[* 1] SCANNED ON 8/2/2010

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Tower Ins. Co. of N.Y.

- v -

Merkos L'Inyonei Chinuch

INDEX NO. ____

MOTION DATE 5/12/2010

MOTION SEQ. NO. 001

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	

FILED
AUG 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §§302, 1001, 3211(a)(8) and 3211 (a)(10), dismissing the complaint by plaintiff Tower Insurance Company of New York for lack of personal jurisdiction over necessary parties is granted; and it is further

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §327 (a) dismissing the complaint by plaintiff Tower Insurance Company of New York for *forum non conveniens*, is granted; and it is further

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §3211(a)(4), dismissing the complaint by plaintiff Tower Insurance Company of New York on the ground that another action is pending in Florida, is granted; and it is further

ORDERED that defendant Merkos L'Inyonei Chinuch, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 7/29/2010

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: PART 35

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 100275/10

-against-

MERCOS L'INYONEI CHINUCH, INC.,
CHABAD HOUSE OF NORTH DADE, INC.,
JOHN DOE and JANE DOE, individually and
as the natural parents and guardians of J.D., a minor,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Tower Insurance Company of New York ("Tower") commenced this action seeking a declaratory judgment that it has no duty to defend or indemnify defendant Merkos L'Inyonei Chinuch, Inc. ("Merkos") in an underlying negligence action in Florida (the "underlying action"). Merkos now moves to dismiss Tower's complaint pursuant to CPLR §§302, 1001, 3211(a)(8) and 3211 (a)(10), for lack of personal jurisdiction over necessary parties and pursuant to CPLR §327 (a) for *forum non conveniens*.

Factual Background

Defendant Merkos is a New York-based not-for-profit corporation doing business in Florida. Chabad House of North Dade, Inc. ("Chabad") is a Florida not-for-profit corporation with its principal place of business in Miami-Dade County, Florida. Chabad is not registered to do business in New York. Jane Doe and Joe Doe are the parents and natural guardians (collectively, the "Does") of their 11-year-old son J.D., who lives with his parents in Miami-

Dade County, Florida.

The underlying action was commenced by the Does on May 30, 2008, alleging that between November 2006 and August 2007 (the "relevant time"), two teenage volunteer workers of Merkos and its affiliate Chabad physically, mentally and sexually abused the Does' son, a child with special needs. The complaint alleges negligent hiring and supervision against Chabad and direct and vicarious negligence against Merkos.

During the relevant time, Merkos was insured by three consecutive, non-overlapping policies issued by three insurance carriers[1], including Tower. Merkos contacted Tower and requested coverage under the policy, but Tower denied coverage by letters, dated June 19, 2008 and July 21, 2008, claiming, *inter alia*, that the policy contains a "Designated Premises Endorsement" (the "endorsement"), which purports to limit the application of said policy to liabilities arising out of certain locations in Brooklyn, New York, while the complaint alleges that the tortious acts committed by Merkos occurred in Florida.

On or about October 7, 2009, the Does amended the original complaint, adding the claim that Merkos negligently misrepresented to the Does that the volunteers were "specially trained" and "professionally trained," and Merkos again contacted Tower for coverage. This time Tower did not respond to Merkos's requests, later claiming that "no response [. . .] was necessary since Tower [previously] disclaimed coverage to Merkos for this claim" in its June 19, 2008 and July 21, 2008 letters. Merkos's counsel demanded that, unless Tower provide its position as to coverage by the end of December 31, 2009, Merkos intends to start an action against it in the

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[1] According to the motion papers, the two other carriers, Colony Insurance Company ("Colony") and Travelers have been defending Merkos in the underlying action under a reservation of rights, but Colony has filed a declaratory judgment action against Merkos in Florida federal court on June 4, 2009 (the "Colony action").

Florida court.

On January 8, 2010, Tower filed this declaratory judgment action against Merkos in New York, also naming the Does and Chabad as nominal defendants.[2] In or about March 2010, Merkos filed a third-party complaint against Tower in the underlying tort action in Florida (the "impleader action"). Later, Merkos agreed to stay that action and Tower agreed to withdraw without prejudice its motion to stay the impleader action pending the decision on this motion (see Stipulation and Order, dated July 7, 2010).[3]

In this motion, Merkos moves for dismissal on several grounds. First, the court lacks personal jurisdiction over Chabad and the Does, and because they are necessary parties to the adjudication of this action, the court cannot proceed without them. The outcome of this litigation will affect Does' and Chabad's rights and interests if they are omitted: Chabad may have rights under the policy and the Does may lose their statutory right pursuant to the Insurance Law §3420(b)(1) to bring an action against Tower, assuming they obtain a judgment against Chabad and/or Merkos in the underlying action.

Merkos maintains that Florida courts have jurisdiction over all the parties in the underlying action and any prejudice to Chabad and the Does if they are omitted from the instant action can be easily avoided by the court dismissing this action and Tower re-filing its action in Florida.

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[2] The court notes that neither Chabad nor the Does are named as insureds on the policy, and neither of them have claimed coverage under Merkos's policy or otherwise appeared in this action.

[3] The parties in the underlying tort action exchanged discovery requests, produced documents and deposed some witnesses. Merkos expects to depose additional witnesses, including Mr. and Mrs. Doe and J.D.'s doctors. It also anticipates that Tower will be seeking the deposition testimony of the Chabad's employees, some of whom have already been deposed in the underlying action and/or subpoenaed in connection with the Colony action in Florida

Next, Merkos argues that the court should dismiss this action on the ground of *forum inconveniens* since all the alleged events took place in Florida, where all the material witnesses are, where the underlying action is pending and where discovery has already begun.

Further, Merkos argues that another action (the underlying [tort] action) is pending between the same parties, except Tower, "for the same cause of action" in a Florida court and that discovery in that action will be necessary for Tower's present action, and "will need to be repeated" if this court retains this action in New York. Merkos points out that, but for Tower's "forum shopping," Merkos would have filed its Florida impleader action first and that Tower "raced to the New York courts" after learning of Merkos's intention to implead Tower in the underlying litigation in Florida.

In opposition, while not challenging the absence of this court's jurisdiction over the Does and Chabad, Tower argues that the Does and Chabad are not necessary parties as their rights to recover from Merkos will not be affected by the outcome of this action and, "unless they obtain a judgment against tortfeasors," they presently have no standing to litigate coverage issues against Tower. Tower argues that neither Chabad nor the Does have claimed coverage under the policy and Tower included them in its complaint "in anticipation of the possible future claims against Tower" and "only as a precautionary measure in case Chabad were to claim [. . .] under the policy."

Second, Tower argues that New York is the proper forum for this insurance coverage dispute. Notwithstanding Merkos's Florida third-party action, Tower was "first to file" this action, and Merkos cannot show any special circumstances justifying a departure from the first-to-file rule. Tower points out that it was able to "file first" only because Merkos has not

challenged the disclaimer until Tower commenced this action and delayed its third party action by missing deadlines for filing the requested extensions.

Further, Tower contends that Merkos has not shown relevant factors militating against the New York forum which has a material nexus to the subject matter of the suit. Tower argues that both Tower and Merkos are New York-based entities, the dispute, governed by New York law, is contractual in nature and the premises insured under the policy are located in New York.

Further, Tower contends, witness testimony as to the specific facts of the underlying claim is not necessary since those facts are not material to the determination of Tower's obligations under the policy and the court need only to compare the underlying complaint with the policy which limits liability coverage to losses arising out of the premises listed in the policy.[4] Tower maintains that this dispute "does not involve complex site-specific insurance-coverage issues necessitating depositions of local witnesses in Florida" and the Florida court would be burdened by being forced to interpret both New York and Florida law.

Finally, Tower argues that it is contrary to New York law and highly prejudicial to Tower if this insurance coverage dispute were joined with the underlying tort action and thus, the court should deny the motion.

In its reply, Merkos argues that Chabad is a necessary party because it "may feel bound [. . .] to accept an adverse holding without having been heard"; CPLR §1001 (a) refers only to a

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[4] The endorsement states in relevant part: "This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

(Form CG 21 44 07 98).

The Schedule limits the designated premises to six locations in Brooklyn, New York, listed in the Extension of Declarations.

person "who might be inequitably affected" and not "*would* be inequitably affected" (id., at p. 5 [emphasis in the original]) and thus, that the Does may presently lack standing does not prevent them from being a necessary party.

Further, Merkos argues that the coverage dispute cannot be resolved without depositions of witnesses in Florida, as it is difficult to determine "from where the alleged [misrepresentations] statements originated," since the amended complaint alleges that "Merkos committed torts outside the state causing injury within the state."Merkos also points out that, while Tower in its June/July 2008 letters denied coverage as to the original claims, it has not addressed the new claims in the amended complaint filed in October 2009. Finally, Merkos argues that, whether the coverage dispute may be joined with the underlying action in Florida is not contrary to either Florida or New York law, and it is for the Florida courts to decide.

Discussion

Personal Jurisdiction: *CPLR 3211(a)(8)*

Indispensable Parties: CPLR § 1001(a) and (b)

As an initial matter, because dismissal based upon lack of personal jurisdiction is mandatory, while dismissal based upon claims of inconvenient forum or another action pending are discretionary, issue of personal jurisdiction must be resolved before the court even reaches any of the issues raised regarding discretionary dismissal (*Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618 [2d Dept 1995]; *New Hampshire Ins. Co. v Sphere Drake Ins. Ltd.*, 2002 WL 1586962 [SDNY 2002]; *Sandella v Gulf Coast Purveyors Inc.*, 2008 WL 620747 (Trial Order) [Sup Ct, New York County 2008]).

Based on CPLR §3211(a)(8), a party can move to dismiss a cause of action against a

defendant on the ground that "the court has no jurisdiction of the person of the defendant." Merkos, without specifying the subsection, appears to base its arguments on the due process requirements of CPLR §302, *i.e.*, sufficient minimum contacts with the forum and purposeful availment of the privilege of conducting activities within the forum State (*Hanson v Deckla*, 357 US 235, 253 [1958]; *McGee v International Life Ins. Co.*, 355 US 220, 222-223 [1957]; *International Shoe Co. v Washington*, 326 US 310, 316 [1945]).

There is no dispute that this court lacks personal jurisdiction over Chabad and the Does. Chabad is a Florida entity, with a principal place of business in Florida and not registered to do business in New York. While the amended complaint alleges that Chabad does business in New York[5], there is nothing in the record to support this allegation. Similarly, the Does are residents of Florida and there is no evidence that the Does waived their right to a personal jurisdiction defense in this action. Thus, the Does' and Chabad's presence in this action is jurisdictionally improper.

Nevertheless, Merkos urges this court that the Does and Chabad are necessary parties to this action. CPLR §3211 (a)(10) provides that "the court should not proceed in the absence of a person who should be a party." Pursuant to CPLR §1001 (a), a party is necessary if its presence is required for "complete relief" to be accorded between the persons who are parties to the action or if an absent party "might be inequitably affected by a judgment in the action."[6] An action is

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[5] This would appear to invoke jurisdiction under CPLR §301 which provides that "a foreign corporation is amenable to suit in New York courts if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted" (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 563 NYS2d 739 [1990] [internal citations omitted]). However, there is no evidence before the court that Chabad engaged in such activities.

[6] CPLR §1001(a) provides that necessary parties are "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment

subject to dismissal without prejudice if there has been a failure to join a necessary party (CPLR §1003; *City of New York v Long Island Airports Limousine Service Corp.*, 48 NY2d 469, 423 NYS2d 651 [1979]; *Eclair Advisor Ltd. v Jindo America, Inc.*, 39 AD3d 240, 244-245 [1st Dept 2007]; *CBS Corp. v Dumsday,* 268 AD2d 350, 353 [1st Dept 2000]).

However, where, as here, the court lacks personal jurisdiction over a necessary party, a court may allow the action to proceed, in the interest of justice, without such a party,[7] upon consideration of the five factors set forth in CPLR §1001 (b) (*Saratoga County Chamber of Commerce, Inc. v Pataki,* 100 NY2d 801, 819, 766 NYS2d 654, 665 [2003]; *Blumenthal v Allen*, 46 Misc 2d 688, 260 NYS2d 363 [NY Sup Ct, New York County 1965]). Thus, in determining whether to proceed without parties whose rights would be affected but who are not subject to the court's jurisdiction, the court must consider the following factors: 1) whether the plaintiff has another effective remedy in case the action is dismissed for nonjoinder; 2) the prejudice that may accrue from the nonjoinder to the party not joined; 3) whether the prejudice might have been avoided (or could be in the future), and by whom; 4) the ability of the court to protect the parties from the prejudice; and 5) whether effective judgment may be rendered in the parties' absence (CPLR §1001(b); *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2009 WL 4009121, 2009 NY Slip Op 32650(U), Trial Order, No 104734/09, NY Sup Ct, November 5, 2009], *citing Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726 [2008]; *Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals,* 5

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in the action . . ."

[7] Moreover, "[m]isjoinder of parties is not a ground for dismissal of an action" (CPLR§ 1003). Instead, an improperly joined party may be "dropped" (CPLR §1003: [p]arties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just]; see *Koshiba v City of Syracuse*, 287 NY 283, 39 NE2d 240 [1942]).

NY3d 452, 457-59 [2005]).

This rule aims to prevent inconsistent judgments relating to the same controversy and to protect the otherwise absent parties who would be "embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*Saratoga County*, at 820). Nevertheless, CPLR §1001(b) treats dismissal for failure to join a necessary party as a last resort (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10-11 [1st Dept 2007]; see Siegel, NY Prac § 133, at 227 [4th ed.]).

Applying the above principles, the court finds that Chabad and the Does are necessary parties because, assuming a "complete relief" can be accorded between Tower and Merkos, the Does and Chabad might be inequitably affected by a judgment in this action if the court proceeds to adjudicate this dispute without them (CPLR §1001 [a]).

As to the Does, although they neither have direct claims under the Tower policy, nor are in privity with Tower or third-party beneficiaries of the insurance contract (*Clarendon Place Corp. v Landmark Ins. Co.*, (182 AD2d 6, 587 NYS2d 311[1st Dept 1992]), *appeal dismissed, lv denied,* 80 NY2d 918, 589 NYS2d 303 [1992]), and have not obtained judgment against Merkos in the underlying tort action pursuant to Insurance Law §3420 (a)(2)[8], they will nevertheless be "bound to the court's coverage determination irrespective of their presence in the case caption" (*U.S. Underwriters Ins. Co. v Landau*, 679 FSupp2d 330, 338 [EDNY, January 19, 2010]). It has been held that Insurance Law §3420 does not bear on the situation where, as here, the insurer

[8] Insurance Law §3420 grants an injured plaintiff the right to sue a tortfeasor's insurance company, but the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 352 [2004]; Insurance Law § 3420[a][2]).

pursues a declaration of noncoverage against its insured and the injured tort claimants (*id.*). Even if Tower only named Merkos as defendant, and thus the action was purely between the two parties to the insurance contract, "the result of any declaratory judgment denying coverage would practically affect the injured parties in exactly the same way as if they had been named defendants" (*id.*). Thus, if Tower is successful, it will nullify the Does' chances to later bring a direct action against Tower pursuant to Insurance Law §3420, if they obtain a judgment against Merkos.

Furthermore, contrary to Tower's assertion, even though the Does would not ordinarily have standing at this point to bring an action as to the Tower's coverage obligation *(Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004], *supra*, footnote 9), because Tower joined them as defendants in seeking a declaration of its rights in this action, they would be permitted to contest the issue of coverage in the instant case (*3405 Putnam Realty Corp. v Ins. Corp. of N.Y.*, 36 AD3d 565, 828 NYS2d 394 [1st Dept 2007], *citing Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471 [2005]).

Similarly, Chabad, while standing on distinctly different footing than the Does, may also be inequitably affected by the outcome of this action. Even though Chabad is not alleged to be a named insured under the policy and, at this juncture, the nature of the relationship between Merkos and Chabad is not completely clear (the complaint merely identifies it as an "affiliate" of Merkos) (complaint, ¶¶14 - 15), the issue of whether Chabad may qualify as an insured under the policy is not before the court on this motion. However, it may be fairly assumed that, in case Chabad is found to have any rights under the policy (which is not implausible in light of Tower's seeking a declaratory judgment against Chabad), it would be prejudiced if the legal issue of

Tower's rights and obligations under the policy is litigated in Chabad's absence (see *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, at10-11).

This is not the case where a manufacturer and distributor of a product which caused injury, who were not named insureds and clearly did not qualify in any way under the policy, were not necessary parties to a coverage dispute between the insurer and the insured, because the coverage issue as to the insured *had no bearing on any claim by the injured claimant against the manufacturer or distributor*, and thus, they were not inequitably affected by the declaratory judgment action (*Mayer's Cider Mill, Inc. v Preferred Mut. Ins. Co.*, 63 AD3d 1522, 879 NYS2d 858 [4th Dept 2009][emphasis added]).

Unlike the manufacturer or distributor in *Cider Mill*, who were clearly strangers to the policy at issue, Chabad, as an alleged agent or an "affiliate" of Merkos, may be in privity with Merkos and may be found to qualify as a claimant under the policy (as stated above, the court does not make this determination on this motion). The case *Brother Jimmy's BBQ Inc. v American International Group Inc.*, Index No. 105077/09 [Sup Ct, New York County 2010], relied on by Tower and submitted to this court on July 12, 2010, is factually similar to *Cider Mill* and thus, likewise distinguishable from the case at bar on the same grounds.

Thus, the court finds that, because both Chabad and the Does might be inequitably affected by the adverse judgment in this action, they are necessary parties. However, because they are not subject to this court's personal jurisdiction, in order to determine whether, in the interest of justice, the court may allow the action to proceed without the Does and Chabad being as parties, the court turns to consideration of the five factors set forth in CPLR §1001 (b) (*Saratoga County; Blumenthal v Allen, supra*).

As to the first factor - whether plaintiff has another effective remedy in case the action is dismissed - at this point, the court assumes that Tower may have an effective remedy in the Florida court since Tower does not allege that Florida courts lack jurisdiction over Tower, and there is nothing in this court's record showing that it raised a personal jurisdiction defense in its motion to stay the Florida impleader action. As to the second factor, the potential prejudice to Chabad and the Does exists, as discussed above, if this action proceeds in their absence. As to the third factor, while the prejudice of omitting Chabad and the Does from this action could be avoided if they waived jurisdiction in New York; but, to date, they have not. With respect to the fourth factor, if this action is dismissed, it would not be necessary for the court to offer any protective orders since the previously stayed impleader action in Florida will be revived. The fifth factor - whether an effective judgment may be rendered in the Does' and Chabad's absence - also weighs in favor of dismissal, since, as discussed above, even assuming "complete relief" can be accorded between Tower and Merkos, in the absence of the Does and Chabad, the judgment will not be "effective" to the extent that it would "bind [the Does' and Chabad's] rights or interests where they have had no opportunity to be heard" (*Saratoga County Chamber of Commerce*, *supra*, at 820).

The factors discussed above weigh heavily in favor of dismissal of the entire action and adjudicating it in Florida where all indispensable parties could be heard (*Honvitz v Sax,* 16 AD3d 161, 792 NYS2d 383 [1st Dept 2005] [dismissal was warranted because New York courts lacked jurisdiction over a necessary party, a resident of France, and there was an alternative forum available in Gibraltar, where all indispensable parties could be joined]).

Notwithstanding the above, the court turns to the movant's two alternative grounds for

dismissal: pursuant to CPLR § 3211 (a)(4)[9] ("another action pending" in Florida court) and pursuant to CPLR §327 (a) for *forum non conveniens*.

Another Action Pending: CPLR § 3211(a)(4)

In deciding a motion to dismiss based on the pendency of another action, the analysis is similar to that employed in deciding a motion predicated on *forum non conveniens* (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90 [1st Dept 1997]). The court must consider in which jurisdiction litigation was first commenced, how far each litigation has progressed and which forum has a more significant and substantive nexus to the controversy, and thus, is the most appropriate forum for its resolution (*Certain Underwriters at Lloyd's, London v Hartford Accident and Indemnity Co.*, 16 AD3d 167, 168 [1st Dept 2005]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003]; *Seneca Ins. Co. v Lincolnshire Mgmt., Inc.*, 269 AD2d 274 [1st Dept 2000]).

New York courts generally follow the first-in-time rule, which instructs that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*L-3 Communications*, 45 AD3d 1, *supra*, *citing City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 58, 302 NYS2d 557 [1969] [internal quotations marks and citation omitted]).

However, this rule should not be applied in a "mechanical" way, and, special circumstances may warrant deviation from this rule where "the action sought to be restrained is [. . .] instituted to obtain some unjust or inequitable advantage" (*White Light Prods.*, at 96-97;

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[9] Under CPLR 3211§ (a) (4), a party may move for dismissal of an action if "there is another action pending between *the same parties for the same cause of action* in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." [Emphasis added].

Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co., 16 AD3d 167, 168, 791 NYS2d 90 [2005]). And, while CPLR §3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action (*Harvest Court, LLC v Nanopierce Technologies, Inc.*, Not Reported in NYS2d, 2001 WL 1359501 [Sup Ct, New York County 2001]), the race to the courthouse should not be determinative, and the case should be heard by the forum with the most reason to hear the case (*White Light Prods., supra*).

Here, Merkos commenced an impleader action against Tower in Florida for the same relief - to determine Tower's coverage rights and obligations under the policy.[10] While that action is held in abeyance pending resolution of this motion, it will proceed if this action is dismissed. Although Tower filed this action three months prior to Merkos's filing its impleader action in Florida, the record shows that Tower acted preemptively by filing only shortly after learning of Merkos's intention to commence litigation (*White Light Prods., supra*; *San Ysidro Corp. v Robinow*,1 AD3d 185 [1st Dept 2003] [technical priority not dispositive]; *Hertz Corp. v Luken*, 126 AD2d 446, 450, 510 NYS2d 590 [1987] [fact that Florida complaint filed a few days earlier than New York complaint was "not particularly significant"]). Merkos's counsel's letter dated December 29, 2009 to Tower stating that if Tower "did not provide a coverage position 'by the close of business on December 31st', Merkos would bring Tower before the Florida courts" shows that Tower was clearly aware that Merkos was considering a legal action to enforce its rights at the time this New York action was commenced. Significantly, that this suit was brought

[10] The court notes that, to the extent that Merkos refers to the underlying tort action in Florida as "another action pending", its argument is unavailing since that action and the present insurance coverage dispute are not "between the same parties on the same cause of action."

as a declaratory judgment action, strongly suggests that it was responsive to Merkos's threat of litigation (*L-3 Communications, supra, citing White Light Prods*, at 98). In this court's view, these facts weigh heavily against application of the first-in-time rule, "which otherwise would reward a party for winning the race to the courthouse" (*Elbex Video, Ltd. v Tecton, Ltd.*, 2000 WL 1708189, *8 [SDNY2000]; *see also Continental Ins. Co. v Garlock Sealing Technologies, LLC*, 2005 WL 6214778 [Sup Ct, New York County 2005][the basis for dismissal of one or the other action must turn on some other consideration and not just who was more successful in racing to the courthouse]).

Further, both Florida and New York litigations relating to Tower's coverage obligations are in the early stages. As stated above, the Florida impleader action has been stayed, and no discovery has been conducted as to this coverage dispute. As discussed below (supra at 16-19), Florida has a more significant nexus to the entire controversy.

Therefore, in view of the above and, since Tower's commencement of this action first in time is not determinative, dismissal pursuant to CPLR §3211(a)(4) in favor of the Florida litigation is warranted.

Forum Non Conveniens: CPLR §327 (a)

As to whether New York is an inconvenient forum, a court may stay or dismiss an action if it finds "that in the interest of substantial justice the action should be heard in another forum" (CPLR §327(a);[11] *Atlantic Mut. Ins. Co. v Cadillac Fairview US, Inc.*, 125 AD2d 181, 508 NYS2d 445 [1st Dept 1986][a court can stay or dismiss an action when it determines that such

[11] CPLR §327(a) provides: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

action, although jurisdictionally sound, would be better adjudicated elsewhere than in New York State]).

Although no one factor is controlling, factors which the court must weigh in deciding a motion to dismiss on such grounds are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action and the burden which will be imposed upon the New York courts (*Phat Tan Nguyen* v *Banque Indosuez,* 19 AD3d 292, 294, 797 NYS2d 89, 92 [1st Dept 2005]; *Intertec Contracting v Turner. Steiner Intern. S.A.*, 6 AD3d 1 [1st Dept 2004]; *Neville v Anglo American Management Corp.*, 191 AD2d 240, 594 NYS2d 747 [1st Dept 1993]; *Daly v Metropolitan Life Ins. Co.*, 4 Misc3d 887, 894 [Sup Ct, New York County 2004]). "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985]). To override plaintiff's chosen forum, "defendant[. . .] bear[s] the burden to identify the non-party witnesses and the testimony they would offer and to show it would be unobtainable in this forum (*Islamic Republic*, at 479-480; *Anagnostou v Stifel,* 204 AD2d 61, 62 [1st Dept 1994]).

The court holds that this action would be better adjudicated in Florida than in New York.

First, while both Tower and Merkos are New York residents, Merkos is alleged to do business in Florida and Tower, at least at this point, has not alleged that it raised or will raise jurisdictional objections in its motion to stay (or dismiss) the Florida impleader action (*Islamic Republic*, *supra*, at 479 [The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action]).

Second, the situs of the underlying action is Florida, the majority of the events giving rise to the liability for which coverage is sought arose in Florida and Merkos showed that there is a significantly greater number of witnesses situated in Florida than in New York (see *Certain Underwriters at Lloyd's, London v Millennium Holdings, LLC*, 44 AD3d 536, 844 NYS2d 226 [1st Dept 2007]; *Certain Underwriters at Lloyd's, London v Mobil Corp.*, 303 AD2d 259, 756 NYS2d 204 [1st Dept 2003]).

Merkos has identified several witnesses relating to material issues in this litigation, including those beyond the subpoena power of this court (Chabad employees, Mr. and Mrs. Does), some of whom have already been deposed in the underlying tort action (*cf. Grizzle v Hertz Corp.*, 305 AD2d 311, 761 NYS2d 163 [1st Dept 2003] [dismissal of the New York action for *forum non convenience* denied where the witnesses of the accident in Jamaica were willing to travel to New York and the non-witness police officer could not offer any material evidence]).

Notwithstanding the fact that the record does not contain affidavits or any other evidence showing potential hardship or unwillingness of those witnesses to travel to New York or testify absent a subpoena, "failure to submit affidavits establishing hardship is not necessarily fatal to a motion to dismiss for *forum non conveniens*" (*Jackam v. Nature's Bounty, Inc.*, 70 AD3d 1000, 895 NYS2d 508 [2d Dept 2010]).

Most importantly, a substantial nexus between the state of Florida and the issues in this coverage dispute is a compelling factor in favor of litigating this action in Florida. An alternative forum is available since, as stated above, there is a similar action involving coverage dispute is pending in the Florida court: the situs of the underlying action is Florida, where substantial discovery has already been conducted by Merkos, and a significantly greater number of material

witnesses are located than in New York.

Tower's argument that the specific facts of the underlying claim are not material to the determination of coverage obligations and can be made solely by comparing the policy to the complaint, is not persuasive. For one, the crux of the Tower's disclaimer is the location of the events giving rise to the claims of Merkos's and Chabad's liabilities. Second, it is not so readily discernable from the allegations in the amended complaint that the alleged negligent misrepresentations were not made on the "covered premises." Thus, it is unlikely that the coverage issues can be resolved without the necessity of calling witnesses, the majority of whom are in Florida, and solely on the basis of documentary evidence (*Shin-Etsu Chemical Co.* v *3033 ICICI Bank Limited*, 9 AD3d 171, 176 [1st Dept 2004]; *Continental Ins. Co. v Polaris Industries Partners, L.P.*, 199 AD2d 222, 606 NYS2d 164 [1st Dept 1993]; *see Giovanielli v Certain Underwriters at Lloyds, London*, 23 Misc 3d 1128, 889 NYS2d 882 [Sup Ct, Queens County 2009]).

Neither do Tower's reasons for its choice of New York as the situs of this action weigh against the dismissal in favor of the Florida forum. First, that the insurance policy was issued in New York is "but one factor to be considered and does not automatically make New York the most convenient forum" (*Avnet, Inc. v Aetna Casualty & Surety Co.*, 160 AD2d 463, 464, 554 NYS2d 134, 135-36 [1st Dept 1990], *citing Atlantic Mut. Ins. Co v Cadillac Fairview US*, 125 AD2d 181 [1st Dept 1986], *lv denied* 69 NY2d 613 [1987]).

Second, this court is mindful that "[i]t is generally recognized that even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the [same] jury that considers the underlying liability claims" (*Cruz v Taino Const. Corp.*, 38 AD3d

391, 830 NYS2d 902 [1st Dept 2007]; *Medick v Millers Livestock Mkt.*, 248 AD2d 864, 865, 669 NYS2d 776 [1998], *citing Kelly v Yannotti*, 4 NY2d 603, 607, 176 NYS2d 637 [1958]). However, such prejudice can be avoided by severing the insurance dispute action from the negligence action (*Chunn v New York City Housing Auth.*, 55 AD3d 437, 866 NYS2d 145 [1st 2008]; *Cruz v Taino Const. Corp.*; *Kelly v Yannotti*, at 607 [The second third-party action should be severed to avoid the prejudice to the second third-party defendants that would result from the jury's awareness of the existence of liability insurance]).

Nor does this court find any potential application by the Florida court of the laws of New York to be an unnecessary burden upon Florida judiciary since "courts are frequently called upon to apply laws of foreign jurisdictions" (*Phat Tan Nguyen* v *Banque Indosuez,* 19 AD3d 292, *supra*; *Intertec Contracting v Turner Steiner Intern. S.A.*, 6 AD3d 1, *supra*).

Having considered all the relevant factors, the court finds that, even assuming Merkos has not sustained its burden of demonstrating disproportionate hardship or unwillingness of its witnesses to come to New York, *forum non convenience* is an alternative ground for dismissal of this action, which should in any event be dismissed based on the other grounds, discussed above. Yet, since "no one factor is controlling" (*Neville v Anglo American Management Corp.*, 191 AD2d 240, *supra*) and all the remaining relevant interests militate against this litigation proceeding in New York, the court holds that, dismissal for *forum non convenience* is warranted.

Thus, because Chabad and the Does are necessary parties to this action, not subject to this court's personal jurisdiction, and Florida has a more significant nexus to the controversy, the motion is granted and this action is dismissed in its entirety.

Conclusion

Accordingly, it is hereby

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §§302, 1001, 3211(a)(8) and 3211 (a)(10), dismissing the complaint by plaintiff Tower Insurance Company of New York for lack of personal jurisdiction over necessary parties is granted; and it is further

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §327 (a) dismissing the complaint by plaintiff Tower Insurance Company of New York for *forum non conveniens*, is granted; and it is further

ORDERED that the branch of the motion by defendant Merkos L'Inyonei Chinuch, Inc., pursuant to CPLR §3211(a)(4), dismissing the complaint by plaintiff Tower Insurance Company of New York on the ground that another action is pending in Florida, is granted; and it is further

ORDERED that defendant Merkos L'Inyonei Chinuch, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 29, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
AUG 02 2010
COUNTY CLERK'S OFFICE
NEW YORK