At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October, 2021.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

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MELISSA SCARLETT,

Plaintiff,

- against -

LM GENERAL INSURANCE COMPANY AND LIBERTY MUTUAL GROUP INC.,

Defendants.

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Index No. 515705/2020

DECISION AND ORDER CORRECTED

MOTION SEQUENCE #1

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	12 - 18
Affirmation (Affidavit) in Opposition and Exhibits Annexed	20 - 30
Affirmation (Affidavit) in Reply	31

Upon the foregoing papers, Defendants LM GENERAL INSURANCE COMPANY (LM General) and LIBERTY MUTUAL GROUP INC. (LMG and together with LM General, defendants) move for an order, pursuant to CPLR 3211 (a) (1) & (7) dismissing the complaint in its entirety based on documentary evidence or, in the alternative, dismissing all causes of action against LMG and plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing for failure to state a claim (motion sequence #1).

Background

Plaintiff MELISSA SCARLETT (Scarlett or plaintiff) commenced this action against defendants seeking Supplementary Underinsured Motorists (SUM) coverage under her automobile insurance policy with LM General due to injuries that she allegedly sustained as a result of a motor vehicle accident on August 27, 2019 in Charlotte, North Carolina. At the time of the accident, Scarlett was a passenger in a vehicle operated by Julissa Marie Broderick and owned by Vibert McAlmon (McAlmon) when said vehicle collided with another motor vehicle owned and operated by Sherry Ross (Ross). As a result of the collision, Scarlett allegedly suffered a femur fracture requiring major surgery and a two-week hospital stay.

Although neither party provides a precise date, it is undisputed that, sometime between November 18, 2019 and January 26, 2020, Scarlett settled her claims with Metropolitan Property and Casualty Insurance Company (Metropolitan), the insurer for Ross's vehicle, and State Farm Mutual Automobile Insurance Company (State Farm), the insurer for McAlmon's vehicle, for $15,000 and $35,000 respectively.[1]

As it is undisputed that Scarlett failed to obtain written consent from LM General before settling her claims with Metropolitan and State Farm as required under her insurance

[1] The Metropolitan policy had bodily injury liability limits of $30,000 per person and $60,000 per accident. The State Farm policy had bodily injury liability limits of $50,000 per person and $100,000 per accident, including Combined Uninsured/Underinsured Motorist Benefits with limits of $50,000/$100,000. The balance of Metropolitan's and State Farm's liability policy limits were paid to the two other passengers in the McAlmon vehicle.

policy, defendants argue that plaintiff is not entitled to SUM coverage and her complaint, therefore, must be dismissed.

The relevant provision from the policy of insurance pursuant to which plaintiff seeks SUM benefits provides:

> EXCLUSIONS: This SUM coverage does not apply: (1) To bodily injury to an insured, including care or loss of services recoverable by an insured, if such insured, such insured's legal representatives, or any person entitled to payment under this coverage, **without our written consent, settles any lawsuit against any person or organization that may be legally liable for such injury**, care or loss of services, but this provision shall be subject to Condition 10.
>
> CONDITIONS: (10) Release or Advance. In accidents involving the insured and one or more negligent parties, if such insured settles with any such party for the available limit of the motor vehicle bodily injury liability coverage of such party, **release may be executed with such party after thirty calendar days actual written notice to us**, unless within this time period we agree to advance such settlement amounts to the insured in return for the cooperation of the insured in our lawsuit on behalf of the insured (emphasis supplied).

If the court declines to dismiss the complaint, defendants contend that plaintiff's claims against LMG, at least, must be dismissed because no privity of contract exists between LMG and Scarlett. In addition, the Defendants argue that the court should dismiss plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing because it is duplicative of plaintiff's breach of contract claim and, in any event, plaintiff cannot recover damages above the $50,000 sought by way of her breach of

contract claim.[2] Even if plaintiff could avoid the statutory and regulatory limitation on her potential recovery by claiming consequential damages, defendants argue that plaintiff fails to allege what sort of consequential damages she has incurred or that the parties contemplated consequential damages at the time of contracting.

Plaintiff does not oppose that part of defendants' motion seeking dismissal of the complaint as against LMG. In opposition to the first part of defendants' motion, plaintiff argues that (1) LM General should be precluded from denying coverage since its disclaimer was unreasonably late as a matter of law; and (2) LM General, through its claims representative, Corey Sharp (Sharp), acquiesced to the settlements via Sharp's numerous interactions with plaintiff's attorney, Gilbert J. Serrano, Esq. (Serrano).

In support, plaintiff proffers Serrano's affidavit in which he avers that, by letter dated September 26, 2019, he notified LM General that the Law Offices of Spencer H. Herman, P.C., represented Scarlett, their insured, and that Scarlett intended to make a claim for Underinsured Motorist Benefits pursuant to her policy due to the August 27, 2019 accident. On October 2, 2019, Serrano received an email from Sharp, which plaintiff attaches as an exhibit, acknowledging receipt of the September 26th letter. Serrano avers that he spoke to Sharp on the phone that same day and discussed Scarlett's serious injuries and the limited liability insurance coverage of the vehicle owners involved in the accident, among other things.

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[2] Plaintiff does not dispute that, by statute, she is only able to recover a maximum of $50,000 in SUM benefits since her policy with LM General contains a $100,000 SUM coverage limit and she has already recovered $50,000 from her settlements with Metropolitan and State Farm.

Serrano further states that, on or about October 16, 2019, he emailed Scarlett's operative x-rays to Sharp and informed him of his expectation that, since Metropolitan and State Farm were going to offer Scarlett a combined sum of $50,000, LM General would offer Scarlett $50,000 in Underinsured Motorist Benefits since Scarlett's policy had underinsured limits of $100,000 per person and $300,000 per accident. According to Serrano, between November 18, 2019 and January 26, 2020, he informed Sharp on more than one occasion that Scarlett planned to accept $15,000 from Metropolitan and $35,000 from State Farm in partial settlement of her third-party claims and that he expected LM General would pay the remaining $50,000 to Scarlett.

Serrano further states that between March 2020 and June 30, 2020, Sharp told him several times that once Serrano received copies of the settlement checks from Metropolitan and State Farm, LM General would pay Scarlett the $50,000. Serrano contends that, on June 4, 2020, Serrano spoke to Sharp and informed him that Scarlett had received her $35,000 check from State Farm after which Sharp requested that Serrano forward him the documents to "wrap things up." Serrano avers that he e-mailed Sharp the settlement documents that same day. Then, almost two months later, on July 27, 2020, Serrano states that Sharp called him to request that he forward the email sent on June 4, 2020, which he did. Both the June 4th and July 27th emails are attached as exhibits.

On August 7, 2020, Serrano received a letter dated July 28, 2020 from Sharp denying Scarlett's claim for SUM benefits but referencing the wrong owner and vehicle. Subsequently, Serrano received a letter from Sharp dated September 9, 2020 denying Scarlett's claim for SUM benefits but reflecting the correct vehicle and owner.

In arguing that LM General's September 9, 2020 disclaimer was unreasonably late as a matter of law, plaintiff posits that LM General acquired knowledge of plaintiff's settlement with Metropolitan and State Farm as early as January 2020, eight months prior to its disclaimer letter, when Serrano informed Sharp of same over the phone. Further that, at the latest, LM General knew of said settlements by June 4, 2020, when Sharp received the settlement documents by email. The Plaintiff contends that because the defendants waited over three months to disclaim coverage, the disclaimer is unreasonable as matter of law under existing precedent.

In the event, however, that the court finds an issue of fact to exist regarding whether defendants timely disclaimed coverage, plaintiff contends that there are also issues as to whether LM General, via Sharp's conduct and actions, implicitly consented to the settlements with Metropolitan and State Farm.

Finally, with regard to that part of defendants' motion seeking to dismiss plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing, plaintiff argues that she has adequately plead said cause of action in light of Serrano's affidavit detailing his long history of dealings with Sharp. Further, to the extent that plaintiff must show consequential damages to recover beyond $50,000, that a mandated liberal construction of her complaint supports this showing.

In reply, defendants argue that LM General cannot be deemed to have waived any right to disclaim coverage because of an untimely disclaimer because the statute relied upon by plaintiff, NY Ins. Law § 3420 (d) (2), applies only to accidents "occurring within this state" and plaintiff's accident occurred in North Carolina.

Discussion

It is well established that "[w]here an automobile insurance policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy" (*State Farm Auto. Ins. Co. v Blanco*, 208 AD2d 933, 934 [2d Dept 2000] [citations omitted]). However, if the insured can demonstrate that the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement, then the insurer may be estopped from denying coverage (*see id.*, citing *Bernstein v Allstate Ins. Co.*, 199 AD2d 358 [2d Dept 1993]; *Matter of State Farm Mut. Ins. Co. v Del Pizzo*, 185 AD2d 352 [2d Dept 1992]; *Matter of Aetna Cas. & Sur. Co. v Crown*, 181 AD2d 883 [2d Dept 1992]).

Insurance Law § 3420 (d) requires written notice of a disclaimer to be given "as soon as is reasonably possible" after the insurer first learns of the accident or of grounds for disclaimer of liability or denial of coverage (*see Matter of Liberty Mut. Ins. Co. v Rhone*, 189 AD3d 1241, 1241 [2d Dept 2020]). Although whether a notice of disclaimer has been sent "as soon as is reasonably possible" is usually a question of fact, it may be determined as a matter of law where "there is absolutely no explanation for the delay provided by the insurer" (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030 [1979]). In such cases, courts have held that disclaimers made two months after the insurer possesses all of the facts necessary to invoke an exclusion are untimely as a matter of law (*see id.* at 1030; *see also Utica Fire Ins. Co. v Spagnolo*, 221 AD2d 921, 922 [4th Dept 1995] ["Disclaimers

made more than two months after the insurer possesses all facts necessary to invoke an exclusion are untimely as a matter of law"]; *Mt. Vernon Fire Ins. Co. v Unjar*, 177 AD2d 480, 481 [2d Dept 1991] [finding the two and one-half month delay between Mount Vernon's receipt of the investigative report and disclaimer of liability was unreasonable as a matter of law].

Here, it is undisputed that, at the latest, LM General received written notice of the subject settlements on June 4, 2020, and verbal notice, according to plaintiff, as early as January 26, 2020. Thus, based on the foregoing, it is clear that LM General's disclaimer letter dated September 9,2020, which is the one relied upon by defendants in the instant motion, would be untimely as a matter of law.

As mentioned above, section 3420 (d) of the Insurance Law provides that "[i]f under a liability policy issued or delivered **in this state**, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or **any other type of accident occurring within this state**, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant" (emphasis provided).

Based on the above language and cases finding Insurance Law § 3420 (d) inapplicable where the accident occurs outside of New York (*see Transportation Ins. Co. v Cafaro*, 295 AD2d 618 [2d Dept 2002] ["since the accident in this case occurred in Aruba, Insurance Law § 3420 (d) is inapplicable"]; *see also Brennan v Liberty Mut. Fire Ins. Co.*, 204 AD2d 675 [2d Dept 1994] ["Since the accident in this case occurred in Florida, Insurance Law § 3420 (d) is inapplicable."]), defendants posit that the requirement to

promptly disclaim coverage imposed by Insurance Law § 3420 (d) does not apply to plaintiff's case. However, upon a review of the cases dealing with the applicability of Insurance Law § 3420 (d) to out-of-state accidents, the court finds that defendants fail to establish that the rule does not apply.

First, whether an insured is entitled to coverage or benefits largely depends on the specific terms of the policy, which the court must review to determine coverage (*see Grening v Empire Mut. Ins. Co.*, 101 AD2d 550, 553 [1st Dept 1984] ["In our case, the insurance policy is not before the court, nor is the policy language part of the record, so that we have no way of knowing whether the coverage is limited, as required by subdivision 2-a of section 167 [predecessor to section 3420 (d)], or is broader."]; *see also Sentry Ins. Co. v Amsel*, 36 NY2d 291, 295 [1975] ["In sum the policy in this case expressly limited uninsured motorist coverage to accidents occurring in New York State, and [subdivision 2-a of section 167 of the Insurance Law] requires no more."]). Here, LM General fails to provide the specific policy language regarding plaintiff's SUM coverage. Thus, the court cannot determine whether plaintiff's SUM coverage is limited to accidents that occur within New York State or is broader.[3]

Moreover, some courts have applied Insurance Law § 3420 (d) to accidents occurring outside of New York where the policy was issued in New York and there existed

[3] There is indication, on page 11 of the 94-page policy attached as Exhibit 2 to defendants' motion, that the purchase of SUM coverage provides the insured "with the option of purchasing higher limits of coverage, (up to $500,000 per person and $500,000 per accident for bodily injury, and the greater of the SUM Limit chosen by you or $50,000 per person/$100,000 per accident in the event of death), and **coverage of accidents that occur out-of-state**"(emphasis added).

very strong connections to New York (*see Newman v Ketani*, 54 AD2d 926, 928 [2d Dept 1976] [finding that the accident bears such a substantial relation to this State that [section 3420 (d)] should apply); *see also Kasson & Keller, Inc. v Centennial Ins. Co.*, 79 Misc2d 450, 454 [Sup Ct, Montgomery County 1974] [applying subdivision 8 of section 167 of the Insurance Law to an out-of-state accident where the policy in question was issued in New York State to a New York State resident by an insurance company authorized to do business in the State of New York]). Based on the foregoing, LM General fails to establish that Insurance Law § 3420 (d) does not apply to the case at bar.

The court also finds that there is an issue as to whether LM General waived compliance with the written consent requirement via Sharp's conduct. "It is settled law in this State that, if the insurer, with full knowledge of the facts, acts in a manner inconsistent with a disclaimer of liability, it will be precluded from so disclaiming" (*Matter of Allstate Ins. Co. v Flaumenbaum*, 62 Misc 2d 32, 48-50 [Supt Ct, New York County 1970]). The waiver doctrine will be invoked where there is proof, actual or circumstantial, that the insurer intended to abandon or, at least, not to rely upon a particular defense (*see Albert J. Schiff Associates, Inc. v Flack*, 51 NY2d 692, 698 [1980] [citations omitted]). As stated by the Court of Appeals in *Titus v Glens Falls Ins. Co.*, 81 NY 410, 419 [1880]:

> "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until

> claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived...." (citations omitted).

Here, accepting plaintiff's allegations as true, as the court must do for purposes of a motion to dismiss, and upon consideration of Serrano's affidavit,[4] LM General knew that Scarlett settled with Metropolitan and State Farm without first obtaining its written consent or providing it with written notice as a result of Sharp's telephone conversations with Serrano between November 18, 2019 and January 26, 2020. Thereafter, not only did Sharp purportedly tell Serrano, on several occasions, that LM General would pay $50,000 in SUM benefits to Scarlett, Sharp requested that Serrano forward certain documents, including copies of the settlement checks, to which Serrano complied by email dated June 4, 2020. Then, on July 27, 2020, almost two months later, Sharp requested that Serrano forward him the same June 4th email, which Serrano did. These alleged facts are sufficient to raise an issue as to whether LM General intended to abandon the requirement that an insured obtain its written consent before settling with a tortfeasor.

[4] "A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681, 682-83 [2nd Dept 2017] [*citing Well v Yeshiva Rambam*, 300 AD2d 580, 580 [2nd Dept 2002], and upon considering such an affidavit, the facts alleged therein must also be assumed to be true (*Gawrych, supra, citing Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2nd Dept 2011]).

Based on the foregoing, defendants' motion to dismiss plaintiff's complaint based on documentary evidence must be denied.

Turning then to that part of defendants' motion seeking to dismiss plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing, the court finds that plaintiff has stated a claim for same.

"Implicit in every contract is a covenant of good faith and fair dealing..." (*Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]). "An insurance carrier has a duty to 'investigate in good faith and pay covered claims'" (*Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016], citing *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 195 [2008]). "Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time" (*id.* at 976-77). "Such a cause of action is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim" (*Tiffany Tower Condominium, LLC v Insurance Co. of the Greater N.Y.*, 164 AD3d 860, 862 [2d Dept 2018] [citation omitted]).

Here, plaintiff's allegations regarding Sharp's conduct, including his alleged false assurances, support a claim for breach of the covenant of good faith and fair dealing that is not duplicative of the breach of contract claim. Furthermore, plaintiff's complaint, liberally construed, asserts a claim for consequential damages. Additionally, while defendants are correct that, to recover consequential damages, same must have been within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting, as the movant, it is defendants' burden to affirmatively establish that the

damages sought were not within the contemplation of the parties when they executed the insurance policy (*see Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1235-36 [2d Dept 2016] [citations omitted]). Defendants have not met that burden here.

Conclusion

In conclusion, it is hereby

ORDERED that defendants' motion to dismiss the complaint as against LMG is granted on consent and the complaint is dismissed as against LMG; and the complaint shall read as follows:

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MELISSA SCARLETT, Index No. 515705/2020

Plaintiff,

- against -

LM GENERAL INSURANCE COMPANY[5],

Defendant.

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and it is further

ORDERED that defendants' motion to dismiss plaintiff's complaint is otherwise denied.

Any argument not addressed herein was deemed to be without merit.

This constitutes the decision and order of the court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK FILED 2021 NOV -5 AM 9:40

[5] In the original decision and order dated July 27, 2021 the Court erred in that the caption reflected that Liberty Mutual Group, Inc., remained as a Defendant and LM General Insurance Company was removed. This corrected order addresses that error.