[* 1]

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

PRESENT: HON. MILTON A. TINGLING J.S.C. PART 44

Commerce + Industry

- v -

Gun Hill

INDEX NO. 101579/10

MOTION DATE 9/13/10

MOTION SEQ. NO. 1

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 is decided in accordance with annexed decision.

FILED
NOV 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/25/10

Mat
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 44

COMMERCE AND INDUSTRY INSURANCE CO.,

Plaintiff,

Index No.: 101579/10

-against-

DECISION

GUN HILL MANAGEMENT, INC., LANGSAM PROPERTY SERVICES CORP., LONDON RAIN ORTIZ, an infant by her mother and natural guardian KRISTAL FOWLER, and KRISTAL FOWLER, Individually,

Defendants.

MILTON A. TINGLING, J.:

BACKGROUND

Plaintiff moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the counterclaim asserted as against it by defendant Gun Hill Management, Inc. (Gun Hill).

Plaintiff instituted the instant action seeking a declaration that it had no duty to defend Gun Hill in an underlying personal injury action entitled *London Rain Ortiz, et al. v Gun Hill Management, Inc., Langsam Property Service Corp., et al.*, index number 13063/06 (the 2006 action), now pending in the Supreme Court, Bronx County. Motion, Ex. C. On or about April 16, 2010, Gun Hill interposed an answer to the instant suit, denying the substance of the claims, and asserting a counterclaim against plaintiff, seeking reformation of the two

insurance policies at issue to name Gun Hill as an insured thereunder.

In the underlying personal injury action, the infant plaintiff allegedly suffered injuries as the result of the ingestion of lead paint while residing in Apartment 2C of 660 East 242 Street, Bronx, New York. The infant plaintiff failed to seek a default judgment as against Gun Hill in this action, in which Gun Hill did not answer or otherwise appear, and that action was ultimately administratively dismissed as against Gun Hill. It is noted that service on Gun Hill was effectuated by serving the Secretary of State (Motion, Ex. C), and that, in its opposition, Gun Hill does not contend that it never received notice of this underlying lawsuit.

In 2009, the infant plaintiff commenced a second action against Gun Hill under index number 350019/09 (the 2009 action), which contains identical allegations as against Gun Hill as appeared in the 2006 action. Motion, Ex. D. By order dated July 9, 2009, the 2009 action was consolidated with the 2006 action. Motion, Ex. E.

Plaintiff issued a Pollution Legal Liability Real Estate Policy to Langsam Property Services Corp. (Langsam) for the period from June 30, 2002, through June 30, 2007, and issued a renewal policy for the period from June 30, 2007, to June 30, 2012. Motion, Exs. F & G. Both policies provide insurance only

for claims first made against the insured, and reported to plaintiff, during the policy period. The pertinent policy provision states:

> Coverage B - Legal Liability for Pollution Conditions
> To pay on behalf of the Insured, Loss that the Insured is legally obligated to pay as a result of Claims for Bodily Injury, Property Damage or Clean-Up Costs resulting from Pollution Conditions on, under or migrating from the Insured Property provided such Claims are first made against the Insured and reported to the Company, in writing, during the Policy Period or during the Extended Reporting Period if applicable, and in accordance with Section III of the Policy.

Id.

Gun Hill is not named as an insured or as an additional insured under the policy in effect between 2002 and 2007, but is named as a named insured under Endorsement 36 of the renewal of that policy. *Id.*

In the counterclaim asserted as against plaintiff, Gun Hill contends that, under both policies, the premises which are the subject of the underlying personal injury action were identified as the covered premises, that Gun Hill, as owner of the premises, entered into an agreement with Langsam to manage the premises, that, pursuant to the agreement between Gun Hill and Langsam, Langsam was to acquire insurance coverage for Gun Hill, and that the failure of the policies to name Gun Hill was a unilateral mistake that plaintiff should rectify by reforming the policies to name Gun Hill as an insured retroactively. Motion, Ex. B, ¶¶ 46-59.

Plaintiff argues that Gun Hill's counterclaim for reformation asserted as against it should be dismissed because it is time-barred by application of the statute of limitations, since the initial policy went into effect no later than June 30, 2002, and Gun Hill did not bring its claim for reformation of the initial policy until the instant counterclaim was filed in April, 2010, more than six years after the effective date of that policy.

