To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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EASTCHESTER FIRE DISTRICT,

Plaintiff,

-against-

JOHN CONDON, KEITH E. FENNELLY, PATRICK S. VARLEY, RAYMOND MAGRO, WALTER C. SHOURECK, GEORGE N. STEWART and ANTHONY S. PITTORE,

Defendants.

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INDEX NO. 52383/2015

DECISION/ORDER

Motion Date: 7/19/17
Motion Seqs. 2, 3

ECKER, J.

The following papers numbered 1 through 54 were considered on the motion of JOHN CONDON, KEITH E. FENNELLY, PATRICK S. VARLEY, RAYMOND MAGRO, WALTER C. SHOURECK, GEORGE N. STEWART and ANTHONY S. PITTORE ("defendants"), made pursuant to CPLR 3212, for an order dismissing the complaint [Mot. Seq. 2], and the cross-motion of EASTCHESTER FIRE DISTRICT ('plaintiff"), made pursuant to CPLR 3025(b), for an order permitting amendment of the complaint and its caption to include Walter S. Shoureck as a named defendant [Mot. Seq. 3]:

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-T, Memorandum of Law	1 - 22
Notice of Cross-Motion, Hedstrom Affidavit with Exhibits 1-9, Catalano Affidavit with Exhibits 1-13, Memorandum of Law	23 - 48
Defendants' Reply Memorandum	49
Plaintiff's Reply Memorandum	50
Affirmation in Opposition, Affidavit, Exhibit 1, Memorandum of Law	51 - 54

Upon the foregoing papers, the court determines as follows:

Plaintiff commenced this action against defendants, and others, retired fire fighters in the Town of Eastchester, seeking payment for medical insurance premiums claimed to be owing and due. Specifically, defendants retired from the Eastchester Fire District due to service related permanent disability. They allege that as a matter of contract, by virtue of Collective Bargaining Agreements ("C.B.A.s), and GML § 207-a(2), they are entitled to receive free family medical insurance coverage for life. Plaintiff alleges that this is not so, and that they are responsible for twenty-five (25%) percent of the cost to the Town of Eastchester for the family component of the coverage.

Defendants now move to dismiss the complaint [Ex. B] which contains three causes of action, namely breach of contract [first cause of action], failure to pay for health insurance benefits had and received [second cause of action], and unjust enrichment [third cause of action]. In its cross-motion, plaintiff seeks to amend the complaint to add Walter C. Shoureck as a named defendant.

Summary Judgment Standard

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], *quoting LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp.*, *supra.* On a motion for summary judgment, the court's function is to determine if a factual issue exists, and 'the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and [a]n conflict in the testimony or evidence presented merely raise(s) an issue of fact.' [internal citations omitted]. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

First Cause of Action: Breach of Contract

Defendants argue in their Memorandum of Law that they are entitled to continued free family coverage as a matter of contract, which would presumably be the contract that plaintiff alleges they have breached by failing to pay that portion of the family coverage premium now claimed to be owing and due. In its Memorandum, plaintiff appears to have abandoned its breach of contract action, by arguing that there is no contract upon which defendants may rely in support of their defense that they are entitled to free family coverage. Rather, the basis of the Town's claim is predicated upon unjust enrichment, and

that defendants are not entitled to a benefit that others similarly situated have paid, or have now agreed to pay as a result of this lawsuit.[1]

Upon consideration of the arguments of the parties, the court finds that plaintiff has elected to withdraw its first cause of action alleging breach of contract. Notwithstanding this finding, as addressed infra, defendants may assert as a defense to the cause of action for unjust enrichment, that they are free from liability due to contract. In other words, plaintiff is estopped from proceeding on its breach of contract cause of action; however, defendants may assert their first affirmative defense of failure to state a cause of action [Catalano Ex. 8], which together with its general denials as to the breach of contract action, are for the consideration of the trier of fact. The first cause of action is dismissed.

Second Cause of Action: Failure to Pay Health Insurance Benefits Had and Received

Neither plaintiff or defendants specifically address this cause of action in their Memoranda. "The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money (internal citations omitted). *Goel v Ranachandran*, 111 AD3d 783, 789 [2d Dept 2013]. Here, plaintiff has failed to show it has a cause of action sufficient to defeat the motion for summary judgment. Defendants may have received a benefit to which they were not entitled, which, if so, may be owing and due plaintiff under principles of equity and good conscience, and under the theory of quasi-contract, which is an element of unjust enrichment, addressed infra. However, defendants did not receive money directly from plaintiff, i.e., cash in hand. Hence, no cause of action lies for monies had and received. The second cause of action is dismissed.

Third Cause of Action: Unjust Enrichment

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Suntrust Mortg., Inc.v Mooney*, 113 AD3d 836, 837 [2 Dept 2014], citing *Citibank, N.A. v Walker,* 12 AD3d 480 [2d Dept 2004]. The court finds that plaintiff has established that it has a viable cause of action for unjust enrichment, and that there are issues of fact that must be adjudicated by the trier of fact. *Winegrad v New York University Medical Center*, supra. The third cause of action is sustained.

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[1] The court notes that pursuant to a stipulation of discontinuance dated September 22, 2016 [NYSCEF Doc. No. 51], ten individuals originally named as defendants no longer are part of this lawsuit. For purposes of these motions, the court will make no inference, nor consider, whether these parties settled with plaintiff based upon the complaint filed against them.

Amendment of the Complaint

Pursuant to CPLR 3025(b), in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. *American Scientific Light Corp. v. Hamilton Plaza Assoc.*, 144 AD3d 614 [2d Dept 2016]. Here, the proposed amendment relates solely to plaintiff's failure to include causes of action against Walter C. Shoureck as a named defendant in the body of the complaint. There is no claim that he was not properly named in the summons with notice or that he did not receive service of process along with the other named defendants [Pltf's Ex. 12]. There is no claim that he has not been represented throughout these proceedings by the firm that represents the other defendants. There is no claim that additional discovery is required. There is no claim that the complaint against him, as now pared down, or the defense thereto, are incompatible with those of the other defendants. There is no clam that he was precluded from participating in all pre-trial disclosure proceedings. In short, this appears to be nothing more than a scrivener's error. [2]

Pursuant to CPLR § 2001, the court, at any stage of an action, is authorized to permit correction of a mistake, omission, defect or irregularity, again in the absence of prejudice to a substantial right of a party. What is being asked here by plaintiff falls squarely within the permissible boundaries of both CPLR 3025 and CPLR § 2001. The motion to amend the caption of the complaint and the body of the complaint to include Walter C. Shoureck as a defendant is granted. Further, the motion to amend allegations as to George N. Stewart, as set forth in the proposed amended complaint [Catalano Ex. 13, ¶ 14, ¶ 29], is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants JOHN CONDON, KEITH E. FENNELLY, PATRICK S. VARLEY, RAYMOND MAGRO, WALTER C. SHOURECK, GEORGE N. STEWART and ANTHONY S. PITTORE, made pursuant to CPLR 3212 [Mot. Seq. 2], is granted to the extent the first and second causes of action in the complaint are dismissed, leaving the third cause of action for unjust enrichment; and it is further

ORDERED that the motion of plaintiff EASTCHESTER FIRE DISTRICT [Mot. Seq. 3], to amend the caption and body of the complaint, to add defendant Walter C. Shoureck as a defendant, and to amend the allegations as to defendant George N. Stewart, is

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[2] The court notes that the affirmation of defendants' counsel, Jason D. Lewis, submitted in support of their motion, does not state in ¶ 1 that his firm represents named defendant Raymond Magro, likewise an apparent scrivener's error.

granted, and defendants are deemed to have been served with the amended complaint;[3] and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on October 17, 2017 at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
September 18, 2017

ENTER,

LAWRENCE H. ECKER, J.S.C.

Appearances

Coughlin & Gerhart, LLP
Attorneys for Plaintiff
Via NYSCEF

Bartlett, McDonough & Monaghan, LLP
Attorneys for Defendants
Via NYSCEF

[3] Defendants' answer [NYSCEF Doc. No. 54] is deemed amended so as to include the general denials and affirmative defenses, as set forth therein, shall likewise apply to the amended complaint.