SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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LEXINGTON INSURANCE COMPANY, ON ITS OWN BEHALF AND AS SUBROGEE OF TWIN AMERICA, LLC AND MARK 'ZEV' MARMURSTEIN,

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE COMPANY, GREENWICH INSURANCE COMPANY, TWIN AMERICA, LLC,MARK 'ZEV' MARMURSTEIN

Defendant.

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INDEX NO. 651214/2022

MOTION DATE 04/03/2023, 04/03/2023

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 54, 55, 56, 57, 58, 59, 60, 61, 62, 87, 88, 89, 104

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 63, 64, 65, 66, 67, 68, 90, 91, 92, 93, 94, 95, 96, 106, 107, 108, 109, 110

were read on this motion to/for DISMISSAL.

This case arises from a November 2015 tour bus accident in California. The accident allegedly injured various people, caused significant property damage, and resulted in various lawsuits against the tour operators and tour bus owners (the consolidated underlying litigation, *Kfouri v CS Global SF*, No. CGC-16-551098 [San Francisco Super. Ct.]). Ultimately, the underlying litigation settled for $10.5 million. Plaintiff Lexington Insurance Co. (Lexington), an insurer that provided umbrella coverage to the tour bus operator defendants Twin America, LLC (Twin America) and Mark 'Zev' Marmurstein (together, the Twin defendants), brought this action to recover $2.5 million that it paid, subject to a reservation of rights, towards the settlement. Plaintiff seeks to recoup that $2.5 million from defendants from the Twin

defendants, the Twin defendants' primary insurer (Greenwich), and the tour bus owner's primary insurer (New York Marine) under a variety of theories.

Background

The insurance coverage in the underlying litigation was arranged in two "towers": (1) the insurance policies issued to the nonparty tour bus owners; and (2) the insurance policies issued to the vicariously liable defendants [the Twin defendants].

In the first tower, defendant New York Marine and General Insurance Co. (NYM) issued a $1 million primary policy to the bus owners, and nonparty Gotham Ins. issued a $4 million excess policy to the bus owners. In the second tower, defendant Greenwich Ins. Co. (Greenwich) issued two $1 million primary policies to Twin America, a commercial auto policy (the auto policy) and a commercial general liability policy (the CGL policy). Also in the second tower, nonparty Axis Ins. issued a $4 million excess policy to Twin America, and plaintiff issued a $5 million umbrella liability policy to Twin America.

The Defense and Settlement of the Underlying Litigation

NYM acknowledged its duty to defend the bus owners, the named insureds under the NYM policy, and provided the defense in the underlying action for the bus owners as well as the "vicariously liable defendants" (including Twin America and Marmurstein). While NYM initially provided a defense to the Twin defendants as potential insureds, it later asserted that the vicariously liable defendants were not "insureds" within the meaning of its policy. NYM took the position that it defended the Twin defendants as the bus owners' "contractual indemnitees," and therefore asserted that its defense of the Twin defendants eroded the bus owners' $1 million policy limit. Based on this reasoning, NYM refused to contribute to the settlement.

The bus owners' and the Twin defendants' respective excess insurers, Gotham and Axis, both contributed their total $4 million policy limits towards the settlement. Plaintiff paid the remaining $2.5 million under umbrella policy it issued to the Twin defendants.

Both the Greenwich auto and CGL policies are "fronting"[1] policies with $1 million limits and matching $1 million deductibles. Greenwich did not pay any amount towards the settlement under either of those policies. Neither Twin America nor Marmurstein paid the deductible for either Greenwich policy or paid any amount for the settlement. However, Greenwich and Twin America entered into a settlement agreement in April 2021 (Doc 61). In that stipulation, they "agree[d] that any indemnity payments that New York Marine and/or Gotham pay on behalf of Twin America and/or Marmurstein shall be applied to satisfy the [$1 million Greenwich auto policy] Indemnity Deductible" (*id.*, ¶ 1). None of the other insurers, including Gotham and NYM, were involved with that Greenwich-Twin America agreement.

The Greenwich Auto Policy

The Greenwich Auto Policy provides, in Section II ["Liability Coverage"], that "We [Greenwich] will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto' " (Doc 59, § II [A] [Auto Policy]). That section further states that

> "We [Greenwich] have the right and duty to defend any 'insured' against a 'suit' asking for such damages . . . . We may investigate and settle any claim or 'suit' as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements"

[1] " 'Fronting policies' are policies in which the insured's deductible is equal to the policy limits, essentially meaning the insured is self-insured" (1 Couch on Ins. § 1:5 [Insurance terminology—Classification of policy types]).

(*id.*).

The Auto policy includes $1 million liability coverage and a $1 million deductible per accident (*see id.* at 74 [ENDORSEMENT #001]).[2] Section A of Endorsement #001's Schedule ["Indemnity Deductible"] provides that "Allocated Loss Adjustment Expenses Payments 100% Paid BY Insured," and states

> " 'Allocated Loss Adjustment Expenses' means such expenses or costs that are incurred in connection with the investigation, administration, adjustment, subrogation, settlement or defense of any claim or 'suit' that we allocate to a particular claim, whether or not an indemnity payment is made"

(*id.* at 74-75).

Endorsement #001 also provides that "[t]he limits of liability shown on the declerations [sic] page **shall be reduced by amounts included with the indemnity deductible**" (*id.* § C [4]).

The Greenwich CGL Policy

Section 1 (a) of the CGL policy states:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance"

(Doc 60 [CGL policy]).

Section III [Limits of Insurance] of the CGL policy refers to the Declarations page. The Declarations page provides that the limits of liability are $1 million per occurrence, and the

[2] Endorsement #001 emphasizes, apparently due to a scrivener's error, that "[t]he damages and sums that must be paid as *'covered pollution cost or expense'* in any one accident and would be payable under LIABILITY COVERAGE will be reduced by the [$1 million] indemnity deductible amount" (Doc 59 at 73 [auto policy]).

"Deductible Liability Insurance Endorsement" provides that the deductible is $1 million per occurrence (*id.* at 77). That Endorsement states:

> "A. Our obligation to pay damages or medical expense on your behalf applies only to the amount of damages **in excess of any deductible amount** stated in the Schedule above as applicable to such coverages.
>
> . . . .
>
> D. The applicable limits of insurance **shall be reduced by the amount of any damages or medical expense included within the deductible amount**"

(*id.* at 77-78).

The CGL policy also includes the following coverage exclusion for:

> " 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . **owned or operated by or rented or loaned to any insured**.
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the 'occurrence' which caused the 'bodily injury' or 'property damage' involved the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . that is owned or operated by or rented or loaned to any insured"

(*id.*, § 2 [g]).

The Greenwich Policies' "Other Insurance" Provisions

Both Greenwich policies contain "other insurance" provisions. The Auto policy provides: "For any covered 'auto' you don't own, the insurance provided by this coverage form is excess over any other collectible insurance" (Doc 59 [auto policy], § 5). The CGL policy states: "This insurance is excess over: (a) Any of the other insurance, whether primary, excess, contingent or on any other basis: . . . . (iv) If the loss arises out of the maintenance or use of . . . 'autos' . . . to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury and Property Damage Liability" (Doc 60 [CGL policy], § 4 [b] [1]).

The Greenwich "Large Deductible Program Agreement"

Under the "Large Deductible Program Agreement" [Notice of Election #3] (Doc 58), the Greenwich policies each had a retention of $1 million and a deductible of $1 million. The Program Agreement states that the "Claims Service Company [Greenwich] will handle and pay claims in accordance with the policy provisions and will bill the Insured for Paid Losses within the Insured's Retention described herein . . ." (*id.*, § B [1]).

The Lexington Umbrella Policy

Lexington issued a $5 million commercial umbrella policy to Twin America (Doc 27 [Lexington policy]). The Lexington policy provides coverage for bodily injury and property damage that exceeds the "Retained Amount." The Retained Amount means "The total applicable limits of 'scheduled underlying insurance' (plus any 'Self-Insured' retention applicable thereto) and any applicable 'other insurance' providing coverage to [Twin America]" (*id.* § V [W]-[X]; *see also id.* § IV [F] ["This policy applies only in excess of the total applicable limits of 'scheduled underlying insurance' and any applicable 'other insurance' whether or not such limits are collectible."]). The Schedule of Underlying Insurance includes Twin America's $1 million Greenwich CGL policy, $1 million Greenwich Auto policy, and $4 million Axis excess policy (*id.* at 6).

Plaintiff's Claims Against Greenwich and the Twin Defendants

In the amended complaint, plaintiff asserts two common law indemnification claims against Twin America, Marmurstein, and Greenwich. Plaintiff seeks to recover $1 million under the auto policy (Doc 43 [amended compl., third cause of action]) and $1 million under the CGL policy (*id.* [fourth cause of action]). Plaintiff also seeks a "declaration that neither of the Greenwich Deductibles, and neither of the limits of the Greenwich Policies, were satisfied or

exhausted, in whole or in part, by any defense and/or indemnity payments made, or to be made, by New York Marine and/or Gotham in connection with the Consolidated Underlying Actions" (*id.* [fifth cause of action]). Finally, plaintiff alleges that the Twin defendants breached Condition J.3 of the Lexington umbrella policy by executing the settlement agreement with Greenwich (*id.* [sixth cause of action]).

In Motion Seq. No. 06, Greenwich moves, pre-answer, to dismiss the third, fourth, and fifth claims against it pursuant to CPLR 3211 (a) (1) and (a) (7). In Motion Seq. No. 07, the Twin defendants move, pre-answer, to dismiss the third, fourth, fifth, and sixth claims against them pursuant to CPLR 3211 (a) (1) and (a) (7). Plaintiff opposes both motions.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under CPLR 3211 (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]; *see also Amsterdam Hospitality Group, LLC v Marshall–Alan Associates, Inc.,* 120 AD3d 431, 433 [1st Dept 2014]).

I. Motion Seq. No. 06 – Greenwich's Motion to Dismiss

Greenwich moves to dismiss plaintiff's third and fourth causes of action for common law indemnification under the $1 million auto and CGL fronting policies. It argues that it had no duty to contribute to the settlement because the policy limits are equal to the policy deductibles.

Greenwich also moves to dismiss the fifth cause of action whereby plaintiff seeks a declaration that the Greenwich policies were not satisfied or exhausted by NYM's payment of defense costs or Gotham's payment towards the settlement. Greenwich argues that the declaratory judgment claim is duplicative of the common law indemnification claims, and that this claim is not justiciable (Doc 62 at 16-19 [Greenwich mem.]).

1. Common Law Indemnification (Third and Fourth Causes of Action)

"Common-law indemnification is an equitable remedy . . . . based upon the 'simple fairness' that a party who has in whole or in part discharged a duty which, although may be owed by that party, should have been discharged by another" (*In re Part 60 RMBS Put - Back Litig.*, 195 AD3d 40, 54 [1st Dept 2021], quoting *City of New York v Lead Indus. Assn., Inc.,* 222 AD2d 119, 124–125 [1st Dept 1996]). This equitable remedy "permits the shifting of a loss because failure to do so would result in the unjust enrichment of one party at the expense of another" (*id.*), and "often applies where the parties had a joint duty to a third party" (*id.*, citing *State of N.Y. Workers' Compensation Bd. v Madden,* 119 AD3d 1022, 1023–1024 [3d Dept 2014]; *see City of New York v Lead Indus. Ass'n, Inc.*, 222 AD2d 119, 125 [1st Dept 1996] ["The gravamen of an action for (common law) indemnity is that both parties, indemnitor and indemnitee, are subject to a duty to a third person under such circumstances that one of them, as between themselves, should perform it rather than the other."], citing Restatement of Restitution § 76, comment *b,* at 331–332).

In *City of New York v Lead Indus. Ass'n, Inc.* (222 AD2d 119 [1st Dept 1996]), the Appellate Division, First Department explained:

> "The classic situation giving rise to a claim for indemnity is where one, without fault on its own part, is held liable to a third party by operation of law (frequently statutory) due to the fault of another. It is the independent duty which the wrongdoer owes to prevent the other from becoming vicariously liable, and cast in damages, to the injured party that is the predicate for the indemnity action, and it is not necessary that the indemnitee establish that the indemnitor ever has owed, or currently owes, it a separate duty apart from the duty to indemnify"

(*id.* at 125 [citations omitted]).

> "In the insurance context, . . . where the insurance contracts reveal multiple coverage, the court exercises its equity powers to imply a contract between the coinsurers to contribute, and the proportion of their required contribution is grounded in the policy limits set forth in the contract of each insurer with the insured"

(*U.S. Fire Ins. Co. v Fed. Ins. Co.*, 858 F2d 882, 888 [2d Cir 1988]).

Greenwich first argues that the indemnification claims must be dismissed because Greenwich had no obligation to contribute to the settlement as "both the Auto Policy and the CGL Policy have $1 million deductibles that equal their $1 million limits of liability" (Greenwich's mem. supp. at 13). That is, Greenwich argues it had no obligation to pay any amounts on behalf of the Twin defendants because both policies state that the applicable policy limits will be reduced by the deductible amounts (*see* Doc 59 [auto policy stating "The limits of liability shown on the decl(a)rations page shall be reduced by amounts included with the indemnity deductible"]; Doc 60 [CGL policy stating "The applicable limits of insurance shall be reduced by the amount of any damages . . . included within the deductible amount"]). Because the deductible amount is equal to the retention limit, Greenwich argues it did not, and cannot, have any obligation to contribute to the settlement (Doc 62 at 14 [arguing that "Because the policy deductibles are equal to the policy limits, the amount of insurance under the Greenwich

policies effectively is reduced to zero, leaving Greenwich with no duty to contribute to the Settlement"]).

In *Insurance Co. of N. Am. v Pyramid Ins. Co. of Bermuda Ltd.* (1994 WL 88701 [SDNY Mar. 16, 1994]), then-District Judge Sotomayor explained:

> "In a fronting arrangement, an insurer, for a fee, issues an insurance policy with the intent of passing most or all of risk back to the policyholder, or to a reinsurer, or to the policyholder's captive. Insureds commonly use fronting to retain risks and control reinsurance. Fronting policies have no transfer of risk associated with them. They can be used to transfer claims handling responsibilities or to satisfy financial responsibility laws. . . .
>
> Clearly, then, insurance policies which do not actually transfer risk to the insurer but that serve other purposes are very much a custom of the industry . . ."

(*id.* at *4 [internal quotation marks and citations omitted]; *see also Forest Ins., Ltd. v Am. Motorists Ins. Co.*, 1994 WL 97138, at *2 [SDNY Mar. 21, 1994] [explaining that a fronting "arrangement permits the company for all practical purposes to self-insure losses up to the amount of the deductible without meeting the formal legal requirements for qualifying as a self-insurer in jurisdictions where it does business"]).

Simply put, the main issue in Greenwich's motion is whether plaintiff can recover under the auto and CGL fronting policies from Greenwich, rather than from the insureds on those policies. Plaintiff does not allege that the insureds, Twin America and Marmurstein, are insolvent or otherwise unable to pay the deductibles.

Greenwich notes, correctly, that "a [true] deductible is an amount that an insurer subtracts from a policy amount, reducing the amount of insurance" (Doc 62 at 14, citing Ostrager & Newman, Handbook on Insurance Coverage Disputes § 13.13 [a] [17th ed.]; *see Tokio Mar. and Fire Ins. Co., Ltd. v Ins. Co. of N. Am., Inc.*, 262 AD2d 103, 103 [1st Dept 1999]). However, the principle that a deductible is subtracted from the policy limits does not answer the question of

which party pays first (the insurer or the insured), or which of those parties can be sued when there is a dispute over priority of coverage. The Greenwich policies are instructive.

The Greenwich policies state that Greenwich had the right, but not the obligation, to settle claims on behalf of the Twin defendants (*see* Auto Policy at 20 ["We may investigate and settle any claim or 'suit' as we consider appropriate."], CGL Policy at 38 ["We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."], *id.* at 76 ["We may pay any part or all of the deductible amount to effect settlement of any claim or 'suit' and, upon notification of the action taken, you shall promptly reimburse us for any part of the deductible amount that we paid."]). The CGL policy states that Greenwich's "obligation to pay damages . . . on [Twin's] behalf applies only to the amount of damages in excess of [the $1 million] deductible amount," but "[t]he applicable limits of insurance shall be reduced by the amount of any damages . . . included within the deductible amount" (Doc 60 at 77-78). Likewise, the Auto policy states that the "INDEMNITY DEDUCTIBLE AMOUNT [is] $1,000,000 PER ACCIDENT," and provides that "(t)he limits of liability shown on the decl[a]rations page shall be reduced by amounts included with the indemnity deductible" (Doc 59 at 73).

Thus, Greenwich's submissions establish that Greenwich had no duty to contribute to the settlement on behalf of the Twin defendants under the Auto and CGL fronting policies. Instead, the policies are clear that the insureds must pay the deductible for covered claims, and the deductibles reduce Greenwich's obligation to pay for covered claims. The deductibles are the policy limits (*see e.g. Forest Ins., Ltd. v Am. Motorists Ins. Co.*, 1994 WL 97138, at *1 [SDNY Mar. 21, 1994] [the fronting policy insurer "bore no obligation to . . . settle claims and no risk of loss under the Fronting Policy"]; *White v Ins. Co. of State of Pa.*, 405 F3d 455, 457 [6th Cir

2005] ["In typical fronting policies, the deductible matches the limit of liability, such that the business bears the entire risk of loss."]; *see also U.S. Fire Ins. Co. v Fed. Ins. Co.*, 858 F2d 882, 888 [2d Cir 1988] [explaining that an insurer's "required contribution is grounded in the policy limits set forth in the contract of each insurer with the insured"]). It is not until the insureds fail to pay the deductible that Greenwich would have to step in (*see Scottsdale Ins. v United Rentals (N. Am.) Inc.*, 977 F3d 69 [1st Cir 2020] [stating that the fronting insurer had no obligation to pay unless the insured "cannot pay the deductible"]).

Plaintiff relies on authorities that do not bind this court, are distinguishable, or that support Greenwich's arguments (*see e.g.* Doc 87 at 6-7 [plaintiff's mem. opp.], citing *Greyhound Lines, Inc. v Utah Transit Auth.*, 477 P3d 472, 482 [Utah Ct. App. 2020] and *Scottsdale Ins. v United Rentals (N. Am.) Inc.*, 977 F3d 69 [1st Cir 2020]).

For instance, in *Greyhound*, the Utah Court of Appeals noted that the plaintiff, Greyhound, purchased a $5 million fronting policy with a $5 million deductible. The court stated:

> "Greyhound asserts—and UTA does not dispute—that, under the Fronting Policy, it is the responsibility of the insured—and not any additional named insured—to pay the deductible. The policy Greyhound obtained thus obligated Greyhound—and not UTA—to satisfy the deductible. Stated another way, under the Fronting Policy purchased by Greyhound, Insurer was responsible to defend and indemnify UTA against third-party claims, starting at dollar one, even if those claims were less than the deductible amount, and even if Insurer had the right to recover from Greyhound any amount it paid to defend or indemnify UTA"

(*Greyhound Lines, Inc. v Utah Tr. Auth.*, 2020 UT App 144, ¶ 12, 477 P3d 472, 477).

However, *Greyhound* involved a dispute between the insured and its indemnitee, the Utah Transit Authority. The insurance company was not a party and the language of the policy at issue is not included in the Utah court's decision. The main issue in *Greyhound* was whether the fronting policy satisfied the parties' lease obligations.

In *Scottsdale* (977 F3d 69), the First Circuit Court of Appeals explained:

> "Under [the fronting policy] arrangement, the first $2M of any loss must be paid by [the insured,] United Rentals, and once United Rentals has paid that first $2M, the $2M policy limit is considered exhausted. **If United Rentals cannot pay the deductible, [the insurer,] ACE[,] has an obligation to pay damages of up to $2M to satisfy a judgment or settlement**, and ACE always has the right, **at its discretion**, to pay damages on behalf of United Rentals. However, in either scenario, United Rentals must reimburse ACE for any sums paid out"

(*Scottsdale Ins. Co.*, 977 F3d at 75).

While the First Circuit concluded that the fronting policy insurer *could* be liable to pay damages first and attempt to recover them from the insured later, that conclusion was premised on the insureds' inability to pay its deductible (*id.* ["ACE does have some responsibility below the $2M policy limit--specifically in the case when United Rentals cannot pay its deductible."]). Here, plaintiff does not allege that the Twin defendants are insolvent or otherwise cannot pay the deductible.

Accordingly, Motion Seq. No. 06 is granted to the extent that the third and fourth causes of action are dismissed against Greenwich.

2. Declaratory Judgment (Fifth Cause of Action)

Greenwich argues that plaintiff's declaratory judgment claim must be dismissed as duplicative of plaintiff's breach of contract and common law indemnity claims. It also argues that the claim must be dismissed against Greenwich because "Lexington has not alleged any justiciable controversy as to this issue, at least as concerns Greenwich, who has never asserted to Lexington that New York Marine's payments have any bearing on its fronting policies" (Doc 62 at 17).

The court agrees with plaintiff that the declaratory judgment cause of action is not entirely duplicative of plaintiff's other claims. Plaintiff seeks a declaration that "that neither of

the Greenwich Deductibles, and neither of the limits of the Greenwich Policies, were satisfied or exhausted, in whole or in part, by any defense and/or indemnity payments made, or to be made, by New York Marine and/or Gotham in connection with the Consolidated Underlying Actions" (Amended Complaint at 40). Among other things, this claim seeks a declaration clarifying the priority of coverage between the various insurers and the validity of the Greenwich/Twin defendants' settlement agreement purporting to apply NYM/Gotham payments to satisfy the Twin defendants' deductibles (*see e.g. Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140 [1st Dept 2008]).

However, plaintiff seeks a "declaration that neither of the Greenwich Deductibles, and neither of the limits of the Greenwich Policies, were satisfied or exhausted, in whole or in part, by any defense and/or indemnity payments made, or to be made, by New York Marine and/or Gotham in connection with the Consolidated Underlying Actions." As discussed above, Greenwich had no obligation to contribute to the settlement under the Auto and CGL policies. Rather, if there is an obligation to pay under the Greenwich policies, it is Twin America's obligation to pay the deductibles. Although Greenwich and Twin stipulated that the $1 million Auto policy deductible was satisfied by $1 million from NYM's or Gotham's payments, the declaration that plaintiff seeks would have no impact on Greenwich. Instead, Twin America would be on the hook for the deductible amount(s).

The prospect that the Twin defendants may become insolvent and unable to pay the deductibles, if applicable, is too remote to create a justiciable controversy between plaintiff and Greenwich. Further, the Greenwich-Twin settlement agreement does not create a justiciable controversy between Greenwich and plaintiff, though it may impact a controversy between Greenwich and the Twin defendants at some later point (*see e.g. Touro Coll. v Novus Univ.*

Corp., 146 AD3d 679, 680 [1st Dept 2017] [a plaintiff seeking a declaratory judgment must "have an interest sufficient to constitute standing to maintain the action [and] also . . . the controversy [must] involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs"]).

Accordingly, the fifth cause of action is dismissed against Greenwich.

II. Motion Seq. No. 07 - The Twin Defendants' Motion to Dismiss

The Twin defendants move to dismiss the third and fourth claims [common law indemnification] against them, as well as the fifth cause of action [declaratory judgment], and sixth cause of action [breach of contract].

1. Common Law Indemnification (Third and Fourth Causes of Action)

As discussed above, "[c]ommon-law indemnification is an equitable remedy . . . . based upon the 'simple fairness' that a party who has in whole or in part discharged a duty which, although may be owed by that party, should have been discharged by another" (*In re Part 60 RMBS Put - Back Litig.*, 195 AD3d at 54). It is an equitable claim that "permits the shifting of a loss because failure to do so would result in the unjust enrichment of one party at the expense of another" (*id.*). While common law indemnification claims often involve a shared duty to a third party, here, the insured [Twin America] assumed a self-insured position under the Greenwich fronting policies.

The Auto and CGL policies provide that the insured, Twin America, must pay the deductible for covered claims, and these deductibles reduce Greenwich's obligation to pay for claims. That is, the deductibles are the policy limits (*see* discussion, *supra*). Twin America stands in the shoes of the insurer as, effectively, a self-insured entity. Thus, under the Auto and CGL policies, Twin America is responsible for paying covered claims by paying its deductibles.

Moreover, Twin America does not establish, and plaintiff does not allege, that Twin is insolvent or otherwise unable to pay its deductible.

Finally, plaintiff adequately alleges that Twin America was unjustly enriched when it agreed with Greenwich to apply part of NYM's or Gotham's insurance payments to satisfy Twin's auto deductible.

a. The Auto Policy (Third Cause of Action - Indemnification)

Twin America argues that its $1 million auto policy deductible was satisfied by Gotham's $4 million contribution to the settlement. Gotham is the tour bus owners' excess carrier. Twin America is not a named insured under the Gotham policy. Plaintiff alleges that "[t]he Gotham Excess Policy provided a limit of liability of $4 million in excess of the $1 million limit of the New York Marine Policy," and the Gotham policy covered the named insureds and any other "insureds" within the meaning of the NYM primary policy (amended compl., ¶¶ 44-46). Gotham agreed to pay "on behalf of the [tour bus owners] the 'ultimate net loss' in excess of the 'retained limit' " (*id.*, ¶ 47).

The Gotham policy contained the following "other insurance" provision:

> "a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance specifically written as excess over this Coverage Part.
>
> . . . .
>
> b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of: (1) The total amount that all such other insurance would pay for the loss in the absence of the insurance provided under this Coverage Part; and (2) The total of all deductible and self-insured amounts under all that other insurance"

(*id.*, ¶ 50, quoting Gotham Policy, Section III, ¶ 8).

It would be premature to dismiss the third cause of action for common law indemnification under the Greenwich auto policy. Twin America does not establish prima facie, or even contend, that Gotham tendered payment to Greenwich to satisfy Twin America's auto policy deductible. The underlying litigation was settled for $10.5 million, with Gotham contributing $4 million, Axis [Twin's excess insurer] contributing $4 million, and plaintiff contributing $2.5 million. If part of Gotham's $4 million payment satisfied Twin America's auto fronting policy deductible payment, why was there neither a $1 million shortfall to the settlement proceeds nor a $1 million payment towards the settlement from Greenwich or the Twin defendants?

The Twin defendants rely on cases that are not controlling and are distinguishable (*see e.g.* Doc 68 [def's mem. supp.] at 15-16, citing *Intervest Constr. of JAX Inc. v General Fidelity Ins. Co.*, 133 So3d 494 [2014] [analyzing satisfaction of SIRs, not deductibles, under Florida law] and *Vons Companies, Inc. v United States Fire Ins. Co.*, 78 Cal App 4th 52 [Cal Ct App 2000], *as mod* [Mar. 6, 2000] [analyzing the same under California law]).

In *Intervest*, a customer sued a residential contractor for personal injuries. The contractor, ICI, sought indemnification from a subcontractor, Custom Cutting, under the subcontract's terms. ICI had an insurance policy with a $1 million self-insured retention (SIR). Custom Cutting had a CGL policy. After mediation, the personal injury claim settled for $1.6 million, but Custom Cutting's insurer "agreed to pay ICI $1 million to settle ICI's indemnification claim against Custom Cutting. ICI, in turn, would pay that $1 million to [the personal injury claimant]" (*Intervest Constr. of JAX Inc.*, 133 So3d at 495-496). Thus, in *Intervest*, the subcontractor's insurer expressly agreed to pay the general contractor's SIR as part

of the settlement. Here, there was no agreement between Gotham (or any of the tour bus owners' insurers) to pay Twin America's auto policy deductible.

In *Vons*, a customer was injured when a pallet jack operated by a Vons employee struck him in a shopping center's common area. Vons was an additional insured under the landlord's CGL policy. Vons also had its own CGL policy with $1 million in coverage and a $1 million SIR endorsement. The personal injury claim settled for $1,539,905. The landlord's insurance issued a $1 million check to Vons as an additional insured, and Vons paid the entire settlement amount (using the $1 million from the landlord's insurer and the remaining $539,905 from Vons' pocket). Vons then sued its insurer for declaratory relief, contending that the landlord's $1 million contribution satisfied Vons' $1 million SIR. While the California court determined that the SIR could be satisfied by "other insurance" payments, the landlord's insurance payments to Vons were actually used to fund the personal injury settlement (*Vons Companies, Inc.*, 78 Cal App 4th at 45-64).

Here, neither Greenwich nor Twin America actually used the $1 million auto policy deductible/limit to fund the underlying settlement. Allegedly, the Gotham payments funded the settlement, not Twin America's auto policy deductible. Accordingly, the branch of motion seq. no. 07 seeking dismissal of the common law indemnification claim against Twin America is denied (third cause of action under the auto policy).

b. The CGL Policy (Fourth Cause of Action – Indemnification)

The court disagrees with Twin's argument that plaintiff's indemnification claim under the CGL policy (fourth cause of action) must be dismissed because the auto exclusion applies. While the CGL policy contains an auto exclusion, that exclusion applies to " 'Bodily injury' or

'property damage' arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . *owned or operated by or rented or loaned to any insured*" (Doc 60, § 2 [g]).

Although "[t]he duty to defend is measured against the allegations of pleadings," "the duty to [indemnify] is determined by the actual basis for the insured's liability to a third person" (*Servidone Const. Corp. v Sec. Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985] [explaining that indemnification liability is determined "not from the pleadings but from the actual facts"]). Here, the underlying litigation settled before trial. Nevertheless, in approving the settlement of the underlying litigation, the trial court stated: "Additionally, the TA [Twin America], Marmurstein, ZM, City Sightseeing, Compania Hispalense de Tranvias, and Ybarra [defendants] **did not** own or operate the involved bus, employ the involved driver, and did not have any employees or officers" (Doc 95 [Order Granting Good-Faith Settlement]). The exclusion applies only to injuries or damages arising from the use, maintenance, ownership, or entrustment of autos "owned or operated by or rented or loaned to any insured [Twin America and Marmurstein]." The court in the underlying litigation found, in connection with the good faith settlement, that Twin America and Marmurstein did not own or operate the vehicle. While the pleadings in the underlying litigation contained allegations that the Twin defendants were alter-egos of the tour bus owners (that did own or operate the vehicle), those allegations are immaterial to the issue of indemnification.

Thus, the Twin defendants fail to establish prima facie that the auto exclusion applies. Whether further proceedings are needed to determine if the CGL policy's exclusion applies is not presently before the court (*see e.g. Servidone Const. Corp. v Sec. Ins. Co. of Hartford*, 64 NY2d 419, 425 [1985]).

Accordingly, at this pre-answer stage, dismissal of the fourth cause of action for indemnification under the CGL policy is not warranted.

c. The Indemnification Claims Against Marmurstein, Individually

Plaintiff's common law indemnification claims must be dismissed against Marmurstein, individually. Marmurstein is neither the named insured under the Greenwich policies, nor is he obligated to pay those policies' deductibles. Only Twin America is responsible for paying the Greenwich policies' deductibles (*see* Docs 58-60).

Accordingly, the third and fourth causes of action are dismissed against Marmurstein only. These claims are severed and shall continue against Twin America.

2. Declaratory Judgment (Fifth Cause of Action)

Likewise, the Twin defendants' motion to dismiss Plaintiff's cause of action seeking a declaratory judgment (fifth cause of action) is granted with respect to Marmurstein, since he had no obligation to pay the Greenwich policies' deductibles. The motion is otherwise denied.

As already addressed above in Section I, plaintiff's declaratory judgment claim is not entirely duplicative of plaintiff's indemnification claims. Plaintiff seeks a declaration that "that neither of the Greenwich Deductibles, and neither of the limits of the Greenwich Policies, were satisfied or exhausted, in whole or in part, by any defense and/or indemnity payments made, or to be made, by New York Marine and/or Gotham in connection with the Consolidated Underlying Actions" (Amended Complaint at 40). Among other things, this claim seeks a declaration clarifying the priority of coverage between the various insurers (and Twin America, to the extent it sits in a self-insured position).

As already discussed, the court rejects as premature the Twin defendants' argument that Gotham's settlement payments satisfied the auto policy deductible. There is also an issue of fact

as to whether NYM's defense of the Twin defendants in the underlying litigation exhausted NYM's policy limits.

"Under New York law, where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage . . . , priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective 'other insurance' clauses" (*Travelers Prop. Cas. Co. of Am. v Wesco Ins. Co.*, 585 F Supp 3d 463, 469 [SDNY 2022]). Plaintiff notes, correctly, that the Greenwich auto policy served as excess over the NYM policy. Based on the language of the Gotham policy, the Gotham policy served as excess over the NYM policy.

As discussed in *Jefferson Ins. Co. of New York v Travelers Indem. Co.* (92 NY2d 363, 372 [1998]):

> "New York applies a functional analysis to separate lines of insurance, and an insurance policy should be read in light of the role it is to play. We seek the purpose of the insurance policy, in part, by reference to the commonsense meaning of the terms that describe the policy's coverage vis-à-vis other insurance. Where such terms in two or more policies conflict--as two policies that purport to be excess over each other--insurers must contribute in the proportion their policies bear to the limit of coverage at that level. However, a policy that explicitly provides that it is to be excess over other excess coverage can be specifically enforced by the court"

(*id.* [internal citations and quotation marks omitted]).

Because both the NYM policy and Greenwich policies are "primary" policies, there are issues as to whether those policies had to exhaust before Gotham's specific excess policy attached. The court can resolve these issues as a matter of law after issue has been joined. Specifically, the question whether NYM properly declined to contribute to the settlement on behalf of the tour bus owners has not been addressed in this case yet. NYM moved to dismiss the complaint based on CPLR 3211 (a) (4) and forum non conveniens, only (*see* Docs 48-52 [MS

05]). The court denied NYM's motion (Doc 113 [decision and order resolving MS 05]). That issue, and other issues concerning priority of coverage, are not before the court at this time because the defendants all filed pre-answer motions to dismiss instead of answering the amended complaint and moving for summary judgment to resolve these disputes.

3. Breach of the Lexington Policy (Sixth Cause of Action)

Plaintiff concedes that it pleads the sixth cause of action for breach of contract against only Twin America, not Marmurstein. Thus, the motion is granted to the extent that the breach of contract claim is dismissed against Marmurstein.

However, the motion is denied with respect to Twin America. There is an issue of fact as to whether Twin violated Condition J.3 of the Lexington policy in purportedly applying $1 million from Gotham's excess payments to satisfy the Greenwich auto policy deductible. Section J of the Lexington policy states:

> J. Maintenance of Scheduled Underlying Insurance
>
> You agree that during the "policy period"
> . . . .
> 3. The total applicable limits of "scheduled underlying insurance" will not decrease, except for any reduction or exhaustion of aggregate limits by payment of damages to which this policy applies.
> . . . .
> If you fail to comply with these requirements, we will be liable only to the same extent that we would have, had you fully complied with these requirements"

(amended compl., ¶ 160).

The scheduled underlying insurance totals $6 million and includes the [$1 million] Greenwich auto policy, the [$1 million] Greenwich CGL policy, and the [$4 million] Axis excess policy. There is an issue of fact as to whether Twin America's failure to pay its deductible under the auto policy was a violation of Condition J.3, and whether either the NYM or Gotham payments could constitute "payment of damages" within the meaning of Condition J.3. As

plaintiff notes, Condition J.3 exempts "payment of damages to which this policy applies," that is, payment of damages on behalf of Twin America. Twin's submissions do not conclusively establish that the Gotham payments were made on behalf of the Twin defendants, as opposed to the tour bus owners. Indeed, the record indicates that it was Greenwich and Twin America that decided to apply $1 million from either the NYM or Gotham payments to satisfy the auto deductible.

Accordingly, the motion to dismiss the sixth cause of action is denied with respect to Twin America.

Conclusion

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Motion Seq. No. 06 is granted in its entirety, and the amended complaint is dismissed against defendant Greenwich; and it is further

ORDERED that Motion Seq. No. 07 is granted to the extent that the amended complaint is dismissed against defendant Marmurstein, individually. The remainder of Motion Seq. No. 07 that seeks to dismiss the amended complaint against Twin America is denied; and it is further

ORDERED that the parties must answer the amended complaint within 20 days of the date of this decision and order; and it is further

ORDERED that the parties must appear for a status conference over Microsoft Teams on August 1, 2023 at 3:30 p.m.

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7/7/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER