemnify the plaintiff with respect to the Knudsen's claims. The plaintiff also demanded the same relief against the Hanover Insurance Company, as it had disclaimed coverage under a homeowners' liability policy issued to the plaintiff in effect on March 18, 2005. Shortly after the commencement of this action, Hanover commenced a separate action for declaratory relief against the plaintiff and the Knudsens. That action is assigned to an IAS Part in this court other than that of the undersigned. Pre-trial discovery proceedings were fully completed in that second, declaratory judgment action in October of 2007, when it was placed on the trial calendar by the filing a note of issue. This action has had no pre-trial proceedings of the type contemplated by 22 NYCRR 202.19, as the same was initialized in October of 2007 by the filing of a Request for Judicial Intervention upon interposition of RLI's motion-in-chief.

Shortly after the interposition of the instant applications, counsel for the Knudsen defendants circulated a stipulation of discontinuance which provided that all claims interposed in this action would be discontinued without prejudice. Although said stipulation was executed by counsel for the plaintiff and counsel for defendants, Hanover Insurance Company and the Knudsens, counsel for RLI refused to execute same as counsel objected to those portions of the stipulation that provided for the discontinuance of all claims, *without prejudice*. Counsel also objected to the fact that the stipulation was circulated after the interposition of RLI's motion for summary judgment.

By its motion-in-chief, defendant RLI demands summary judgment declaring that it is not obligated to defend or indemnify plaintiff Keefe in the underlying personal injury action commenced against him by the Knudsens. The plaintiff cross-moves for an order permitting him to discontinue this action, particularly, his claims for declaratory relief against RLI, without prejudice. Since the plaintiff's cross motion seeks a court ordered discontinuance of the plaintiff's claims against RLI, the granting of which would render RLI's motion-in-chief academic, the court shall first consider the plaintiff's cross motion.

CPLR 3217 governs the discontinuance of an action by a party asserting a claim, the relevant portions of which, require an order of this court (CPLR 3217[b]). Applications for the granting of motions to discontinue are addressed to the discretion of the court and are liberally granted since it is recognized that a party may not be compelled to litigate (***St. James Plaza v Notey***, 166 AD2d 439, 560 NYS2d 670 [1990]). While an order granting an application for a discontinuance without prejudice has been held to be properly issued so as to rectify a tactical error, to simplify the form of the action or to avoid juror confusion, such application should be denied if prejudice inures to adverse parties or it appears that the granting of the discontinuance would circumvent the effect of one or more prior orders of the court that are adverse to the party seeking the discontinuance (***Angerame v Nissenbaum***, 208 AD2d 579, 617 NYS2d 194[1994]). However, the existence of a pending motion targeting the merits of the plaintiff's claims does not require a denial of a motion to discontinue the action without prejudice (*see*, ***Pearson v New York City Health and Hospitals Corporation,*** 43 AD3d 92, 840 NYS2d 25 [2007]; *Cf.*, ***Matter of Baltia Air Lines v CIBC Oppenheimer Corp.***, 273 AD2d 55, 709 NYS2d 54 [2000]).

Relevant to the court's determination of an application pursuant to CPLR 3217(b) is the nature of the litigation, including the existence of one or more counterclaims (*see, **Aison v Hudson River Black River Regulating District,*** 279 AD2d 754, 718 NYS2d 483 [2003]) and the stage of said litigation at the time the application for discontinuance is interposed, including the extent to which pre-trial proceedings have progressed (*see, **Burnham Service Corporation v National Council on Compensation Insurance, Inc.***, 288 AD2d 31, 732 NYS2d 223 [2001]; ***Kane v Kane***, 163 AD2d 568, 558 NYS2d 627 [1990]; ***Ruderman v Brunn***, 65 AD2d 771, 409 NYS2d 789 [1978]). Claims of prejudice by a party opposing an application for a stipulation of discontinuance that are based upon grounds that such party has incurred expenses in defending the action and that legal work will have to be duplicated if the action is later recommenced are generally insufficient to defeat a motion for a discontinuance pursuant to CPLR 3217(b) (*see*, ***Eugenia Vi Venture Holdings, Ltd v Maplewood Equity Partners, L.P.,*** 38 AD3d 264, 832 NYS2d 155 [2007]; ***Granoff v Henry Products Co.***, 279AD 747, 108 NYS2d 420 [1951]; ***Laxer V Bergen & Zanger***, 178 Misc 391, 34 NYS2d 808 [1942], *aff'd*, 264 AD 710, 34 NYS2d 828 [1942]).

Upon the application of the foregoing principles, the court finds that the plaintiff has sufficiently established his entitlement to an order granting his application to discontinue this action without prejudice against all defendants, including RLI. The instant action is at the pleading stage, or just beyond same, as no pre-trial proceedings have been engaged in by the parties other than RLI's service upon the plaintiff of a notice to admit the contents of the transcript of the plea allocution proceedings conducted on January 6, 2006, by which, the criminal charges brought against the plaintiff after his arrest on March 18, 2005 were concluded. There are no counterclaims asserted by RLI in its answer to the plaintiff's complaint, which answer and complaint are the only pleadings put before the court on the instant applications. There are no adverse prior orders of this court which would be circumvented by the granting of the plaintiff's cross motion for a discontinuance without prejudice and the existence of RLI's pending motion for summary judgment does not, in and of itself, preclude the granting of plaintiff's demands for a discontinuance without prejudice. The court rejects the notion

that the plaintiff's default in responding to RLI's notice to admit is tantamount to an adverse ruling against the plaintiff which would warrant a denial of the plaintiff's cross motion (*see*, CPLR 3123).

In opposing the plaintiff's cross motion, RLI claims that it would be prejudiced if the court were to grant the discontinuance. Such claims are predicated on the fact that RLI is not party to the separate declaratory action commenced by Hanover against Keefe and the Knudsens. RLI claims that it would be required to intervene therein so as to prevent it from being bound by any adverse coverage determinations issued by the court presiding over that separate declaratory action. RLI further claims that prejudice would inure to it by reason of the heavy burdens of time, effort and expense associated with such intervention and with the resumption of pre-trial proceedings on behalf of RLI in the separate action, assuming that RLI was successful at re-opening said pre-trial proceedings.

However, the court rejects the foregoing claims of prejudice asserted by RLI. It is clear beyond peradventure that RLI would not be bound by any determination of the court presiding over the Hanover action, as RLI is not a party to said action. Moreover, the purported absence of common questions of fact or law with respect to Hanover's claims as to the validity of its declination of coverage under the terms of its homeowners' policy and the declination of coverage by RLI under the terms of its umbrella policy negates any necessity for intervention. RLI's claims as to the necessity for its intervention in the separate action and its concomitant claims of prejudice are thus without merit.

The court further rejects RLI's claims that the court should not consider the plaintiff's cross motion in as much as it was not timely served. Objections to the untimeliness of service of a cross motion may be rejected where opposing parties had the opportunity to respond to the merits of said cross motion and such response was considered by the court *(see, **Sheehan v Marshall,*** 9 AD3d 403, 780 NYS2d 34 [2004]). Here, RLI's opposition to the plaintiff's cross motion was received and considered by the court, as a further adjournment of the return date of RLI's motion-in-chief and the plaintiff's cross motion to January 24, 2008 was granted by the court. Under these circumstances, the tardiness of the service of the plaintiff's cross motion does not warrant its denial without consideration of its merits.

In view of the foregoing, the cross motion(#002) by the plaintiff for and order pursuant to CPLR 3217(b) discontinuing this action against all defendants without prejudice is granted. The motion-in-chief (#001) by defendant RLI for summary judgment dismissing the plaintiff's complaint is denied as moot.

Dated: February 27, 2008

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION