SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ROCKAWAY COMMONS LLC, ROCKAWAY COMMONS REALTY, L.P., ROCKAWAY COMMONS, INC., and MALACHITE GROUP LTD.,

Plaintiffs,

-against-

LEXINGTON INSURANCE COMPANY, MAIDEN SPECIALTY INSURANCE COMPANY, ARCH SPECIALTY INSURANCE COMPANY, ARCH INSURANCE GROUP, JAMES RIVER INSURANCE COMPANY, and COLONY INSURANCE COMPANY,

Defendants.

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Index No. 160180/14

Motion seq. nos. 001, 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiffs:
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For Arch defendants:
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By notice of motion, defendant Arch Insurance Group (Arch) moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against it (motion seq. 001). Plaintiffs oppose.

By notice of motion, defendant Arch Specialty Insurance Company (Arch Specialty) moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against it (motion seq. 002). Plaintiffs oppose. The motions are consolidated here for disposition.

I. BACKGROUND

On September 19, 2012, Arch Specialty, a subsidiary of Arch Group, issued to plaintiff Malachite Group Ltd. a second-layer excess commercial property insurance policy for real property owned by plaintiffs in Queens County. (NYSCEF 1, 17, Exh. A). The policy, covering June 2012 through June 2013, provides excess coverage above the $5 million limits provided respectively by the primary and first-layer excess insurers, defendants Lexington Insurance Company and Maiden Speciality Insurance Company. The policy contains the following provision:

> Provided always that liability attached to the Company only after the primary and underlying excess insurer(s) have paid or have admitted liability for the full amount of their respective ultimate net loss liability . . . then the limits of the Company's liability shall be those set forth [on the annexed schedule] under the designation "Limit Insured" and the Company shall be liable to pay the ultimate net loss up to the full amount of such "Limit Insured."

(*Id.*).

Following damage to plaintiffs' property resulting from Hurricane Sandy in October 2012, and upon submission of claims to its carriers, to date, Lexington paid plaintiffs $4,775,107 (NYSCEF 31, 34); Maiden paid nothing (NYSCEF 21, 34).

On October 28, 2014, plaintiffs commenced this action alleging a breach of contract against Arch Group and Arch Specialty, claiming damages of $25,000,000. (NYSCEF 3).

At oral argument on these motions, the parties agreed that the subject policy provides for a two-year period during which the insured may bring suit against the insurer, and the parties suggested that I decide the applicability of that provision should they attempt to litigate it in the future. (NYSCEF 37).

II. CONTENTIONS

Defendants allege that as Arch Group is a holding company and corporate parent to Arch Specialty, and does not issue insurance polices, there is no contractual relationship between it and plaintiffs, and thus, it cannot be held liable to plaintiffs for breach of contract. (NYSCEF 17, 19). They also contend that because the underlying primary and excess policy limits have not been met, and as those insurers do not admit liability for their policy limits, Arch Specialty has no obligation to pay under its policy, and thus, there is no breach. (NYSCEF 23). They offer the affidavit of Maiden's vice-president who attests that Maiden has not paid any loss or admitted liability on its policy with plaintiffs. (NYSCEF 21).

In response, plaintiffs explain that they erroneously believed Arch Group had issued the subject policy because its name appears on it, and that because their losses have yet been fully assessed, they would agree to discontinue the action as to the Arch defendants conditioned on their waiving the statute of limitations to permit subsequent actions against them once the losses exceed the second-layer coverage threshold. (NYSCEF 31). And as defendants are represented by common counsel, plaintiffs claim that they should bear the costs of duplicative and unnecessary motion practice. (NYSCEF 30).

In reply, defendants assert that absent any dispute that the policy limits have not yet been met, the Arch Speciality policy has not been triggered, and they will not agree to a discontinuance based on an open-ended extension of the statute of limitations. To the extent plaintiffs refer to the limitationsperiod pursuant to its policy, defendants ask that I determine the applicability of that provision at a later time. They also contend that as plaintiffs concede that Arch Group was improperly named and they have no cause of action against it, a dismissal of it

should be with prejudice and unconditional. (NYSCEF 34, 36).

III. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

A. Arch Group

An insurance policy is a contract between the insurer and insured (*Bovis Lend Lease LMB v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]), and a plaintiff may not maintain a cause of action for breach of contract against a party absent contractual privity (*Andrew R. Mancini Assoc., Inc. v Mary Imogene Bassett Hosp.*, 80 AD3d 933, 934 [3d Dept 2011]; *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 722 [2d Dept 2009]; *Vogel v Lyman*, 246 AD2d 422, 422 [1st Dept 1998]).

Here, it is undisputed that Arch Group did not issue an insurance policy to plaintiffs. Thus, there is no contractual relationship between them to support a breach of contract claim. (*See OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 123 AD3d 222, 226-227 [1st Dept 2014]

[no contractual privity between insured and its carrier's reinsurer to support breach of contract claim]; *Utica Mut. Ins. Co. v Johnston*, 62 AD3d 692, 694 [2d Dept 2009] [insured's breach of contract claim barred as a matter of law as parent insurance company had not issued the subject policy]).

B. Arch Specialty

An insurance policy that "explicitly provides" that it is to be excess over other excess coverage may be enforced (*Jefferson Ins. Co. of New York v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]), and if the terms of the policy so provide, the excess carrier's obligation is triggered only when the underlying policy limits have been exhausted (*eg*, *Liberty Mut. Ins. Co. v Ins. Co. of State of Pennsylvania*, 43 AD3d 666, 668 [1st Dept 2007]).

Again, it is undisputed that Arch Specialty's obligation is triggered only upon the exhaustion of the underlying policy limits, which are defined under each policy as $5 million per occurrence. Defendants offer sufficient evidence, which plaintiffs do not dispute, that the limits have not been met. Consequently, Arch Specialty's obligation has not ripened and plaintiffs may not assert a cause of action against it for denial of coverage. (*See Combustion Engineering, Inc. v Travelers Indem. Co.*, 75 AD2d 777, 779 [1st Dept 1980], *affd* 53 NY2d 875 [1981] [as excess insurer's liability would only be triggered for losses over $50 million, plaintiff's claim for $36 million dismissed]; *cf. Simplexdiam, Inc. v Brockbank*, 283 AD2d 34, 39 [1st Dept 2001] [summary dismissal of complaint denied where plaintiff had submitted claim above threshold to implicate excess coverage]).

C. Limitations clause

As defendants do not raise a statute of limitations defense, and the complaint must be

dismissed against the Arch defendants (*supra* III.A., B.), any issue as to a future statute of limitations defense is not ripe for judicial review (*see Brown v Huntington Med. Group*, 229 AD2d 458, 460 [2d Dept 1996] [applicability of CPLR 205 toll on hypothetical, future action not ripe for judicial review until subsequent action brought and defendant raises statute of limitation defense]; *Commisso v Pricewaterhousecoopers LLP*, 2014 NY Slip Op 31979[U], *3 [Sup Ct, NY County 2014] [statute of limitation defense not ripe for review as plaintiff had yet to withdraw and substitute parties to which defense would apply]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Arch Insurance Group's motion to dismiss is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk directed to enter judgment accordingly in favor of said defendant; it is further

ORDERED, that defendant Arch Specialty Insurance Company's motion to dismiss is granted and the complaint is dismissed without prejudice; it is further

ORDERED, that the action is severed and continued against the remaining defendants; it is further

ORDERED, that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED, that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 15B), who are directed to mark the court's records to reflect the change in the caption

herein.

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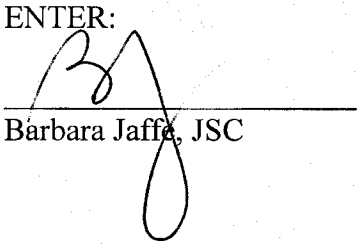

Barbara Jaffe, JSC

DATED: August 13, 2015
New York, New York