Empire Ins. Co. v San Miguel
2013 NY Slip Op 30702(U)
April 8, 2013
Sup Ct, New York County
Docket Number: 111691/11
Judge: Saliann Scarpulla
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SCANNED ON 4/9/2013

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 111691/2011
EMPIRE INSURANCE COMPANY
vs.
SAN MIGUEL, ROBERT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | **No(s).** ____

Answering Affidavits — Exhibits ____ | **No(s).** ____

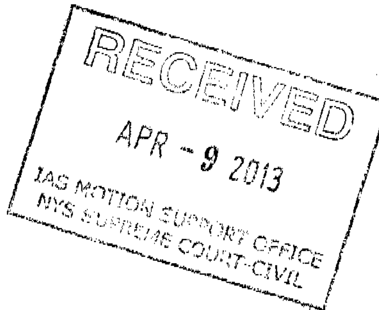
Replying Affidavits ____ | **No(s).** ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

decided per the memorandum decision dated
which disposes of motion sequence(s) no. 001 and 002.



Dated: 4/8/13

J.S.C.
HON. SALIANN SCARPULLA

1. **CHECK ONE:** .... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. **CHECK AS APPROPRIATE:** ....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE: .... ☑ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

5/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
--X
EMPIRE INSURANCE COMPANY AS
SUCCESSOR IN INTEREST TO ALLCITY
INSURANCE COMPANY,

Plaintiff,

-against-

Index No.:111691/11

DECISION AND ORDER

ROBERT SAN MIGUEL and THOMAS McHENRY,

Defendants.
--X
HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action, plaintiff, Empire Insurance Company ("Empire"), seeks a declaration that it has no duty to defend or indemnify defendant Robert San Miguel ("San Miguel"), under a personal homeowner's insurance policy (the "Policy").[1] Defendant Thomas McHenry ("McHenry"), recovered a $750,000 judgment after a jury verdict in a separate tort action against San Miguel. Here, McHenry seeks a declaration that Empire owed coverage to San Miguel (the "Underlying Action"), and thus is liable for the amount of McHenry's judgment and interest, pursuant to Insurance Law § 3420 (b). Both Empire and McHenry move, pursuant to CPLR 3212, for summary judgment.

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[1] The Policy was issued by Allcity Insurance Company, Empire's predecessor in interest.

Background

It is undisputed that San Miguel is an insured under the Policy, which was issued to his mother, Rebecca San Miguel/Ramirez ("Ramirez"), and was in effect when the underlying incident occurred on January 24, 1998. There is also no dispute that in the early morning hours on January 24, 1998 San Miguel struck McHenry with a metal pipe, in the backyard of San Miguel's home, causing injury to McHenry. This altercation occurred over a dispute between the two concerning money that San Miguel owed to McHenry for work.

In McHenry's complaint in the Underlying Action, he alleged that San Miguel had assaulted and battered him and that Ramirez, as the premises owner, was negligent in the ownership and maintenance of the premises. In his bill of particulars in that action, McHenry stated that San Miguel had intentionally and repeatedly hit McHenry with a metal pipe acting "with malice, intent and reckless disregard for the safety of others when he assaulted and battered plaintiff" and that McHenry suffered "[m]ultiple blunt trauma to head, neck, back, arms, knees and hands as a result of being struck by the pipe." Regarding Ramirez, McHenry stated that she was negligent in property maintenance and ownership, resulting in a trap, and also in failing to warn McHenry of the pending assault.

In a letter from Empire to San Miguel, dated April 12, 1999 (the "April 1999 Letter"), Empire acknowledged receipt of the summons and complaint in the Underlying Action, and stated that there was no coverage for the intentional conduct allegedly taken

by San Miguel which, Empire wrote, did not meet the definition of occurrence as defined in the Policy. The April 1999 Letter also stated that Policy coverage was for damages that were neither expected or intended by the insured, noting the Policy exclusion for bodily injury expected or intended by the insured, and referring to the assault and battery allegations against San Miguel. Empire stated in the April 199 letter that "[w]e are denying coverage for these allegations." Empire further advised San Miguel that it would defend him under a reservation of rights, "but will not make any indemnity payments if you are found liable for the fourth [assault and battery] cause of action."

According to the judgment in the Underlying Action, the negligence action against Ramirez was dismissed by order dated October 4, 2002. By letter dated January 13, 2003, Empire's administrator advised San Miguel that, given the dismissal of the negligence claim, the remaining allegations against San Miguel were for intentional acts, which were not covered under the Policy (the "2003 Letter"). Referring to the April 1999 Letter, the 2003 Letter also stated that Empire had previously advised that the intentional allegations were not covered under the Policy. The 2003 Letter refers to the Policy's "bodily injury" definition, and the exclusion for bodily injury expected or intended by the insured (the "Expected and Intended Exclusion"), and stated that McHenry's claims did not result from an occurrence, as assault "denotes an intentional act or conduct and does not constitute an occurrence." Empire further stated that an insurance policy is generally intended to cover fortuitous or accidental events, and that it is against public policy to

provide coverage for intentional harm. Empire concluded that it would no longer defend or indemnify San Miguel, requesting that he immediately hire counsel and stating that the failure to do so would result in the commencement of a declaratory judgment action.

In 2004 or 2005, the Court in the Underlying Action granted San Miguel's counsel's motion to be relieved as counsel.[2] Thereafter, in May 2006, an inquest was held, but the resulting $375,000 judgment in McHenry's favor, was subsequently vacated on appeal in 2008. *See McHenry v. Miguel*, 54 A.D.3d 912, 913 (2d Dept 2008).

After jury trial in 2012, McHenry prevailed. The jury verdict sheet reflects that the jurors unanimously agreed that San Miguel assaulted McHenry, and that five of six agreed that San Miguel did not act in self-defense.[3] The 2012 judgment in the Underlying Action reflects that the jury awarded McHenry recovery of $750,000 against San Miguel. At trial in 2012, and in vacating the earlier $375,000 default judgment McHenry had received, San Miguel was represented by his own counsel.

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[2] McHenry's counsel states that San Miguel's counsel was relieved as counsel in early 2005, relying on a printout that she avers is from a "Kings County Court computer." Counsel for Empire states that in November 2004 San Miguel's counsel's order to show cause to be relieved as counsel was granted. Neither party provides a copy of the order.

[3] The jury was asked whether or not San Miguel reasonably believed that McHenry was attacking or about to attack him.

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Discussion

Both Mchenry and Empire move for summary judgment.[4] To succeed on such a motion, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). If this showing is made, the burden of proof shifts to the party opposing the motion to produce admissible evidence to establish that material issues of fact exist that require trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

The Policy's declarations page states that Empire would provide the insurance described in the policy in return for the premium and compliance with all applicable policy provisions and that "[i]nsurance under this policy applies . . . for the coverages where limits of liability and premiums are stated." The declarations page also indicates that the Policy provides "COVERAGES" for personal liability, with a "LIMIT OF LIABILITY" of "$300,000 EA OCCURRENCE." Under the heading of "LIABILITY COVERAGES," labeled as "Coverage L Personal Liability" ("Coverage L"), the Policy provides that:

[4] Empire argues that McHenry's separate summary judgment motion, with additional arguments that McHenry did not make in opposition to Empire's motion, should not be considered, or the additional arguments should be deemed waived, because such conduct is procedurally improper, but cites no authority in support of this contention. Empire also notes that McHenry served a sur-reply, but no sur-reply has been accepted or considered.

[* 7]

> "If a claim is made or a suit is brought against any 'insured' for damages because of 'bodily injury' . . . to which this coverage applies, we will:
>
> a. pay up to our limit of liability for the damages for which the insured is legally liable. Damages include prejudgment interest awarded against the insured.
>
> b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. This applies even if the claim or suit is groundless."

In the Policy's "Definitions" sections, the term "bodily injury" is defined as "bodily harm, sickness or disease, including required care, loss of services and death resulting therefrom." The Policy's Expected or Intended Exclusion excludes from personal liability coverage bodily injury "which is expected or intended by the 'insured.'"

The conditions section of the Policy includes a provision that limits total liability under the Policy for Coverage L for all damages resulting from any single occurrence, regardless of claims made or persons injured, to the $300,000 limit of liability stated in the declarations. This provision explains that "[a]ll 'bodily injury' . . . resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence."

Empire argues that there is no coverage because the claims in the Underlying Action are outside the scope of the insuring agreement of the Policy, which contemplates coverage for an occurrence or accident based on an unexpected event. Empire also asserts that an occurrence necessarily involves an unexpected event, that an assault is an intentional act and not an accident, and that intentional assault with a pipe does not

constitute an accident under the Policy. McHenry argues that the Policy's language provides coverage for the incident which, viewed from the insured San Miguel's perspective, was an accident, unintended and unexpected.

"Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218 (2002). McHenry, standing in the shoes of San Miguel, bears the insured's same burden of proof. *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 665 (1990).

In resolving an insurance coverage dispute, a court first looks to the language of the policy, which should be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 162 (2005) (citation and quotation marks omitted). "Insurance contracts [also] must be interpreted according to common speech and consistent with the reasonable expectations of the average insured," *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011), and their unambiguous provisions given their plain and ordinary meaning. *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007). The interpretation of such provisions is a question of law for the court, and ambiguous provisions are "construed in favor of the insured and against the insurer." *Id.* "Exclusionary language is strictly and narrowly interpreted and when an ambiguity is found, 'it is the insurer's burden to prove

that the construction it advances is not only reasonable, but also that it is the only fair [one]." *Pepper v. Allstate Ins. Co.*, 20 A.D.3d 633, 635 (3d Dept 2005), quoting *Boggs v. Commercial Mut. Ins. Co.*, 220 A.D.2d 973, 974 (3d Dept 1995)).

The Policy, an occurrence policy, provides indemnity for up to the $300,000 limit of liability for each occurrence, for damages which the insured is legally liable to pay as a result of a suit brought against the insured for bodily injury. San Miguel, an insured under the Policy, was sued and found legally liable for such damages. Accordingly, the language of the Policy's insuring agreement includes the incident. While Empire argues that, in the limits of liability provision of the Policy, the word "occurrence" is used as the equivalent of accident, that section is neither the insuring agreement nor the definitions section of the Policy, but serves to set total liability limits on the Policy. To the extent that the limits of liability provision uses the words accident and occurrence synonymously, Empire's assertion that the average homeowner would incorporate that provision into the insuring agreement, is not consistent with the reasonable expectation of the average insured, but rather is confusing and unclear.

Furthermore, in this form insurance policy, Empire could easily have defined the word "occurrence" as an accident, in the definitions or the coverage section of the Policy, but did not, and the Policy will not be interpreted against the insured to do so. To demonstrate that the Policy's language covers only accidents, Empire cites to and relies upon case law in which the involved policies define occurrence to mean accidental,

fortuitous or unintended or unexpected. Here, however, the Policy does not define occurrence or accident.

Empire also argues that the Policy does not cover the incident because insurance policies are not intended to provide coverage for intentional events where harm is inherent in the conduct. Empire contends that San Miguel's conduct was intentional, not unexpected and not accidental, and therefore is not conduct of the nature intended to be covered by insurance. Empire asserts that the issue of whether or not the conduct was intentional or accidental was decided in the Underlying Action, where the jury found San Miguel liable for intentional assault and that he did not act in self-defense. In support of its motion, Empire provides McHenry and San Miguel's testimony, the pleadings, the verdict sheet, minutes and judgment from the Underlying Action.

McHenry does not dispute that insurance policies do not cover instances where the insured intentionally inflicts harm on another, but contends that the Policy does include the incident because, viewed from the insured's perspective, it was an accident, as San Miguel neither expected or intended the harm. McHenry bases this contention on San Miguel's testimony, which, McHenry states, demonstrates that San Miguel subjectively believed that he was acting in self-defense, only intended to subdue McHenry, and struck McHenry instinctively, in a situation in which everything happened quickly.

At trial, San Miguel testified that McHenry and another man came to his home on a Saturday, around 7:00 A.M., and that McHenry, then drunk, lunged at San Miguel's face. San Miguel testified that, in response to the attack, he picked up a pipe, which he thought may have fallen from McHenry's pocket, and hit McHenry in the leg. San Miguel further testified that he deflected McHenry's continued attempt to attack him by hitting McHenry in the hand with the pipe, and that he did not intend to harm McHenry, but only to, in self-defense, subdue him. McHenry's version of events was quite different.

McHenry testified at trial that San Miguel instructed him to come to San Miguel's home early on a Saturday morning to pick up money, and that when he did, San Miguel came at him, pushing his chest up toward McHenry's face. Then, McHenry testified, that he

> pushed off of [San Miguel] and . . . backed up[,] and right away [San Miguel] went into the back of his pants and he pulled out a pipe and he went to swing it at my head and I put my hand up to block the pipe and instantly the pipe was like jagged edges and it cut my hand.

McHenry further testified that he backed up to avoid getting hit with the pipe, fell backwards, over logs in the yard, and San Miguel thereafter continued to repeatedly strike McHenry with the pipe while McHenry was on the ground. McHenry testified that he screamed for help, and had a chance to try to get away, but was between "the logs and stuff" when San Miguel hit McHenry across the back on his right shoulder knocking him to the ground again "where he hit me with the pipe some more and I put my arm up to

block it an then he cut a big chunk out of my forearm." McHenry testified that at this point, he could not walk.

"As a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance." *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 445 (2002). *See also QBE Ins. Corp. v. Jinx-Proof Inc.*, 102 A.D.3d 508, 513(1st Dept 201) ("Liability policies, in accordance with public policy, indemnify persons for the unexpected and unforeseen consequences of negligent acts; they do not afford coverage for intentional acts"); *Consolidated Edison Co. of N.Y.*, 98 N.Y.2d at 220 (based upon definitions contained in Insurance Law § 1101, "the requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'").

However, it is a well-established insurance principle that there can be liability coverage for an insured's liability arising out of his own intentional act if the resulting injury or damage caused was not intended. *See Allegany Co-Op Ins. Co. v. Kohorst*, 254 A.D.2d 744, 744 (4th Dept 1998) (insured intentionally set fire to property for insurance proceeds without intent to cause injury to victim); *Slayko v. Security Mut. Ins. Co.*, 98 N.Y.2d 289, 293 (2002) (intentional act exclusion did not apply where the record demonstrated that insured did not intend to injure victim when gun insured pointed at victim discharged and could have been empty). "The damage in question may be unintended even though the original act or acts leading to the damage were intentional."

Allegany Co-Op Ins. Co., 254 A.D.2d at 744 ("There is coverage if the damages alleged in the complaint arise out of a chain of unintended though foreseeable events that occurred after the intentional act") (citation and quotation marks omitted); *New York Cent. Mut. Fire Ins. Co. v. Steely*, 29 A.D.3d 967, 967 (2d Dept 2006) (issue of fact whether conduct was negligent where insured maintained that striking of another was reflex reaction to assault); *Salimbene v. Merchants Mut. Ins. Co.*, 217 A.D.2d 991, 994 (4th Dept 1995).

In certain instances, where the harm to the victim was inherent in the nature and force of the act, courts have determined that there is no coverage, despite the fact that the intention of the insured may not have been to cause the harm. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 161 (1992) (sex abuse of minors); *see Peters v. State Farm Fire & Cas. Co.*, 306 A.D.2d 817, 818 (4th Dept 2003) (resultant injuries intentionally caused where insured testified at deposition that he repeatedly swung bat, knowing the bat was striking a person, in order to extricate his brother from an altercation with plaintiff). *Cf. New York Cas. Ins. Co. v. Ward*, 139 A.D.2d 922, 923 (4th Dept 1988) (no duty to defend or indemnify for punching in response to obscene gestures). "In deciding whether a loss is the result of an accident, it must be determined, from the point of view of the *insured*, whether the loss was unexpected, unusual and unforeseen." *Allegany Co-Op Ins. Co.*, 254 A.D2.d at 744 (emphasis added); *Siagha v. National Union Fire Ins. Co. of Pittsburg, Pa.*, 306 A.D.2d 60, 61 (1st Dept 2003).

Empire argues that the doctrine of collateral estoppel preclude re-litigating whether or not San Miguel's conduct was intentional because the jury determined that he assaulted McHenry without justification. McHenry argues that collateral estoppel does not lie because the jury did not determine whether or not, from San Miguel's view, San Miguel intended the harm, but only that San Miguel was the aggressor.

The doctrine of collateral estoppel prevents repetitive litigation, and potentially inconsistent judgments, by precluding re-litigation, in a subsequent law suit, of a particular question of fact previously adjudicated. *See Ryan v .New York Tel. Co.*, 62 N.Y.2d 494, 499–500 (1984). It is not necessary that the cause of action be the same in order for collateral estoppel to apply. *Id. See also Ventur Group, LLC v. Finnerty*, 80 A.D.3d 474, 475 (1st Dept 2011). But the "doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." *Finnerty*, 80 A.D.3d at 475. Because assault and battery are intentional, as opposed to negligence-based torts, the question of whether San Miguel's conduct was intentional was determined.[5] As neither tort includes as an element the intention to cause

[5] "To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent." *Holland v. City of Poughkeepsie,* 90 A.D.3d 841, 846 (2d Dept 2011) (internal quotation marks and citation omitted). "[A]n intent to do *harm* is not an element of a battery cause of action." *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 95 A.D.3d 671, 674 (1st Dept 2012)

harm, the issue of whether or not San Miguel intended the harm was not previously adjudicated as an element to either claim.

However, this is a post-judgment case, in which the victim seeks recovery based on the judgment from the Underlying Action. In that fully-adjudicated action, the issue of self-defense was raised by, and determined against, San Miguel and, as previously stated, McHenry stands in the insured shoes for purposes of determining indemnity coverage. Unlike the duty to defend, the duty to indemnify "is determined by the actual basis for the insured's liability to a third person, and does not turn on the pleadings, but rather on whether the loss, as established by the facts, is covered by the policy." *Atlantic Mut. Ins. Co. v. Terk Tech. Corp.*, 309 A.D.2d 22, 28 (1st Dept 2003) (internal citation and quotation marks omitted). *See also K2 Inv. Group, LLC v. American Guar. & Liab. Ins. Co.*, 91 A.D.3d 401, 402 (1st Dept 2012) ("duty to indemnify . . . is determined by the actual basis of the insured's liability to plaintiff") (citation and quotation marks omitted).

In the Underlying Action, San Miguel was not found to have acted in self-defense, and admitted that he struck McHenry at least twice. In other words, San Miguel repeatedly struck McHenry with a metal pipe without justification. Such conduct is

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(emphasis added). "To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact." *Holtz v. Wildenstein & Co.*, 261 A.D.2d 336, 336 (1st Dept 1999). McHenry's counsel here, who was also his trial counsel in the Underlying Action, avers the battery claim was also decided against San Miguel, presumably as a matter of law, but that no question was put to the jury because San Miguel admitted the battery.

intentional. Further, under these circumstances, the harm that occurred (McHenry's injuries from being struck with a metal pipe) must be deemed to have flowed directly from, and to be inherent in the nature of, San Miguel's acts.[6] In light of these facts, San Miguel is not entitled to indemnity coverage under the Policy.

McHenry's reliance on cases such as *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 58 A.D.3d 990, 991-992 (3d Dept 2009) is unpersuasive. In *Clayburn*, the insured restrained the injured party in a bear hug, in self-defense, after which the injured party then fell through a plate-glass window. The Court determined that the record demonstrated that while the insured's act in restraining the injured party was intentional, the subsequent window incident, which caused the harm, was not intentional, as the "injuries were not inherently likely to result from the nature and force of a defensive bear hug." *Id.* at 992. In *Massa v. Nationwide Mut. Fire Ins. Co.*, 74 A.D.3d 1661, 1662-1663 (3d Dept 2010), the Court found that there was no proof that a drunken college student

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[6] This is not a case like so many cited by McHenry where the court was determining whether or not an insurer had a duty to defend. An insurer may be required to defend, even though it may not be required to pay once the litigation has run its course. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006). In duty-to-defend cases, there generally exist only pleadings to demonstrate the alleged facts of the case, which, for purposes of determining the insurer's duty to defend, must be read in favor of the insured. Here, the facts of the underlying occurrence have been established through the Underlying Action, the basis for the judgment for which McHenry seeks indemnification. Moreover, as the jury determined that San Miguel did not act in self-defense, it is unnecessary to reach the issue of whether, in a case of self-defense, an insured's acts would not be deemed an intentional cause of harm, but merely intended for protection of self or others.

knew that the victim was below when he threw an oil drum out of a window. Unlike here, these cases have resulting consequences that could, from the point of view of the insured, be deemed accidental.

As this is a case in which noncoverage arose from a lack of inclusion, not an exclusion, it is unnecessary to reach the issue of timeliness of disclaimer, pursuant to Insurance Law § 3420 (d), as disclaimer was not required. *See Markevics v. Liberty Mut. Ins. Co.*, 97 N.Y.2d 646, 648-649 (2001).[7]

McHenry argues that, in the event that the court determines that the Policy does not cover the incident, Empire should be equitably estopped from denying indemnity coverage. Generally, equitable estoppel cannot be used to create coverage where none

[7] Even if I were to reach it, however, "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage." *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64, 68-69 (2003) (internal quotation marks and citations omitted). Neither party has demonstrated when Empire was provided notice of the claim. McHenry's counsel's assertion that Empire knew of the claim from the date of the complaint, January 1999, is not supported by admissible evidence to raise a fact issue to defeat summary judgment.

While McHenry's counsel may be accorded a presumption of personal knowledge concerning the underlying trial, as the transcript of it reveals that she was McHenry's trial counsel, the record also reveals that McHenry had other counsel initially and does not reveal when McHenry's trial counsel was engaged. McHenry's counsel does not state that her affirmation is made on personal knowledge or provide the basis for her knowledge about when Empire was notified about the claim. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980) (attorney affidavit lacked probative value and could not raise a triable issue of fact).

exists. *Wausau Ins. Cos. v. Feldman*, 213 A.D.2d 179, 180 (1st Dept 1995) (clerical error resulting in assignment of defense for nine years did not create coverage by estoppel). However, "[t]he doctrine of [equitable] estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense." *Liberty Ins. Underwriters, Inc. v. Arch Ins. Co.*, 61 A.D.3d 482, 482 (1st Dept 2009) (citation and quotation marks omitted). *See also Albert J. Schiff Assoc. v. Flack*, 51 N.Y.2d 692, 699 (1980) ("where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense . . . though coverage . . . does not exist, the insurer will not be heard to say so"); *Utica Mut. Ins. Co. v. 215 W. 91st St. Corp.*, 283 A.D.2d 421, 422–423 (2d Dept 2001) (insurer that assumes and controls defense on behalf of insured knowing facts that constitute a defense to coverage without reserving its right to deny coverage is later estopped from denying coverage); *Travelers Prop. Cas. v. Weiner*, 174 Misc. 2d 831 (Sup Ct. Tompkins Co. 1997) (insurer estopped from denying coverage where it knowingly continued to defend insured for three years after insured's conviction assault that was dispositive, against insured, concerning coverage).

McHenry argues that Empire should be estopped because it knew from the time of the January 1999 summons and complaint that assault and battery were alleged, and had all knowledge necessary to disclaim then. However, as previously stated, Empire was not required to disclaim coverage for intentional harm. In any event, cases in which courts have estopped an insurer from disclaiming indemnity are those in which the insurer did not assert a reservation of rights to disclaim and the insured was prejudiced by the insurer's control and setting of the defense. In defending San Miguel, Empire was required to defend against all claims against him. *QBE Ins. Corp.*, 102 A.D.3d at 510. However, from the time of interposition of the answer in the Underlying Action,[8] through its April 1999 Letter, Empire both disclaimed for the assault and battery allegations and asserted a reservation of rights to later disclaim defense of the case against San Miguel. With this notice from Empire, San Miguel have reasonably believed that he would have indemnity coverage under the policy for the assault and battery claims for which McHenry recovered against San Miguel.

McHenry's counsel asserts that at the time of depositions, in January 2002, Empire knew all that was necessary to determine the coverage issue and disclaim, and should not have waited until after summary judgment was granted on Ramirez's motion, in October

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[8] As the answer in the Underlying Action is dated May 3, 1999 and the April 1999 Letter denying indemnity coverage is dated before then, there could hardly have been an expansive period of time, if any, in which Empire-hired counsel set defenses in the underlying case prior to advising San Miguel of its coverage position.

2002, to disclaim in 2003. However, as stated above, Empire had already disclaimed for indemnity for the assault and battery claims in April 1999. In addition, McHenry does not cite any support in the record for his conclusory assertion, which is insufficient to defeat a motion for summary judgment. *See Alvarez,* 68 N.Y.2d at 325.

McHenry also argues that a reservation of rights should not absolve an insurance company into perpetuity. He asserts there was prejudice because he had a viable negligence claim based on a dangerous condition, specifically logs in the backyard behind San Miguel's home, but that San Miguel's Empire-hired counsel did not oppose Ramirez's motion for summary judgment, which was made by Ramirez's Empire-hired counsel. In support, McHenry refers to his deposition testimony, but does not explain how it demonstrates that the negligence claim against Ramirez was viable, the dismissal of which was never appealed. Accordingly, this unsupported conclusion or speculation is insufficient to raise a genuine triable fact issue to defeat summary judgment. *Zuckerman*, 49 N.Y.2d at 562-63; *see Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383-384 (2004) (averments that are conclusions are not sufficient to defeat summary judgment). McHenry also does not sufficiently demonstrate how San Miguel would have litigated differently, had he not been defended by counsel paid for by Empire, or prejudice to San Miguel due to this passage of time between the depositions and Empire's January 2003 disclaimer of its duty to defend.

In addition, McHenry argues that Empire should be estopped from denying coverage because it misled San Miguel in the 2003 Letter by: (1) failing to advise him to that he had a right to bring an action to fight the disclaimer; (2) stating that intentional conduct was not covered, when harm or injury that is accidentally caused may be covered; (3) informing San Miguel that it is against public policy to provide coverage for intentional harm; and (4) stating that San Miguel's failure to hire his own counsel to assume his defense would result in Empire commencing a declaratory judgment, and then failing to commence a declaratory judgment action.

The elements of equitable estoppel are: (1) conduct amounting to false representation or concealment of a material fact; (2) intention or expectation that the other party will act upon that conduct; and (3) knowledge of the true facts. *See BWA Corp. v. Alltrans Express U.S.A.*, 112 A.D.2d 850, 853 (1st Dept 1985). The party seeking estoppel must show: "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position." *Id.* (citation and quotation marks omitted). *See also River Seafoods, Inc. v. JPMorgan Chase Bank*, 19 A.D.3d 120, 122 (1st Dept 2005). Equitable estoppel is invoked "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another." *American Bartenders School v. 105 Madison Co.*, 59 N.Y.2d 716, 718 (1983).

As discussed above, in insurance coverage cases, equitable estoppel has been employed to estop an insurer from denying coverage where the insured is prejudiced by

losing control of the defense of a case by the insurer's continued representation of the insured, without reservation of rights. McHenry's assertions regarding the 2003 Letter do not involve San Miguel's reliance upon Empire's conduct in continuing to represent San Miguel, but the manner in which Empire discontinued defense coverage. However, assuming there is an issue of fact whether or not Empire misled San Miguel with one of its statements in the 2003 Letter, McHenry has not submitted any admissible evidence to demonstrate that a fact issue exists as to reliance by *San Miguel* or his lack of knowledge of the true facts.