Plaintiff also avers that Gun Hill's request to reform the renewal policy should be dismissed because the policy states that it provides insurance only for claims first made against the insured, and reported to plaintiff in writing, during the policy period, and Gun Hill, in its counterclaim, acknowledges that the underlying action was first brought against it in 2006. Therefore, according to plaintiff, even if the renewal policy were to be reformed to include Gun Hill as a named insured, the claim was made against it outside of the policy's coverage period.

In opposition, Gun Hill argues that it had two years from the time when the facts were discovered to request a reformation of the insurance policy, based on a mutual mistake[1], and that there is a material issue of fact regarding plaintiff's statute

[1]The counterclaim states that it was a unilateral mistake, but the attorney's affirmation in opposition says that it was a mutual mistake.

of limitations contention. Gun Hill further states that it would be inequitable and unjust to allow plaintiff to shirk its obligations to defend and indemnify Gun Hill "due to a scrivener's error," when the intention of the parties was to provide coverage for Gun Hill. Moreover, according to Gun Hill, since the second action against it was filed in 2009, during the coverage period for the renewal policy under which it is a named insured, it is entitled to defense and indemnification from plaintiff under that policy, regardless of plaintiff's statute of limitations argument with respect to the initial policy. The court notes that Gun Hill does not argue or dispute plaintiff's statement that the complaint filed as against it in the 2009 action contains the identical allegations as were asserted as against it in the 2006 action.

In reply, plaintiff points to Exclusion I of the renewal policy, which states:

> "Prior Knowledge/Non-Disclosure:
> arising from Pollution Conditions existing prior to the Inception Date and known by a Responsible Insured and not disclosed in the application for this Policy, or any previous policy for which this Policy is a renewal thereof."

Plaintiff argues that, even if the renewal policy were deemed applicable, since Gun Hill was aware of the pollution condition claim asserted as against it when it was originally sued in 2006, it would not be entitled to coverage under the renewal policy, which became effective in 2007, because it failed

to disclose the claim made by the infant plaintiff in the underlying personal injury action at the time the renewal policy was executed.

DISCUSSION

CPLR 3211 (a), governing motions to dismiss a cause of action, states that

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> (1) a defense is founded upon documentary evidence; or
> * * *
> (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability or the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
> * * *
> (7) the pleading fails to state a cause of action ... ."

On a motion to dismiss, pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted]." *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

Plaintiff's motion to dismiss Gun Hill's counterclaim

asserted as against it, seeking reformation of the insurance policies that are the subject of this action, is granted.

> "The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties. The proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties [internal quotation marks and citation omitted]."

Greater New York Mutual Insurance Company v United States Underwriters Insurance Company, 36 AD3d 441, 442-443 (1st Dept 2007).

Gun Hill has failed to meet this burden.

Reformation of the initial insurance policy, executed in 2002, is barred by application of the statute of limitations.

The initial insurance policy went into effect on June 30, 2002. The first lawsuit instituted against Gun Hill was filed in 2006, approximately four years after the initial policy's coverage period started. The renewal policy went into effect on June 30, 2007, and the second lawsuit was filed by the infant plaintiff in 2009, and consolidated with the first personal injury action in July, 2009. The first time Gun Hill requested reformation of the two insurance policies was in its answer to the instant action, said answer being dated April 16, 2010, almost eight years after the effective date of the initial insurance policy.

Gun Hill argues that the failure of its name to appear as a

named insured on the initial policy was due to a mutual mistake; however, Gun Hill fails to indicate how plaintiff was a party to that alleged mistake. Gun Hill merely assumes that plaintiff would know that Gun Hill was intended to be included in the policy simply because the premises indicated therein are owned by Gun Hill. Gun Hill fails to indicate how plaintiff would know who the owner of the premises was, or would be obligated to question why that owner was not named in the policy.

