

Old Republic Ins. Co. v United Natl. Ins. Co.,
2014 NY Slip Op 31699(U)
July 1, 2014
Sup Ct, NY County
Docket Number: 155995/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
OLD REPUBLIC INSURANCE COMPANY,
directly and as subrogee of STS STEEL, INC.,

DECISION & ORDER

Plaintiff,

-against-

Index No.: 155995/2012

UNITED NATIONAL INSURANCE COMPANY,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Defendant United National Insurance Company (United) moves for summary judgment dismissing the amended complaint (AC) of Old Republic Insurance Company (Republic). Motion Sequence 008. Republic cross-moves to renew United’s motion to dismiss (Motion Sequence 002), which resulted in this court’s decision and order, dated June 7, 2013 (Decision). Republic seeks to vacate the portions of the Decision that dismissed without prejudice its causes of action for ineffective disclaimer and common law waiver, the first and third causes of action in the AC, respectively. The second cause of action is for equitable estoppel. At oral argument, Republic’s attorney stated that his client was not asserting claims for breach of an oral contract or promissory estoppel. Doc¹ 215, Tr 4/3/14, pp 3-4. The only agreement Republic relies upon is the umbrella policy issued by United to Conception Bay, Inc. (Conception).

Factual & Procedural Background

In this declaratory judgment action Republic, individually and as subrogee of its insured, STS Steel, Inc. (STS), seeks to recover from United \$1 million that Republic paid to settle an

¹ References to “Doc” refer to documents filed in the New York State Electronic Filing System.

underlying personal injury action. In January 2004, the Rye City School District (Rye) hired Andron Construction Corporation (Andron) to be the construction manager for work performed at an elementary school (the School Project). Doc 202. In June 2005, Rye and STS entered into a Trade Contract, which provided that STS, as Contractor, a defined term, was to supply the metals requirements for the School Project (STS Contract). Doc 201, p 165. The STS Contract defined “Contractor” as the person or entity identified as such in the STS Contract, i.e., STS. *Id.*, §3.1.1, p 179. Article 5 of the STS Contract defined “Subcontractor” as “a person or entity who has a direct contract with the Contractor [STS] to perform a portion of the Work at the site or to otherwise furnish labor, material or other services with respect to a portion of the Work....” *Id.*, General Conditions §5.1.1, p 185 & Supplementary General Conditions, §5.1.1, p 214.

Pursuant to the STS Contract, STS was required to obtain personal injury liability insurance, as well as excess liability insurance, that named Rye, Andron, the Architect and the Architect’s consultants as additional insureds. Doc 201, Supplementary General Conditions, & Insurance, §§ 11.1.1 & 11.1.2, pp 227-228 & Annex p 12 (last page). STS was required to cause Subcontractors to obtain comprehensive general liability insurance “reasonably satisfactory to” Rye, naming Rye, the Architect, the Architect’s consultants and Andron as additional insureds. *Id.*, Supplementary General Conditions, & Insurance, §11.1.8. The STS Contract did not require Subcontractors to obtain excess insurance or to name STS as additional insured. *Id.*

STS obtained a primary liability insurance policy from Republic, effective from April 9, 2005 to February 1, 2006, with a per occurrence limit for bodily injury of \$1 million. Doc 182. STS also obtained an umbrella policy from American International Specialty Lines Co. (American International), a/k/a, Chartis. Doc 151, Fact 25; Doc 196, admitting Fact 25.

STS subcontracted with Conception to erect steel at the School Project (Subcontract).

Doc 193.² In the Subcontract, Conception agreed to indemnify, *inter alia*, STS, Rye and Andron for any claims, including attorneys' fees, arising out of the Work. *Id.*, §4. Section 7 of the Subcontract provided that Conception was required to obtain commercial general liability insurance in the amount of \$1 million covering personal injury. *Id.* In the same section, under the heading "Commercial Umbrella", the body of the clause was crossed out. *Id.* The deleted portion contained a minimum limit of \$5 million of umbrella insurance. *Id.* Next to the heading, the following handwritten words appear: "Current Insurance approved by Jim Stori R.T". Under the heading "Additional Insured Endorsement", section 7 further provided that:

Attached to each certificate of insurance shall be a copy of the Additional Insured Endorsement that is part of the Subcontractor's Commercial General Liability Policy and Umbrella Policy. These certificates and the insurance policies shall contain a provision that coverage afforded under the policies will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Contractor.

Id., p 4. Attachment A to the Subcontract, §4 stated:

The attached sample ACORD Certificate of Insurance form shows the Minimum coverage's [sic] and limits to be certified as required by your subcontract agreement of the project specifications. Minimum limit requirements may be satisfied by any combination of limits shown for primary liability coverage's [sic] (e.g. general liability, automobile liability, employers liability) and Umbrella/Excess limits provided the sum of each of the combined limits equals or exceeds the Minimum shown on the attached sample Certificate of Insurance.

Id., p 5. Finally, subsection 5 to Attachment A stated that the Certificate of Insurance:

must clearly state that [STS] and as required by contract... [Rye] ... [Andron] .. and ... Architect are added as "Primary Additional Insured" to the General Liability, ... and Umbrella/Excess policies.

² STS signed the Subcontract on June 13, 2005. However, it is unclear whether Conception signed it on August 18, 2005 or 2006. Doc 193, p 4.

Id., p 5. It is undisputed that there was no certificate of insurance attached to the Subcontract.

Conception obtained a primary general liability policy from Scottsdale Insurance Company (Scottsdale), effective from August 3, 2005 to August 3, 2006, with a \$1 million per occurrence limit for bodily injury (Scottsdale Policy). Doc 183. Conception also procured an umbrella policy issued by United, Policy Number MBU0003309, effective from December 10, 2005 to August 3, 2006, with a \$5 million per occurrence limit (United Policy). Doc 184, see also, Doc 151, Fact 9 & 10, Doc 196, admitting Fact 9 to the extent that Conception was the named insured under the United Policy and admitting Fact 10 regarding the limits of the United Policy.

Although the Subcontract says “current insurance approved” next to the crossed out umbrella insurance provision, it is undisputed that Conception did not have umbrella insurance in place when STS signed the Subcontract. STS signed the Subcontract in June 2005, but the United Policy was effective on December 10, 2005. Docs 184 & 193. The court rejects Republic’s strained interpretation of “current” as meaning insurance “in progress.” The dictionary definition Republic cites is from the phrase “current negotiations.” The ordinary meaning of that phrase is negotiations happening at the present time. Moreover, “current” cannot be interpreted to mean insurance obtained almost six months later.

Jim Stori, the chief executive officer of STS, submitted an affidavit in which he averred that Richard Travers of Conception wrote the handwritten note about current insurance, which Mr. Stori understood to mean “that however much umbrella coverage Conception could obtain would satisfy the part of the Subcontract pertaining to Conception’s obligation to obtain umbrella insurance for the benefit of STS.” Doc 192, ¶¶ 8 & 12. Afterward, Mr. Stori signed the Subcontract for STS and Seana Travers signed it on behalf of Conception. *Id.*, ¶9. Seana

Travers allegedly told Jim Stori that “umbrella coverage was expensive, and Conception was unsure if it could obtain \$5 million...” Ms. Travers also allegedly promised Deborah Clements, a financial planner employed by STS, that “Conception would obtain as much umbrella coverage as it could purchase.”

On January 19, 2006, Jose Pollock, an employee of Conception, was injured while working on the School Project. Doc 16, AC, ¶12. On January 20, 2006, the day after the accident, the Mitchell J. Blecker Agency, Inc., issued a certificate of insurance to STS, which stated that it was an additional insured under the United Policy and the Scottsdale Policy (Certificate of Insurance). Doc 205. The Certificate of Insurance was faxed to Rye and STS on February 27 and March 1, 2006, respectively. *Id.*

On May 22, 2006, Pollock commenced a personal injury action against Rye and Andron in the Supreme Court, Westchester County, entitled *Pollock v The Rye City School Dist.*, Index No. 9988/2006 (Pollock Action). Doc 159. On January 30, 2006, Rye and Andron tendered its defense of the Pollock Action to STS and Republic. Doc 170, Bates STS000194. By letter dated December 8, 2006, Republic agreed to defend Andron and Rye, subject to a reservation of rights. *Id.*, Bates STS 000188. Republic noted that it had tendered the defense of Rye and Andron to Scottsdale, but, notably, not to United. *Id.*, Bates STS000197.

On April 16, 2007, Zurich Insurance, the insurer for Andron and Rye tendered its defense of the Pollock Action to United (Zurich Tender). Doc 152, ¶9. No copy of the Zurich Tender is in the record, but the affidavit of United’s Senior Claims Manager, Duane Parker, which is undisputed, states that Zurich tendered the defense of Andron and Rye. *Id.* On June 18, 2007, Rye and Andron filed a third-party complaint against STS and Conception, which asserted causes of action for breach of contract, common law indemnification, contractual

indemnification and contribution. Doc 160. In response to the Zurich Tender, United disclaimed by letter dated August 3, 2007 (Disclaimer). Doc 185. The Disclaimer was addressed to, *inter alia*, STS and Conception and stated that it was mailed to STS and Conception by certified mail, return receipt requested, in August of 2007, after the third-party action was commenced. *Id.* The Disclaimer noted that United had attempted to obtain copies of the “relevant contracts” to no avail, and instead Andron and Rye had commenced a declaratory judgment action against it. *Id.* In addition, United disclaimed defense and indemnity to Conception and STS because they failed to tender their defense and provide timely notice of the occurrence or claim, which was a breach of a condition precedent to coverage under the United Policy. *Id.*

In fact, there is no evidence in the record that STS or Conception notified United of the third-party complaint or tendered their defense to United. In its responses to United’s notice to admit, Republic admitted it had no documentary evidence that STS and/or Conception, or anyone representing them, tendered its defense of the Pollock Action to United. Doc 167, Requests and Responses 13, 14 & 17. Republic also admitted that it defended STS in the Pollock Action without a reservation of rights; that it received United’s Disclaimer of the Zurich Tender on behalf of Andron and Rye; and that STS was not an additional insured under the Zurich Policy. *Id.*, Requests and Responses 15, 18 & 20. However, in its response to the notice to admit, Republic holds out hope that a tender to United by STS and/or Conception will turn up in “multiple subpoenas to non-parties, each demanding deposition testimony and voluminous documents,” including subpoenas to STS, and Republic promises to supplement its responses when discovery is complete. *Id.*, Requests and Responses 13, 14 & 17. The court notes that Republic brought this action as subrogee of STS and should not need discovery from its own insured.

In 2006, Andron and Rye had brought a declaratory judgment action in this court, Index No. 602975/2006 (Republic/Scottsdale DJ), against Republic, Scottsdale (Conceptions' primary insurer), American International, STS and Conception. Doc 163. United's Memorandum of Law says that American International was STS's umbrella carrier. Doc 150, p 4. On March 11, 2009, in the Republic/Scottsdale DJ, the court granted partial summary judgment to Rye and Andron, ruling that Scottsdale had a duty to defend them in the Pollock Action, based upon Scottsdale's concession that it was required to do so. Doc 163.

On December 29, 2010, in the Pollock Action, the court granted partial summary judgment on Andron and Rye's contractual indemnification claim, ruling that, pursuant to the Subcontract, Conception was required to indemnify Andron and Rye. Doc 162. The motion as against STS for contractual indemnification was denied because the STS Contract was not submitted in support of the motion. *Id.*

On February 6, 2012, the Pollock Action was settled on the record in open court. Doc 187. Jeanne M. Gonsalves Lloyd appeared on behalf of STS and agreed that Republic would contribute \$1 million of the \$3,000,000 settlement (Settlement). *Id.*, pp 4-5 & 13. Ms. Lloyd reserved Republic's rights against "UAIG" for \$1 million. *Id.*, p 14. A Ms. Higgins, whose appearance was not noted at the beginning of the transcript as an attorney for any party, spoke up and said:

Your Honor, I also represent UAIG on this case. We just want to add this settlement of the matter in no way waives any of our coverage, defenses or representations taken at this time on this matter.

Id., p 15.

Two prior declaratory judgment actions related to this case were brought. On June 1, 2007, Andron and Rye brought a declaratory judgment action in this court against United, under

Index No. 107744/2007 (Prior United DJ). The County Clerk's minutes reflect that the action was marked "disposed" on April 27, 2012. This was the declaratory judgment action referred to in United's Disclaimer. In January 2012, Conception brought a declaratory judgment action in the Supreme Court Westchester County, Index No. 50765/2012 (Conception DJ). The Conception DJ sought a declaration that United was required to provide coverage for Conception in the Pollack Action. Conception DJ, Doc 1. On April 25, 2012, the parties to the Conception DJ stipulated to discontinue it without prejudice to United's "defenses under its Policy(ies) and at law that were or could have been asserted in this action." Conception DJ, Doc 8.

Anna Higgins represented UAIG in the Prior United DJ and in her own words, "took the lead in scheduling the mediation" held on October 17, 2011. Doc 190, Bates UN003888. However, as previously noted, the Prior United DJ was over at the time of the Settlement. In e-mail correspondence that references the Prior United DJ, which was generated in September and October of 2011, Ms. Higgins' client is referred to as UAIG or Diamond State, but not United National. Doc 190. In their submissions, the parties assume that UAIG and United are the same insurer. Thus, the court will also.

Contrary to Republic's contention, the correspondence from Ms. Higgins does not contain any agreement by United to fund a specific amount of the Settlement or any admission as to coverage for STS or Conception under the United Policy. Nor does it indicate that United agreed to defend STS or Conception in the Pollock Action, where they were defended by Republic and Scottsdale, respectively. The most that can be said is that Ms. Higgins took the lead in scheduling a mediation that led to the Settlement and that she admitted that "everyone" had forgotten about United's August 2007 Disclaimer. However, far from retracting the Disclaimer, on October 14, 2011, three days prior to the mediation, Ms. Higgins e-mailed , *inter*

alia, Republic's attorney, Ms. Lloyd, who was defending STS in the Pollack Action. Ms. Higgins wrote that UAIG denied coverage to STS and Conception, writing "as detailed in the [Disclaimer], there is no defense or indemnity to STS or Conception Bay under UAIG's umbrella policy." Doc 190, Bates UN003870. A copy of the Disclaimer was attached. *Id.* Ms. Higgins further stated that "***for purposes of the upcoming mediation, UAIG will agree to accept Andron's and Rye's tender*** ... subject to all exclusions noted in the [Disclaimer] as well as the other insurance exclusion, making the UAIG policy excess to any available coverage to both Andron and Rye" [emphasis supplied]. *Id.*

On August 31, 2012, Republic commenced this action to recover the \$1 million it paid to settle the Pollock Action. The AC asserts three causes of action: (1) ineffective disclaimer of coverage; (2) equitable estoppel; and (3) waiver.

When United moved to dismiss the AC, the Decision ruled that there was no coverage for STS under the United Policy because the Subcontract did not require Conception to obtain umbrella coverage for STS. In addition, this court dismissed Republic's claim for ineffective disclaimer because where there is no coverage to begin with, a disclaimer is unnecessary. However, Republic did not have all of the United Policy documentation and the court granted leave to renew with proof that STS was an insured. With respect to waiver, the decision held that United's participation in the Pollock Action on behalf of Conception did not waive the defense that the United Policy did not cover STS.³ Discovery ensued.

Discussion

³ The Decision also held that the equitable estoppel argument made by Republic was really a claim that United breached an oral agreement to pay Republic back for the \$1 million it contributed to the Settlement. However, Republic does not press that argument. As a result, it is unnecessary to address United's contention that the alleged oral agreement would be unenforceable due to the statute of frauds.

A. Is STS an Insured under the United Policy?

Republic contends that STS was an insured, pursuant to Section III of the United Policy entitled "WHO IS AN INSURED", while United asserts that the same language proves that STS was not. Section III, subsection 2, provides:

2. ... each of the following is also an insured: ...

e. Any person or organization qualifying as an insured under any policy of "underlying insurance". Coverage afforded such insureds under this policy applies only to injury or damage:

(1) which is covered by this policy; and

(2) which is covered by the "underlying insurance" or would be covered but for the exhaustion of such policy's limits of insurance.

This policy does not afford

such person or organization limits of insurance in excess of the lesser of:

(1) The minimum limit of insurance you agreed to provide; or

(2) The limit of insurance under this policy.

f. Any person or organization for whom you have agreed in writing prior to any "occurrence" or "offense" to provide insurance such as is afforded by this policy, but only with respect to operations performed by you or on your behalf, or facilities owned or used by you. This policy does not afford such person or organization limits of insurance in excess of the lesser of:

(1) The minimum limit of insurance you agreed to provide; or

(2) The limit of insurance under this policy.

Doc 184, p 7, Bates UN000029.

With respect to Section III(2)(e), United argues that even though STS was an additional insured under the Scottsdale primary policy, the minimum limit of umbrella insurance Conception agreed to provide was zero. Ergo, according to United, there is no coverage available to STS under §2(e) because the lesser of zero and \$5 million is zero. United argues

that §2(f) does not afford STS coverage because Conception did not agree to provide STS with umbrella insurance, as evidenced by the language crossed out in the Subcontract, and, in any event, zero is less than \$5 million, so no coverage is available to STS.

In its cross-motion, Republic urges that STS is an insured under §2(e) of the United Policy because STS was an insured under Conception's underlying Scottsdale Policy, which was exhausted by payment of \$1 million to settle the Pollock Action. In addition, Republic contends that STS is an insured under §2(f) of the United Policy because Conception agreed in the Subcontract to provide umbrella insurance naming STS as an additional insured. In addition, Republic presented excerpts from the STS Contract to demonstrate that it required Subcontractors to obtain umbrella coverage, which in fact it did not (see factual background above). Finally, Republic argues that the United Policy contains language about sublimits, which proves that the lesser amount could not be zero.

A court may pass on the meaning of an unambiguous contract. *Innophos Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 (2008); *West, Weir & Bartel, Inc. v Mary Carter Paint Co.*, 25 NY2d 535, 540 (1969). A provision is unambiguous on its face if it is reasonably susceptible of only one meaning. *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007); *Breed v Insurance Co. of North America*, 46 NY2d 351, 355 (1978)(no reasonable basis for difference of opinion as to meaning of words). If there is ambiguity in the terminology used, a fact-finder must interpret the intent of the contracting parties. *Hartford Accident & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 (1973).

The Subcontract is ambiguous with respect to Conception's obligation to procure umbrella insurance for STS. The words "current insurance approved" and the crossed out umbrella policy language tends to prove that Conception was not required to purchase umbrella

insurance. On the other hand, §7 was not crossed out, and it required a certificate of insurance with an additional insured endorsement that was “part of the Subcontractor’s ... Umbrella Policy” and provisions in that policy that it would not be canceled or expire without notice to STS. Attachment A to the Subcontract, §5, also required a certificate of insurance naming STS as additional insured under Umbrella/Excess policies. The Subcontract contains conflicting provisions, which creates ambiguity on whether Conception had to obtain umbrella insurance naming STS. There is no dispute that STS was an additional insured under Conception’s general liability policy issued by Scottsdale. Thus, the first part of subsection 2(f) was satisfied. But there is nothing in the Subcontract that states how much umbrella insurance coverage Conception was required to procure.

Consequently, the outcome turns on whether the language in the United Policy, the “minimum insurance you agreed to provide” could equal zero. The United Policy’s coverage is the lesser of \$5 million or what Conception agreed to provide. No amount was agreed to in the Subcontract, which was less than \$5 million. Hence, the court agrees with United that the agreed to coverage was zero. Mr. Stori’s affidavit is not in conflict. It says that Mr. Stori agreed “that however much umbrella coverage Conception could obtain would satisfy the part of the Subcontract pertaining to Conception’s obligation to obtain umbrella insurance for the benefit of STS.” Even if the Subcontract were ambiguous, which it is not, Republic’s parole evidence adds nothing. Mr. Stori’s affidavit does not overcome the fact STS and Conception did not agree to an amount. The coverage of the United Policy turns on *the amount that Conception agreed to provide in the Subcontract*, not on what Conception actually could or did obtain. That language is not ambiguous.

To overcome United's argument that the lesser amount agreed to was zero, Republic points to §§ V(9)(b)(1) and VI(20)(a)(3) of the United Policy, which mention sublimits.

However, both sections refer to sublimits of underlying insurance not listed in the Declarations.⁴

The issue here has nothing to do with underlying insurance that was lower than the amount set forth in the Declarations. As a result, Republic's argument is not cogent.

In sum, there is no coverage for STS under the United Policy because in the Subcontract, Conception and STS did not agree to any amount of umbrella coverage. Although Republic requests discovery, it has not pointed to any discoverable evidence that would overcome this reasoning. A motion for summary judgment should not be denied for lack of disclosure unless

⁴Subsection 9(b) is entitled "Maintenance of Underlying Insurance", and requires the insured to notify United if the underlying insurance is reduced below the amount set forth in the Declarations:

- 9. Maintenance of Underlying insurance ...
 - b. You must notify us within 30 days of any change in the terms of any "underlying policy" that:
 - (1) Introduces a sublimit lower than the limits shown in the schedule of "underlying insurance" described item 5 of the Declarations for any coverage

Subsection 20(a)(3) is a definition of "retained limit", which also refers to underlying insurance involving a sublimit not listed in the Declarations:

- 20. "Retained limit" means the greater of:
 - a. The sum of amounts applicable to any "claim" or "suit" from: ...
 - (3) "Underlying insurance" which is not payable for full limits as shown in the Schedule of Underlying Insurance due to the existence of any applicable sublimit which is not listed on the Schedule of Underlying Insurance described in Item 5 of the Declarations

the party opposing the motion identifies the needed disclosure. *Auerback v Bennett*, 47 NY2d 619, 636 (1979). Republic has not done so.

B. Compliance with Notice Condition to Coverage

An independent basis exists to grant United's motion for summary judgment. Even if STS were an additional insured under the United Policy, STS failed to comply with a condition for coverage contained in Section V of the United Policy, which is entitled "Conditions". Subsection 5 thereof entitled "Duties in the Event Of Occurrence, Offense, Claim Or Suit", provides, *inter alia*:

- b. If a "claim" is made or "suit" is brought against any insured, you must: ...
 - (2) Notify us as soon as practicable.

Doc 184, p 9, Bates UN000031. The United Policy provides that the word "you" refers "to the named insured shown in the Declarations and all other ... organizations qualifying as named insureds under this policy." *Id*, p 1, Bates UN000023. The named insured shown in the Declarations was Conception, *Id*, Bates UN000019.

It is undisputed that neither STS nor Conception notified United of the Pollock suit or the accident, which was a condition precedent to coverage. Notice from another insured, or from another source, does not satisfy an insured's obligation to provide timely notice. *Ciampa Estates, LLC v Tower Ins. Co. of NY*, 84 AD3d 511, 512 (1st Dept 2011), *lv den.*, 17 NY3d 709 (2011). The cases cited by Republic for the proposition that Zurich's notice was sufficient do not support Republic's claim. None of the cases involved lack of notice by the party seeking coverage. Nor has the court's independent research disclosed any such precedent.⁵

⁵ An exception is that notice from a party united in interest in the underlying suit is sufficient. *National Union Fire Ins. Co. v Insurance Co. of N. Am.*, 188 AD2d 259 (1st Dept 1992), *app. den.*, 81 NY2d 709 (1993). In the Pollock Action, Rye and Andron, whose insurer gave notice, brought a third-party action

C. Ineffective Disclaimer, Waiver & Estoppel

Republic's cause of action for ineffective disclaimer is without merit. As noted in the Decision, pursuant to CPLR 3420(d), a late disclaimer does not create coverage that does not exist:

A disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed.

Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188 (2000).

Republic's causes of action for equitable estoppel and waiver are predicated on the notion that after United issued the Disclaimer, it actively participated in the Pollock action and took over STS' defense and strategy to its prejudice. Republic says that these actions waived the Disclaimer and estops United from denying coverage to STS.

However, waiver does not apply where there is no coverage under the policy as written. *Alfred J. Schiff Assoc., Inc. v Flack*, 51 NY2d 692, 698 (1980). Further, in order to equitably estop an insurer from denying coverage, the insurer must control the defense, without reserving its rights, in a manner that affects the character and strategy of the lawsuit in a way that can no longer be altered. *206-208 Main St. Assoc., Inc. v Arch Ins. Co.*, 106 AD3d 403, 406 (1st Dept 2013) (“[T]he Court of Appeals has only found estoppel in cases where, by the time the insurer attempted to avoid liability under the policy, the underlying litigation against the insured had reached a point where the course of the litigation had been fully charted.”); citing *U.S. Fid. & Guar. Co. v New York Susquehanna & Western Ry. Co.*, 275 AD2d 977, 978-979 (4th Dept

against Conception and STS. Thus, the party that gave notice was adverse to, not united in interest with, STS and Conception.

2000)(insurer fully undertook defense and discovery in underlying action and did not assert disclaimer until settlement conference on eve of trial).

Here, the facts do not support equitable estoppel. Republic admits that it appeared for and defended STS in the Pollock Action. Doc 167, Requests and Responses 13, 14, 15-18 & 20. There is no evidence that STS tendered its defense to United. United reserved its rights in the Disclaimer, when scheduling the mediation and at the time of the Settlement. Docs 185, 187 & 190. While scheduling the mediation, Ms. Higgins, the attorney for UAIG, made clear that she represented UAIG in the Prior United DJ brought by Andron and Rye, not STS in the Pollock Action. Doc 190. Ms. Higgins never offered to represent STS in the Pollock Action or took over its defense. When Ms. Higgins asked who would be trial counsel for STS in the Pollock Action, Ms. Lloyd said that she would be representing STS. Doc 190. The correspondence between Ms. Lloyd and Ms. Higgins reflects that Ms. Higgins expected a substantial contribution from Republic on behalf of STS to settle the Pollock Action. *Id.* Further, Ms. Higgins' participation in the mediation was for Conception, who was insured under the United Policy. Finally, Ms. Higgins never retracted the Disclaimer, and she reiterated that in the Settlement transcript. Docs 187 & 190. United is not estopped because it disclaimed in 2007 and never took over the defense of STS, who was represented by the attorney for Republic. Accordingly, it is

ORDERED that the motion of defendant United National Insurance Company for summary judgment dismissing the amended complaint is granted, and the amended complaint is dismissed with prejudice; and it is further

ORDERED, ADJUDGED and DECLARED that United National Insurance Company is not obligated to reimburse Old Republic Insurance Company for the \$1,000,000.00 it paid for the

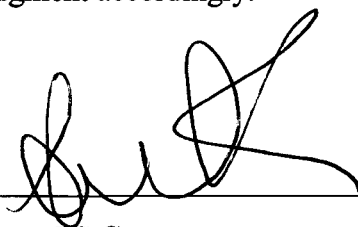
settlement of the action entitled *Jose Pollock v Rye City School District et ano.*, Sup. Ct. Westchester Co., Index No. 9988/2006; and it is further

ORDERED that the cross-motion by Old Republic Insurance Company to renew United's motion to dismiss is granted and, upon renewal, the court dismisses the amended complaint with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 1, 2014

ENTER:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

J.S.C.