

<b>Chipotle Mexican Grill, Inc. v RLI Ins. Co.</b>
2018 NY Slip Op 32120(U)
July 9, 2018
Supreme Court, Queens County
Docket Number: 700712/2016
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS  
Justice

IAS PART 30

CHIPOTLE MEXICAN GRILL, INC., CHIPOTLE  
MEXICAN GRILL OF COLORADO, LLC and  
CHIPOTLE SERVICES, LLC

Index  
Number 700712/2016

Plaintiff,

-against-

Motion  
Date February 7, 2018

RLI INSURANCE COMPNAY and THE KOCH-  
GLACKEN AGENCY A/K/A GLACKEN GROUP,  
INC., PIECE MANAGEMENT INC., SIMON  
PROPERTY GROUP, INC., THE RETAIL  
PROPERTY TRUST, and AFMAT WAZADALLY,

Motion Seq. Nos. 3, 6 and 7

Defendants.

**FILED**  
JUL 17 2018  
COUNTY CLERK  
QUEENS COUNTY

The following e-file papers numbered EF77 to EF96 and EF175 to EF293 were submitted and considered on this motion by defendant, AFI Associates, Inc. d/b/a The Koch-Glacken Agency (Koch-Glacken), sued herein incorrectly as The Koch-Glacken Agency a/k/a Glacken Group, Inc., (Seq. 3) for leave to renew, pursuant to CPLR 2221 (e), a prior motion to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (7); and on motions by plaintiffs (collectively Chipotle) (Seq. 6) for summary judgment against defendant, RLI Insurance Company (RLI), and by RLI (Seq. 7), for summary judgment declaring that it "has no obligation to defend or indemnify (Chipotle) in connection with the underlying action."

	<u>Papers Numbered</u>
Notices of Motion - Affirmations - Exhibits .....	EF77-EF96 EF175-EF209 EF210-EF252
Answering Affirmations - Exhibits .....	EF253-EF272
Reply Affirmations - Exhibits .....	EF273-EF293

Upon the foregoing papers, it is ordered that the three motions are determined as follows:

Chipotle hired Piece Management, Inc. (PMI) to do construction/repair work at plaintiff's restaurant in Roosevelt Field Mall. PMI was the employer of one Afmat Wazzadally, who allegedly fell from a ladder, and was injured, while working at said construction site on December 20, 2014. Wazzadally sued plaintiff, and another party, for his injuries, in this court, under Index No. 1064/2015. Chipotle alleges that PMI must defend and indemnify it in such personal injury action, and the instant action was brought "seeking a declaration that Chipotle is entitled to additional insured coverage from RLI, as the insurer of PMI."

Koch Glacken acted as the insurance broker for PMI on this job, and obtained a commercial general liability policy with RLI, which stated, in relevant part, that additional insureds under said policy are "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." Koch Glacken issued a Certificate of Liability Insurance for the subject policy listing Chipotle as a "Certificate Holder" and an "additional insured." Such Certificate of Insurance stated it "confers no rights upon the certificate holder" and "does not constitute a contract between the issuing insurer ... and the certificate holder." Upon commencement of the personal injury lawsuit, Chipotle requested that PMI and RLI hold it harmless and indemnify it, as Chipotle believed it was an "additional insured" under the Policy. RLI denied Chipotle's request, stating that Chipotle was required to provide a contract with PMI before it could qualify as an "additional insured" pursuant to the Policy, and had not. Chipotle brought a third-party action against PMI, alleging causes of action including indemnity, contribution, breach of contract, and fraudulent and negligent misrepresentation. Thereafter, Chipotle commenced the instant declaratory judgment action (First, Third and Fourth Causes of Action) against RLI and Koch-Glacken, adding claims for unjust enrichment (Fifth and Sixth Causes of Action).

A previous motion by Koch-Glacken, seeking dismissal of the First, and Third through, and including, Sixth Causes of Action against it, pursuant to CPLR 3211 (7) and 3212, was denied by this court in December 2016, allowing movant leave to renew after the completion of discovery. Said defendant now moves to renew, and upon renewal, to dismiss those designated causes of action in plaintiff's complaint for failure to state a cause of action. Plaintiff opposes such dismissals.

This motion to renew is granted, as permission to do so was expressly given in the order of this court, dated December 21, 2016, and no opposition to renewal has been forthcoming.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52

AD3d 767 [2008]. Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2016]; *Bravo v Vargas*, 113 AD3d 579 [2014]).

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

In the case at bar, Koch-Glacken acted as an agent for PMI in obtaining liability insurance with RLI (see e.g. *Inman Constr. v Cathedral Marble & Granite Co.*, 307 AD2d 955 [2d Dept 2003]; *Progressive Cas. Ins. Co. v Yodice*, 276 AD2d 540 [2d Dept 2000]). There is no argument that Chipotle was not named as an insured on the face of the subject liability policy from RLI to PMI. The “well-understood meaning” of “additional insured” is “an entity enjoying the same protection as the named insured” (*Pecker Iron Works of N. Y. v Traveler’s Ins. Co.*, 99 NY2d 391, 393 [2003]). “A party is not entitled to coverage if it is not named as an insured or additional insured on the face of the policy as of the date of the accident for which coverage is sought” (*New York State Thruway Auth. v Ketco, Inc.*, 119 AD3d 659, 661 [2d Dept 2014]). It is for the courts to determine whether a party is an “additional insured” or not, “from the intention of the parties to the policy, as determined from the four corners of the policy itself” (*140 Broadway Prop. v Schindler El. Co.*, 73 AD3d 717, 718 [2d Dept 2010]; see *77 Water Street, Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092 [2d Dept 2017]).

A certificate of insurance issued by a broker listing a party as an “additional insured” is insufficient to alter the language of the policy itself, especially where the certificate recites that it is for informational purposes only; that it confers no rights upon the holder; that it confers no rights upon the holder; and that it does not amend, alter, or extend the coverage afforded by the policy (see *Ramcharan v Beach 20<sup>th</sup> Realty, LLC*, 94 AD3d 964 [2d Dept 2012]; *School Const. Consultants, Inc. v ARA Plumbing & Heating Corp.*, 63 AD3d 1029 [2d Dept 2009]; *Home Depot v National Fire & Mar. Ins. Co.*, 55 AD3d 671 [2d Dept 2008]).

Here, such exculpatory language was included in the certificate of insurance naming Chipotle as an “additional insured,” and the policy terms required a written contract or agreement, between PMI and Chipotle, conferring such status on Chipotle, before Chipotle could be an “additional insured.” Plaintiff has failed to demonstrate the existence of such an agreement or contract.

Plaintiff contends that even if no privity of insurance contract existed herein, which is the case, Koch-Glacken still owed a duty to Chipotle to obtain the necessary coverage due to an alleged “near-privity relationship” between these entities. Such contention is without merit. Koch-Glacken procured the requested coverage for its principal, PMI, and had no further common-law duty to obtain additional coverage, based upon plaintiff’s insufficiently established argument that the facts herein created a “special relationship in a commercial controversy” (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]), or an “exceptional situation” with an “additional duty of advisement” (*ibid* at 272; *see Joseph v Interboro Ins. Co.*, 144 AD3d 1105 [2d Dept 2016]), to warrant such an expanded duty. Consequently, the branch of Koch-Glacken’s motion seeking summary judgment dismissing the First, Third and Fourth Causes of Action, as against it, is granted.

Plaintiff’s Fifth and Sixth Causes of Action, alleging unjust enrichment, contemplate a situation in which the defendant has obtained a benefit which in “equity and good conscience” should be paid to the plaintiff (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012] quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 412 [1972]). However, “[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon NY, Inc.*, 18 AD3d at 790). A cause of action for a declaratory judgment is unnecessary and improper where plaintiff’s complaint asserts another adequate remedy at law (*see Stuckey v Lutheran Care Foundation Network, Inc.*, 140 AD3d 734 [2d Dept 2016]; *JMF Consulting Group II, Inc. v Beverage Marketing USA, Inc.*, 97 AD2d 540 [2d Dept 2012]). Here, the two causes of action alleging unjust enrichment were based on the same facts and sought the same damages as the Fourth Cause of Action alleging breach of contract, and, thus, they were duplicative of the Fourth Cause of Action, and subject to dismissal on that ground (*see Amrusi v Nwaukoni*, 155 AD3d 814 [2d Dept 2017]; *Ochoa v Montgomery*, 132 AD3d 827 [2d Dept 2015]). In opposition, plaintiff has failed to raise an issue of fact to refute such entitlement, and the branch of the motion seeking dismissal of the Fifth and Sixth Causes of Action, as against Koch-Glacken, is granted.

Plaintiffs, Chipotle, move (Seq. 6) for summary judgment against defendant, RLI, seeking a declaration that RLI “is obligated to immediately defend and indemnify Chipotle in the underlying personal injury action” brought by Wazadally. Defendant, RLI, moves (Seq. 7) for summary judgment, seeking a declaration that it has no obligation to defend or indemnify Chipotle in the underlying action, and for dismissal of plaintiffs’ complaint against it. Plaintiffs’ supporting arguments rely on the initial determination that the PMI ServiceChannel profile and the Chipotle vendor bulletin are “written contracts or agreements,” binding PMI and Chipotle on the issue of “additional insured” coverage for Chipotle. Plaintiffs are mistaken in such reliance. Plaintiffs have failed to demonstrate that such documents comprised all of the “settled and agreed upon ... material conditions of a contract ... (therefore) no binding agreement exists .... Their minds never met as to some of the elements necessary to constitute a valid contract” (*Schenectady Stove Co. v Holbrook*, 101 NY 45, 48 [1885]). Whether the Service Channel profile and the vendor bulletin were “offers,” “propositions,” or merely “advertisements,” they were not “written contracts or agreements” for additional insurance coverage between Chipotle and PMI, as required by the insurance policy. The vast majority of the information contained in the ServiceChannel “screenshot,” and the vendor “Fixxbook” profile, was general information viewable by all potential ServiceChannel customers

to review, and not terms or conditions specific to Chipotle and/or PMI, and neither the “screenshot,” nor the profile were ever signed by either party. Without any such “written contract or agreement” Chipotle was not an additional insured under the policy.

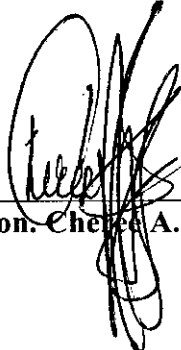
Further, Chipotle maintains that RLI, because it issued a certificate of insurance naming Chipotle as an additional insured, is estopped from denying coverage, where Chipotle reasonably relied on the certificate of insurance to its detriment. Initially, estoppel cannot apply in this matter, because “the doctrine of estoppel may not be invoked to create coverage where none exists under the policy” (*American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420 [2d Dept 1998]; see *American Safety Cas. Ins. Co. v 385 Onderdonk Ave., LLC*, US Dist Ct, ED NY, 14 Civ 3909, Kuntz, J., 2018; *Sena v Nationwide Mut. Fire Ins. Co.*, 224 ad2D 513 [2d Dept 1996]). Notwithstanding, for such estoppel, based upon the issuance of a certificate of insurance, to apply, such certificate must have been issued either by the insurer itself or by an agent of the insurer (see *Harco Constr., LLC v First Mercury Co.*, 148 AD3d 870 [2d Dept 2017]). Here, the certificate was issued by Koch-Glacken, PMI’s insurance agent. “An insurance broker, when acting for an insured, is deemed the agent of the insured,” not the insurer (*Bohlinger v Zanger*, 306 NY 228, 231 [1954]). A broker will only be held to have acted as the insurer’s agent where there are some facts presented from which a general authority to represent the insurer may be inferred (see *Harco Constr., LLC v First Mercury Co.*, 148 AD3d 870; *Three Boroughs, LLC v Endurance American Specialty Ins. Co.*, 143 AD3d 480 [1st Dept 2016]). In the case at bar, no such evidence has been presented, and there exists no basis to estop RLI from denying the existence of coverage founded solely on the issuance of the certificate of insurance. Consequently, Chipotle’s motion for summary judgment, declaring that RLI is obligated to defend and indemnify Chipotle in the underlying personal injury action, is denied. RLI’s motion seeking summary judgment dismissing Chipotle’s action demanding coverage under the PMI policy as an additional insured, as against RLI, is granted.

The parties’ remaining arguments and contentions either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of Koch-Glacken’s motion (Seq. 3) for leave to renew is granted, and upon renewal, the branch of its motion seeking summary judgment, dismissing the First, Third, Fourth, Fifth and Sixth Causes of Action in plaintiff’s complaint, as against it, is granted. Plaintiff’s motion (Seq. 6), seeking summary judgment against defendant, RLI, is denied. RLI’s motion (Seq. 7), seeking summary judgment dismissing plaintiff’s complaint, as against it, is granted.

This constitutes the Decision and Order of this Court.

Dated: July 9, 2018

  
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Hon. Cheryl A. Buggs, J.S.C.

**FILED**  
JUL 17 2018  
COUNTY CLERK  
QUEENS COUNTY