SHORT FORM ORDER

INDEX No. 10-4626

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 46 - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-10-10 (#001)
MOTION DATE 7-9-10 (#002)
MOTION DATE 7-9-10 (#003)
ADJ. DATE 8-24-10
Mot. Seq. # 001 - MD
002 - XMG
003 - XMD

COPIAGUE PUBLIC SCHOOL DISTRICT and IRWIN CONTRACTING OF LONG ISLAND, INC. Plaintiffs, - against - HEALTH AND EDUCATION EQUIPMENT CORP., and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT d/b/a TRAVELERS & TRAVELERS INSURANCE COMPANY, Defendants.	GALLO VITUCII KLAR PINTER Attorney for Plaintiff 90 Broad Street, 3rd Floor New York, New York 10004 ANDREA G. SAWYERS, ESQ. Attorney for Health and Education 3 Huntington Quadrangle, Suite 102S PO Box 9028 Melville, New York 11747 LAZARE POTTER GIACOVAS KRANJAC Attorney for Travelers 950 Third Avenue, 27th Floor New York, New York 10022

Upon the following papers numbered 1 to 38 read on this motion Summary Judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers 12 - 27; 28 - 34 ; Answering Affidavits and supporting papers 35 - 36 ; Replying Affidavits and supporting papers 37 - 38 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs Copiague Public School District and Irwin Contracting of Long Island, Inc. for, inter alia, a judgment declaring that the defendants are obligated to defend and indemnify them against any liability arising from the underlying personal injury action is denied; and its further

ORDERED that the cross motion by Health and Education Equipment Corp. for summary judgment dismissing plaintiffs' complaint against it is granted; and it is further

ORDERED that the cross motion by Traveler's Indemnity Company of Connecticut for, inter alia, severance of plaintiffs' action against it, amendment of the caption, and the production of outstanding discovery demands is decided as follows; and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by deleting "Travelers" and "Travelers Insurance Company"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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COPIAGUE PUBLIC SCHOOL DISTRICT and IRWIN CONTRACTING OF LONG ISLAND, INC.,

Plaintiffs,

- against -

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Defendant.

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This case arises from an underlying action entitled ***John Posa & Caroline Posa v Copiague Public School District et al*** under index number 06-7683, wherein plaintiffs sought, personally and derivatively, damages for injuries John Posa sustained while he was working at a construction site owned by Copiague Public School District. Posa was injured when table tops stored in a hallway fell over onto his foot. The Posas sought damages from, among others, Copiague Public School District ("Copiague"), its prime construction contractor, Irwin Contracting of Long Island. Inc., ("Irwin"), and Health and Education Equipment Corp. ("HEC"), which was hired as the general contractor for the project. On November 14,2006, Copiague and Irwin commenced a third-party action against HEC and its insurer, Traveler's Indemnity Company of Connecticut d/b/a Travelers & Travelers Insurance Company ("TCT"). The third-party complaint set forth causes of action for breach of contract, contribution, common law and contractual indemnification and for the compensation of all costs associated with the defense of the underlying action. It also sought a judgment declaring that the third-party plaintiffs are entitled to indemnification and defense costs from the third-party defendants. By order dated October 29, 2007, this court granted a motion by TCT to sever the third-party action from the underlying personal injury action. The court further determined, by order dated January 7, 2010, that the third-party plaintiffs were entitled to summary judgment on their claim against HEC for indemnification pursuant to the terms of the parties' contract.

On February 1, 2010, Copiague and Irwin (hereinafter "plaintiffs") filed a summons and complaint commencing the instant action against HEC and TCT. Shortly thereafter, plaintiffs served an amended complaint seeking, inter alia, a declaratory judgment that HEC and TCT are obligated to defend and indemnify them against any liability arising from the underlying personal injury action, and that they are entitled to additional insured status under the terms of HEC's insurance agreement with TCT. Plaintiffs now move for partial summary judgment in their favor on the abovementioned causes of action. TCT opposes plaintiffs' motion and cross-moves, pursuant to CPLR 603, for an order severing all claims against it from the claims asserted against HEC. TCT also moves, pursuant to CPLR 3211, to dismiss any claims asserted against, or captioned in reference to "Travelers Insurance Company" or "Travelers", or any other related entity other than TCT. TCT further seeks an order compelling plaintiffs to produce outstanding discovery, specifically responses to its March 25, 2010 discovery demands and notice to appear for deposition. TCT argues plaintiffs' motion should be denied as the court already determined HEC was liable for their defense and indemnification costs, and triable issues exit as to whether plaintiffs should be regarded as additional insureds under HEC's insurance policy. HEC also opposes plaintiffs' motion on similar grounds and cross-moves for dismissal of the complaint. Specifically, HEC asserts the court already awarded plaintiffs the requested relief in the January 7, 2010 order issued in the underlying action, which addressed identical claims contained in plaintiffs' third-party complaint.

