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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

WESTCHESTER TRIANGLE HOUSING DEVELOPMENT FUND CORPORATION, INTEGRATED BUILDING SYSTEMS, INC., WESTCHESTER LLC, and M. MELNICK & CO.,

Plaintiffs,

- against -

BURLINGTON INSURANCE COMPANY, A. ENRICO CONTRACTING CORP., ILLINOIS UNION INSURANCE COMPANY, and J&R MASONRY, INC.,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 22528/10

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3, 4
Replying Affidavits 5, 6, 7
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's 8

The defendants Illinois Union Insurance Company and J&R Masonry, Inc. move pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the verified complaint declaring the plaintiffs are not additional insureds on the Illinois Union Insurance Company policy, declaring Illinois Union Insurance Company is not obligated to provide insurance coverage, defense, or indemnity to the plaintiffs, and to grant costs and disbursements to Illinois Union Insurance Company. These defendants contend the verified complaint should be dismissed against them based on documentary evidence, lack of standing,

failure to satisfy a condition precedent, the statute of frauds, and failure to state a cause of action. The underlying action seeks a declaration on the plaintiffs' rights and the defendants' obligations for contractual indemnity and additional insured coverage arising from construction contracts. Deposition testimony has been taken, and is provided here together with other relevant papers.

The plaintiffs claim entitlement to insurance coverage as additional insureds on a February 24, 2006 insurance policy issued by Illinois Union Insurance Company to J&R Masonry, Inc. The claim arises from an alleged construction contract between the plaintiff M. Melnick & Co., Inc. and J&R Masonry, Inc.. The defendants contend documentary evidence shows that contract was executed after the underlying loss, so there is no basis for coverage to be extended to anyone as an additional insured based on that contract. The defendants point out the construction contract recites it involved a project location other than the situs of the January 17, 2006 injury at 871 Westchester Avenue, Bronx, New York to Hugo Carrera, an employee of Danica, Inc., the plumbing contractor. That project involved the construction of an apartment building, community room and retail space. The defendants assert other policy defenses, including the plaintiffs' failure to give timely notice to Illinois Union Insurance Company, which is a condition precedent to coverage, and the application of the designated work exclusion demonstrate no coverage is afforded to the plaintiffs even if they could otherwise show status as additional insureds.

The plaintiffs oppose the defense motion, and cross move pursuant to CPLR 305 to amend the caption to correct a clerical error by changing the plaintiff Westchester LLC to Westchester Triangle LLC, and to dismiss the defense motion and award costs and fees incurred in the plaintiffs' response to the defense motion. The plaintiffs contend M. Melnick & Co., Inc. contracted with J&R Masonry, Inc. For the work identified and described in riders A, B and C to the February 24, 2006 insurance policy issued by Illinois Union Insurance Company to J&R Masonry, Inc. The plaintiffs aver that contract incorporates by reference the terms and conditions of the prime contract between the Westchester Triangle LLC and M. Melnick & Co., Inc. The plaintiffs assert the February 24, 2006 contract required J&R Masonry, Inc. to procure additional insured coverage, and to indemnify the plaintiffs and hold them harmless.

The defense replies to the plaintiffs' first argument the defense motion is premature, and contend the plaintiffs' assertion is frivolous. The defense contends the plaintiffs' position on the entitlement to insurance coverage as additional insureds is misplaced under the express terms of the insurance policy. The defense asserts coverage is measured by the additional insured endorsement and the construction of the written contract not upon inadmissible parole evidence. The defense avers the contract was not executed prior to the loss. The defense claims rider B was not executed. The defense reiterates the contract identifies a different project location than the injury site. The defense adds the insurance certificate was not plead as a basis for additional insured

coverage, and in any event, it cannot serve as the basis for an estoppel cause of action. The defense contends the schedule of additional insureds is internal to the endorsement and the underwriting file is irrelevant. The defense claims the plaintiffs misunderstand and distort the "arising out of" limitation in the additional insured endorsement, and the supplementary payments provision as to insurance coverage. The defense asserts the voluntary payment condition is a contractual policy issue distinguished from the voluntary payment doctrine. The defense reiterates the plaintiffs' notice was late as demonstrated in the documentary evidence.

J&R Masonry, Inc. contends testimony shows there is no basis in the plaintiffs' allegation that J&R Masonry, Inc. created the condition which caused injury to Carrera. The defense notes the plaintiffs provided a discontinuance to the plumbing contractor, and adds should the plaintiffs prevail in this litigation it will have prejudiced the defense rights in seeking additional coverages from other responsible parties.

The plaintiffs reply to the opposition by J&R Masonry, Inc. to the defense request to amend the caption *nunc pro tunc*. The plaintiffs maintain there is no undue prejudice to the defendants. The plaintiffs this amendment should be permitted as a matter of law. The plaintiffs point out discovery is incomplete, and there have been no depositions nor a request for a preliminary conference. The plaintiffs note Westchester Triangle LLC has been a defendant for the past five years in the Carrera litigation where the defendants fully funded a defense and controlled that same personal injury litigation, so this

amendment is not a surprise.

Illinois Union Insurance Company opposes the plaintiffs' request to amend the lawsuit caption because it will not correct the other pleading deficiencies in the substance of the contract. Illinois Union Insurance Company asserts, contrary to the plaintiffs' assertions, this modification is not an insignificant change nor a mere misnomer, but rather creates unfair surprise and prejudice to the defendants. Illinois Union Insurance Company points out the plaintiffs fail to state any corporate details about Westchester Triangle LLC, so the Court does not have sufficient jurisdictional allegations to determine whether that entity even has standing to sue in New York. Illinois Union Insurance Company also notes the contract identifies the project as the Westchester Triangle Apartments, 225 Willow Avenue, Bronx, New York, and the owner as Westchester Triangle LLC at 225 Willow Avenue, Bronx, New York, but the complaint seeks coverage for a project at 871 Westchester Avenue, Bronx, New York. Illinois Union Insurance Company indicates neither the contract nor the complaint identify who is the owner of 871 Westchester Avenue, Bronx, New York. and what is the relationship of Westchester Triangle LLC to that work site.

The plaintiffs reply to the opposition by Illinois Union Insurance Company. The plaintiffs contend Illinois Union Insurance Company fails to show prejudice with respect to the caption change. The plaintiffs note Illinois Union Insurance Company provided a defense and indemnity to J&R Masonry, Inc., and has not denied it is the insurer adjusting

and controlling the defense for J&R Masonry, Inc. in the litigation by Carrera where Westchester Triangle LLC has been involved for three years. The plaintiffs contend the complaint adequately asserts causes of action against Illinois Union Insurance Company, and the contract between J&R Masonry, Inc. and M. Melnick & Co., Inc. expressly provides fro the contractual obligation to procure insurance and indemnity for the benefit of Westchester Triangle LLC.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Second Department stated:

> In considering a motion to dismiss pursuant to CPLR 3211, the court must afford the complaint a liberal construction and "determine only whether the facts as alleged fit within any cognizable legal theory" (***Leon v. Martinez***, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" . (***EBC I, Inc. v. Goldman, Sachs & Co.***, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26). Contrary to the defendants' contentions on appeal, the allegations of the complaint are sufficient to state a viable cause of action sounding in breach of fiduciary duty. Furthermore, "CPLR 3211 allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal ... [U]nless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint" (***Rovello v. Orofino Realty Co.***, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970)

Reiver v. Burkhart Wexler & Hirschberg, LLP, 73 A.D.3d 1149, 1150, 901 N.Y.S.2d 690 [2nd Dept, 2010].

The Second Department held:

> A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Fortis Fin. Servs. v. Fimat Futures USA***, 290 A.D.2d 383, 383, 737 N.Y.S.2d 40; ***see Leon v.***

> ***Martinez***, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; ***Martin v. New York Hosp. Med. Ctr. of Queens***, 34 A.D.3d 650, 826 N.Y.S.2d 85; ***Berger v. Temple Beth-El of Great Neck***, 303 A.D.2d 346, 347, 756 N.Y.S.2d 94)

Fontanetta v. Doe, 73 A.D.3d 78, 83-84, 898 N.Y.S.2d 569 [2nd Dept, 2010].

The Second Department explained:

> In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (***Fontanetta v. John Doe 1***, 73 A.D.3d 78, 84-86, 898 N.Y.S.2d 569). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211(a)(1) (***see Suchmacher v. Manana Grocery***, 73 A.D.3d 1017, 900 N.Y.S.2d 686; ***Fontanetta v. John Doe 1***, 73 A.D.3d at 85-87, 898 N.Y.S.2d 569)

Granada Condominium III Ass'n v. Palomino, 78 A.D.3d 996, 996-997, 913 N.Y.S.2d 668 [2nd Dept, 2010].

This Court determines the material submitted by these defendants, does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1), and failed to utterly refute the plaintiff's allegations and conclusively establish a defense as a matter of law (***see Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., et al.***, 10 A.D.3d 267, 780 N.Y.S.2d 593 [1st Dept, 2004].

The Second Department articulated:

> "On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Breytman v. Olinville Realty, LLC***, 54 AD3d 703, 703–704; ***see Leon v. Martinez***, 84 N.Y.2d 83, 87). Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the

> plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (***see Guggenheimer v. Ginzburg***, 43 N.Y.2d 268, 274–275; ***Fishberger v. Voss***, 51 AD3d 627, 628)

Rietschel v. Maimonides Medical Center, --- N.Y.S.2d ----, 2011 WL 1441541 [2nd Dept, 2011].

This Court finds, contrary to the defense contentions, none of the defendants are entitled to dismissal of the verified complaint pursuant to CPLR 3211(a) (7).

> The Second Department held, in an CPLR 3211 (a) (5) issue:
> In determining which limitations period is applicable to a given claim, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties (***see Western Elec. Co. v Brenner***, 41 NY2d 291, 293; ***Doe v Jacobs***, 19 AD3d 641, 642; ***Rutzinger v Lewis***, 302 AD2d 653, 654)

Tong v. Target, Inc., 2011 N.Y. Slip Op. 03585 [2nd Dept, 2011].

The Second Department also stated:

> Where, as here, "it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts" (***Trepuk v Frank***, 44 NY2d 723, 725; ***see Sargiss v Magarelli***, 12 NY3d at 532; ***see Pericon v Ruck***, 56 AD3d 635, 636-637; ***Oggioni v Oggioni***, 46 AD3d 646, 648-649; ***Saphir Intl., SA v UBS PaineWebber Inc.***, 25 AD3d 315, 316).

Gorelick v. Vorhand, 2011 N.Y. Slip Op. 03207 [2nd Dept, 2011].

Here, the defense has not met their burden with respect to dismissal under CPLR 3211 (a) (5) with regard to lack of standing, failure to satisfy a condition precedent, nor the statute of frauds.

> The Second Department held:
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> Leave to amend pleadings should be "freely given" (CPLR 3025 [b]). "In

> the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***Lucido v Mancuso***, 49 AD3d 220, 222 [2008])

Kiaer v. Gilligan, 63 A.D.3d 1009, 1011, 883 N.Y.S.2d 224 [2nd Dept, 2009].

The plaintiffs have not delayed this matter seeking to amend the caption of the complaint, and neither the defendants have not identified any palpable insufficiency or patent lack of merit in the proposed amendment.

Accordingly, the defense motion is denied, and the cross motion granted only to the extent of amending the caption by changing the plaintiff Westchester LLC to Westchester Triangle LLC without costs, disbursements or fees as to either motion.

So ordered.

Dated: **May 3, 2011**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION