SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

----------X

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

- v -

KOOKMIN BEST INSURANCE CO., LTD. (US BRANCH)(F/K/A LIG INSURANCE CO., LTD.), NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, P.A., NEW YORK SUPERMARKET EAST BROADWAY, INC.,

Defendant.

----------X

INDEX NO. 652938/2016

MOTION DATE 01/30/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

----------X

NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, P.A.

Plaintiff,

-against-

Defendant.

----------X

Third-Party
Index No. 595823/2017

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant New York Supermarket East Broadway, Inc. (NY Supermarket) moves for an order: (1) pursuant to CPLR §3211(a)(5), dismissing The Burlington Insurance Company's (Burlington) complaint, and American Guarantee and Liability Insurance Company's (AGLIC) second third-party complaint on the grounds of *res judicata* and collateral estoppel; (2) pursuant

to CPLR ¶3211(a)(1) dismissing the breach of contract for failure to procure insurance claims; and (3) staying discovery until this motion is decided.

***BACKGROUND***

This action arises out of an accident that occurred on September 28, 2010 at a supermarket operated by NY Supermarket at 75-85 East Broadway, New York, New York (the Building). Xuan Quan Xu (the Claimant), an employee of NY Supermarket, fell down a freight elevator shaft at the Building on that date and suffered injuries as a result of that fall (NYSCEF Doc. No. 85, complaint in underlying personal injury action; NYSCEF Doc. No. 97, Burlington complaint, ¶ 10).

The City of New York owned the Building and leased it to the New York Economic Development Corporation (NYCEDC), which in turn leased it to Winking Group, LLC (Winking) (NYSCEF Doc. No. 97, compl, ¶ 11).

Winking further subleased the first floor and the cellar to NY Supermarket (NY Supermarket Sublease) (*id.*; see NYSCEF Doc. No. 113, NY Supermarket Sublease). Under section 9 (A) of the NY Supermarket Sublease, NY Supermarket agreed to indemnify Winking from all liability or claims arising from personal injuries sustained by anyone in or about the subleased premises (NYSCEF Doc. 113 at 31). It also agreed to indemnify, defend, and save harmless Winking against and from all liabilities, including costs and attorneys' fees which may be imposed on or incurred by Winking by reason of NY Supermarket's negligence, any accident or injury occurring on the premises, and/or any matter arising out of NY Supermarket's use of the premises (*id.*, § 17 at 54-55).

Under section 9 (C) of the NY Supermarket Sublease, NY Supermarket was obligated to procure commercial general liability insurance coverage naming Winking as an additional

insured with limits not less than $3 million per occurrence and $5 million in the aggregate (*id.* § 9 [C] at 32-33). NY Supermarket obtained a commercial general liability policy from defendant Kookmin Best Insurance Company, Ltd. (US Branch) (f/k/a LIG Insurance Co, Ltd.) (KBIC), bearing policy number 01CPS023295, for the period from January 1, 2010 to January 1, 2011, subject to limits of liability of $1 million per occurrence and $2 million in the aggregate with Winking as an additional insured (KBIC Policy) (NYSCEF Doc. No. 97, compl, ¶ 25; see also NYSCEF Doc. No. 94 , KBIC Policy). This KBIC Policy provides coverage to Winking as an additional insured for the Claimant's accident on a primary and non-contributory basis. NY Supermarket also procured a commercial excess liability insurance policy from defendant/third-party plaintiff National Union Fire Insurance Company of Pittsburgh, PA (NUFIC), bearing policy number EBU 065822493, for the period January 1, 2010 to January 1, 2011, and subject to limits of liability of $4 million per occurrence and in the aggregate (NUFIC Policy) (NYSCEF Doc. No. 97, compl, ¶ 27; see also NYSCEF Doc. No. 95, NUFIC Policy). This NUFIC Policy also provides coverage to Winking as an additional insured for the Claimant's accident.

Winking had obtained its own commercial general liability policy from Burlington, for the period of July 19, 2010 to July 19, 2011, bearing policy number 489BW17066, and subject to limits of liability of $1 million per occurrence and $2 million in the aggregate (Burlington Policy) (NYSCEF Doc. No. 97, compl, ¶ 29; see also NYSCEF Doc. No. 128, second third-party complaint, ¶ 20). Winking also procured a commercial umbrella liability policy from AGLIC for the period of July 19, 2010 to July 19, 2011, with effective limits of $10 million per occurrence and in the aggregate (AGLIC Policy) (NYSCEF Doc. No. 128, second third-party complaint, ¶ 21). Under the AGLIC Policy, it was subrogated to the rights of Winking as its insured (*id.*, ¶ 22).

***The Underlying Action***

After the accident on April 26, 2011, the Claimant filed a negligence complaint bearing Index Number 402134/2011 against the City of New York (the City), Winking, and New York Supermarket (the Underlying Action) (NYSCEF Doc. No. 97, compl, ¶ 15). The Underlying Action involved a single claim of negligence, asserting that defendants failed to properly maintain the freight elevator/dumbwaiter (dumbwaiter) at the Building causing Claimant's injuries. On April 4, 2012, Winking brought a third-party action against NY Supermarket for contractual and common-law indemnity, contribution, and breach of contract, for failure to procure insurance pursuant to the terms of the NY Supermarket Sublease (*id.*, compl, ¶ 15). The City also brought a third-party action.

In September 2014, Winking and the City moved for summary judgment in the Underlying Action on Claimant's negligence claims, arguing that they were out-of-possession landlords who did not reserve right to maintain/repair the dumbwaiter. Winking also moved for summary judgment on its contractual indemnification claim against NY Supermarket. NY Supermarket did not oppose those motions (*id.*, ¶ 17; see also NYSCEF Doc. No. 116, April 30, 2015 order at 1-2).

By decision and order entered on April 30, 2015, the trial court in the Underlying Action dismissed Claimant's negligence claim against the City but denied Winking's motion on that claim. In addition, the court granted Winking summary judgment on its third-party contractual indemnification claim against NY Supermarket (NYSCEF Doc. No. 116, April 30, 2015 order at 12-13). It reviewed the broad indemnification obligation set forth in section 17 of the NY Supermarket Sublease and found that it clearly provided that Winking was entitled to contractual indemnification from NY Supermarket for any injury to a person within the leased space (*id.* at

13). Winking filed the Notice of Entry of this order on May 28, 2015, and NY Supermarket did not appeal (NYSCEF Doc. No. 117).

***The Instant Coverage Action***

In June 2016, Burlington, which issued primary coverage to Winking on the date of loss, commenced this declaratory judgment action against: (1) KBIC; (2) NUFIC; and (3) NY Supermarket. It seeks a declaration that Winking is an additional insured entitled to coverage for the Underlying Action under the KBIC and NUFIC Policies (NYSCEF Doc. No. 118). NUFIC filed an answer with a counterclaim and crossclaim seeking a declaration that any coverage provided to Winking by NUFIC for the Underlying Action was excess to that under the Burlington Policy (NYSCEF Doc. No. 127, NUFIC's third-party action; see also NYSCEF Doc. No. 128, second third-party complaint, ¶ 28).

At the same time, the Underlying Action was moving towards trial after the April 30, 2015 summary judgment order.

***The Settlement***

On January 12, 2017, KBIC, NUFIC, Burlington, and AGLIC agreed to settle the Claimant's claims in the Underlying Action for $3.1 million, and to pursue their claims of priority of coverage separately in this declaratory action. This settlement required KBIC to pay $1 million, NUFIC to pay $1 million, Burlington to pay $1 million, and AGLIC to pay $100,000. On that day, Burlington paid Claimant $1 million, and, on February 13, 2017, AGLIC paid Claimant $100,000. The Claimant signed a release in connection therewith, but none of the insurers signed such release, and the release did not contain any provision regarding the third-party claims asserted by Winking against NY Supermarket (NYSCEF Doc. No. 119, release).

On March 13, 2017, the parties filed a stipulation of discontinuance in the Underlying Action (the Stipulation) (NYSCEF Doc. No. 123). This Stipulation only contained the caption and index number of the main action by Claimant, and not the third-party captions or index number. It was signed only by the attorneys for Claimant, NY Supermarket, and Winking, and provided that:

> IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys of record for the parties to the above entitled action whereas no party hereto is an infant, incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of this action, NY SUPERMARKET EAST BROADWAY INC., NEW YORK SUPERMARKET INC., and WINKING GROUP, LLC be, and the same hereby is discontinued, with prejudice

(*id.*). While Burlington and AGLIC had made their settlement payments before this Stipulation they were not referenced in the Stipulation and did not sign it.

On October 10, 2017, NUFIC filed a third-party complaint against AGLIC in the instant coverage action, seeking a declaration that the coverage it provided Winking was excess to AGLIC's Policy, or that the policies were co-excess policies (NYSCEF Doc. No. 127, NUFIC third-party complaint). It requested that AGLIC reimburse it, in whole or in part, for the amounts NUFIC paid in connection with the settlement of the Underlying Action (*id.*).

On November 20, 2017, AGLIC filed an answer to the third-party complaint in this coverage action, and asserted a counterclaim against NUFIC, seeking reimbursement of the $100,000 it paid Claimant toward the settlement of the Underlying Action (NYSCEF Doc. No. 12). Also on that date, AGLIC, as subrogee of Winking, filed a second third-party complaint against NY Supermarket, seeking a judgment (1) ordering NY Supermarket to reimburse AGLIC for its contribution to the settlement pursuant to NY Supermarket's contractual indemnity obligations, and the summary judgment order regarding those obligations in the Underlying

Action; and (2) holding NY Supermarket liable to AGLIC for its breach of the sublease obligation to procure and maintain additional insured coverage on behalf of Winking (NYSCEF Doc. No. 128).

Also, on November 20, 2017, Burlington amended its complaint seeking additional declarations that it was subrogated to the rights of Winking's claims for contractual indemnity and breach for failure to procure insurance, that it is entitled to be reimbursed for its contribution to the settlement and defense costs it incurred in the Underlying Action, and for its attorneys' fees in this action (NYSCEF Doc. No. 103).

***The Present Motion***

NY Supermarket now moves to dismiss the claims against it. It urges that Burlington's and AGLIC's subrogated claims for contractual indemnity are barred by the doctrines of *res judicata* and collateral estoppel (CPLR §3211 [a] [5]). It contends that Winking and NY Supermarket were defendants in the Underlying Action, Winking's claims against NY Supermarket sought damages for contractual indemnification and breach of contract, and that action was discontinued with prejudice and without any reservation of rights. It argues that Winking did not preserve its rights to pursue its claims against NY Supermarket, and therefore, the claims by Burlington and AGLIC as subrogees of Winking, against NY Supermarket are barred. NY Supermarket points to the New York Supreme Court's On-Line Library (SCROLL) entry for the Underlying Action, under the main Index Number 402134/2011, marking the case as "Disposed," as proof that these claims were discontinued (NYSCEF Doc. No. 93). NY Supermarket contends that the Stipulation fully and finally terminated all claims arising out of the events alleged in the Underlying Action, including Burlington's and AGLIC's subrogee claims.

With respect to the summary judgment order on Winking's indemnification claims, NY Supermarket urges that because that order was never converted into a judgment, it has no collateral estoppel/*res judicata* effect. On the breach of contract claim, NY Supermarket contends that it purchased policies from KBIC and NUFIC, which together satisfy its obligation to procure insurance under the NY Supermarket Sublease, and thus that claim must be dismissed as well. It submits as proof the certificate of insurance naming Winking as an additional insured and the policies with a blanket additional insured endorsement (NYSCEF Doc. Nos. 94, 95, and 96).

In opposition, Burlington argues that the Stipulation was a first-party stipulation of discontinuance relating solely to a first-party release provided by the Claimant to all defendants in exchange for settlement payments. It fails to provide a basis to dismiss an already adjudicated third-party indemnification claim without any consideration or even reference to that third-party claim. Moreover, it contends that NY Supermarket ignores that it's and AGLIC's subrogation rights vested upon payment, which occurred before the Stipulation was executed, and thus even if NY Supermarket could modify the Stipulation to encompass already adjudicated third-party claims preserved in this declaratory action, it did not have the power to waive the insurer-subrogees' rights. On the contract claim, Burlington urges that simply acknowledging that Winking is an additional insured under the KBIC and NUFIC policies does not fulfill its obligations to "provide" Winking insurance.

AGLIC opposes, arguing that NY Supermarket is precluded from relitigating the issue of its contractual indemnity obligations under the doctrine of collateral estoppel. It also asserts that contrary to NY Supermarket's argument, collateral estoppel does not apply to the Stipulation which did not decide anything. Further, it's *res judicata* argument is flawed because the

Stipulation does not evidence any intent to void the prior summary judgment order on contractual indemnity. AGLIC asserts that this motion is premature because the parties were proceeding with discovery on these issues when this motion was made.

***DISCUSSION***

On a motion to dismiss, pursuant to CPLR §3211, the pleadings are liberally construed, all the allegations are taken as true, and the plaintiff is afforded the benefit of all possible inferences (*EBI I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). On a motion to dismiss based on documentary evidence (CPLR §3211 [a] [1]), the documentary evidence must utterly refute the plaintiff's factual allegations and establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326). Under CPLR §3211 (a) (5), the movant may seek dismissal of one or more claims on the ground that the cause of action cannot be maintained because of collateral estoppel or *res judicata*.

Under the doctrine of *res judicata*, when a claim is brought to final conclusion, all claims arising out of the same transaction, or series of transactions, are barred, even if they are based on different theories or seek different relief (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439, 441 [1st Dept 1998]). As a general rule, a "stipulation of discontinuance with prejudice has the same preclusive effect as a judgment on the merits" (*Schwartzreich v E.P.C. Carting Co.*, 246 AD2d at 441; *see Klein v Gutman*, 121 AD3d 859, 861 [2d Dept 2014]; *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d 665, 667 [2d Dept 2010]). When such a stipulation is relied upon for *res judicata* effect, "the language 'with prejudice' is narrowly interpreted when the interests of justice, or the particular equities involved, warrant such approach" (*Employers' Fire Ins. Co. v Brookner*, 47 AD3d 754, 756 [2d

Dept 2008], quoting *Dolitsky's Dry Cleaners v YL Jericho Dry Cleaners*, 203 AD2d 322, 323 [2d Dept 1994]; *see Mooney v Manhattan Occupational, Physical and Speech Therapies, PLLC*, 166 AD3d 957, 959 [2d Dept 2018] [same]; *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d at 667).

Here, contrary to NY Supermarket's argument, the indemnification claims do not arise out of the same transaction as those in the Underlying Action. Although there is a common factual background, Burlington's and AGLIC's claims are not the "same claim" as the Claimant's personal injury claims, nor are they based on the same harm (*Employers' Fire Ins. Co. v Brookner*, 47 AD3d at 756 [dismissal denied on *res judicata* ground because insurer's subrogation action not the same claim or same harm]). Specifically, Burlington's and AGLIC's indemnity claims stem from harm they suffered because of the settlement of the Underlying Action (*see Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 582 [1995] [insurer's subrogation rights accrue upon payment]), whereas Claimant's harm was the result of defendants' negligence in preventing him from falling down the dumbwaiter (*see Employers' Fire Ins. Co. v Brookner*, 47 AD3d at 756).

In addition, the language of the Stipulation must be narrowly construed (*see Mooney v Manhattan Occupational, Physical and Speech Therapy, PLLC*, 166 AD3d at 959). The Stipulation did not expressly bar the continued litigation of the third-party actions and claims. It never even mentions the counterclaims or crossclaims, it fails to include the caption for the third-party actions or their index number (they were never consolidated with the main action), and it was never signed by either Burlington or AGLIC (see NYSCEF Doc. No. 123). The vague language fails to show that the parties intended to preclude relitigation of all third-party claims and cross claims in the Underlying Action (*see Employers Fire Ins. Co. v Brookner*, 47 AD3d at

756 [where settlement did not involve, and stipulation of discontinuance did not mention the cross claim for indemnification or contribution, they are not precluded]; *Desiderio v GEICO Gen. Ins. Co.*, 107 AD3d 662, 663 [2d Dept 2013] [to cover unknown claims release must contain broad, all-encompassing language]; *Dolitsky's Dry Cleaners v YL Jericho Dry Cleaners*, 203 AD2d at 323).

While generally a release in favor of a tortfeasor that does not reserve the insurer's subrogation rights may shield the tortfeasor from liability to the subrogee insurer (*see Navigators Ins. Co. v Ironshore Indemnity, Inc.*, 156 AD3d 426, 426-427 [1st Dept 2017]; *Daimler Chrysler Ins. Co. v New York Cent. Mut. Fire Ins. Co.*, 125 AD3d 518, 519 [1st Dept 2015]), it is a well-established that "[o]nce an insurer has paid a claim and the tortfeasor knows or should have known that a right to subrogation exists, the wrongdoer and the insured cannot agree to terminate the insurer's claim without its consent and such an agreement cannot be asserted as a defense to the insurer's cause of action" (*Fasso v Doerr,* 12 NY3d 80, 88 [2009]; *see Aetna Cas. & Sur. Co. v Bekins Van Lines Co.*, 67 NY2d 901, 903 [1986]; *Group Health, Inc. v Mid-Hudson Cablevision, Inc.*, 58 AD3d 1029, 1030 [3d Dept 2009]; *New York Cent. Mut. Fire Ins. Co. v Hildreth,* 40 AD3d 602, 607 [2d Dept 2007]; *see also Allstate Ins. Co. v Mazzola*, 175 F3d 255, 260-261 [2d Cir 1999]).

Here, Burlington and AGLIC paid their share of the settlement before the Stipulation was filed. Their subrogation rights attached at the time of payment (*Fasso v Doerr*, 12 NY3d at 88; *see Allstate Ins. Co. v Mazzola*, 175 F3d at 260-261). NY Supermarket was fully aware of the insurers' pending claims for equitable subrogation since this declaratory action was commenced in 2016. It was aware of these insurers' payments in January and February 2017, before the March 1, 2017 filing of the Stipulation (*see State Farm Mut. Auto Ins. Co. v Knish*

*Hacking Corp.*, 52 Misc 3d 132[A], 2016 NY Slip Op 50996[U] [Sup Ct, App Term 2d Dept 2016]). To the extent that NY Supermarket urges an implied waiver, where a general release or stipulation includes no express waiver of the subrogation rights of the releasor's insurer, a waiver cannot be implied (*see Matter of State Farm Mut. Auto Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1111-1112 [2d Dept 2005]; *Jemb Realty Corp. v New Cingular Wireless PCS, LLC*, 2020 NY Slip Op 32916[U], * 3 [Sup Ct, NY County 2020]). Therefore, there was no waiver of subrogation rights. NY Supermarket could not agree to terminate the insurer-subrogees' claims without their consent.

NY Supermarket's reliance on *Navigators Ins. Co. v Ironshore Indemnity, Inc.* (156 AD3d 426), *Daimler Chrysler Ins. Co. v New York Cent. Mut. Fire Ins. Co.* (125 AD3d 518), and *Fifty CPW Tenants Corp. v Epstein* (16 AD3d 292 [1st Dept 2005]) is misplaced as those cases all are factually distinguishable. In *Navigators Ins. Co.*, the insureds stipulated to discontinue with prejudice "their defense and indemnification claims in the underlying action" (156 AD3d at 427). In fact, the stipulation expressly stated: "the above entitled action, including any Counterclaims, Cross Claims and Third Party Actions, be and the same hereby is discontinued with prejudice" (see NYSCEF Doc. No. 136). Similarly, in *Daimler* the parties executed general releases that were unambiguous and unconditional, and they specifically agreed in their stipulation of discontinuance "that all cross claims between the defendants in that action were 'discontinued and waived'" (125 AD3d at 519). *Fifty CPW Corp.* involved a stipulation of "discontinuance 'with prejudice' of [the building co-op's] indemnification and contribution claims against [the contractor] in [the prior litigation]" (16 AD3d at 294).

Here, in stark contrast, the Stipulation made no mention of the third-party indemnification and breach of contract claims and referenced only the Claimant's claims. In

addition, in *Fifty CPW Corp.*, during settlement negotiations the plaintiff sought to insert language into the stipulation reserving the corporation's right to seek indemnification in the future, but the contractor refused to agree to such a provision. Thus, the court reasoned that it could not "now escape the effect of its agreement to a stipulation that ended its third-party action . . . 'with prejudice' and without qualification or limitation" (*id.* at 294; *see also Grey Family Properties L.P. v Edgecombe Ave.*, 2015 NY Slip Op 32289[U] [Sup Ct, NY County 2015]). This rationale does not apply here, since at the time of settlement with the Claimant, neither Winking nor Burlington or AGLIC ever requested a carve out for the indemnification claims that NY Supermarket rejected.

NY Supermarket's argument that the entry on SCROLL demonstrates that the Stipulation was intended to and did discontinue the third-party claims, is unpersuasive. While SCROLL indicates under the main index number that the case was "Disposed," the full notes for the 3/13/17 filing states: "Action Discontinued As Per Stip. Filed on 3/13/17 As To Defts. New York Supermarket East Broadway Inc., New York Supermarket Inc., And Winking Group, LLC, **Only**" (NYSCEF Doc. No. 93 [emphasis added]). NY Supermarket's argument fails to give effect to that language. While this court does not condone Burlington's, AGLIC's, and Winking's actions in not continuing to litigate those third-party actions and, instead, pursuing the claims in this declaratory action, this is not a basis to preclude these parties from pursuing their subrogated rights. Therefore, although Burlington and AGLIC did not explicitly reserve their rights to indemnification when the Claimant, NY Supermarket and Winking settled the Underlying Action, they did not relinquish their right to indemnification (*see Fasso v Doerr,* 12 NY3d at 88). Dismissal is denied under the doctrine of *res judicata.*

Alternatively, NY Supermarket asserts that Burlington's complaint and AGLIC's second third-party complaint should be dismissed on collateral estoppel grounds. Collateral estoppel is a narrower type of *res judicata* (*see David v Biondi*, 92 NY2d 318, 322 [1998]). It bars a party from relitigating an issue where the issue was previously litigated and decided against that party and his or her privies. The movant is required to show that: (1) the identical issue was decided in the prior action and is decisive in the present action; and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to challenge the prior decision (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]; *Zimmerman v Tower Ins. Co. of N.Y.*, 13 AD3d 137, 139 [1st Dept 2004]). Insureds are generally deemed to be in privity with their insurer (*see Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d at 337). Because the doctrine requires that the issue actually be decided in the prior action (*Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006]), it is not applicable to issues resolved by stipulation of settlement since they were never actually litigated (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]; *Matter of Singh v New York State Div. of Human Rights*, 186 AD3d 1694, 1696 [2d Dept 2020]; *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d at 668).

Here, collateral estoppel is not applicable to the Stipulation which was a settlement of the Underlying Action and does not bar the parties' indemnification and breach of contract claims. Moreover, contrary to NY Supermarket's contention, the Stipulation does not undercut the preclusive effect of the summary judgment order in the Underlying Action on NY Supermarket's contractual indemnity obligations (*see Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 123 [1st Dept 2007] [a "settlement does not entail vacatur of a prior decision"]). The prior summary judgment order still has preclusive effect even thought it was

not actually converted into a judgment (*Vavolizza v Krieger*, 33 NY2d 351, 356 [1974] [an order made upon a motion will bar relitigation]; *Siddiqi v Ober, Kaler, Grimes &* Shriver, 224 AD2d 220, 222 [1st Dept 1996] [decision on motion bars new claim]; *see also Moore v Aegon Reins. Co. of Am.*, 196 AD2d 250, 255-56 [1st Dept], *cert dismissed* 512 US 1283 [1994]).

The claim for breach of contract, however, is dismissed based on documentary evidence. This claim alleges that NY Supermarket failed to procure insurance in accordance with the NY Supermarket Sublease which required that it procure insurance on behalf of Winking in the amount of $3 million per occurrence and $5 million in the aggregate (NYSCEF Doc. No. 113, NY Supermarket Sublease at 32-33). The KBIC and NUFIC Policies together satisfy NY Supermarket's obligation. Winking is an additional insured under the KBIC and NUFIC Policies, and together they provide the per occurrence and in the aggregate coverage amounts specified in the sublease. Contrary to AGLIC's and Burlington's contentions, the fact that NUFIC may challenge the priority of coverages among the insurers, or that KBIC defends and asserts that it paid its full policy amount, does not create an issue on this breach of contract claim (*see Georges v Resorts World Casino N.Y. City*, 189 AD3d 1549, 1551 [2d Dept 2020]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [insurer's refusal to indemnify does not change conclusion that party purchased the liability policy required under the contract]).

Accordingly, it is hereby;

ORDERED that Defendant New York Supermarket East Broadway, Inc.'s motion pursuant to CPLR §3211(a)(5), dismissing The Burlington Insurance Company's (Burlington) complaint, and American Guarantee and Liability Insurance Company's (AGLIC) second third-party complaint on the grounds of *res judicata* and collateral estoppel is denied; and it is further

ORDERED that Defendant New York Supermarket East Broadway, Inc's motion pursuant to CPLR ¶3211(a)(1) dismissing the breach of contract for failure to procure insurance claim is granted and the breach of contract claim is dismissed; and it is further

ORDERED that counsel are directed to appear for a remote status conference, on June 29, 2021 at 11:00 AM.

4/21/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [ ] DENIED | [X] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |