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

PRESENT: EDWARD H. LEHNER Justice

PART 19

Index Number : 113585/2003

LEE, HAN SOO

VS

RIVERHEAD BAY MOTORS

Sequence Number : 007

ORDER TO PAY MONIES INTO COURT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

motion is decided in accordance

with accompanying memorandum decision

FILED
MAR 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: MAR 10 2008

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 19

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HAN SOO LEE and SOON OK JANG,

Plaintiffs,

INDEX NO.
113585/03

- against -

RIVERHEAD BAY MOTORS, RIVERHEAD POOH, LLC, MANHATTAN SKYLINE MANAGEMENT CORP. & QUEENS IRON WORKS & STORE FRONT, INC.

Defendants.

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EDWARD H. LEHNER, J.;

Before me are motions by three non-party insurers who have moved to intervene in this tort action. First Specialty Insurance Company ("Specialty") issued a $1,000,000 general liability policy to non-party Queens Stainless, Inc. ("Stainless"), who was a subcontractor on a construction project on property owned by defendant Riverhead Pooh, LLC ("Riverhead"), on which defendant Yoda LLC ("Yoda") was the general contractor. On December 2, 2002, plaintiff Han Soo Lee ("plaintiff"), an employee of Stainless, was injured while working at a height and he and his spouse Soon Ok Jang commenced an action against, among others, Riverhead and Yoda (jointly referred to herein as "defendants").

Yoda was insured under a policy issued by United National Insurance Company ("United"), with a per-occurrence limit of $1,000,000. National Union Fire Insurance Company of Pittsburgh, PA ("Union") had issued an excess policy to Stainless, with a per-occurrence limit of $2,000,000. United, claiming that Yoda was entitled to additional insured status under the Specialty policy, tendered a claim for Yoda's defense and indemnification to Specialty, which was accepted. Since the contract between Yoda and Stainless contained an "indemnity and save harmless" clause in favor of both Riverhead and Yoda, Specialty then undertook to provide a defense of this action to both Yoda and Riverhead.

By order dated August 17, 2006, Justice Doris Ling-Cohan granted summary judgment to plaintiff on his liability claim under Labor Law §240(1). At the trial on damages before former Justice Robert Lippmann, the jury rendered a verdict against defendants in the total amount of $1,226,000. Subsequent to Justice Lippmann's retirement at the end of 2006, this matter was assigned to me and, after I denied a motion by plaintiffs for a new trial, a judgment was entered on September 7, 2007 in favor of both plaintiffs against defendants for the total sum (at present value) of $1,323,277.93. Plaintiffs have filed a notice of appeal asserting that the amount of the verdict was inadequate.

At the time of the oral argument of the motions before me in November 2007, it did not appear that defendants intended to cross-appeal.

In a separate declaratory judgment action commenced by defendants and United against Union (2006 WL 3615293), Justice Ling-Cohan, by order dated December 12, 2006, granted summary judgment to plaintiffs therein, declaring that Union "is obligated to indemnify ... (defendants herein) for all damages they incur in connection with (the present action) which exceed the $1,000,000 limit of the insurance policy issued by" Specialty to Stainless, which ruling had the consequence of placing United's coverage as a third layer after those of Specialty and Union. Union is appealing that determination.

Before me are motions by i) Specialty "to intervene and, pursuant to CPLR 2106(a)(1),"[1] to pay its coverage limitation of $1,000,000 into court "in full satisfaction" of its obligation to defendants and to then "withdraw from the defense of the action"; ii) United seeking to intervene in order "to oppose Specialty's motion to intervene"; and iii) Union to intervene and also oppose Specialty's application.

The contention of both Union and United is that Specialty has the obligation to provide defense to the insureds on plaintiff's appeal, as well as to

[1] Although Specialty's motion papers refer to the section pursuant to which it is seeking to deposit monies as CPLR 2106(a)(1), the intended section is obviously 2601(a).

provide a defense should the appeal result in an order for a new trial, whereas Specialty maintains that upon it paying into court the $1,000,000 of coverage set forth in its policy it should have no further liability to any party.

The Specialty policy provides that its "right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements." Union's policy provides that its duty to defend exists "when the total applicable limit of Scheduled Underlying Insurance has been exhausted by payment of Loss," with the term "Loss" defined as "those sums actually paid as judgments and settlements."

