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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,

Justice.

UNITED STATES LIABILITY INSURANCE COMPANY,

Plaintiffs,

- against -

A.J. HUNTER CONSTRUCTION CORP. and ANDREW CACCIATORE,

Defendants.

Trial/IAS	Part 13
Index No.	18976/2000
Motion No.	006, 007 & 008
Motion Date	3/11/2005

A.J. HUNTER CONSTRUCTION CORP. and ANDREW CACCIATORE,

Third-Party Plaintiffs,

- against -

AMERICAN AGENCY INC. and SOVEREIGN INTERNATIONAL GROUP, INC.,

Third-Party Defendants.

Papers Numbered

Notice of Motion, Affirmation & Exhibits Annexed.....	1-3
Affirmation in Opposition.....	4
Reply Affirmation.....	5-6
Memorandum of Law.....	7

Motion (seq. no. 6) by third-party defendant American Agency Inc. ("American") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the third party complaint is granted. Cross-motion (seq. no. 7) by A.J. Hunter Construction Corp ("A J Hunter") and Andrew Cacciatore ("Cacciatore") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and awarding judgment on their counterclaim for legal fees and expenses is denied. Cross-motion (seq. no. 8) by plaintiff United States Liability Insurance Company ("USLIC") for an order pursuant to CPLR 3212 granting it summary judgment, or, in the alternative, for an order pursuant to CPLR 3217(b) granting it leave to voluntarily discontinue the action is granted.

USLIC commenced this action seeking rescission of a Workers' Compensation insurance policy and a judgment declaring the insurance contract null and void upon the grounds of fraud and material misrepresentation.

A J Hunter and Cacciatore commenced a third-party action against American, the insurance broker claiming, *inter alia*, that American was negligent in preparing the Workers' Compensation application, in assisting defendants in procuring the Workers' Compensation policy, and in failing to procure proper coverage.

Facts

In May, 2000, the principals of A J Hunter went to American to obtain Workers' Compensation insurance. A J Hunter represented that the nature of its business was kitchen cabinet sales, design and installation. Jed Raynor of American then submitted an application, signed by Andrew Cacciatore, Jr., for Workers' Compensation to cover this type of work. Around this same time, the principals also sought general liability coverage from Christopher Re regarding their other company, Hunter Home Construction. In connection with this application, Hunter Home indicated

on the application that its business was "high end custom home general contractor." Based upon this, Mr. Re recommended the "straight residential general contracting" program.

In June of 2000, USLIC issued a Workers' Compensation insurance policy for one year to A J Hunter. Cacciatore is part owner and president of A J Hunter, whose primary business is cabinet installation and sales. Cacciatore is also part owner and president of Hunter Home Construction Corporation ("Hunter Home"), which was formed for the purpose of owning and developing residential property in Suffolk County. Hunter Home did not carry Workers' Compensation coverage at the time of the accident. Hunter Home did, however, carry builders' risk insurance and general liability insurance.

On July 3, 2000, Cacciatore was at the site of a home under construction at 8 Cowhill Lane in the Town of East Hampton, which was owned by Hunter Home. Cacciatore was injured while "backfilling foundation of a new house and a tree fell on him." (see employer's report of injury/illness form C2, Exhibit E to moving papers).

Thereafter, Cacciatore filed a claim for Workers' Compensation benefits under the policy maintained by A J Hunter. USLIC opposed Cacciatore's claim and sought to cancel the Workers' Compensation policy, *ab initio*, upon the grounds of alleged fraud and misrepresentation.

Two months after Mr. Cacciatore's action, Mr. Cacciatore sought replacement insurance from White & Re. In connection therewith, they still identified A. J. Hunter as a cabinet design and sales and installation entity.

Following various hearings, a Workers' Compensation Law Judge (WCLJ) disallowed the claim. In his decision filed December 13, 2001, the WCLJ concluded that Cacciatore was acting as an employee of Hunter Home and not A J Hunter at the time of the accident. On December 12, 2002, the Workers' Compensation Board affirmed the WCLJ decision with the slight modification

that Cacciatore was neither an employee of A J Hunter nor Hunter Home. Cacciatore appealed this determination.

