SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Gotham Construction Company, LLC et al

INDEX NO. 158938-2017

MOT. DATE

- v -

MOT. SEQ. NO. 003

Harleysville Insurance Company of New York

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

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s).____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s).____
Replying Affidavits	ECFS DOC No(s).____

In this motion, plaintiffs move for an order pursuant to CPLR 3025 permitting them to amend or otherwise conform their pleadings to the evidence adduced on the prior motion for summary judgment, and permitting plaintiffs to seek a declaration that defendant's policy is primary rather than excess to any other policy issued to the Plaintiffs. Alternatively, plaintiffs move pursuant to CPLR § 2001 and/or CPLR § 5015 for an order disregarding the "error" contained in the original complaint and modifying the portions of the Court's September 14, 2022 decision/order which granted Plaintiffs' summary judgment motion and stated defendant's policy was excess. Finally, plaintiffs move for an order extending their time to obtain a hearing on fees before the referee as per the 9/14/22 decision/order.

Defendant opposes the motion, arguing that "[p]laintiffs failed to move to reargue and/or file a Notice of Appeal of the prior decision", that plaintiffs should not be permitted to amend their pleadings five years after they were filed and, in any event, the amendment lacks merit because defendant's policy is excess and plaintiffs failed to provide any evidence in admissible form that they were not afforded other coverage as an additional insured for the underlying incident.

The court's 9/13/22 decision/order is herein incorporated by reference. For the reasons that follow, the motion is granted. Although plaintiffs have not specified which subdivisions of CPLR § 3025 they move pursuant to, their request for relief implicates subdivisions [b] and [c], which provide as follows:

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings

Dated: 4/12/23

HON. LYNN R. KOTLER, J.S.C.

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**

> shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.
>
> (c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

At the outset, the motion pursuant to CPLR 3025[c] is denied, since the evidence on the prior motion does not support plaintiffs' contention that defendant's policy is primary. In the prior motion, plaintiffs argued that "[t]he policy [p]laintiffs are being defended under states it is excess above any other policy save for certain conditions that do not apply." As defendant pointed out in opposition, "[p]laintiffs argue that the [defendant's] Policy is primary and non-contributory without making any reference to its own primary 'other insurance' provision. ... Moreover, [p]laintiffs failed to provide any evidence in admissible form that [p]laintiffs are not afforded any other coverage as an additional insured for the water incident." Plaintiffs' counsel admitted that it failed to meet its prima facie burden. On reply, plaintiffs' counsel points to a footnote in plaintiff's motion papers and states that "[a]s to whether Plaintiffs were 'afforded any other coverage as addition (sic) insured[s,]' Plaintiffs responded to interrogatories which identified the policy providing their defense years ago." Those interrogatories were advanced for the first time on reply. Since it is a movant's burden to establish entitlement to judgment as a matter of law on a motion for summary judgment, and plaintiffs failed to do so, there is no basis to conform the pleadings to proof not properly presented.

Leave to amend a pleading pursuant to CPLR 3025[b] should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda*, *supra* at 470). Prejudice does not occur simply because a defendant is exposed to greater liability or has to expend additional time preparing its case (*Jacobson v. McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652 [1st Dept 2009]). "Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*id.* quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981] [internal quotations omitted]). A motion to amend should be denied where it is "clear and free from doubt" that the proposed claim lacks merit (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433 [1st Dept 1988]).

Defendant does not assert that it was hindered in its preparation of the case or prevented from taking any measure due to plaintiffs' failure to affirmatively plead the issue of priority of coverage. Instead, defendant argues that it will be prejudiced by the late amendment. In *Fleet Factors Corp. v. Van Dorn Retail Management, Inc.* (180 AD2d 556 [1st Dept 1992]), the First Department found that a late amendment should be denied because no "viable explanation [was] proffered for such delay". Plaintiffs' counsel claims that it was a mere typographical error in the complaint which led to this situation. Since plaintiffs' counsel has proffered a viable explanation for the error, the motion to amend should be granted. Assuming arguendo that plaintiff's typographical error excuse is insufficient to warrant the amendment, the motion should also be granted pursuant to CPLR § 2001.

CPLR § 2001 permits the court to correct "a mistake, defect or irregularity ... upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded..." The court finds that plaintiff's use of the term "excess" rather than "primary" is the type of mistake which plaintiffs should be permitted to correct.

A dispute over whether defendant's policy was primary existed at the time of the prior motion (see footnote 5 of plaintiff's motion: "The policy Plaintiffs are being defended under states it is excess above any other policy save for certain conditions that do not apply. See Ex. "A" to Giles Aff. at p. 63." Meanwhile, defendants maintained that their policy was excess, pointing to CG-7249 Other Insurance Amendment Endorsement which states that the coverage under defendant's policy "will be excess over any other insurance available to the additional insured which is conferred onto said person or organiza-

tion by a separate additional insured endorsement." Since defendant is not surprised by the parties' dispute as to priority of coverage or otherwise prejudiced by the proposed correction, the court will permit plaintiffs to correct their complaint to change its demand for a declaration that defendant's policy is excess to primary (*see i.e. Greenburgh Eleven Union Free School Dist. v. National Union Fire Ins. Co.*, 298 AD2d 180 [1st Dept 2002]).

Whether granted pursuant to CPLR 3025[b] or § 2001, the court finds that the motion to amend should be conditioned on plaintiffs paying defendants' reasonable attorneys fees and costs incurred in opposing the instant motion. With respect to the former, the circumstances in this case warrant such relief since this issue should have been resolved by this point if plaintiffs had not made the underlying typographical error (*see i.e. Maxim Inc. v. Gross*, 179 AD3d 536 [1st Dept 2020]). The court notes that this error did not appear just in the plaintiffs' complaint, but also appeared in plaintiffs' prior notice of motion which again, approximately five years after the complaint was interposed, demanded a declaration that "the coverage afforded by [defendant's] Policy is excess to any other policy that Plaintiffs may have procured or which names them as insureds".

Meanwhile, CPLR 2001 permits the court to grant plaintiffs' motion on such terms as may be just, and defendant would not have had to oppose this motion if plaintiffs had been more careful and diligent in their pleadings and on the prior motion. Therefore, the court orders plaintiffs to pay defendant's reasonable costs in opposing the instant motion and will grant the parties sixty days from the date of this decision/order to make a subsequent summary judgment motion on the limited issue of whether defendants' policy is primary or excess.

As to defendant's reasonable attorneys fees, if the parties cannot agree on a sum, the issue of what defendant is entitled to recover for reasonable attorneys fees and expenses incurred in opposing this motion shall be folded into the court's previous referral to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and determine.

In light of this result, the balance of plaintiffs' motion is granted to the extent that the deadline for plaintiffs to serve a copy of the 9/14/22 decision/order with information sheet upon the Special Referee Clerk is adjourned to 90 days from the date of this decision/order. To the extent a further adjournment is necessary in light of this court's decision/order, the parties may move by order to show cause for appropriate interim relief or present a proposed stipulation to the court to be so ordered.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the motion is granted to the extent that plaintiff's complaint is deemed amended/corrected pursuant to CPLR 3025[b] and § 2001 in the form annexed to their motion papers as exhibit F (NYSCEF Doc. No. 84); and it is further

ORDERED that plaintiffs shall pay defendant's reasonable costs in opposing the instant motion and the parties are granted an additional sixty days from the date of this decision/order to make a subsequent summary judgment motion on the limited issue of whether defendant's policy is primary or excess; and it is further

ORDERED that the balance of plaintiffs' motion is granted to the extent that the deadline for plaintiffs to serve a copy of the 9/14/22 decision/order with information sheet upon the Special Referee Clerk is adjourned to 90 days from the date of this decision/order. In the event the parties cannot resolve the issue of what reasonable attorneys fees defendant is entitled to recover from plaintiffs for opposing this motion, the parties shall notify the court via joint letter and the court will amend the prior reference to include this additional issue.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 4/12/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.