

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DOREEN RAMSARUP, ROBBIE RAMSARUP, and
TRECIA RAMSARUP,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiffs,

Index No.: 18686/09
Motion Seq. No.: 01
Motion Date: 01/12/10

- against -

RUTGERS CASUALTY INSURANCE COMPANY,
LYONS GENERAL INSURANCE AGENCY, INC. and
ANTHONY KAMMAS,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant, Rutgers Casualty Insurance Company ("Rutgers"), moves, pursuant to CPLR §3211, for an order dismissing plaintiffs' complaint based upon the facts that plaintiffs: 1) failed to state a claim upon which relief could be granted; 2) failed to obtain personal jurisdiction over Rutgers' insured, H. Ramjit Construction Inc. ("Ramjit"); 3) failed to obtain a proper judgment over Ramjit; 4) failed to obtain a valid judgment over the correct party; and 5) that the Court lacks subject matter jurisdiction over the matter. Plaintiffs oppose the motion.

Defendants Rutgers contends that, on or about February 23, 2006, Ramjit sought to obtain a renewal commercial general liability policy from defendant Rutgers. Rutgers' policy, bearing the Number SKP 310 6793, with effective dates from February 23, 2006 through

February 23, 2007, was issued to Ramjit to cover its business activities conducted during that period. Plaintiffs entered into a home improvement contract with defendant Rutgers' insured in April 2006 to perform extensive renovations of their home situated at 174 Rockmart Avenue, Elmont, New York 11003. On or about August 17, 2006, plaintiffs commenced an action in Nassau County Supreme Court, under index number 13280/2006, against H. Ramjit Home Improvement Inc., H. Ramjit Home Improvement Corp. and Hemchandra Ramjit. On or about March 17, 2009, plaintiffs obtained a judgment against H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp. in the amount of \$815,287.50. On or about September 9, 2009, plaintiffs commenced the present action against defendant Rutgers as insurer for H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp.

First, defendant Rutgers argues that the aforementioned judgment obtained by plaintiffs was issued upon default. However, plaintiffs provided a copy of said judgment as an exhibit to their motion papers and said judgment, signed by the Honorable Leonard B. Austin, Justice of the Supreme Court of Nassau County, states "[w]hereas at a hearing held before the Hon. Leonard B. Austin on October 31, 2008 defendants H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp. agreed to the settlement of this action against them for the amount of \$650,000 and plaintiffs Doreen Ramsarup, Robbie Ramsarup and Trecia Ramsarup agreed to the settlement of this action by releasing and withdrawing all claims with prejudice asserted in the complaint against defendant Hemchandra Ramjit in his individual capacity." No where is it indicated that this was a default judgment.

Defendant Rutgers also claims that plaintiffs obtained a judgment of an entity that was no longer a living, legal person, stating that "a review of the New York State Department of State Division of Corporations Entity information sheet regarding the entity known as 'H. Ramjit Home Improvement Corp' discloses that the entity was 'dissolved by proclamation or annulment of authority' on June 30, 2004" and that the "entity is inactive."

Defendant Rutgers additionally argues that the name of Rutgers' insured is "H. Ramjit Construction Inc." Rutgers states that this is the name of the entity to whom they issued the policy of insurance and "[a]s a result, it appears as though, even if this Court were to determine, erroneously, that the prior Judgment upon Default were valid, the Judgment was rendered

against another legal entity and not Rutgers' actual insured. Upon this basis, Plaintiffs will not have satisfied the condition precedent to the maintenance of an action against Rutgers, pursuant to New York Insurance Law § 3420 (a)(2)."

Plaintiffs contend that "Rutgers' motion for an order vacating the 'prior Judgment upon Default' is without merit and must be denied because it is based on Rutgers' misconception that the subject judgment was granted on default when, in fact, it was not." Plaintiffs also state that "Rutgers has already admitted that all of the defendants named in the underlying action were its insureds. But for the purposes of its motion, Rutgers has taken the inconsistent position that H. Ramjit Home Improvement Corp. and H. Ramjit Home Improvement Inc. were not its insureds under the subject policy. Rutgers' assumption of inconsistent positions to suit its needs in litigation is barred under the principle of judicial estoppel. In an affirmation in support of Rutgers' motion to open its default with respect to the declaratory judgment action that plaintiffs commenced against Rutgers, Rutgers' counsel, Elio M. Di Berardino, Esq. admits and takes the position that H. Ramjit Home Improvement Corp. and H. Ramjit Home Improvement Inc. are insureds under the subject policy- Rutgers Policy SKP310679310." *See* Plaintiffs' Affirmation in Opposition Exhibit D.

With respect to defendant Rutgers' application to the Court to vacate the judgment entered against H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp. on the grounds that H. Ramjit Home Improvement Corp. was no longer a legal entity on the date of said judgment, said application is denied. First, it does not appear that said judgment was granted upon default as defendant Rutgers alleges. Second, the default is not solely against H. Ramjit Home Improvement Corp., the entity defendant Rutgers claims was no longer in existence at the time of said judgment, but is also against H. Ramjit Home Improvement Inc., for which there is no evidence that it was also dissolved or in "inactive status".

Furthermore, plaintiffs offer as evidence in support of their claims against defendant Rutgers, that "documents obtained from the New York City Department of Buildings unequivocally reflect, as Rutgers has already admitted, that H. Ramjit Home Improvement Inc. was an insured under the Subject Policy." *See* Plaintiffs' Affirmation in Opposition Exhibit E. Said document, with a search dated November 28, 2006, indicates that contractor "H. Ramjit

Home Improvement" had a general liability insurance policy SKP310679310 with Rutgers Casualty until February 23, 2007. While said document states "H. Ramjit Home Improvement" and does not specify "Inc." or "Corp.," it does not, however, anywhere state "Ramjit Construction Inc.," the entity name defendant Rutgers is claiming was its insured. Therefore, the Court holds that defendant Rutgers has not provided sufficient evidence to support its claims that failed to obtain personal jurisdiction over Rutgers' insured, H. Ramjit Construction Inc., failed to obtain a proper judgment over Ramjit, failed to obtain a valid judgment over the correct party and that the Court lacks subject matter jurisdiction over the matter.

Plaintiffs argue that "[t]o the extent that H. Ramjit Home Improvement Corp. is no longer an entity, the judgment against it may not be satisfied as against it. It does not render the judgment a nullity against the other judgment debtor, H. Ramjit Home Improvement Inc., whom Rutgers has admitted was an insured under the Subject Policy." The Court is in agreement with this argument.

Furthermore, in determining a motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff's alleged failure to state a cause of action/to state a claim upon which relief could be granted, the court will afford the complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telco, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001).

For all of the reasons set forth above, defendant Rutgers's motion is denied.

Plaintiffs are hereby ordered to comply with any and all outstanding discovery requests made by defendant Rutgers, specifically those stated in its moving papers in the instant motion.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. STEINER, J.S.

ENTERED

APR 16 2010

Dated: Mineola, New York
April 12, 2010