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SHORT FORM ORDER

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

PRESENT:

**Hon. Burton S. Joseph,
Justice.**

JESSICA OROL,

Plaintiff,

- against -

Trial/IAS Part 13
Index No. 437/2004
Motion No. 001
Motion Date: 10/17/2005

RCA INSURANCE GROUP, INC. AND
UNDERWRITERS AT LLOYD'S OF LONDON,

Defendants.

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Notice of Motion, Affirmation & Exhibits Annexed.....	1
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Motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's complaint is granted.

This is an action by an injured party, brought pursuant to Insurance Law § 3420(b), to obtain payment of a judgment recovered against the defendants' insured. A default judgment in the amount of \$29,072.91 was entered in favor of the plaintiff and against J.D.E.S. Tavern, Inc., and J.D.E.S. Tavern, Inc., d/b/a E.J. Rockwells, ("Rockwells") on August 8, 2003, in the Nassau County Clerk's Office. The judgment is based upon an incident, which occurred at Rockwells'

place of business located at 48 North Village Avenue, Rockville Centre, New York, on August 18, 2000. It is undisputed that on the date of the incident, Rockwells was covered by a commercial general liability insurance policy (Policy #LCP-710099) issued by defendant Underwriters at Lloyd's of London ("Underwriters").

The defendants move for summary judgment, inter alia, on the grounds that: "The plaintiff's action is procedurally barred as she failed to comply with the procedural requirements imposed by the Direct Action statute [Insurance Law §3420], which requires as a condition precedent to bringing a direct action against the insurer, that the injured person: (1) first obtain a judgment against the insured-tortfeasor, (2) serve notice of entry of judgment upon the insurer, and (3) await payment for thirty days." Counsel for the defendants contends that: "Here plaintiff failed to serve RCA/UNDERWRITERS [i.e., the defendants] with notice of entry of judgment, and failed to await payment for thirty days, prior to commencing a direct action against the defendants." These grounds are substantial.

The Court of Appeals has held that Insurance Law § 3420 "grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances – the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. [and that] Compliance with these requirements is a condition precedent to a direct action against the insurance company." (*Lang v. Hanover Ins. Co.*, 3 NY3d 350, 354). The plaintiff here has only met the first condition (i.e., obtaining a judgment against the tortfeasor).

With respect to the second condition, counsel for the plaintiff states that: "Plaintiff served the Judgment with notice of Entry upon defendants' insureds on November 21, 2003 and receipt

was confirmed by RCA Insurance on January 17, 2003.” Counsel further states that: “A copy of the judgment was sent to James C. Herrmann & Associates (insurance agent for RCA) on December 16, 2003.” In this regard, counsel states that: “There is no doubt that James C. Herrmann was the insurance broker and agent of RCA and that they were the particular broker on the policy at issue here.”

To show that James C. Herrmann was the agent of RCA, counsel relies upon the deposition testimony of Schyler Kohl (i.e., the Vice-President of Claims for RCA). Mr. Kohl testified that James Herrmann & Associates was the broker on this particular policy “[t]o the best of [his] recollection.” (Plaintiff’s Exhibit 4, pp. 13-14). The Court notes, however, that as a general rule, an insurance broker is regarded as the agent for the insured. (See Insurance Law § 2101[c]; *Rendeiro v. State-Wide Ins. Co.*, 8 AD3d 253; *Ribacoff v. Chubb Group*, 2 AD3d 153, 154). Thus, Mr. Kohl’s testimony constitutes a prima facie showing that James C. Herrmann & Associates, Ltd., was the agent for Rockwells, not the defendants.

Moreover, Mr. Kohl states in a supplemental affidavit, dated October 4, 2005, that the plaintiff has misconstrued his testimony “wherein [he] stated that James C. Herrmann & Associates, Ltd. is ‘the broker’.” Mr. Kohl explains that: “[His] statement did not mean that James C. Herrmann & Associates, Ltd. is (or was) the agent for RCA and/or UNDERWRITERS. [and that] There is no agency relationship (and there has never been an agency relationship) between James C. Herrmann & Associates, Ltd. and RCA and/or UNDERWRITERS.” Mr. Kohl additionally states that: “James C. Herrmann & Associates, Ltd. is exclusively the agent for the insured, Rockwells, and it obtained the policy at issue on behalf of the insured.”

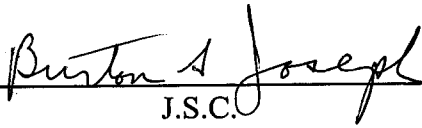
Accordingly, the plaintiff having failed to satisfy pre-conditions 2 and 3 to bringing this

action, the plaintiff's complaint is dismissed. This dismissal is without prejudice to the commencement of a new action upon compliance with the conditions precedent.

This decision is the Order of the Court and terminates all proceedings under Index No. 437/04.

ENTER:

Dated: Mineola, New York
November 18, 2005



J.S.C.

XXX **ENTERED**

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**