UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS LING, as statutory subrogee of Edmund Neale,	:	
Plaintiff,	:	16-CV-5281 (VEC)
-against-	:	
	:	OPINION AND ORDER
ERIE INSURANCE COMPANY,	:	
Defendant.	:	

VALERIE CAPRONI, United States District Judge:

This action is the culmination of a long-running dispute between plaintiff Thomas Ling ("Ling"), his general contractors, Kellam Clark and Service Junction LLC, and their insurance carrier, the defendant, Erie Insurance Company ("Erie").[1] Ling hired Clark and Service Junction to renovate his kitchen. The renovation did not go smoothly, leading Ling to sue Clark, Service Junction, and Edmund Neal[2] ("Neal"). Erie settled Ling's claims as against Clark and Service Junction, but not as against Neal. Neal defaulted and Ling was awarded a $439,013.00 default judgment. Thereafter, Ling instituted this action to recover on his default judgment from Erie, which he claims wrongfully denied Neal coverage. He brings five claims, three pursuant to New York's "direct action" statute, N.Y. Ins. L. § 3420(a)(2), and two claims for breach of New York's consumer protection statute, N.Y. Gen. Bus. L. § 349. *See* Second Am. Compl. (Dkt. 22) ("SAC").

[1] Ling is a litigator by training and represents himself in this case.

[2] The parties spell Neal's name inconsistently. The Court adopts the spelling used by Neal in his answer to Ling's original complaint. *See* Decl. of Elsa J. Schmidt ("Schmidt Decl.") (Dkt. 27) Ex. 2.

Erie has moved to dismiss the SAC. For the reasons that follow, Erie's motion to dismiss is GRANTED IN PART and DENIED IN PART.

BACKGROUND

Clark and Service Junction were hired in February 2012 to "design and build a kitchen."[3] Decl. of Judith Treger Shelton ("Shelton Decl.") (Dkt. 19) Ex. A ("Ling Compl.") ¶ 1. Neal's relationship to the project is unclear and disputed by the parties. It is enough for purposes of this motion to say that Neal assisted in the renovation, as another contractor, a hired assistant, or as a favor to his friend Clark. *See* Ling Compl. ¶¶ 15, 24, 67, 126; SAC ¶¶ 14, 28, 31.[4] The work done on the kitchen was not to Ling's liking. On February 25, 2013, Ling sued Clark, Neal, and Service Junction (the "Ling Action") in New York Supreme Court for violations of New York's licensing laws, consumer protection statutes, and common law torts related to damage to Ling's apartment. *See generally* Ling Compl.

Erie, which had insured Clark and Service Junction pursuant to a "Fivestar Contractor's Policy" (the "Policy" or "Policies"), partially disclaimed coverage and assumed the defense of Clark and Service Junction on March 11, 2013. Shelton Decl. Ex. I; SAC ¶ 29. Erie did not defend Neal. SAC ¶ 30. According to Ling, Erie was on notice that Neal might be covered under the Policy as a "volunteer worker" or an employee of Service Junction, SAC ¶¶ 28, 31, 35-37, but concealed this fact from Neal. SAC ¶ 39. Erie neither interviewed Neal nor issued a formal disclaimer of coverage. SAC ¶ 42.

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[3] The SAC does not include details regarding the underlying business arrangement between Ling and Clark, Neal, and Service Junction. While these facts are not essential to the Court's decision, they provide relevant background. They are drawn from the underlying complaint in Ling's suit against Clark, Neal, and Service Junction, attached by Erie to a declaration in support of its motion to dismiss. The Court may take notice of judicial documents such as the underlying complaint. *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000).

[4] Clark is the sole member of Service Junction.

Erie contends that it did not have notice that Neal might be entitled to coverage under the Policy. Section Four of the Policy requires that "[i]f a claim is made or 'suit' is brought against any insured, you[5] must: (1) Immediately record the specifics of the claim or 'suit' and the date received; and (2) Notify us [Erie] as soon as practicable."[6] Shelton Decl. Ex. F CG 00 01/UF-9708 § 4 ¶ 2(b). "To the extent possible," notice must include the "[h]ow, when and where" of the occurrence, the "nature and location of any injury or damage," and the "names and addresses" of involved persons. Shelton Decl. Ex. F. CG 00 01/UF-9708 § 4 ¶ 2(a). Paragraph 2(c) requires the policyholder and "any other involved insured" to turn over records of a suit immediately and to cooperate with Erie. Shelton Decl. Ex. F. CG 00 01/UF-9708 § 4 ¶ 2(c). An addendum to the Policy specifies that written notice given by or on behalf of the insured must include "particulars sufficient to identify the insured." Shelton Decl. Ex. F. CG 01 63/UF-9700 § C.

Ling alleges that he notified Erie's agent of his claims four days before he filed the Ling Action, SAC ¶ 25, and provided Erie with copies of the pleadings once the action was filed, SAC ¶ 26. According to the SAC, Clark also provided Erie with information about Neal's role on the job. The SAC references, without citation, an interview of Clark conducted by an Erie claims adjuster on March 14, 2013. According to the SAC, during that interview Clark described Neal's involvement as limited to helping Clark remove things from Ling's apartment and attending a meeting with Clark. SAC ¶ 28; Shelton Decl. Ex. H (Tr. of Mar. 14, 2013 Interview) at 25. On

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5 The policy defines "you" to mean the "Named Insured." Shelton Decl. Ex. F. at 1.

6 Ling did not attach the Policies to his complaint. Erie included the Policies as exhibits to its motion to dismiss. *See* Shelton Decl. Exs. F, G. The Court deems the Policies to be integrated into the complaint. *See Tagged, Inc. v. Scottsdale Ins. Co.*, No. 11-CV-127 (JFM), 2011 WL 2748682, at *1 n.1 (S.D.N.Y. May 27, 2011) (Insurance policies fall within "classic category of documents that may be considered although not attached to the complaint because it is a contract that gives rise to the legal obligations on which [Plaintiff's] claims are based.").

March 15, 2013, Erie was provided with a copy of an affidavit completed by Neal in which he wrote that his role in the project was "limited to assisting [Clark] 'as a friend . . . .'" SAC ¶ 31.

Erie and Ling reached a revised settlement on August 11, 2014. SAC ¶ 53.[7] Ling agreed to release fully "Service Junction, Clark, and Erie . . . from any and all rights and claims, demands, actions, and/or suits of whatever kind or nature whatsoever, known or unknown, arising from, in connection with, or as a consequence of . . . the Ling Action . . . ."[8] Shelton Decl. Ex. J. § 2 (the "Ling Release"). Ling further agreed "not to commence, maintain, initiate, or prosecute (or cause or encourage any other person or entity to commence, maintain, initiate, or prosecute) any action . . . against Service Junction, Clark and/or Erie . . . , based on or concerning, in whole or in part, any of the claims, demands, actions, and/or suits released

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[7] Erie and Ling had previously agreed to settle the Ling Action. SAC ¶ 46. That initial settlement, reached in March 2013, was predicated in part on Erie's misrepresentation that coverage under the Policy had lapsed shortly before much of the damage had been done to Ling's apartment. SAC ¶¶ 43-46. In fact, the Policy had been renewed and was in effect at the time. SAC ¶ 43. Ling alleges that Erie intentionally mislead him regarding the scope of coverage and to obtain a reduced settlement. SAC ¶ 50. Ling also alleges that Erie and its attorneys concealed other information throughout the course of the Ling Action, ultimately leading the state court to schedule a hearing to determine appropriate sanctions. SAC ¶¶ 51-42. The SAC alleges that Erie's conduct in the Ling Action and its refusal to indemnify Neal were part of a pattern of "sanctioned deceit," SAC ¶ 57, through which Erie has "consistently misled its other insured[s] regarding the scope of coverage," SAC ¶ 58.

[8] In full, the release provides that:

> Ling discharges and forever releases Service Junction, Clark, and Erie, their predecessors, parents, subsidiaries, co-ventures, affiliates, officers, directors, members, agents, servants, employees, representatives, heirs, administrators, executors, successors, assigns, insurers, attorneys, law firms, and legal counsel, past and present, from any and all rights and claims, demands, actions, and/or suits of whatever kind or nature whatsoever, known or unknown, arising from, in connection with, or as a consequence of Ling's contractual or other relationship with Service Junction and/or Clark (and in particular the work performed by Service Junction and/or Clark for Ling at Ling's residence located at 220 E. 5th St. Apt. 2W, New York, New York 10003), the Undisputed Claims, the Disputed Claims, the Ling action, and the Erie action including his counterclaims therein (the "Ling Release").

Shelton Decl. Ex. J § 2.

herein." Shelton Decl. Ex. J § 5. The settlement did not release Ling's claims against Neal. *See* Shelton Decl. Ex. J. § 8.

Ling secured a default judgment against Neal in the amount of $439,013.75 and instituted this action to collect under New York's "direct action" statute, N.Y. Ins. L. §§ 3420(a)(2), (b)(1). SAC ¶ 1. That statute requires all insurance policies to include a provision permitting victims such as Ling to bring an action against the insurer "under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."[9] N.Y. Ins. L. § 3420(a)(2). Section 3420(b)(1) creates a cause of action co-extensive with the victim's rights under Section 3420(a)(2). N.Y. Ins. L. § 3420(b)(1). In other words, New York law permits a victim to hold an insurer liable for a covered judgment against its insured.

Counts I-III of the SAC assert claims under Section 3420 for breach of Erie's duty to defend and indemnify Neal and to settle on his behalf. *See* SAC ¶¶ 65-79. Counts IV and V assert claims under New York's consumer protection statute, N.Y. Gen. Bus. L. § 349.

DISCUSSION

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com*, *Inc*., 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). In

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[9] In full, Section 3420(a)(2) provides that:

> [I]n case judgment against the insured or the insured's personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, . . . , be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

N.Y. Ins. L. § 3420(a)(2). The parties do not dispute that Ling timely provided notice of the entry of judgment and initiated this action more than thirty days thereafter.

reviewing a Rule 12(b)(6) motion to dismiss, courts "accept[] all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013) (quoting *Litwin v. Blackstone Grp., LP*, 634 F.3d 707, 715 (2d Cir. 2011)). Nonetheless, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 544). "Plausibility" is not certainty. *Iqbal* does not require the complaint to allege "facts which can have no conceivable other explanation, no matter how improbable that explanation may be." *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 360 (2d Cir. 2013). But "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and "[courts] 'are not bound to accept as true a legal conclusion couched as a factual allegation,'" *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555) (other internal quotations marks and citations omitted).

1. Section 3420(a)(2) Claims

A. The Ling Release

Erie argues that Ling's direct action claims are barred by the Ling Release, which released Erie, Service Junction, and its employees and agents from "any and all rights and claims, demands, actions and/or suits of whatever kind or nature . . . as a consequence of . . . the Ling Action . . . ." According to Erie, the Release is co-extensive with any liability it might have for a judgment against Neal. Mem. (Dkt. 29) at 15. Thus, any judgment Ling has against Neal could not be for a covered occurrence. "[T]o the extent Ling alleges Neal[] is liable as Service Junction's employee or volunteer worker, then Neal[] was clearly released in the settlement, and Ling's subsequent judgment against Neal in [the Ling Action] was in breach of the [Ling

Release] . . . ." Mem. at 15. Erie also argues that the Release covers any claims Ling might have personally against Erie, including the direct action claims in this case.[10]

New York's direct action statute creates a cause of action for victims against their tortfeasor's insurer. "Under the common law, 'an injured person possessed no cause of action against the insurer of the tort feasor.'" *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 353 (2004) (quoting *Jackson v. Citizens Cas. Co.*, 277 N.Y. 385, 389 (1938)). The common law rule led to potential injustice if the insured was insolvent or otherwise judgment-proof. "Before [Section 3420's] enactment, the insolvency of the assured was equivalent to a release of the surety" because the victim had no claim against the insurer directly. *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 275 (1928) (Cardozo, J.). Section 3420 mitigates that potential injustice by creating a cause of action personal to the victim. The cause of action is limited, however, by the terms of the policy, and a victim's right to recover is co-extensive with the insured's rights against the insurer. *See McCormick & Co. v. Empire Ins. Grp.*, 878 F.2d 27, 29 (2d Cir. 1989).

Although Neal might have been able to defend the Ling Action by arguing that the Ling Release limited his liability, New York law does not permit Erie to raise that argument as a defense to a direct action claim. "[O]nce an entry of judgment is had, an insurer who was given notice and opportunity to defend such action , . . . , cannot collaterally attack the underlying judgment and instead assumes the risk as to what might be proven against its insured." *Univ. of Cal. Press v. G.A. Ins. Co. of N.Y.*, No. 94-CV-4950 (CPS), 1995 WL 591307, at *7 n.3 (E.D.N.Y. Sept. 27, 1995) (citing *United States Fid. & Guar. Co. v. Copfer*, 406 N.Y.S.2d 201, 203 (4th Dep't 1978)); *see also Rucaj v. Progressive Ins. Co.*, 797 N.Y.S.2d 79 (1st Dep't 2005)

[10] Erie made this argument clearly for the first time in its reply memorandum. *See* Reply Mem. (Dkt. 31) at 2-3. The Court directed Ling to file a sur-reply addressing this issue, which he did. *See* Pl.'s Sur-Reply Mem. (Dkt. 34).

("'Having disclaimed its duty to defend its insured in the underlying action, [an insurer] may not raise defenses extending to the merits of plaintiff's claim against the insured'" (quoting *Robbins v. Michigan Millers Mut. Ins. Co.*, 653 N.Y.S.2d 975 (3d Dep't 1997) (alterations omitted)). Neal's potential argument that Ling released his claims goes to the merits of the underlying judgment in the Ling Action, and it cannot be raised for the first time by Erie as a defense to a direct action claim.

Next, Erie argues that the Ling Release applies to the direct action claims themselves. The parties dispute whether an insurer defending a direct action claim may assert affirmative defenses it has against the victim in its personal capacity; as opposed to affirmative defenses the insurer would have in a coverage action against the insured. There is scant authority on this issue. The First Department has held that a direct action claim is independent of the insured's right to coverage, *see Lauritano v. Am. Fid. Fire Ins. Co.*, 162 N.Y.S.2d 553, 556 (1st Dep't 1957) (Section 3420 creates an "independent right of the injured person to proceed directly against the liability insurer"), which suggests that victims have a personal claim under Section 3420 that can be released or settled. *See also Sales v. U.S. Underwriters Ins. Co.*, No. 93-CV-7580 (CSH), 1995 WL 144783, at *8-9 (S.D.N.Y. Apr. 3, 1995) (victim has an independent right to bring a Section 3420(a)(2) action that is not affected by a settlement between the insurer and insured). On the other hand, in *Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, the First Department held that an insurer could defend a direct action claim by arguing that the insured was guilty of laches and, implicitly, overruled the Supreme Court's holding that the insurer could only assert a laches defense based on the victim's personal conduct. *See* 871 N.Y.S.2d 48, 55 (1st Dep't 2008).

The Court need not resolve this issue at this time, however, because the Ling Release does not clearly apply to the direct action claims in this case. "[A] release—like any contract—

must be construed in accordance with the intent of the parties who executed it." *Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 515 (2d Cir. 2001). New York courts have "ordinarily held a party's release to be 'inapplicable to conduct subsequent to the execution of the release,'" *Benicorp Ins. Co. v. Nat'l Medical Health Card Sys., Inc.*, 447 F. Supp. 2d 329, 338 (S.D.N.Y. 2006) (quoting *Info. Superhighway, Inc. v. Talk Am. Inc.*, 274 F. Supp. 2d 466, 471 (S.D.N.Y. 2003)), because "a 'release' is a provision that intends a present abandonment of a known right or claim,'" *id.* at 339 (quoting *McMahan & Co. v. Bass*, 673 N.Y.S. 2d 19, 21 (1st Dep't 1998)). Thus, unless a release applies clearly to future claims, it will not normally be held to release causes of action arising in the future. *See Interpharm, Inc. v. Wells Fargo Bank, N.A.*, No. 08-CV-11365 (RJH), 2010 WL 1257300, at *12 (S.D.N.Y. Mar. 31, 2010) (rejecting argument that release applied to future claims when it did not "clearly contemplate" future actions).

Assuming *arguendo* that Erie could argue that Ling released his right to bring a Section 3420 claim, the Ling Release does not include language that unambiguously reaches future claims. *See Info. Superhighway, Inc.*, 274 F. Supp. 2d at 470 ("an ambiguous release may not form the basis for a motion to dismiss"). The Ling Release applies to "all rights and claims . . . of whatever kind or nature whatsoever arising from, in connection with, or as a consequence of Ling's contractual or other relationship with Service Junction and/or Clark . . . ." Shelton Decl. Ex. J. ¶ 2. It may have been the parties' intention for this provision to reach claims that arose from Ling's relationship to Service Junction in the future, but the Release is not explicit on this point. For example, the Release was not drafted to apply to any claims Ling "ever had, [may] now have or hereafter can, shall or may have," *Dechberry v. N.Y. City Fire Dep't*, 124 F. Supp. 3d 131, 143 (E.D.N.Y. 2015) (finding release unambiguously applies to future claims), or, even more simply, to all claims "whether past, present or future, actual or contingent," *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 901 N.Y.S.2d 618, 622 (1st Dep't

2010) (same).[11] The Court finds that it is at least ambiguous whether the Ling Release applies to future claims.

Under New York law, a claim "accrues as soon as a claimant is able to state the elements of that cause of action, and hence, to assert a valid right to some sort of legal relief." *Roldan v. Allstate Ins. Co.*, 544 N.Y.S.2d 359, 363 (2d Dep't 1989). In order to state a claim under Section 3420(a)(2), a victim must show: "(1) a judgment against the insured; (2) a thirty-day waiting period, measured from service of notice of entry, during which the judgment remains unsatisfied; (3) an action against the insurer maintained by the person who obtained the judgment; and (4) [that] the amount of the judgment [does not] exceed the applicable limit of coverage under the insurance policy." *NAP, Inc. v. Shuttletex, Inc.*, 112 F. Supp. 2d 369, 373 (S.D.N.Y. 2000). Taking only the first element – a judgment against the insured – Ling's claim did not accrue until June 30, 2016, 30 days after he gave Erie notice of the entry of judgment against Neal, and approximately twenty-three months after Ling and Erie executed their settlement. *See Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, 839 N.Y.S.2d 403, 417 (N.Y. Sup. Ct. 2007) (Section 3420(a)(2) claims do not accrue until after judgment against the insured, and citing *Roldan*, 544 N.Y.S.2d at 362, for same), *rev'd on other grounds by* 871 N.Y.S.2d 48 (1st Dep't 2008). Because that date is well after the Release was executed and the Release is ambiguous as to whether it applies to future claims, the Court concludes that Ling has plausibly alleged claims under Section 3420 that are not barred by the Ling Release.

[11] Erie does not argue that the parties' covenant not to sue, contained in section five of the settlement agreement, applies to future claims. Unlike releases, covenants not to sue ordinarily apply to future actions. *See Bass*, 673 N.Y.S.2d at 21. The Court expresses no view, however, as to whether Ling's direct action claims are barred by that section of the settlement agreement.

B. Coverage under the Policies and Notice to Erie

An insurer may defend a Section 3420 claim by arguing that the insured did not comply with the terms of the insurance policy. Because a victim's rights under Section 3420 are co-extensive with the insured's rights, a victim cannot recover if the insured would have no right to indemnification from the insurer. *See McCormick & Co., Inc.*, 878 F.2d at 29 (victim's "statutory right to maintain [a Section 3420(a) action] is coextensive with, though not exceeding, that which [the insured] would have had if it had paid the initial judgment and sued for indemnity under the policy."). Erie argues that Neal could not recover on the Policy – and, by extension, Ling cannot recover – because Neal is not an additional insured and, even if he is, Erie did not have adequate notice of Neal's claim for coverage.

Ling has plausibly alleged that Neal was entitled to coverage as an additional insured. Section II of the Policy defines as additional insureds "volunteer workers," "while performing duties related to the conduct of [the insured's] business," and "employees," for "acts within the scope of their employment . . . or while performing duties related to the conduct of [the insured's] business." Shelton Decl. Ex. F CG 00 01/UF-9708 § 2 ¶ 2(a). A "volunteer worker" is a person who is not an employee of the insured and who "donates his or her work and acts at the direction of and within the scope of duties determined by [the insured], and is not paid a fee, salary, or other compensation . . . for their work . . . ." Shelton Decl. Ex. F. CG 00 01/UF-9708 § 5 ¶ 20. Erie argues that Neal was not employed by or working for Service Junction, but elides almost entirely the question of whether he was a volunteer worker. *See* Mem. at 17-18. The SAC plausibly alleges that Neal meets the definition of a volunteer worker: it alleges that Neal's involvement in the renovation was limited "to assisting Clark 'as a friend,'" SAC ¶ 36, and that Clark did not pay Neal, SAC ¶ 28.

Ling has also plausibly alleged that Erie had notice that Neal might be an additional insured under the Policy. Notice to an insurer is sufficient if it satisfies the notice provisions of the insurance agreement. *See Mu Yan Lin v. Burlington Ins. Co.*, No. 11-CV-33 (PGG), 2012 WL 967633, at *6 (S.D.N.Y. Mar. 21, 2012). As described above, Section 4 of the Policy requires notice of a suit against any insured "as soon as practicable." Shelton Decl. Ex. F. CG 00 01/UF-9708 § 4 ¶ 2(b). An addendum to the Policy provides that notice must include "particulars sufficient to identify the insured" and may be provided "by or on behalf of" the insured, the injured person, "or any other claimant." Shelton Decl. Ex. F. CG 01 63/UF-9700 § C.

Ling pleads notice that arguably satisfies these requirements. The SAC alleges that Ling notified Erie's agent of his claims four days before filing the Ling Action and that Ling delivered to Erie copies of the underlying complaint, which named Neal as a defendant, contemporaneously with filing. SAC ¶¶ 25-26. The SAC alleges that Erie, through its attorney, disclaimed coverage of Neal several weeks later. SAC ¶ 30. The SAC also alleges that Clark provided notice to Erie. Clark described Neal as unpaid "friend" who had limited involvement in the project. SAC ¶¶ 35-37. Whether Ling's transmission of the pleadings and conversations with Erie representatives are sufficient to satisfy the notice requirement of the Policy, standing alone or together with the information provided to Erie by Clark, is a factual dispute that the Court cannot resolve at this stage. *See Spoleta Const., LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 936 (2016) (affirming denial of motion to dismiss for lack of notice of claim by additional insured, based on a generally-worded letter that did not specify insured or coverage provision);

City of N.Y. v. Gen. Star Indem. Co., 945 N.Y.S.2d 686, 687 (1st Dep't 2012) (adequacy of notice that did not identify an insured is a question of fact).[12]

Erie's position boils down to the argument that Neal himself did not provide notice to Erie that he might be covered under the policies. *See* Mem. at 19 ("Conspicuously absent from the allegations here is a claim that Neal[] timely notified Erie of the action against him . . . . To the extent Neal[] sought coverage as an insured under the Erie policy/ies, Neal[] was obligated to provide notice."). The cases Erie cites for this position concern insurance policies that required each insured claiming coverage to provide notice. *See Webster ex rel. Webster v. Mt. Vernon Fire Ins. Co.*, 368 F.3d 209, 214-15 (2d Cir. 2004) ("The policy unambiguously states that *each* insured has a duty to comply with the policy's notice requirements, regardless of whether the insured is the primary or secondary insured."); *Travelers Ins. Co. v. Volmar Constr. Co.*, 752 N.Y.S.2d 286, 289 (1st Dep't 2002) ("the notice requirement in this insurance policy applies equally to both primary and additional insureds"). At best, Section IV of the Policy can be read to suggest that each insured must independently provide notice, insofar as it requires the primary insured and "any other involved insured" to cooperate with Erie and provide Erie with relevant documents. But the Policy addendum also appears to contemplate that notice may be provided "by or on behalf of" the insured, the injured person, or another claimant. Shelton Decl. Ex. F. CG 01 63/UF-9700 § C. The same provision also provides that notice "with particulars sufficient to identify the insured, shall be considered to be notice to us [Erie]." Shelton Decl. Ex. F. CG 01 63/UF-9700 § C. Section C of the addendum implies that there is no requirement for an insured personally to request coverage. Likewise, the addendum suggests strongly that there

[12] The Court is not unsympathetic, however, to Erie's position that it was not on notice inasmuch as the Ling Complaint identified Neal as "a contractor working in conjunction with" Service Junction and a "conspirator" of Clark. *See* Ling Compl ¶ 11.

is no requirement that notice include a specific request for coverage, so long as it provides "particulars sufficient" for Erie to identify the insured.[13] At this stage, the Policies are sufficiently ambiguous such that the SAC *plausibly* alleges adequate notice.

2. Claims Pursuant to New York General Business Law Section 349

Counts IV and V of the SAC assert claims under Section 349 of the New York General Business Law. Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . . ." N.Y. Gen. Bus. Law § 349(a). Count IV asserts a deceptive practices claim on behalf of Neal on the theory that Section 3420 authorizes Ling to step into the shoes of Erie's insured. In Count V, Ling alleges that Erie's refusal to indemnify Neal for his default judgment injured Ling directly. Erie moves to dismiss on the grounds that Ling lacks standing to assert a Section 349 claim on Neal's behalf and that Ling has not plausibly alleged the elements of a deceptive practices claim. The Court agrees.

A. Ling Cannot Bring a Derivative Section 349 Claim

Section 3420 does not authorize Ling to bring a deceptive practices claim on Neal's behalf. The Court begins from the premise that Section 3420 is a departure from common law

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[13] Erie also argues that Ling's Section 3420 claims are barred by the doctrines of laches and judicial estoppel. Erie's laches argument is substantively the same as its argument that it lacked notice that Neal might be an additional insured. Erie argues that it was prejudiced by Ling's (and Neal's) failure to notify it that Neal might be entitled to coverage as an additional insured or to implead Neal in the declaratory coverage action started by Erie. *See* Mem. at 24-25. The merits of Erie's argument depends on whether it, in fact, had notice of Neal's status and whether Ling (and Neal) are guilty of an "unreasonable and inexcusable delay that has resulted in prejudice to [Erie]." *Eppendorf-Netheler-Hinz GMBH v. Nat. Scientific Supply Co.*, 14 F. App'x 102, 105 (2d Cir. 2001) (quoting *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998)). Ling plausibly alleges that Erie had notice, and whether Ling or Neal unreasonably delayed is "fact-sensitive and so [] not susceptible to determination on a motion to dismiss." *Israel v. Carpenter*, No. 95-CV-2703 (DAB), 1996 WL 11252, at *3 (S.D.N.Y. Jan. 11, 1996).

Erie's judicial estoppel argument is a rehash of whether Neal is in fact an additional insured under the Policy. Whether Ling previously took the position that Neal was not a "volunteer worker" and whether the judgment against Neal in the Ling Action is predicated on a finding that Neal was not an additional insured are issues that will be litigated further in this case. Erie has not shown that it would be appropriate to grant a motion to dismiss on these grounds.

and must be construed strictly. *See McNamara v. Allstate Ins. Co., Chicago, Ill.*, 160 N.Y.S.2d 51, 55 (4th Dep't 1957) ("We start with the mandate that this statute, being in derogation of the common law, will be strictly construed."). Neither the text nor the purpose of Section 3420 suggests that the legislature intended to authorize victims such as Ling to bring a claim for deceptive practices on behalf of their tortfeasor. As the Court has explained, *supra*, Section 3420 is intended to remedy the potential unfairness to a victim when an insured tortfeasor is judgment-proof. "[W]hile not privy to the insurance contract," the victim "ha[s] a genuine interest in it and should be enabled to invoke its protection." *Lauritano*, 162 N.Y.S.2d at 567. The remedy created by the New York legislature is tailored to this purpose: Section 3420 authorizes a victim to bring a claim "under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract." N.Y. Ins. L. § 3420(a). That right is "coextensive with, though not exceeding, that which [the insured] would have had if it had paid the initial judgment and sued for indemnity under the policy." *McCormick & Co., Inc.*, 878 F.2d at 29.

The right to bring a claim for deceptive practices under Section 349 is not a claim "under the terms of the policy." As the Fourth Department has explained, a claim under Section 349 raises a "distinct legal theor[y]" that is "independent" of the terms of the insurance policy. *Nick's Garage, Inc. v. State Farm Gen. Ins. Co.*, 991 N.Y.S.2d 695, 696 (4th Dep't 2014) (defenses under Section 3420 inapplicable to claim under Section 349 because they are distinct legal theories); *Nick's Garage, Inc. v. Liberty Mut. Fire Ins. Co.*, No. 12-CV-633 (MAD), 2013 WL 718323, at *10 (N.D.N.Y. Feb. 27, 2013) (same). Because the insured's rights under Section 349 are distinct from their rights under the policy, Section 3420 is inapposite – it authorizes a victim only to bring claims that arise "under the terms of the policy." The fact that Neal's putative Section 349 claim shares a factual nexus with Ling's derivative claim under the

Policy is irrelevant. In sum, the Court finds that Ling does not have standing to bring a Section 349 claim in Neal's stead.

B. Ling's Section 349 Claim Does Not Allege "Consumer Oriented" Deceptive Conduct

Ling has not alleged actionable deceptive conduct in his personal capacity. Ling concedes that his settlement with Erie releases any right to bring a Section 349 claim based on Erie's conduct up to the time of the settlement.[14] *See* Opp. at 17 ("Plaintiff's GBL § 349 claim arises not out of the misconduct of Service Junction and/or Clark, but instead out of Erie's subsequent and independent misconduct undertaken after the execution of the release."). The SAC's only allegations of conduct post-dating the settlement concern Erie's refusal to indemnify Neal in 2016. Those allegations are too slim a reed to support a deceptive practices claim against Erie.

A claim pursuant to Section 349 has three elements: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). An "unfair or deceptive" practice is an act or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Acquista v. N.Y. Life Ins. Co.*, 730 N.Y.S.2d 272, 279 (1st Dep't 2001). To be consumer-oriented, an insurer's deceptive practices must have a "broad impact on consumers at large." *Wilner v. Allstate Ins. Co.*, 893 N.Y.S.2d 208, 215 (2d Dep't 2010). The critical distinction is between one-off disputes concerning coverage, which do not give rise to any consumer-oriented injury, *see USAlliance Fed. Credit Union v. CUMIS Ins. Soc., Inc.*, 346 F. Supp. 2d 468, 472 (S.D.N.Y. 2004), and

[14] For the reasons stated above, the Court assumes for purposes of the motion to dismiss that the Ling Release does not apply to future causes of action. *See Benicorp Ins. Co.*, 447 F. Supp. 2d at 338-39.

allegations of deceptive acts, which are "designed to deceive the public at large." *Grand Gen. Stores, Inc. v. Royal Indem. Co.*, No. 93-CV-3741 (CSH), 1994 WL 163973, at *4 (S.D.N.Y. Apr. 22, 1994); *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 326 F. Supp. 2d 434, 439 (S.D.N.Y. 2004).

Erie's refusal to indemnify Neal in 2016 is not alleged to be connected to any deceptive acts targeting the public at large. The only deceptive policies or practices alleged in the SAC predate the parties' settlement. The SAC alleges that Erie intentionally misrepresented the amount of Service Junction's coverage and violated its own internal policies by failing to discuss the full extent of its coverage with its insured and by issuing an oral, rather than written, denial of coverage to Neal. Opp. at 22 (citing SAC ¶¶ 35-36, 38-42, 43-50). None of that conduct was public facing.

Nor has Ling alleged how Erie's refusal to indemnify Neal in 2016 – nearly two years after its alleged misrepresentations – was "likely to mislead a reasonable consumer." Ling does not allege, for example, that Erie concealed its refusal to pay the judgment or misrepresented the terms of its decision. Even assuming Erie's conduct was deceptive, Ling has not alleged how refusing to indemnify Neal in 2016 is "consumer-oriented." To the extent Erie's refusal is based on the Ling Release, it relates to an agreement between the parties with no impact on the public at large. Erie's refusal to indemnify Neal is a bilateral dispute over whether Neal is an additional insured under the terms of the Policy. This sort of "garden-variety breach of contract," *USAlliance Fed. Credit Union*, 346 F. Supp. 2d at 472, divorced from any non-conclusory allegations of a practice that deceives the public at large, cannot support a claim under Section 349. *See Lava Trading Inc.*, 326 F. Supp. 2d at 439 (Courts "almost uniformly" reject attempts to convert disputes concerning the scope of coverage into a claim under Section 349).

CONCLUSION

Erie's motion to dismiss the SAC is GRANTED IN PART and DENIED IN PART. Erie's motion to dismiss Counts I through III is denied, and its motion to dismiss Counts IV and V is granted. Ling has already amended his complaint in response to Erie's initial motion to dismiss, and he has not requested leave to amend a second time. Accordingly, Counts IV and V are DISMISSED WITH PREJUDICE.

The parties are directed to appear for a status conference at **10:00 a.m. on August 18, 2017**. The parties' joint pre-conference letter is due by **August 10, 2017**. The Clerk of the Court is directed close the open motion at docket entry 25.

Date: July 19, 2017
New York, New York

VALERIE CAPRONI
United States District Judge