In *Cacciatore v. A.J. Hunter Const. Co.,* 7 AD3d 900 (3rd Dept. 2004); *appeal dismissed, leave to appeal denied* 3 NY3d 735 (2004), the Appellate Division, Third Department affirmed the Workers' Compensation Board's decision which held that the insurance policy issued by USLIC did not cover Cacciatore's injury.

In *Cacciatore, supra,* the Court expressly stated, in pertinent part, as follows:

> "Although claimant was specifically named in the application for insurance submitted by A J Hunter, at the time of the accident he was not performing duties that were at all related to the nature of the business described therein, namely kitchen cabinet sales and installation. He testified that when he applied for the insurance, he represented that A J Hunter was engaged in selling, designing and installing cabinets, and did not request coverage for its activities as a general contractor. We note that there is some dispute as to whether A J Hunter was retained to act as the general contractor at the site where claimant was injured. Regardless, given that claimant's operation of the backhoe was completely unrelated to the business of cabinet installation and sales, substantial evidence supports the Board's finding that the claim was not covered (citations omitted)"

This Court will first address USLIC's request for an order granting it leave to voluntarily discontinue the action.

It is within the sound discretion of this Court to grant or deny an application made pursuant to CPLR 3217(b) by a party seeking voluntarily to discontinue an action. (*Tucker v. Tucker,* 55 NY2d 378, 383 [1982]). Generally, a party will not be compelled to litigate a claim and absent special circumstances, a motion for discontinuance should be granted. (*Id; National Bank of North America v. Brook Shopping Centers, Inc.,* 105 AD2d 734). "Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible . . ." (*Tucker v. Tucker, supra*).

USLIC asserts that defendants will not be prejudiced by the voluntary discontinuance since dismissal of defendants' counterclaim is warranted pursuant to CPLR 3215(c); and defendants are not entitled to attorneys' fees.

In *Mint Factors v. Goldman*, 74 AD2d 599 (2nd Dept. 1980), the court stated "a counterclaim may be dismissed pursuant to CPLR 3215 (subd. [c]) where, as here, a reply was not timely interposed by the plaintiff, and defendant failed to institute proceedings within a year to obtain a default judgment." Although "counterclaims are not specifically mentioned in CPLR 3215, the legislative history reveals that the statute was intended to apply to claims, asserted as counterclaims and third-party claims as well as those included in the complaint." (*Id*).

Inasmuch as defendants failed to take proceedings against USLIC for its failure to interpose a reply to their counterclaim (*see, Clemonds v. Leuder,* NYLJ, 4/23/96, Supreme Court, Queens County, 1996), dismissal of defendants' counterclaim is warranted here. (*Mint Favors v. Goldman, supra*).

Furthermore, defendants have not established that they have a meritorious claim for legal fees. (*Id*).

"Under the general rule in New York, attorneys' fees are the ordinary incidents of litigation and may not be awarded to the prevailing party unless authorized by agreement between the parties, statute or court rule." (*Baker v. Health Management Systems., Inc.,* 98 NY2d 80,88 [2002]). However, an exception to this rule exists where "an [insured] has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations." (*Mighty Midgets, Inc. v. Centennial Ins. Co.,* 47 NY2d 12, 21 [1979]; *see also e.g. , Natural Grange Mut. Ins. Co. v. Udar Corp.*, 98 Civ. 4650, 2002 WL 373240 [S.D.N.Y. 2002]). Hence, "an insured who prevails in a declaratory judgment action brought by an insurance company to

deny a duty to defend and indemnify is allowed to recover fees expended in defending against that action." (*U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 369 F.3d 102, 110 [2nd Cir. N.Y. 2004].

Subsequent case law, however, has limited the *Mighty Midgets* exception to cases where the insurance company has a duty to defend the insured and failed to do so. (*Folksamerica Reinsurance co. v. Republic Insurance*, 2004 WL 1824320 [S.D.N.Y. 2004]. Inasmuch as USLIC did not have a duty to defend here, the narrow *Mighty Midgets* rule does not apply here. (*see Id*).

Significantly, defendants agree that the "commencement of the plenary action runs afoul of the doctrine of collateral estoppel . . . " (page 6 of Memorandum of Law). Furthermore, defendants contend that "t]here was never any need to bring this action, and waste the court's time and resources, and defendants' time and financial resources." (¶ 7 of Reply Affirmation).

Collateral estoppel, as a corollary to the doctrine of *res judicata* precludes a party from relitigating issues previously resolved against that party. As the consequences of this principle are great, strict requirements must be satisfied to insure that a party not be collaterally estopped from obtaining at least one full hearing on its claims. To invoke the benefit of this principle, there must be poof that the party against whom the principle is sought to be invoked had been afforded a full and fair opportunity to contest that the decision and that the issues in the prior action are identical and decisive in the current action *Gramatan Home v. Lopez*, 46 NY2d 481, 485 (1979); *Silverman v. Leucadia, Inc.*, 156 AD2d 442 (2nd Dept. 1989).

Although the issues of fraud and misrepresentation were raised by USLIC before the Workers' Compensation Board, the decision of the Board which was affirmed by the Appellate Division was based on the fact that the insurance policy issued by USLIC did not cover Cacciatore's injury. Under these circumstances, the parties had a full and fair opportunity to raise

these issues (*see, Gramatan Home v. Lopez, supra*). Furthermore, since the denial of coverage has already been decided against Mr. Cacciatore, there is no necessity to relitigate these issues.

To summarize, Mr. Cacciatore's was the only claim under the policy. It is uncontroverted that Mr. Cacciatore's claim to Workers' Compensation has been repeatedly denied and that the policy has been cancelled by USLIC. Thus, there is no reason for this action to proceed. Indeed, to allow defendants to continue to pursue their defense of this action would be a waste of judicial resources and expense.

American seeks dismissal of the third-party complaint, claiming, *inter alia*, that it did not breach any duty to defendants.

In opposition, defendants are claiming that American was negligent in preparing and assisting the Workers' Compensation application and policy and in failing to procure proper coverage. Specifically, plaintiffs claim that they asked Mr. Raynor if they would be covered "if they did something else" beyond their usual kitchen cabinet design business. They also claim that Mr. Raynor told them "not to worry because they would be audited."

An insurance agent has a common law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct client based on a special relationship of trust and confidence (*Chase Scientific Research, Inc. v. NIA Group*, 96 NY2d 20 [2001]; *see also Hjemdahl-Monsen v. Faulkner*, 204 AD2d 516 [2nd Dept. 1994]).

Here, it is undisputed that the application which Mr. Cacciatore, Jr. and the broker signed indicated that the nature of A.J. Hunter's business was cabinet installation and sales (*see, Chaim v. Benedict*, 216 AD2d 347 [2nd Dept. 1995]) and that it was seeking Workers' Compensation insurance. The lack of a specific request for any other type of coverage is significant here (*see, Erwig v. Edward F. Cook Agency Inc.*, 173 AD2d 439 [2nd Dept. 1991]). Further, it is undisputed

that the contractor did not ask for general contracting coverage from American. Hunter Home, the company which was specifically identified as a general contractor at the project had obtained builder's risk insurance and general liability insurance from White & Re. In addition, when A.J. Hunter purchased a replacement Workers' Compensation policy from White & Re in September, 2000, A. J. Hunter again identified itself as a kitchen cabinet designer and installation company.

Defendants' allegation that American Agency breached a "continuing duty to apprise third party plaintiffs of any changes in coverage or policies necessary due to changes in the business of A.J. Hunter" is unpersuasive as no such duty exists here.

In sum, American has established its entitlement to summary judgment as a matter of law dismissing the third party complaint.

In view of the foregoing determination, this court need not consider the issue of the timeliness of USLIC's cross motion for summary judgment or the applicability of *Cruz v. New Millennium Const. & Restoration Corp.*, 2005 WL 673605 (N.Y.A.D. 3rd Dept.).

The complaint and third–party complaint are hereby dismissed.

This decision is the Order of the Court. All proceedings under Index No. 18976/00 are terminated.

ENTER:

Dated: Mineola, New York
May 12, 2005

Burton A. Joseph
J.S.C.

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