McHenry also does not provide authority to support the proposition that Empire was required to bring a declaratory action against San Miguel because it threatened to do so in the 2003 Letter, or explain how this assertion, when made, was concealment or misrepresentation. Similarly, McHenry does not support his assertion that any failure to advise San Miguel that he had a right to bring an action against Empire was a false representation or concealment, or demonstrate that San Miguel was unaware that he could challenge the disclaimer. San Miguel hired counsel to vacate the first ($375,000) judgment that McHenry received, and for trial in the Underlying Action. McHenry's unsupported assertion that San Miguel would not know that he could sue his insurer is speculative, and therefore insufficient to defeat summary judgment.

Moreover, the 2003 conduct McHenry alleges by Empire essentially amounts to the contention that Empire breached its duty to defend San Miguel by, for example,

discontinuing defense where it did not yet know whether or not McHenry's injury might have been accidentally caused. However, the wrongful disclaimer of defense coverage would not create indemnity coverage. *Robbins v. Michigan Millers Mut. Ins. Co.*, 236 A.D.2d 769, 771 (3d Dept 1997) ("breach [by an insurer] of its duty to defend [does not] create coverage"); *Matijiw v. New York Cent. Mut. Fire Ins. Co.*, 292 A.D.2d 865, 866 (4th Dept 2002) ("the breach by defendant of its duty to defend does not create coverage.")[9]

McHenry avers that he suffered prejudice because the first judgment he received was vacated and because of the lengthy delay in the Underlying Action. However, because McHenry does not demonstrate any specific conduct directed toward him by Empire, upon which he relied, his argument is unpersuasive.[10] To the extent that McHenry appears to assert that he was prejudiced because the Insurance Law does not permit a direct claim against the insurer by an injured person until after the entry of judgment, such prejudice does not support estoppel. As the elements of equitable estoppel are not present, McHenry's undeveloped assertion of laches, which involves

[9] McHenry does not demonstrate that Empire misled San Miguel by stating that public policy precludes coverage for intentionally caused harm, which is true.

[10] McHenry asserts that he was prejudiced by Empire's disclaimer because his second trial was not held until 2012. However, this was approximately nine years after Empire disclaimed defense in 2003, and certainly not the product of either Empire's continued defense of San Miguel or its conduct toward McHenry.

lateness coupled with significant prejudice is unpersuasive. *See Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149, 152 (1st Dept 1990), *affd* 77 NY2d 311 (1991).

Empire has met its prima facie burden of demonstrating there is no coverage owed, and McHenry has failed to establish an issue of fact demonstrating coverage to San Miguel. Consequently, Empire's motion must be granted, and McHenry's motion denied.

While McHenry appears to seek a declaration that Empire was required to provide defense and indemnity coverage, here there is no coverage, and thus no duty to defend. *Atlantic Mut. Ins. Co.*, 309 A.D.2d at 30. Finally, as the court has determined that there is no coverage, and as San Miguel has not opposed the motion, Empire is entitled to summary judgment and the declaration it seeks.

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff Empire Insurance Company as Successor in Interest to Allcity Insurance Company for summary judgment in its favor is granted (motion sequence number 001); and it is further

ORDERED that defendant Thomas McHenry's motion for summary judgment (motion sequence number 002) for an order granting summary judgment in his favor and for a declaration that plaintiff Empire Insurance Company as Successor in Interest to Allcity Insurance Company owed insurance coverage to defendant Robert San Miguel and Thomas McHenry and is responsible to pay for Thomas McHenry's judgment, with

interest, resulting from the case captioned *Thomas McHenry v Robert San Miguel*, Index No.: 1995-1999, Supreme Court, Kings County is denied.

Settle judgment on notice.

Dated: New York, New York
April 8 , 2013

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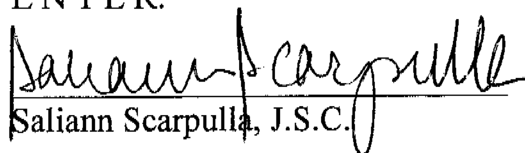

Saliann Scarpulla, J.S.C.