Specialty did not submit a proposed pleading with its motion to intervene as required by CPLR 1014, nor has Union or United. See, Farfan v. Rivera, 33 AD3d 755 (2nd Dept. 2006); Zehnder v. State of New York, 266 AD2d 224 (2nd Dept. 1999). Although Specialty did submit a proposed complaint with its memorandum of law dated June 13, 2007, the interested parties – to wit, United and Union, while mentioned in the pleading, are not named as parties. The proper procedure to adjudicate the respective rights and obligations of Specialty, Union and United would be by an action for a declaratory judgment. For this reason, Specialty's motion to intervene in this tort action is denied.

With respect to the relative obligations of primary and excess carriers, the

case of General Motors Acceptance Corporation v. Nationwide Insurance Company, 4 NY3d 451 (2005) is instructive. There, Nationwide had issued a policy to an automobile lessee which limited liability to $100,000 per person and $300,000 per occurrence. As a result of an accident involving the vehicle in which one person was killed and two individuals seriously injured, it became clear that the liability of the vehicle owner would exceed such limits. Therefore, Nationwide requested the owner's insurer, who had issued both a primary and a true excess policy, to undertake the defense of the claims asserted, which it agreed to do, but reserved the right to pursue the recovery of defense costs from Nationwide. In its decision, the Court of Appeals stated the general rule that "[a] primary insurer has the primary duty to defend on behalf of its insured ... without any entitlement to contribution from an excess insurer" (pp. 455-456), and in explaining the reason for such rule wrote (p. 457):

> Primary insurance premiums are based, at least in part, on the insurer's consideration that it may be liable to defend an action. In this sense, "primary" policy premiums are higher, relatively speaking, than "excess" premiums, because the primary insurer contemplates defending a potential lawsuit when it contracts with the insured. A primary insurer's duty to defend is not diminished, however, nor is it entitled to defend an action less vigorously, simply because its policy limits are more easily exceeded in any given case. Relieving primary insurers of this duty to defend would provide a windfall to the carrier insofar as the costs of defense-litigation insurance are contemplated by, and reflected in, the premiums charged for primary coverage. This is in contrast to a true excess, or "umbrella," policy, where the duty to defend is not

> the premiums charged for primary coverage. This is in contrast to a true excess, or "umbrella," policy, where the duty to defend is not as readily triggered.

See also, The Purdue Frederick Company v. Steadfast Insurance Company, 40 AD3d 285 (1st Dept. 2007), where the court, referring to the Nationwide case, stated that it "stands for the proposition that an excess carrier may protect its interest by participating in the defense, but unlike a primary insurer has no obligation to do so" (p. 286).

Specialty argues that such cases are not relevant here because of the provision in its policy terminating its defense obligation when it has "used up the applicable limits of insurance in the payment of judgments or settlements," citing E.R. Squibb & Sons, Inc. v. Accident and Casualty Insurance Co., 1992 WL 133899 (S.D.N.Y. 1992). Such issue is appropriate for adjudication in a declaratory judgment among the insurers. See also, The Maryland Casualty company v. W.R. Grace Company, 794 F. Supp. 1206, 1221 (S.D.N.Y. 1991), rev'd. on other grounds 23 F. 3d 617 (2nd Cir. 1993).

Further, it is noted that pursuant to the policy it issued, Specialty has an obligation to pay costs asserted against defendants as well as to pay prejudgment interest prior to the time it makes "an offer to pay the applicable limit of insurance." Here, in addition to the interest accrued to date, in light of the conditions it has placed on the offer to deposit $1,000,000 in court, Specialty

would appear to have a further interest obligation.

Accordingly, Specially's motion to intervene in order to deposit $1,000,000 in court "in full satisfaction of (its) obligations to defendants ... (and) withdraw from the defense of this action" is denied. However, should it wish to deposit said sum in court, it is hereby authorized to do so without determining the effect thereof on the rights of any of the parties hereto or their insurers. As a consequence of the denial of Specialty's motion, the applications of United and Union to intervene are denied as moot.

This decision constitutes the order of the court.

Dated: March 10, 2008

J.S.C.