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SHORT FORM ORDER

INDEX No. 10-41469

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MD
003 - MotD
004 - MotD

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PARK EAST CONSTRUCTION CORP.,

Plaintiff,

- against -

ALLIANCE MAINTENANCE & MANAGEMENT, INC. and ARROW STEEL WINDOW CORP.,

Defendants,

VALIANT INSURANCE COMPANY, EVEREST NATIONAL INSURANCE COMPANY, HUB INTERNATIONAL NORTHEAST LIMITED and MERCHANTS MUTUAL INSURANCE COMPANY,

Additional Defendants.

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STEVEN G. RUBIN & ASSOCIATES, P.C.
Attorney for Plaintiff Park East Construction
100 Jericho Quadrangle, Suite 225
Jericho, New York 11753

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
Attorney for Defendant Alliance Maintenance
140 Broadway, 19th Floor
New York, New York 10005

RUBIN, FIORELLA & FRIEDMAN, LLP
Attorney for Defendant Arrow Steel
292 Madison Avenue, 11th Floor
New York, New York 10017

RIVKIN RADLER, LLP
Attorney for Defendant Valiant Insurance
926 RXR Plaza
Uniondale, New York 11556

CARROLL, MCNULTY & KULL, LLC
Attorney for Defendant Everest Indemnity
570 Lexington Avenue, 8th Floor
New York, New York 10022

Upon the following papers numbered 1 to 62 read on these motions to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 22; 23 - 33 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 36 - 46; 47 - 62 ; Replying Affidavits and supporting papers 63 - 64 ; Other plaintiff & defendant's memoranda of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (#002 & #004) by defendant HUB International Northeast Limited and the motion (#004) by defendant Everest Indemnity Insurance Company are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Everest Indemnity Insurance Company for an order dismissing the complaint against it pursuant to CPLR 3211 is granted as set forth herein; and it is further

ADJUDGED AND DECLARED that Everest Indemnity Insurance Company has no obligation to defend or indemnify plaintiff Park East Construction Corporation in the instant action; and it is further

ORDERED that the motion by defendant HUB International Northeast Limited for an order dismissing the complaint against it pursuant to CPLR 3211 is granted as set forth herein; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to sever the remainder of the action, which shall continue.

This action arises out a building facade renovation project at the Long Island Board of Realtors building located at 300 Sunrise Highway, West Babylon, New York. The owner of the building hired plaintiff Park East Construction Corporation ("PEC") as the general contractor for the project. A portion of the project involved the installation and glazing of windows for the facade, which was performed by defendant Arrow Steel Window Corporation ("Arrow"), a subcontractor hired by PEC. PEC also hired defendant Alliance Maintenance & Management ("Alliance") to clean the interior and exterior of the windows. PEC alleges that after the window installation, glazing and cleaning was complete, it discovered "systematic nonliner scratches" throughout 95% of the facade's exterior glass surface. As a result, PEC commenced separate actions against Alliance and Arrow seeking to recover damages for the repair and replacement of the windows. By order dated October 17, 2011, this court granted a motion by PEC seeking consolidation of both actions. Arrow joined issue and asserted a counterclaim against PEC based upon breach of contract, alleging that PEC failed to pay the outstanding balance owed to Arrow for its installation and glazing services. Shortly thereafter, PEC sought confirmation from Everest Indemnity Insurance Company ("Everest"), the underwriter of Alliance's insurance policy, that it had liability coverage for the counterclaim, since it was named as an additional insured on Alliance's certificate of insurance.

By correspondence dated August 24, 2011, Everest disclaimed such coverage on the basis that Alliance's work order contract did not require Alliance to indemnify PEC or name it as an additional insured. The correspondence further stated that the certificate of insurance generated by Alliance's insurance broker, HUB International Northeast Limited ("HUB"), naming PEC as an additional insured does not confer coverage, since HUB has no authority to bind Everest for such coverage. PEC sought clarification from HUB, which informed it that the certificate of insurance did not confer liability

coverage for Arrow's counterclaim since it was prepared for informational purposes only and did not alter the terms of the underlying insurance policy which only covered claims for personal injury or property damage. On December 29, 2011, PEC served an amended complaint which impleaded, among others, Everest and HUB as defendants in the consolidated action. The amended supplemental complaint seeks, as relevant to this determination, judgments declaring that Everest and HUB are estopped from disclaiming coverage based on PEC's reasonable reliance on representations contained in the certificate of insurance, which named PEC as an additional insured and the holder of the certificate. It further asserts that HUB owed PEC a duty to ensure that the information contained in the certificate of insurance was true and accurate, and that PEC was damaged by HUB's alleged negligent misrepresentation in this regard.

Everest now moves, pursuant to CPLR 3211(a)(1) and (7), for judgment dismissing PEC's claims on the grounds that it was not contractually required to treat PEC as an additional insured and that, even if PEC qualified as an additional insured, the claim for liability coverage in connection with Arrow's breach of contract counterclaim would fail since only claims of "bodily injury" or "property damage" are covered under the subject policy. Everest also requests that the court treat the motion as one for summary judgment pursuant to CPLR 3211(c), and that it issue a judgment declaring that Everest has no duty to defend or indemnify PEC. HUB seeks dismissal of PEC's complaint, arguing that it was unreasonable for PEC to rely on it for coverage, since the certificate of insurance provided to PEC contained notices disclaiming such reliance and HUB shared no relationship with PEC approximating privity. In support of the motion, the movants submit, inter alia, copies of the pleadings, the certificate of insurance, the underlying insurance policy, and the insurance policy declarations sheet. PEC opposes both motions on the bases that its claims are sufficiently stated and not refuted by documentary evidence, and that triable issues exist as to whether HUB acted as Everest's authorized agent and, if so, whether the certificate of insurance naming it as an additional insured conferred PEC coverage under the underlying insurance policy.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Hense v Baxter, 79 AD3d 814, 815 [2d Dept 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (Hense v Baxter, supra at 815). In contrast, a motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Granada Condominium III Assn. v Palomino, 78 AD3d 996, 996 [2d Dept 2010]). Whether to treat a motion to dismiss pursuant to CPLR 3211 as a motion for summary judgment pursuant to CPLR 3212 is within the Court's discretion (see Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]; Bronner v Butterfield, 2 AD3d 475 [2d Dept 2003]). Therefore, while CPLR 3211 (c) permits the court, after adequate notice to the parties, to treat a motion pursuant to CPLR 3211 as one for summary judgment, it is not required to do so (see Siddiqui v Nationwide Mut. Ins. Co., 255 AD2d 30 [3d Dept 1999]; SPI Communications v WTZA-TV Assoc. Ltd. Partnership, 229 AD2d 644 [3d Dept 1996]).

It is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement (see Kidalso Gas Corp. v Lancer Ins. Co., 21 AD3d 779, 780-791 [1st Dept 2005]; Moleon v Kreisler Borg Florman Gen. Constr. Co., 304 AD2d 337 [1st Dept 2003]). "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (Tribeca Broadway Assoc. LLC v Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 [1st Dept 2004]; *see* Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co., 74 AD3d 1751 [4th Dept 2010]; School Const. Consultants, Inc. v ARA Plumbing & Heating Corp., supra). Moreover, where a certificate of insurance offered to establish coverage states that it "issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the [general liability] policies listed below" such certificate is insufficient, in and of itself, to establish that a defendant is an additional insured (Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co., 55 AD3d 671, 673 [2d Dept 2008]; see School Const. Consultants, Inc. v ARA Plumbing & Heating Corp., 63 AD3d 1029 [2d Dept 2009]; ALIB, Inc. v Atlantic Cas. Ins. Co., 52 AD3d 419 [1st Dept 2008]). Although an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage where the party reasonably relies on the certificate of insurance to its detriment (see Sevenson Envtl. Services. Inc. v Sirius Am. Ins. Co., 74 AD3d 1751, 1753 [4th Dept 2010], citing Lenox Realty v Excelsior Ins. Co., 255 AD2d 644 [3d Dept 1998], lv denied 93 NY2d 807[1999]; Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207 [3d Dept 1989]), the party claiming estoppel must establish that they reasonably relied on the certificate, and that they lacked knowledge of and the means of knowledge of the truth of the assertions contained therein (see Brelsford v USAA, 289 AD2d 847, 849 [3d Dept 2001]; Michaels v Travelers Indem. Co., 257 AD2d 828, 829 [3d Dept 1999]).

Initially, the Court notes that the motion (# 002) by HUB for dismissal of PEC's complaint is denied as moot, as HUB has submitted an amended motion (# 004) seeking identical relief in connection with PEC's submission of an amended supplemental summons and complaint. Additionally, the branches of the motions by Everest and Alliance seeking dismissal of PEC's complaint pursuant to CPLR 3211(a)(7) are denied, as PEC adequately pleaded valid causes of action based upon equitable estoppel (Brelsford v USAA, supra; Michaels v Travelers Indem. Co., supra), and negligent misrepresentation (see Parrott v Coopers & Lybrand, 95 NY2d 479 [2000]; Sykes v RFD Third Ave. 1 Assoc., LLC, 67 AD3d 162 [1st Dept 2009]).

Notwithstanding the sufficiency of PEC's pleadings, movants' documentary submissions, including a copy of the certificate of insurance and the underlying insurance policy, utterly refute the factual allegations on which PEC's cause of action for equitable estoppel are based. Significantly, PEC's alleged reasonable reliance on the inclusion of its name as an additional insured on the certificate of insurance is refuted by disclaimers included in the certificate notifying the certificate holder that the certificate was "issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the [general liability] policies listed below" Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co., supra at 673; see School Const. Consultants, Inc. v ARA Plumbing & Heating Corp., supra; American Ref-Fuel Co. of Hempstead v

Resource Recycling, 248 AD2d 420 [2d Dept. 1998]). Additionally, PEC can hardly be said to have lacked the means of ascertaining knowledge of the truth of the representations contained in the certificate of insurance, since the underlying insurance policy did not list it as an additional insured (see Tribeca Broadway Assoc. LLC v Mount Vernon Fire Ins. Co., supra; American Ref-Fuel Co. of Hempstead v Resource Recycling, supra; see also Metzger v Aetna Ins. Co., 227 NY 411 [1920]; Rogers v Urbanke, 194 AD2d 1024 [3d Dept 1993]; Wausau v Underwriters Ins. Co. v St. Barnabas Hosp., 145 AD2d 314 [1st Dept 1988]). Furthermore, assuming arguendo that the subcontract required PEC be added as an additional insured to the underlying policy, PEC cannot assert the doctrine of estoppel to create coverage against Arrow's counterclaim for breach of contract, as the underlying insurance policy limits coverage to claims for personal injury or property damage only (see ALIB, Inc. v Atlantic Cas. Ins. Co., supra; Greater N.Y. Mut. Ins. Co. v White Knight Restoration, 7 AD3d 292 [1st Dept 2004]; Moleon v Kreisler Borg Florman General Const. Co., 304 AD2d 337 [1st Dept 2003]; Penske Truck Leasing Co., L.P. v Home Ins. Co., 251 AD2d 478 [2d Dept 1998]; American Ref-Fuel Co. of Hempstead v Resource Recycling., supra; Sena v Nationwide Mut. Fire Ins. Co., 224 AD2d 513 [2d Dept 1996]). Accordingly, the branches of the motions by HUB and Everest seeking dismissal of PEC's claims against them based upon the theory of equitable estoppel is granted. Based upon the foregoing, the Court further grants the branch of Everest's motion seeking a declaration that it is not obligated to defend or indemnify PEC in the underlying action.

As for the branch of HUB's motion seeking dismissal of PEC's claim for negligent misrepresentation, certificates of insurance containing disclaimers that they are for information only may not be used as predicates for a claim of negligent misrepresentation (see Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos., 303 AD2d 245 [1st Dept 2003]; St. George v W.J. Barney Corp., 270 AD2d 171 [1st Dept 2000]; see also American Ref-Fuel Co. of Hempstead v Resource Recycling, supra). Moreover, it is generally accepted that the duty of an insurance broker runs to its customer and not to an additional insured, as no privity of contract exists between the broker and the additional insured justifying the imposition of liability (see Arredondo v City of New York, 6 AD3d 328 [1st Dept 2004]; Greater N.Y. Mut. Ins. Co. v White Knight Restoration, Ltd., supra; Wainwright v Charlew Const. Co., 302 AD2d 784 [3d Dept 2003]; Brunner v United House of Prayer For All People of Church on Rock of Apostolic Faith, 292 AD2d 319, 323 [1st Dept 2002]; American Ref-Fuel Co. of Hempstead v Resource Recycling, supra). Here, it is undisputed that HUB did not share any contractual relationship with PEC, and that the insurance certificate it provided to PEC specifically notified it that the certificate was issued for "information purposes only." In addition, HUB did not create a relationship closely approximating privity with PEC by merely providing it with a certificate of insurance (see eg Greater N.Y. Mut. Ins. Co. v. White Knight Restoration, Ltd., supra at 323; see also Arredondo v City of New York, supra; Brunner v United House of Prayer For All People of Church on Rock of Apostolic Faith, supra; American Ref-Fuel Co. of Hempstead v Resource Recycling, supra).

Furthermore, the Court finds PEC's conclusory assertion that a triable issue exists as to whether HUB may be considered Everest's authorized agent to be without merit, as it is premised upon one section of the certificate which merely notified PEC that the certificate of insurance was signed by an "Authorized Representative" of "HUB International Northeast Limited." PEC's conclusory and unsubstantiated assertion that HUB acted as Everest's authorized agent, because Insurance Law

§2117(h) provides that "any excess line broker . . . may exercise binding authority and execute an authority to bind coverage on behalf of an insurer not licensed or authorized to do business in [New York]" is equally unavailing, as it failed to offer any evidence that such an arrangement existed between HUB and Everest. Therefore, the branch of HUB's motion seeking dismissal of PEC's claim against it for negligent misrepresentation, also is granted.

Finally, because the branches of defendants' motions seeking dismissal of the complaint pursuant to CPLR 3211(a)(1) are granted, their request that the motions be converted to motions for summary judgment pursuant to CPLR 3211(c) is denied, as moot. The action is severed and continued against the remaining defendants.

Dated: November 1, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

TO: HAVKINS ROSENFELD RITZERT & VARRIALE, LLP
Attorney for Defendant Hub International
1065 Avenue of the Americas, Suite 800
New York, New York 10018

GUARARRA & ZAITZ LLP
Attorney for Defendant Merchants Mutual
100 Park Avenue, 20th Floor
New York, New York 10017

CHARLES R. PIERCE, JR., ESQ.
Attorney for Defendant Arrow Steel on Counterclaim
350 Lexington Avenue
Oyster Bay, New York 11771