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

PRESENT: DEBRA A. JAMES — **PART 59**

Justice

THE NEW YORK STATE WORKERS' COMPENSATION BOARD BOTH IN ITS CAPACITY AS THE GOVERNMENTAL ENTITY CHARGED WITH THE ADMINISTRATION OF THE WORKERS' COMPENSATION LAW AND ATTENDANT REGULATIONS AND IN ITS CAPACITY UNDER 12 NYCRR 317.20 AS SUCCESSOR IN INTEREST TO THE TRUSTEES OF THE TRANSPORTATION INDUSTRY WORKERS' COMPENSATION TRUST AND CLARENDON NATIONAL INSURANCE COMPANY,

Plaintiffs,

-v-

CLASSIC INSURANCE AGENCY, ANDREA MEISTER, and LIFETIME INSURANCE BROKERAGE,

Defendants.

Index No.: 601679/08

Motion Date: 10/26/10

Motion Seq. No.: 03

Motion Cal. No.: _____

CLASSIC INSURANCE AGENCY, ANDREA MEISTER, and LIFETIME INSURANCE BROKERAGE,

Third-Party Plaintiffs,

-v-

COMPENSATION RISK MANAGERS, LLC,,

Third-Party Defendant.

Third-Party Index No.: 590327/10

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

The following papers, numbered 1 to 5 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Third-party defendant Compensation Risk Managers, LLC (CRM) moves, pursuant to CPLR 3211 (a) (7), to dismiss the third-party

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

complaint, or alternatively, pursuant to CPLR 603, to sever the third-party action from the main action.

In the main action, the plaintiffs the New York State Workers' Compensation Board and Clarendon National Insurance Company (Clarendon Insurance) allege that the third-party plaintiffs Classic Insurance Agency, Andrea Meister, and Lifetime Insurance Brokerage misrepresented information regarding The Kids Waterfront Corporation (Kids Waterfront) on its application to become a member of the Transportation Industry Workers' Compensation Trust (TIWCT), and because of the misrepresentations, Kids Waterfront was improperly accepted as a member of TIWCT. Plaintiffs further allege that they suffered damages in the amount of $500,000.00 plus legal costs in defending a claim against Kids Waterfront, initiated by Adrian Martinez-Rodriguez, an employee of Kids Waterfront, for a work-related injury (the personal injury action).

In the third-party action, the third-party plaintiffs, the co-brokers for Kids Waterfront, allege that CRM acted as an administrator for TIWCT, handling claims and underwriting the risks, at the time of the application, and was responsible for the admission of employers as members of TIWCT. Based on this, they assert two claims against CRM. The first is for equitable subrogation, seeking recovery of legal fees and expenses incurred by TIWCT in defending the Kids Waterfront in the personal injury

action. They assert that this loss was created by and/or resulted from CRM's negligence and failure to fulfill its responsibilities to TIWCT and Clarendon Insurance, by failing to ensure that the Kids Waterfront met and complied with the underwriting guidelines of TIWCT. The second claim seeks contribution, asserting that but for CRM's negligence and failure to satisfy its responsibilities to TIWCT, the main action would not be cognizable, and thus, CRM is liable for the proportionate share of any damages suffered by TIWCT and Clarendon Insurance which were caused by its acts or omissions.

The motion to dismiss is granted only to the extent that the first claim of the third-party complaint is dismissed, and is otherwise denied. The court finds that the complaint fails to state a cause of action based upon principles of equitable subrogation. "Subrogation is 'an equitable doctrine [that] entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse'" Federal Ins. Co. v North Am. Specialty Ins. Co., 47 AD3d 52, 62 (1st Dept 2007), quoting North Star Reins. Corp. v Continental Ins. Co., 82 NY2d 281, 294 (1993). Clearly, third-party plaintiffs were not insurers of plaintiffs, and cannot stand in their respective shoes.

The doctrine of equitable subrogation has been applied outside the insurance context where one party pays the debt for which another is primarily answerable, which in equity and good conscience should have been discharged by the other, and payment was made either under compulsion, or for the protection of some interest of the party making the payment (e.g. to protect the party's own rights or save its own property). See Gerseta Corp. v Equitable Trust Co. of N.Y., 241 NY 418, 425-26 (1926); see also Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp., 64 AD3d 85, 105-06 (2d Dept), lv dismissed 13 NY3d 900 (2009). The payment must not be voluntary, that is, it must be either required by contract, or to protect the party's legal or economic interests. With regard to the latter ground, the party seeking subrogation must show the act is not simply helpful but necessary to protect its interests. Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937 (2d Dept 2010). There is no need, however, to prove payment to bring an impleader action for subrogation, only the right to recover on the claim. See Krause v American Guar. & Liab. Ins. Co., 22 NY2d 147, 151-53 (1968). Subrogation, in these circumstances, depends on the "particular relationship of the parties and the nature of the controversy." Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp., 64 AD3d at 106.

In Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp., (64 AD3d 85, supra), the court found that the plaintiff, a developer of a 177-unit residential development, had "an undeniable interest in the timely completion and approval of the project." (id. at 107), which interest was threatened when the town withheld certificates of occupancy, and stopped work on the project. Plaintiff responded by paying the town environmental fees and engineering costs, satisfying the town's conditions for continuing work, and bringing a subrogation claim against an excavation contractor. The court found that the payments were made to protect the developer's interest in the completion of the project. The third party actually responsible for these fees was the principal on the performance bond, the excavation contractor, who was obligated to pay the town under the bond. The court found this was sufficient for an equitable subrogation claim (id. at 105-08).

The instant case lacks such a relationship, and the third-party plaintiffs fail to allege that any payment they may make to TIWCT for misrepresentations on their applications is the debt for which CRM is primarily answerable, and that it is not voluntary. See Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, supra (owner who elected to pay subcontractors directly, even though already paid contractor in full, could not seek equitable subrogation from contractor, because payment was

voluntary). Their claim that CRM was responsible for failing to uncover their alleged misrepresentations is insufficient. Moreover, third-party plaintiffs, while purporting to sue as the subrogees of plaintiffs, are not suing the entity responsible for the injuries sustained by the worker in the underlying action, for which plaintiffs paid out the funds they seek. See Federal Ins. Co. v Spectrum Ins. Brokerage Servs., 304 AD2d 316, 317 (1st Dept 2003). Instead, third-party plaintiffs are seeking recovery from the underwriter for the insured party TIWCT, which allegedly failed to properly investigate and discover their misrepresentations. CRM's duty was to TIWCT, not to brokers of parties applying to become members of TIWCT. While the scope of subrogation is broad, it cannot encompass the third-party claim here. See Federal Ins. Co. v Spectrum Ins. Brokerage Servs., Inc., 304 AD2d at 317. Therefore, the first third-party claim for equitable subrogation is dismissed.

The contribution claim, however, is sufficient to state a claim. A contribution claim lies where the alleged wrongdoer breaches a duty of care owed either to the injured party, in this case the plaintiffs, or to a co-defendant. Linares v United Mgt. Corp., 16 AD3d 382 (2d Dept 2005); see also CPLR 1401. The critical requirement for contribution apportionment is that the breach of duty by the contributor "must have had a part in causing or augmenting the injury for which contribution is

sought." Trump Vil., Section 3, Inc. v New York State Hous. Fin. Agency, 307 AD2d 891, 896 (1st Dept), lv denied 1 NY3d 504 (2003) (quotation marks and citations omitted). It is available whether or not the parties are allegedly liable for the injuries under the same or different theories. Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 (1988). It can be invoked against concurrent, independent, alternative, successive, and even intentional tortfeasors. Raquet v Braun, 90 NY2d 177, 183 (1997).

Third-party plaintiffs have alleged that CRM was responsible for investigating and underwriting applications for plaintiff TIWCT, including the one submitted by them. They allege that CRM breached its duty to plaintiffs by failing to exercise due diligence in its underwriting duties, specifically by failing to investigate and discover that the Kids Waterfront was not engaged in the business of "local trucking," but was actually a debris removal company. Apparently, debris removal companies were not appropriate businesses for membership in TIWCT, and claims involving injuries to their employees would not be covered under TIWCT's workers' compensation policy. This caused plaintiffs' damages in defending and paying damages in the underlying personal injury action. Clearly, as plaintiffs' underwriter, CRM had a duty to plaintiffs, which third-party plaintiffs have alleged CRM breached. It does not matter that CRM is allegedly

liable under a different theory of liability than the third-party plaintiffs. This claim is sufficient at this stage of the litigation.

CRM's argument that the third-party plaintiffs failed to properly commence their action by failing to file and serve all prior pleadings on CRM within 120 days of the filing of the third-party summons and complaint (CPLR 1007) is rejected. Third-party plaintiffs have demonstrated that their complaint was filed on April 20, 2010, so that they had until August 17, 2010 (which was after this motion was initially made) to serve the prior pleadings, and that the prior pleadings were annexed to the opposition papers. Therefore the third-party action complies with CPLR 1007.

The branch of the motion to sever the third-party action is denied. The note of issue has not yet been filed in the main action, and as noted above, the third-party action was timely commenced after completion of the depositions of the defendants. The parties are directed to conduct discovery in the third-party action expeditiously.

Accordingly, it is

ORDERED that the motion to dismiss the third-party complaint is granted only to the extent that the first cause of action of the third-party complaint is dismissed, and is otherwise denied; and it is further

ORDERED that third-party defendant is directed to serve an answer to the third-party complaint within 20 days after service of this order with notice of entry; and it is further

ORDERED that the parties are directed to attend the previously scheduled status conference on April 12, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 9:30 A.M.

This is the decision and order of the court.

Dated: FEB 17 2011 ENTER:

J.S.C.

FILED

FEB 25 2011

NEW YORK
COUNTY CLERK'S OFFICE