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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 6

Index Number : 108974/2006
WASEK, MACIEJ
vs.
HEALTH & HOSPITALS CORPORATION
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT CAL: #107

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 19 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-15-13
AUG 15 2013

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

MACIEJ WASEK,

Plaintiff,

-against-

NEW YORK CITY HEALTH & HOSPITALS CORPORATION AND THE CITY OF NEW YORK,

Defendants.

----------X

NEW YORK CITY HEALTH & HOSPITALS CORPORATION AND THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

CONSTRUCTION FORCE SERVICES, INC., CONSTRUCTION FORCE SERVICES LLC and C FORCE SYSTEMS LLC,

Third-Party Defendants.

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DECISION/ORDER
Index No. 108974/2006
Seq. No. 009

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Index No. 591183/2009
Seq. No. 010

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED (Seq. No. 009)
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2..(Exs. O, Q & R)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3..(Exs. C, D&E)
REPLYING AFFIDAVITS.....	.....4.....
OTHER.....(memo of law).....	.....5.....

PAPERS	NUMBERED (Seq. No. 010)
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 (Ex.C)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3-6.....
REPLYING AFFIDAVITS.....	.....8.....
OTHER.....(memo of law).....	.....7.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Under Sequence 009, third party-defendant C-Force Systems, LLC, ("C-Force"), moves for an Order pursuant to CPLR§ 3212, seeking summary judgment and a dismissal of the third-party action against it. Defendants and third-party plaintiff (New York City Health and Hospitals Corporation ("HHC") and the City of New York (the "City"), oppose. Under Sequence 010, third-party defendant, Construction Force Services moves for an Order pursuant to CPLR§ 3212, seeking summary judgment and dismissing the third-party complaint and any cross-claims.

It is important to note that HHC and the City submit one set of opposition papers to the motions submitted under both sequence numbers for the Court's convenience.

After a review a review of the papers presented, all relevant statutes and case law, the Court grants both motions for summary judgment.

Factual and procedural background:

According to third-party defendant C-Force, plaintiff commenced the instant action against defendant/third-party plaintiffs HHC and the City on or about June 16, 2006, to recover damages for an eye injury he alleging sustained on October 6, 2005, while working at 346 Broadway, New York, New York. HHC and the City prepared an Answer. They also commenced a third party action against C-Force Systems, LLC, Construction Force Services, Inc. ("CFS, Inc."), and Construction Force Services, LLC., ("CFS, LLC"). The City's third-party pleadings allege claims of contribution, common law indemnity, contractual indemnity and breach of contract to procure insurance. Shortly

after, C-Force appeared in this matter, HHC and the City settled the plaintiff's action for $1.1 million dollars. However, they continued to pursue their third-party claims.

C-Force moved for summary judgment seeking a dismissal against the third-party action against it. CFS, Inc. moved for dismissal of the third party action against it under CPLR§ 3211. HHC and the City opposed the motions but agreed to withdraw their contribution claims due to their settlement with the plaintiff. Justice Barbara Jaffe rendered a written decision denying C-Force's motion seeking dismissal of the common law indemnification, contractual indemnification and breach of contract to procure insurance claims. Justice Jaffe found that discovery was necessary to ascertain if a written contract between C-Force and HHC or the City existed which afforded same contractual indemnification and insurance coverage. Justice Jaffe further denied CFS, Inc.'s motion *sua sponte*, by granting HHC and the City the right to serve an amended pleading asserting claims regarding piercing the corporate veil within 30 days. C-Force subsequently appealed the denial of its summary judgment motion. However, CFS, Inc. did not.

In reliance upon Justice Jaffe's decision, HHC and the City served an amended third-party complaint, which C-Force answered. With respect to C-Force's appeal of the denial of its summary judgment motion, the Appellate Division issued a decision dismissing HHC and the City's claims against C-Force and CFS, Inc. and CFS, LLC, for common law and contractual indemnity. However, it did not dismiss the breach of contract claim against the third-party defendants. The Appellate Division found that both HHC and the City had an agreement with CFS, Inc., for the procurement of insurance, but not with C-Force.

Since the issuance of the Appellate Division's decision, depositions of all parties involved in the third-party action were conducted and other discovery was completed. Subsequently, HHC and the City filed a Note of Issue which was then rejected by the court because its records indicated

that one had already been filed by plaintiff. In an effort to afford the parties time to submit dispositive motions, the court so-ordered a stipulation extending the parties time to do so until November 1, 2012. The court ultimately was compelled to again extend the time to November 29, 2012, due to the ubiquitous damage caused by Hurricane Sandy.

In Sequence No.10, according to third-party defendant, CFS, Inc.,plaintiff commenced this action against defendants and third-party plaintiffs HHC and the City to recover for an eye injury he allegedly sustained while doing construction work on October 6, 2005 at 346 Broadway, New York, New York. HHC and the City subsequently commenced the breach of contract action that is the subject matter of the motion under this sequence number, wherein they allege that CFS, Inc. had failed to procure liability insurance covering HHC for any claims arising out of plaintiff's injury.

CFS, Inc., also asserts that the subject premises are owned by the City and occupied on certain floors by HHC. In 1997, HHC approached CFS, LLC, a temporary staffing agency, about obtaining temporary employees to undertake work at the subject premises. Sometime in 1997 or 1998, all operations of CFS, LLC were transferred to CFS, Inc., which was incorporated in 1996 and is owned by brothers David Terlinsky and Jay Terline. CFS, Inc. operated out of offices located at 131-33 31st Avenue, College Point, New York.

C-Force was a temporary staffing agency that operated from 2003 until late 2009 or early 2010. Its office was located at 1111 Route 110 in Farmingdale, New York. Andrew Terline was President of C-Force. In 2005, C-Force worked in the capacity as subcontractor to CFS, Inc., providing temporary employees to CFS, Inc.'s clients in New York, which included HHC. C-Force had its own clientele to which it directly supplied workers. Plaintiff was employed by C-Force at the time of his accident.

In 1997, CFS, Inc. provided HHC with a proposal detailing the temporary staffing services it could provide at the subject premises and the rates that would be charged. Thus, the parties began negotiations, represented by David Terlinsky for CFS, Inc. and Tom Geldert for HHC. Said negotiations resulted in the creation of a "Labor Proposal" between the parties. The Labor Proposal does not expressly state or make any reference to any obligation by CFS, Inc., to afford indemnification or provide liability insurance for HHC, or name HHC as an additional insured on CFS, Inc.'s own insurance policy.

According to Mr. Terlinsky's deposition testimony, no conversation took place between the parties regarding the prospect of insurance and HHC never asked CFS, Inc., to provide insurance naming it as an additional insured party. However, while the Labor Proposal states that proposed labor rates for temporary employees include "Liability Insurance," Mr. Terlinksy testified that this reference pertained to the purchase of liability insurance by CFS, Inc. for solely itself, and HHC in any capacity. On the date of plaintiff's accident, CFS, Inc. was covered by a liability insurance policy issued by Chubb Group of Insurance Companies. The pertinent excerpts of said policy are annexed to CFS, Inc.'s motion as Exhibit "G."

Positions of the parties:

Now, in the instant motion, C-Force asserts that it is clear from the aforementioned decisions and orders, that the only remaining claim against the third-party defendants is for breach of contract to procure insurance, and as such, the third-party action should be dismissed as against C-Force. C-Force adamantly maintains that is was never obligated to purchase insurance for coverage for defendants via written contract or otherwise. In support of its argument, C-Force refers to and relies on the respective deposition testimony and affidavits of Andrew Terline on its behalf, and also the deposition testimony and affidavit of Salvatore Canatore, on behalf of defendants' HHC and the City

to unequivocally establish that C-Force never agreed to procure insurance coverage and was never asked or agreed to procure insurance coverage for HHC or the City. Therefore, it cannot be accused of breaching a contract which called for the procurement of such coverage.

In his affidavit , Mr. Terline states that C-Force never entered into a written or any other type of contract with HHC or the City, and especially never entered into any type of contract wherein it agreed to procure insurance for either of them. He also states that no representative from HHC or the City ever asked anyone at C-Force to purchase insurance coverage for them and that no one from C-Force ever promised or agreed to provide same. Mr. Terline was also deposed by HHC and the City on March 6, 2012. His transcribed testimony is annexed to the instant moving papers as Exhibit "Q." While C-Force alleges that the purpose of said deposition was to ascertain if it ever agreed to procure insurance coverage for HHC and the City, a review of the testimony indicates that Mr. Terline was never asked any questions relating to this issue. He was merely asked if C-Force ever entered into a written contract with the City (p. 15) and responded that it had not (p. 15).

Additionally, Mr. Salvatore Canatore, Senior Director of Construction and Maintenance Division of HHC, was deposed on February 22, 2012. His transcribed testimony is annexed as Exhibit "R. C-Force argues that based on the testimony emanating from both Mr. Terline and Mr. Canatore, it is clear that C-Force never agreed to and/or did not purchase any insurance coverage for HHC or the City. Thus, it argues that since it has proven its prima facie entitlement to summary judgment, the dismissal of NYCHH and the City's third-party action against is warranted.

However, C-Force concedes that the only remaining issue is whether HHC and the City have the right to pierce the corporate veil of Services, Inc., as decided by the Appellate Division in its decision, annexed as Exhibit "N." C-Force contends that if the Court determines that none of the third-party defendants agreed to procure insurance for HHC and the City, the prospect of piercing

its corporate veil would be unnecessary. Moreover, C-Force argues that if the Court determines that HHC and the City have the right to pierce the corporate veil, such right would only extend to Services, Inc.

C-Force reminds that Court that the Appellate Division clearly stated that it had decided not to grant summary judgment to C-Force because discovery had not yet commenced regarding the prospective piercing Services, Inc.'s corporate veil, to determine it an agreement to procure insurance was entered into between Services, Inc. and HHC or the City. C-Force also argues that piercing the corporate veil would not provide either HHC or the City recovery against the third-party defendants because no evidence exists that there was an agreement to procure insurance for them.

C-Force also argues that since discovery has been completed, the issue of piercing the corporate veil of Services, Inc. is irrelevant to C-Force's summary judgment motion because HHC and the City have failed to proffer the required evidence proving that C-Force dominated and controlled Services, Inc., and/or any alleged domination caused them to suffer harm. Without evidence satisfying both requirements, a corporate veil cannot be pierced. C-Force further argues that to pierce a corporate veil, plaintiff must prove that one entity dominated or controlled another and that such domination or control caused harm to plaintiff. C-Force argues that based on the affidavit of Andrew Terline on its behalf and the deposition testimony of Jay Terlinsky, on behalf of CFS, Inc., it has been established that they did not have the same officers, directors or shareholders. They did not have the same employees at the same time, did not have the same principal place of business, never shared expenses, and never shared or paid each other's debts. More importantly, they purchased their own respective insurance policies.

CFS Inc. argues that it is entitled to summary judgment dismissing HHC's breach of contract claim as there is no evidence of any contract between them obligating CFS, Inc.,to provide insurance

for HHC. CFS, Inc. also argues that the evidence previously relied on by HHC (ie. the certificate of insurance), does not raise a triable issue of fact to rebut CFS Inc.'s prima facie showing. CFS, Inc. argues that certificates of insurance are not considered to be proof of insurance, or a contract to insure the designated party.

HHC and the City assert that there is "compelling evidence of an oral agreement requiring Services, Inc. to procure insurance coverage for HHC" (Mem. of Law in Opp., p.3). In support of their position that Mr. Terlinsky testified that he understood the reference to "necessary liability insurance" to refer to the liability insurance the company carried at the time, HHC and the City refer to and rely on a specific segment of his deposition.

Q: So, to the extent it says the following rates include all necessary liability insurance, what does that mean?

A: It means the company carries a liability policy.

Q: And what liability policy are you referring to?

A: Whatever liability policy we carried at that time (Terlinsky Dep. at 34:4-10).

HHC and the City argue that Mr. Canatore always understood, based on his dealings with CFS, Inc., that the "liability insurance" notation on the Price Cost Breakdown meant that CFS, Inc. would obtain additional insured coverage for HHC. They also rely on a segment of his deposition testimony at 33, and his affidavit at ¶ 7).

Q: And when it says liability insurance, what does it include?

A: It's general liability.

Q: Does it include the payments you made to cover clients as additional insureds?

A: I'm not sure anything about additional insured. All I know is that to buy liability insurance, that's what we felt it cost per hour.

HHC also argues that since discovery revealed sufficient facts to establish a triable issue of fact regarding the relationship between CFS, Inc and C-Force, C-Force's motion should be denied. It argues that while affiliated corporations are treated separately and independently, and will not be liable for each other's torts or contractual responsibilities, a court may pierce the corporate veil and hold the corporations to a single unit where one is so related to the other as to be its instrumentality or alter ego.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D. 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

The Court first addresses the issue of whether C-Force or CFS, Inc. ever entered into any contract/agreement with HHC or the City concerning the procurement of insurance coverage for them. The Court finds that neither HHC nor the City has presented any evidence which establishes with any degree of certainty, the existence of any contract/agreement (oral or written), wherein the

third-party defendants agreed to procure insurance for them.

A party claiming insurance coverage bears the burden of proving entitlement, and a party that is not named an insured or an additional insured on the face of a policy is not entitled to coverage (see *Moleon v. Kreisler Borg Florman Gen. Constr. Co.*, 304 A.D.2d 337 [1st Dept.2003]). It is well settled that "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage; it is not a contract to insure the designated party, nor is it conclusive proof, standing alone, that such a contract exists" (*Tribeca Broadway Associates, LLC v. Mt. Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200 [1st Dept. 2004]; see also *Kermanshah Oriental Rugs, Inc. v. Gollender*, 47 A.D.3d 438 [1st Dept. 2008]; *Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co.*, 74 A.D.3d 1751, 1753[4th Dept. 2010], *lv dismissed* 13 N.Y3d 893[2009]; *School Const. Consultants, Inc. v. ARA Plumbing & Heating Corp.*, 63 A.D.3d 1029, 1030-1031; *St. George v. WJ Barney Corp.*, 270 A.D.2d 171 [1st Dept. 2000] Moreover, it "confers no rights upon the certificate holder" (*Illinois Natl. Ins. Co. v. American Alternative Ins. Corp.*, 58 A.D.3d 537, 538 [1st Dept. 2009]).

Indeed, the instant insurance policy included a "Blanket Additional Insured" endorsement which provides as follows:

> "Any person or organization to whom or by which you are obligated, by virtue of a written contract, to provide insurance such as is afforded by this policy, but only with respect to operations performed by you or on your behalf or to facilities used by you and then only for the limits of liability specified in such contract, but in no event for limits in excess of the applicable limits of liability of the policy, provided such person or organization shall be an additional insured only with respect to occurrences taking place after such written contract has been executed."

Said policy specifically and unequivocally states that an additional insured shall be included pursuant to a "written contract," which did not exist here. Nor, has the City and HHC provided any

evidence of the existence of an oral contract.

Therefore, the Court finds that the third-party defendants have established a prima facie entitlement to summary judgment which HHC and the City have failed to rebut.

In accordance with the foregoing, it is hereby

ORDERED that under Sequence No.009, third-party defendant C-Force Systems, LLC's motion for summary judgment is granted; and it is further

ORDERED that under Sequence No.010, third-party defendant, Construction Force Services, Inc's motion for summary judgment is also granted; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 15, 2013

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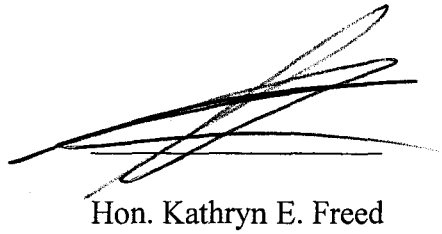

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

AUG 15 2013

FILED

AUG 19 2013

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