The statute of limitations for reformation based on mistake is six years. CPLR 213 (6). Accrual of a cause of action based on mistake is six years from the date of the mistake, or two years after discovery of the mistake, provided that the party seeking reformation can evidence the due diligence required to toll the statute for this two-year period. CPLR 203 (g); *Federal Deposit Insurance Corp. v Five Star Management, Inc.*, 258 AD2d 15 (1st Dept 1999).

In the case at bar, Gun Hill would be on notice of a claim against it as soon as the first personal injury lawsuit was filed against it in 2006, even if it were not then in possession of the initial insurance policy executed in 2002. Due diligence, exercised at that time, would mandate that Gun Hill see a copy of the insurance policy that Langsam was contractually obligated to acquire on Gun Hill's behalf. There is no evidence that Gun Hill demanded a copy of the policy at that time.

Gun Hill argues that the discovery of its lack of inclusion in the initial policy only occurred when it was sued by the infant plaintiff for the second time in 2009. However, Gun Hill did not even seek reformation at that point, but waited until the instant litigation commenced to request equitable relief by means of its answer and counterclaim.

> "The statute of limitations on a claim of reformation based upon mistake is six years, accruing on the date of the mistake. This rule also applies to scrivener's errors. Although [Gun Hill] argues that a two-year date of discovery accrual should apply here, we find that argument unpersuasive inasmuch as [Gun Hill] presumably had the document containing the mistake in its possession and thus could not demonstrate the due diligence required pursuant to CPLR 203 (g) to toll the statute of limitations. The [counterclaim is] thus properly dismissed [internal citations omitted]."

1414 APF, LLC v Dear Stags, Inc., 39 AD3d 329, 330 (1st Dept 2007); *Taintor v Taintor*, 50 AD3d 887 (2d Dept 2008).

Reformation of the renewal policy is barred by the exclusions stated therein.

> "It is well established that when interpreting an insurance contract, as with any written contract, the court must afford the unambiguous provisions of the policy their plain and ordinary meaning, and 'may not make or vary the terms of the contract of insurance to accomplish [its] notion of abstract justice or moral obligation' [internal citation omitted]."

Greater New York Mutual Insurance Company v United States Underwriters Insurance Company, 36 AD3d at 442.

Gun Hill was at least constructively aware of the claim asserted against it by the infant plaintiff when she sued it and

its management agent in 2006. The 2009 lawsuit merely repeats all of the allegations of the 2006 lawsuit, and does not allege any circumstances different from those initially pled. The renewal policy, executed in 2007, excluded from coverage any pre-existing claim of which the named insured had knowledge at the time the policy became effective. Since Gun Hill is presumed to be aware of the claim prior to 2007, its argument that the claim was made during the coverage period (2007-2012), when the second personal injury action was filed, is unpersuasive. Therefore, this claim as against Gun Hill would be outside the scope of this claims-made policy. *See generally Gomez v Feder, Connick & Goldstein, P.C.*, 260 AD2d 348 (2d Dept 1999).

In its opposition, Gun Hill relies heavily on *Federal Deposit Insurance Company v Five Star Management, Inc.* (258 AD2d 15, *supra*), in which the Court enforced a mortgage despite a "scrivener's error" in the mortgage. However, the Court based its findings on theories of equitable mortgages, not insurance contract interpretation, which is the issue before this court.

Gun Hill has also argued that, under general equitable doctrines, this court should reform the policies so as to avoid unjustly enriching plaintiff. The court finds this argument unavailing.

By finding for plaintiff, plaintiff is not discharged from its financial obligations in the underlying personal injury

action, since Langsam, whose coverage it does not deny, is a co-defendant with Gun Hill in that lawsuit. Furthermore, Gun Hill has other avenues of recourse, as indicated by its cross-claims asserted against Langsam, both in negligence and breach of contract, for Langsam's failure to acquire insurance to cover Gun Hill.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is granted and the counterclaim asserted against it by Gun Hill Management, Inc. is hereby dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 321, 60 Centre Street, on Nov. 29, 2010, at 9:30 A.M./P.M.

Dated: 10/25/10

ENTER:

mgt

Milton A. Tingling, J.S.C.

HON. MILTON A. TINGLING
J.S.C.

FILED
NOV 01 2010
COUNTY CLERK'S OFFICE
NEW YORK