Initially, the court notes that an award of summary judgment in plaintiffs' favor on the causes of action set forth in its amended complaint against HEC for indemnification and defense costs is precluded under the doctrine of res judicata. Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*see* ***Parker v Blauvelt Volunteer Fire Co., Inc.***, 93 NY2d 343, 347, 690 NYS2d 478 [1999]). "[A]n order entered on a motion for summary judgment constitutes a disposition on the merits and, accordingly is entitled to preclusive effect for purposes of res judicata" (*see* ***Bardi v Warren County Sheriff's Dept.***, 260 AD2d 763, 765, 687 NYS2d 775 [3d Dept 1999]; *see also* ***QFI , Inc. v Shirley***, 60 AD3d 656, 874 NYS2d 238 [2d Dept 2009]; ***Kinsman v Turetsky***, 21 AD3d 1246, 804 NYS2d 430 [3d Dept 2005]). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*see* ***Parker v Blauvelt Volunteer Fire Co., Inc.***, 93 NY2d at 347 quoting ***O'Brien v City of Syracuse***, 54 NY2d 353, 357, 445 NYS2d 687 [1981]).

By order of this court dated October 29, 2007, plaintiffs were awarded summary judgment in their favor on identical claims contained in their third-party action against HEC under index number 06-7683. Such an award constitutes a disposition on the merits (*see* ***QFI , Inc. v Shirley***, *supra*; ***Kinsman v Turetsky***, *supra*), and is preclusive of the cause of actions contained in plaintiffs' amended complaint (*see* ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258, 893 NYS2d 95 [2d Dept 2010]; ***Beck v E. Mut. Ins. Co.***, 295 AD2d 740, 744 NYS2d 57 [3d Dept 2002]; ***De Santo Constr. Corp. v Royal Ins. Co. of A.m.***, 278 AD2d 357, 717 NYS2d 636 [2d Dept 2000]). Moreover, the actions involve the same parties and arise out of the same underlying series of transactions (*see* ***Parker v Blauvelt Volunteer Fire Co., Inc.***, *supra*). Accordingly, the portion of plaintiffs' summary judgment motion seeking a judgment declaring HEC liable for its defense and indemnification costs is denied. In light of the foregoing, the court awards summary judgment in HEC's favor on its cross motion seeking dismissal of plaintiffs' amended complaint against it. The action is severed and continued as against TCT.

As for the portion of plaintiffs' motion seeking partial summary judgment in their favor declaring TCT's obligation to pay their defense and indemnification costs, plaintiffs have failed to establish their prima facie burden on the motion by eliminating triable issues from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). In particular, a triable issue exists as to whether plaintiffs complied with Section 4 of the Commercial General Liability Form of HEC's insurance agreement with TCT. Section 4.2 (a) of the Commercial General Liability Coverage Form states, in pertinent part, that the insured must "see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Section 4.2 (c) further states, "[y]ou and any other involved insured must immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit'."

Here, plaintiffs failed to submit any evidence that they complied with this requirement in their moving papers. Rather, plaintiffs assert TCT received timely notice of the claim when HEC and one of its subcontractors sent TCT notices of the Posas' personal injury action in October 2005. It is well established that a party claiming insurance coverage bears the burden of proving entitlement to such coverage (*see* ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 746 NYS2d 622 [2002]; ***Rhodes v Liberty Mut. Ins. Co.***, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]). When an insurance policy requires an insured to provide notice of any accidental loss within a reasonable time, providing the required notice is a condition precedent to coverage and, hence, absent a valid excuse, failure to satisfy the notice requirement vitiates the policy, even if no prejudice is shown (*see* ***Argo Corp. v Greater N.Y. Mut. Ins. Co.***, 4 NY3d 332, 794 NYS2d 704 [2005]; ***Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp.***, 31 NY2d 436, 340 NYS2d 902 [1972])[1]. Indeed, where two or more insureds are defendants in the same action, notice of the occurrence or lawsuit provided by one insured will be deemed notice on behalf of both insureds only where the two parties are united in interest or where there is no adversity between them (*see* ***23-08-18 Jackson Realty Assocs. v Nationwide Mut. Ins. Co.***, 53 AD3d 541, 863 NYS2d 35 [2d Dept 2008]). Accordingly, the portion of plaintiffs' summary judgment motion seeking a judgment declaring TCT's obligation to pay their defense costs and indemnify them against any award of damages in the underlying personal injury action is denied.

As for the portion of TCT's cross motion seeking severance from plaintiffs' action against HEC, the determination of whether to grant or deny a request for severance pursuant to CPLR 603 is a matter of judicial discretion, and is generally inappropriate where there is no showing that a party's rights would otherwise be prejudiced (*see* ***Shanley v Callanan Indus. Inc.***, 54 NY2d 52, 44 NYS2d 585 [1981]; ***Andresakis v Lynn***, 236 AD2d 252, 653 NYS2d 559 [1st Dept 1997]). Inasmuch as plaintiffs' amended complaint against HEC has been dismissed and only the issue of insurance coverage remains, TCT's request for severance is denied as moot.

Similarly, the portion of TCT's motion seeking an order compelling plaintiffs to respond to outstanding discovery demands, specifically responses to its March 25, 2010 discovery demands and subpoena for deposition of plaintiffs' attorney's office manager, is denied. TCT failed to provide a

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[1] Although this law has changed for insurance policies issued post 1-1-2009, the amendments to Ins. Law § 342 are not applicable to this case.

sufficient affirmation of a good faith effort to resolve the issues raised by the motion (*see* 22 NYCRR §202.7 [a]). Such an affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]). Here, TCT's attorney affirmation states the parties exchanged a letter and a number of e-mails regarding plaintiffs' objections to the discovery demands and subpoena. However, it has been held that the mere writing of letters is insufficient to meet the statutory obligation (*see* ***Amherst Synagogue v Schuele Paint Co. Inc.***, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]; ***Hutchinson v Langer***, 25 Misc. 3d 1235A, 906 NYS2d 773 [Sup Ct. Kings County 2009]). The letter and e-mails exchanged between the parties reveal disputes concerning the manner of service of the subpoena and whether the subject discovery demands were duplicative of previously exchanged material. Conspicuously absent from these exchanges are any effort by the parties to resolve these disputes. In any event, service of plaintiffs' May 6, 2010 motion for summary judgment triggered the automatic stay of discovery prescribed in CPLR 3124(b).

However, the portion of TCT's motion seeking dismissal, pursuant to CPLR3211 (a) (7), of any claims asserted against or captioned in reference to "Travelers Insurance Company" or "Travelers" is granted. A review of copies of the subject insurance policy declarations page and the commercial general liability coverage declaration page submitted by the parties reveal that "The Travelers Indemnity Company of Connecticut" is listed as the insuring company. Moreover, the commercial general liability form notes that throughout the policy the words 'we', 'us' and 'our' refers to the insuring company listed in the policy declarations. TCT also submitted the affidavit of its senior technical specialist, Ira Cooper, who indicates that HEC's policy was issued solely by TCT and that neither "Travelers Insurance Company" or any other entity operating under the name "Travelers" bears any liability or obligation under the terms of the policy (*see* ***Smithtown v National Union Fire Ins., Co.***, 191 AD2d 426, 594 NYS2d 318 [2d Dept 1993]; ***Eastern States Electrical Contrs., Inc. v William L. Crown Constr. Co.***, 153 AD2d 522, 544 NYS2d 600 [1st Dept 1981]). Plaintiffs, who did not address this portion of TCT's motion in their opposition papers, failed to adduce any evidence that either "Travelers Insurance Company" or any other entity known as "Travelers" were insurers under the terms of the policy or exercised complete control or dominion over TCT. In light of the foregoing and the court's previous dismissal of plaintiffs' action against HEC, the caption of the action shall be amended to read as follows: Copiague Public School District and Irwin Contracting of Long Island, Inc., plaintiffs, against The Travelers Indemnity Company of Connecticut, defendant.

Dated: February 7, 2011
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.