NY Schs. Ins. Found., Inc. v Wright Risk Mgt. Co., LLC
2026 NY Slip Op 31290(U)
March 31, 2026
Supreme Court, New York County
Docket Number: Index No. 453443/2024
Judge: Phaedra F. Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND **PART** 35
Justice

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NY SCHOOLS INSURANCE FOUNDATION, INC. as Attorney in Fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL

Plaintiff,

- v -

WRIGHT RISK MANAGEMENT COMPANY, LLC,

Defendant.

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INDEX NO. 453443/2024

MOTION DATE 04/24/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Defendant's motion to dismiss Plaintiff's Complaint pursuant to CPLR 3211(a)(7) is granted and the Complaint is dismissed without prejudice.

I. Background

New York Schools Insurance Reciprocal ("NYSIR") is a reciprocal insurer formed to provide property and casualty insurance to New York State schools. Since NYSIR's formation, Defendant has provided NYSIR insurance management and claims handling services. Until March of 2022, NYSIR relied entirely on Defendant to evaluate coverage, retain coverage counsel, and issue coverage position letters without need for approval by NYSIR.

From 2018 to 2020, Defendant reported to Plaintiff fifteen claims (the "Claims") made by individuals alleging injuries arising from exposure to toxic substances in the Northport-East Northport School District (the "School District"). The alleged exposures spanned from the 1990s through the 2010s. Notices of Claim were submitted by various individuals and numerous lawsuits have since been filed against the School District in New York Supreme Court, Suffolk County.

NYSIR issued the School District a Special School Policy (the "School Policy"), which was continuously renewed, and which contained exclusions for claims of bodily injury arising from intentional acts and claims for bodily injury arising from certain exposure to pollutants. Some of the School Policy's coverage periods contained a limited pollution liability extension, which provided limited coverage back to those policies where it had previously been excluded by the pollution exclusion. NYSIR also issued the School District an Excess Catastrophe Liability Policy (the "Excess Policy"), but the Excess Policy contained an exclusion claiming it did not apply to personal injury arising from certain toxic chemicals, contaminants or pollutants.

According to Plaintiff, the pollution exclusion in the Excess Policy would have excluded coverage for all the Claims if timely asserted. Plaintiff also claims certain policy periods triggered by certain individual's claims did not contain the limited pollution liability extension, and if timely asserted, could have precluded coverage for those individual's claims. Plaintiff further alleges the intentional acts exclusion could have excluded certain claims made against the School District.

In June of 2018, after receiving Notices of Claims but prior to any Complaints were filed, Defendant sought a coverage opinion from a law firm (the "Firm"). The Firm allegedly advised Defendant to notify the School District of potential exclusions, including the pollution exclusion, but Defendant allegedly failed to do so. According to Plaintiff, once the Complaints were filed, Defendant failed to seek a coverage opinion based on the additional allegations, and disclaimers were never sent to the School District. On September 1, 2022, NYSIR sent a demand for indemnification to Defendant based on the alleged erroneous handling of the Claims.

Now, Plaintiff sues Defendant alleging breach of fiduciary duty and breach of contract, and seeking contractual indemnification, common law indemnification, and contribution. Defendant responds with this motion to dismiss. Defendant argues that because the underlying lawsuits are

still ongoing, and because NYSIR has not paid any settlements or judgments, it has suffered no damages. While Defendant concedes that NYSIR has incurred defense costs, those damages are not attributable to Defendant as Plaintiff has no basis to disclaim the duty to defend. In opposition, Plaintiff argues it sufficiently pleaded harm because it could have disclaimed coverage for certain claims and because it will not have reinsurance for the Claims. Plaintiff also claims it is entitled to seek conditional contractual indemnification in this action. Plaintiff argues it has alleged breach of contract and the failure to timely serve disclaimers constitutes a breach. Plaintiff asks in the alternative for permission to assert a declaratory judgment claim.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). However, conclusory allegations or bare legal conclusions with no factual specificity are insufficient (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

As held by the First Department and the Court of Appeals, a trial court may consider documentary evidence on a CPLR 3211(a)(7) to attack the sufficiency of a pleading if the evidence conclusively establishes that Plaintiff has no cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014] citing *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]). When documentary evidence is submitted by a defendant on a CPLR 3211(a)(7) motion, "the standard morphs from whether the plaintiff has stated a cause of

action to whether it has one" (*Basis Yield Alpha Fund (Master), supra*). As held by the Hon. Dianne T. Renwick, "the key should be whether the evidence adduced conclusively negates an element of the cause of action" (*Basis Yield Alpha Fund (Master)*, *supra* at 134 n. 4).

It is well established that "[i]f any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443-44 [2002] quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). The insurer's duty to defend is broader than the duty to indemnify (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). The standard used to determine whether the duty to defend is triggered is whether "the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Port Auth. of N.Y. & N.J. v Brickman Group Ltd.,* LLC, 181 AD3d 1, 20 [1st Dept 2019] quoting *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264 [2011]). To avoid its duty to defend an insured, an insurer must show, as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured (*see 3650 White Plains Corp. v Mama G. African Kitchen Inc.*, 205 AD3d 468 [1st Dept 2022]).

It is immaterial "that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Town of Massena, supra* quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). Any ambiguity regarding an insurer's duty to defend is resolved in favor of the insured (*International Business Machines Corp. v Liberty Mut. Ins. Co.*, 363 F3d 137, 144 [2d Cir. 2004] citing *Charles F. Evans, Inc. v Zurich Ins. Co.*, 95 NY2d 779, 780 [2000]). "Even where there exist extrinsic facts suggesting that the claim may ultimately prove meritless or outside the policy's coverage, the insurer cannot avoid its

commitment to provide a defense, since '[a] complaint subject to defeat because of debatable theories * * * must [nevertheless] be defended by the insured" (*Fitzpatrick v American Honda Motor Co., Inc.,* 78 NY2d 61, 66 quoting *International Paper Co. v Continental Cas. Co.,* 35 NY2d 322, 326 [1974])

Where a duty to defend is triggered, so too is the obligation to pay defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40-41 [1st Dept 2005]). Until there is a final determination that an insured's actions fall squarely under an exclusion of a liability policy, or outside the policy altogether, the policy remains in effect and an insurer must pay defense costs related to the underlying action (*Dupree v Scottsdale Ins. Co.*, 96 AD3d 546 [1st Dept 2012]).

B. Failure to Allege Damages

Keeping the aforementioned principles in mind, the Court finds the Complaint must be dismissed as Plaintiff failed to allege cognizable damages. Plaintiff asserts its alleged damages flow from the costs of providing the School District a legal defense, and it could have had no duty to defend had a disclaimer been issued regarding the pollution exclusion. However, the coverage opinion, which Plaintiff alleges Defendant did not follow, explicitly states that no conclusion can yet be reached as to whether the pollution exclusion would apply to bar coverage. While Defendant was advised it could issue a partial disclaimer, they also advised of numerous cases from the Court of Appeals that have found the pollution exclusion at issue only bars coverage for environmental pollution and not interior pollution (*see generally* NYSCEF Doc. 49; *see also Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377 [2003]; *Tower Ins. Co. of New York v Breyter*, 37 AD3d 309, 309 [1st Dept 2007]).

Considering the coverage opinion could not state with certainty whether the pollution exclusion barred coverage, the duty to defend would still apply even if a partial disclaimer was

issued, as the duty to defend may only be avoided where it can be conclusively shown as a matter of law that there is no factual or legal basis through which the insurer must indemnify the insured (*see Servidone Const. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 423-424 [1985]; *see also Love Picin, Inc. v Certain Interested Underwriters at Lloyd's, London*, 35 AD3d 282 [1st Dept 2006]). Most importantly, the Complaint only alleges that Defendant should have issued a partial disclaimer – but a partial disclaimer in and of itself does not relieve Plaintiff of the duty to defend the School District because it is not a full disclaimer. Therefore, the assertion that the costs of providing the School District with a legal defense constitutes the damage underpinning the Complaint is insufficient.

The assertion that Plaintiff has been damaged because a reinsurer disclaimed coverage is insufficient because Plaintiff has not yet shown that it required indemnification from reinsurers to cover any settlements or judgments.[1] While Plaintiff may have a claim against its reinsurer for the reinsurer's coverage determination, Defendant cannot be liable for the coverage position taken by a reinsurer over which it has no control., Nor can Defendant's alleged failure to issue a partial disclaimer constitute grounds for damages where Plaintiff does not allege it has even been required to indemnify the School Districts under the School Policy. Because there are no legally cognizable damages alleged, the Complaint is dismissed, without prejudice, and with leave to replead if Plaintiff eventually suffers legally cognizable damages allegedly caused by Defendant's handling of the Northport claims.

C. Alternative Grounds for Dismissal

For the sake of completeness, the Court also dismisses the Complaint on the other grounds set forth by Defendant. The breach of fiduciary duty claim is duplicative of the breach of contract

[1] Plaintiff has not alleged it paid any settlements or judgments.

claim as it is based on the same allegations as the breach of contract claim and fails to allege the breach of any duty outside of the parties' agreement (*see Ho v Star Contractors, Inc.* 226 AD3d 511 [1st Dept 2024] citing *Matter of Soames v 2LS Consulting Eng'g, D.P.C.*, 187 AD3d 490, 491 [1st Dept 2020]).

The contribution claim is inapplicable because it seeks purely economic loss resulting from the alleged breach of contract (*see Americon Constr., Inc. v Cirocco & Ozzimo, Inc.*, 205 AD3d 568, 569 [1st Dept 2022] citing *Children's Corner Learning Ctr. V A. Miranda Contr. Corp.*, 64 AD3d 318, 323-324 [1st Dept 2009]). Moreover, the common law and contractual indemnification claims have not yet accrued and while they may be brought by way of a third-party action even though the claims are premature, here Plaintiff impermissibly brings them as direct claims in the main action as opposed to impleader in a third-party action (*Americon, supra* at 569-570 citing *Schmutz v Fleet Bank, N.A.*, 278 AD2d 19, 19-20 [1st Dept 2000]). Finally, the breach of contract claim fails because there are no cognizable damages flowing from the alleged breach (*see, e.g. Vista Food Exchange, Inc. v BenefitMall*, 138 AD3d 535, 536-537 [1st Dept 2016]).

Plaintiff's request to assert a claim for declaratory judgment, which is buried in its memorandum of law, is not properly before the Court. There is no proposed pleading in violation of CPLR 3025(b), nor was the relief sought via notice of motion (*see, e.g. Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024] citing *Caesar v Metropolitan Transp. Auth.*, 229 AD3d 601 [2d Dept 2024]). The Court has considered the remainder of Plaintiff's contentions and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss is granted, and the Complaint is dismissed; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

3/31/26
DATE

HON. PHAEDRA F. PERRY-BOND, J.S.C.

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