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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 601864/2009
TOWER INS. CO. OF NY
VS.
NESHER BUILDERS, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

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 to dismiss is decided per attached

FILED
OCT 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/1/10

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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TOWER INSURANCE COMPANY OF NEW YORK a/s/o Eli & Chaya Baumwolspiner and other interested insureds under the relevant policy of insurance,

Plaintiff,

Index No. 601864/09

-against-

NESHER BUILDERS, LLC, NESHER BUILDERS, LLC, a/k/a SHIR NESHER BUILDERS and BETH JACOB DAY SCHOOL,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

Defendant Beth Jacob Day School (Beth Jacob) moves, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss the complaint as against it, and/or, pursuant to CPLR 7503, to compel arbitration.

FACTS

Beth Jacob owns a property adjacent to that of plaintiff Tower Insurance Company of New York's (Tower) insureds, Ely and Chaya Baumwolspiner (the Baumwolspiners). Tower asserts that construction performed by Beth Jacob caused damage to the Baumwolspiners' house, and that it anticipates paying in excess of $187,000 in relation to that damage.

Beth Jacob began construction to expand its building at 98-100 Lawrence Street, Brooklyn, New York, in late March or early April 2006. In mid-October 2006, Rabbi Michael Levi (Levi) was

served with a summons to appear on behalf of Beth Jacob at the Beis Din Zedek Rabbinical Court of the Central Rabbinical Congress of the United States and Canada (Beis Din). The proceeding was initiated by Rabbi Aharon Zaberman and Eli Baumwolspiner. According to Beth Jacob, the parties appeared before the Beis Din on October 22, 2006. Levi asserts, in his affidavit, that Eli Baumwolspiner, Zaberman, and Levi signed an agreement to have the case heard by the Beis Din, after which the three-member panel of the Beis Din heard the parties' arguments. While Levi contends that the Beis Din did not require Beth Jacob to pay any money to Baumwolspiner, and permitted the construction to continue, there are no documents submitted on this motion regarding the parties' agreement to arbitrate, or the Beis Din's determination. The Baumwolspiners maintain that they merely sought the Beis Din's assistance in preventing further damage, but did not submit the issue of payment for the damages to the Beis Din for consideration.

Tower commenced this action on June 16, 2009. The original summons and complaint named Nesher Builders, LLC, Nesher Builders, LLC a/k/a Shir Nesher Builders and Beth Jacob Day Care Center, Inc. (Day Care), as defendants. By supplemental summons and amended complaint, dated July 2, 2009, and filed October 19, 2009, Tower named Beth Jacob in place of Day Care. There apparently had been communication between the attorney for both

Beth Jacob entities regarding Tower's mistaken name in the action. By letter dated September 30, 2009, Beth Jacob's attorney wrote to Tower's attorney, saying

> As we discussed, I would be willing to sign a stipulation discontinuing the action against [Beth Jacob Day Care Center Inc.]. Please email or fax it to me and I will sign and send it back to you.
>
> Additionally, once you have discontinued against Beth Jacob Day Care Center Inc. and have filed the amended complaint which you said that you intend to file, I will accept service of the amended complaint for the correct Beth Jacob entity.

Affirmation in Opposition, Ex. G.

Tower discontinued the action against Day Care on October 14, 2009, filed the amended complaint on October 19, 2009, and served it on Beth Jacob's attorney, as the parties had discussed. *Id.*

Beth Jacob now seeks to dismiss the action as against it as time-barred, or, alternatively, seeks to compel arbitration on the ground that plaintiff's subrogors are bound by their agreement to arbitrate, and Tower stands in their shoes.

DISCUSSION

Arbitration

Beth Jacob argues that the Baumwolspiners' choice of arbitrating before the Beis Din was a valid election to arbitrate, and that Tower is bound by that election. Tower does not dispute that a Rabbinic Court is a valid arbitration proceeding when parties seek to adjudicate before that forum.

However, it disputes Beth Jacob's claim that that is what occurred here, and points out that there is no agreement or contract binding the parties to adjudicate their claims before the Beis Din.

There is no question that the courts in this state enforce agreements to arbitrate. Here, however, Beth Jacob has produced no written agreement to arbitrate, either from prior to the parties' appearance at the Beis Din, or dating from that appearance. An agreement to arbitrate must be in writing in order to be enforced. CPLR 7501. Furthermore, that writing must make it clear what issues are to be arbitrated, and make the parties' intention to arbitrate the dispute unequivocal. *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (1st Dept 2007). In this case, there is no documentation that establishes what the Beis Din was authorized to, or did in fact, address. In the absence of any such written evidence, Beth Jacob has failed to meet its burden of establishing that the Baumwolspiners agreed to arbitrate their claim against Beth Jacob. *Id.* There is also no indication anywhere that Chaya Baumwolspiner participated in, or agreed to participate in, any arbitration. Thus, Tower is not obligated to arbitrate before the Beis Din.

Statute of Limitations

Tower argues that it can rely on the six-year statute of

limitations in pursuing this action because the construction work done adjacent to the Baumwolspiners was done pursuant to contract. This argument is without merit. The Baumwolspiners were not parties to the contract, or in any way privy to the contract. Their claim as against Beth Jacob is based upon tort, not contract. Therefore, the three-year statute of limitations applies. CPLR 214.

Beth Jacob asserts that Tower cannot proceed against it because the damage was alleged to have been caused by activity which occurred in September 2006. The amended complaint was not filed until October 19, 2009, more than three years later. The statute of limitations is three years, thus precluding commencement of this action as against Beth Jacob.

Tower contends that the amended complaint is timely because the initial complaint was timely, and merely misnamed Beth Jacob. Tower argues that the misnaming of Beth Jacob should not affect the timeliness of this action, because Beth Jacob was actually served with the initial summons and complaint on June 25, 2009, well before the statute of limitations expired. Since the correct entity was served, and no additional claims were added, Tower maintains that the correction of the name was appropriate. Tower acknowledges that it did not seek leave of the court to amend, because counsel for the respective parties stipulated to amend the complaint in September 2009. Tower asserts that had it

sought leave to amend, such leave would have been granted.

CPLR 1024 provides that if the identity of a party is unknown, that party should be designated by so much of its name as is known. CPLR 2001 authorizes the court to permit the correction of a mistake, omission or defect, or to disregard such defect if a substantial right of a party is not prejudiced thereby. Courts have held that mistakes relating to the name of a party fall within this category, and where the misnomer did not mislead the defendant concerning whom the plaintiff was seeking to sue, dismissal is not warranted. *See Suarez v Shorehaven Homeowners Assn., Inc.*, 202 AD2d 229, 231 (1st Dept 1994); *Covino v Alside Aluminium Supply Co.*, 42 AD2d 77, 80 (4th Dept 1973).

Here, there is no question that Beth Jacob knew that it was the party that plaintiff sought to sue, and it was served with the summons and complaint. In fact, counsel for Beth Jacob states "it is conceded that Beth Jacob was aware that it was the potential target." Therefore, there is no prejudice from the late filing of the amended summons.

Beth Jacob, however, contends that, pursuant to CPLR 305 (c), Tower would have to move for leave to amend, which it has not done, and, Tower cannot simply file an amended complaint. CPLR 305 (c) provides that "[a]t any time...the court may allow any summons ...to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced." As an

amendment correcting a misnomer relates back to the date that the summons was filed, and as the Court can grant this relief at anytime, the Court, if necessary, would have allowed Plaintiff to move for such relief.[1] However, such a motion is unnecessary.[2] Where amendment is properly sought under CPLR 1024, no formal motion is necessary. *Woodburn Court Assoc. I v Wingate Mgt. Co.*, 243 AD2d 1043, 1045 (3d Dept 1997) (no motion was required under CPLR 1024 to add Hartford Fire Insurance Company as a defendant after its identity was ascertained); *see also* Siegel, NY Prac § 188 (4th ed.). Accordingly, as there is no reason why a formal motion would be required here, but not under CPLR 1024, Tower need not seek leave for the amendment, and the amendment suffices to correct the name of Beth Jacob on the caption, nunc pro tunc.

Failure to State a Cause of Action for Subrogation

In its moving papers, Beth Jacob sought dismissal based on Tower's failure to state a cause of action for subrogation, in that the complaint did not allege that Tower made payments to the Baumwolspiners. Beth Jacob withdrew that argument in view of Tower's appending copies of checks made payable to the

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[1]It is surprising that Tower, who cited CPLR 305 (c), did cross move for relief, but merely filed opposition.

[2]Under appropriate circumstances, a court may correct the caption sua sponte. *Suarez v Shorehaven Homeowners Assn., Inc.*, 202 AD2d at 231; *Liberty Ashes Inc. v Health Nuts Inc.*, 27 Misc 3d 1220(A), 2010 NY Slip Op 50810(U) (Civ Ct, Queens County 2010).

Baumwolspiners to its opposition papers.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Beth Jacob Day School is denied in its entirety; and it is further

ORDERED that defendant Beth Jacob Day School is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry, and it is hereby

ORDERED that plaintiff submit an order amending the caption to Chambers, which order shall be filed with Trial Support (Room 148) and the Court Clerk, for amendment of court records.

Dated: October 1, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN