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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 112377/2008

CITIZENS INSURANCE

VS

HATZIGEORGIOU, ARISTOTLE

Sequence Number : 002

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 consolidated with motion sequence no. 003 and the consolidated motions are determined in accordance with the annexed decision and order.

FILED

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 8, 2011

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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CITIZENS INSURANCE COMPANY OF AMERICA d/b/a HANOVER INSURANCE GROUP,

Plaintiff,

INDEX NO. 112377/08

-against-

ARISTOTLE HATZIGEORGIOU, individually and d/b/a PLAY, ALEXANDRA G. JULIANO, individually and d/b/a PLAY, JOHN MICHAEL MAGLIO, individually and d/b/a PLAY, GLOBAL ENTERTAINMENT GROUP, LLC, individually and d/b/a PLAY, PLAY and ANNA FERNANDEZ, as Administratrix of the Estate of MARLENE RIVERA, deceased,

Defendants.

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JOAN A. MADDEN, J.:

In this action for declaratory relief as to insurance coverage, plaintiff Citizens Insurance Company of America d/b/a Hanover Insurance Group ("Hanover") moves for an order pursuant to CPLR 2221(e) granting leave to renew the decision of this Court dated June, 2010, which denied its motion for summary judgment and upon a search of the record awarded summary judgment to defendants declaring that plaintiff is obligated to defend and indemnify defendants in the underlying action (motion sequence no. 002). Upon renewal, plaintiff seeks an order granting summary judgment declaring that it owes no defense or indemnity obligation to defendants. Defendants oppose the motion and separately move for an order striking the plaintiff's affidavit in reply of Lorrie Bianchino, sworn to on November 23, 2010, and the affirmation in reply of William F. Ryan, dated November 18, 2010 (motion sequence no. 003).[1]

[1]Motion sequence nos. 002 and 003 are consolidated for disposition.

"An application for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore not made known to the court." Foley v. Roche, 68 AD2d 558, 567-568 (1st Dept 1979); accord Elson v. Defren, 283 AD2d 109, 113 (1st Dept 2001). In accordance with CPLR 2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3); see Foley v. Roche, supra at 567.

Although renewal ordinarily involves newly discovered facts, this requirement is flexible and the court in its discretion may grant such relief in the interest of justice upon facts previously known, if the party seeking renewal offers a reasonable excuse for its failure to include such facts on the original motion . Scannell v Mt. Sinai Medical Center, 256 AD2d 214 (1st Dept 1998); Framapac Delicatessen, Inc. v Aetna Casualty & Surety Co., 249 AD2d 36 (1st Dept 1998); Martinez v Hudson Armored Car & Courier, Inc., 201 AD2d 359 (1st Dept 1994); Segall v Heyer, 161 AD2d 471 (1st Dept 1990). Renewal, however, "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Rubinstein v. Goldman, 225 AD2d 328, 329 (1st Dept), lv app den 88 NY2d 815 (1996) (quoting Matter of Beiny, 132 AD2d 190 [1st Dept 1987), lv app dism 71 NY2d 994 [1988]); accord CPA Mutual Insurance Co of America Risk Retention Group v. Weiss & Co, 80 AD3d 431 (1st Dept 2011); Mike v. Riverbay Corp, 56 AD3d 357, 358 (1st Dept 2008); American Audio Service Bureau Inc v. AT&T Corp, 33 AD3d 473, 476 (1st Dept 2006); Chelsea Piers Management v. Forest Electric Corp, 281 AD2d 252 (1st Dept 2001).

Applying these standards, the court finds that renewal is not warranted, as plaintiff fails to provide a reasonable justification for its failure to present the "new facts" in its original papers in support of its motion for summary judgment. See Cabrera v. Gilpin, 72 AD3d 552 (1st Dept 2010). As the additional evidence in support of renewal, plaintiff submits a letter dated July 16, 2008, and asserts this was the letter disclaiming coverage that was actually sent to defendants, and that the July 9, 2008 letter on which it relied in its original motion papers was a draft that was never sent to defendants. Plaintiff's attorney simply states, without further explanation, that the "wrong letter," i.e. the July 9 letter, was annexed as an exhibit to plaintiff's motion papers, due to an "error" or "oversight" on the part of the attorney's office. Plaintiff argues that as a result of this error, the court did not have the actual disclaimer of coverage letter that was sent to defendants, when it determined that plaintiff failed to issue a timely disclaimer of coverage.

The assertion of plaintiff's counsel that the July 9 letter was mistakenly annexed to the motion papers does not constitute a reasonable justification for its failure to submit the "actual" letter with its original motion papers. Plaintiff commenced this action seeking a declaration that defendants were not entitled to insurance coverage, and submitted the July 9 letter in support of its motion for judgment as a matter of law, to show that it sent defendants a timely disclaimer of coverage. In opposition to the motion, defendants argued, *inter alia*, that plaintiff did not timely disclaim coverage, and asserted that the July 9 letter was a reservation of rights letter and not a disclaimer of coverage. At that point, plaintiff was on notice that the issue as to the nature of the July 9 letter was squarely before the court. Plaintiff responded by submitting reply papers asserting that the July 9 letter constituted a timely and sufficient disclaimer of coverage, and included a affidavit from Lorrie Bianchino, the Senior Litigation Adjuster who stated under oath

that she sent the July 9 letter to defendants. Bianchino also stated under oath that the July 9 letter was a "disclaimer letter" and that "[o]n July 9, 2008, Hanover issued a Reservation of Rights to disclaim coverage based on late notice."

Plaintiff's motion was submitted to this court in December 2009, and on June 29, 2010, the court issued a decision denying the motion and upon a search of record granted judgment to defendants, declaring that plaintiff was obligated to provide defendants with a defense and indemnification. The court determined that defendants failed to provide plaintiff with timely notice of the claim, but ultimately concluded that they were still entitled to coverage because plaintiff did not timely disclaim, as the July 9 letter constituted a reservation of rights, and not a disclaimer of coverage. The court analyzed the content and nature of the July 9 letter and found that it was merely a reservation of rights.

Not until after the court reached that determination, did plaintiff finally come forward with what it now claims to be the "actual" letter purportedly sent to defendants disclaiming coverage, in direct contravention of its prior position with respect to the letter on which it relied in the original motion. Even accepting the explanation that the office of plaintiff's counsel mistakenly annexed the wrong letter to the motion papers, that explanation is not a reasonable justification for neglecting to submit the letter with the original motion, or at some time before the original motion was decided. Of particular significance is plaintiff's failure to submit the letter in reply, when the issue with respect to the nature of the July 9 letter was raised by defendants in their opposition papers. It is well settled law that renewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation. See CPA Mutual Insurance Co of America Risk Retention Group v. Weiss & Co,

supra; Mike v. Riverbay Corp, supra; American Audio Service Bureau Inc v. AT&T Corp, supra; Chelsea Piers Management v. Forest Electric Corp, supra; Rubinstein v. Goldman, supra; Matter of Beiny, supra. Under the circumstances presented, where plaintiff claims that it submitted and relied on the wrong letter and provides no further explanation, it is clear that plaintiff did not exercise the appropriate degree of due diligence when it made its first factual presentation to this court, and for that reason, plaintiff is not entitled to renewal.

Finally, in view of this conclusion, it is not necessary to consider plaintiff's new and self-serving affidavits from Lorrie Bianchino (dated August 10, 2010 and November 23, 2010), which directly controvert the sworn statements in her prior affidavit submitted in support of the original motion.

Accordingly, it is hereby

ORDERED that plaintiff's motion (002) for leave to renew is denied; and it is further

ORDERED that defendants' motion (003) to strike is denied as moot.

DATED: July 8, 2011

ENTER:

J.S.C.