SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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OLD REPUBLIC INSURANCE COMPANY, directly and as Subrogee of STS Steel, Inc.,

Plaintiff,

Index No. 155995/2012

-against-

DECISION & ORDER

UNITED NATIONAL INSURANCE COMPANY,

Defendant.

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SHIRLEY WERNER KORNREICH, J.

Defendant United National Insurance Company (United) moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint on the ground that the requirement of providing notice of disclaimer as soon as possible, pursuant to Insurance Law 3420(d)(2), does not apply to an underlying claim for contractual indemnification. Motion Sequence 009. The motion is denied for the reasons that follow.

I. Background

This declaratory judgment action was brought by Old Republic Insurance Company (Republic) on its own behalf and as subrogee of its insured, STS Steel, Inc. (STS). Here, Republic seeks to recover from United $1 million that it paid to settle an underlying personal injury action. The facts are more fully set forth in this court's decision and order, dated July 1, 2014 (SJ Decision, Dkt 217),[1] which granted United's motion for summary judgment dismissing the complaint and the decision of the Appellate Division reversing it, *Old Republic Ins. Co. v*

[1] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System. The SJ Decision is reported at *Old Republic Ins. Co. v United Natl. Ins. Co.*, 2014 NY Slip Op 31699(U); 2014 NY Misc LEXIS 2939 (July 1, 2012) (nor).

United Natl. Ins. Co., 135 AD3d 662, 663 (1st Dept 2016) (AD Decision). The reader's familiarity with the SJ and AD Decisions is assumed.

In the underlying action, the plaintiff, Jose Pollock, suffered bodily injuries while performing construction work at a job site owned by The Rye City School District (Rye), for which Andron Construction Corp. (Andron) was the construction manager. Andron had entered into a subcontract with STS, which had subcontracted with Pollock's employer, Conception Bay, Inc. (Conception), to erect steel. Pollock sued Andron and Rye, who brought a third-party complaint against STS and Conception. Dkt 239. The underlying third-party complaint contained the following causes of action against STS and Conception, numbered here as in the Rye/Andron pleading: 1) breach of contract; 2) contractual indemnification pursuant to Rye's contract with STS and STS's subcontract with Conception; 3) contractual indemnification based on STS's subcontract with Conception; and 4) common law indemnification and contribution. *Id.* The fourth third-party claim sought common law indemnification from STS and Conception on the ground that if Rye and Andron were found to be liable to Pollock, it was solely caused by the active negligence of STS and Conception. Dkt 239, ¶¶25-28. Alternatively, the fourth third-party claim sought apportionment, if Rye and Andron were found to be negligent. *Id.*

Two motions for summary judgment were decided in the underlying action, but neither one ruled on the fourth third-party claim against STS. On December 26, 2010, the court in the underlying action granted partial summary judgment to Andron and Rye on their claim for contractual indemnification against Conception, pursuant to its subcontract with STS, i.e., the second and third causes of action in the third-party complaint, but not against STS.[2] Dkt 243. On January 31, 2012, the court in the underlying action granted summary judgment, based on an

[2] The motion was denied as to STS for failure to submit a copy of its contract. Dkt 243.

oral motion, in favor of Rye for contractual indemnification by STS based on a finding that Conception's negligence triggered the contractual indemnification clause in STS's "trade contract". Dkt 244. It is unclear whether the "trade contract" was STS' contract with Andron or the STS/Conception subcontract. The decision on the oral motion did not mention the fourth third-party claim against STS for common law indemnification and apportionment. Subsequently, on February 6, 2012, the underlying action was settled during jury deliberations. Dkt 245. In sum, the record does not prove that the fourth third-party claim against STS had been disposed of at the time of the settlement.

In the SJ Decision, this court ruled that that there was no umbrella coverage for STS under United's umbrella policy issued to Conception and that United's allegedly ineffective disclaimer could not create coverage that never existed. Republic appealed. The AD Decision reversed finding issues of fact as to, *inter alia*, the timeliness of United National's disclaimer to STS.

United then made this motion to dismiss, arguing that the only claim against STS in the underlying action at the time of the settlement was contractual indemnification and, as a matter of law, Insurance Law §3420(d) does not require notice of disclaimer as soon as reasonably possible for such a claim. Insurance Law §3420(d)(2) provides:

> ***If under a liability policy*** issued or delivered in this state, ***an insurer shall disclaim liability or deny coverage for*** death or ***bodily injury*** arising out of a motor vehicle accident or any other type of accident occurring within this state, ***it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person*** or any other claimant. [emphasis added]

United relies on the case of *Preserver Ins. Co. v Ryba*, 10 NY3d 635 (2008) (*Ryba*) for the proposition that a claim for contractual indemnification does not fall within the notice provision

of the statute. The parties agree that United did not cite *Ryba* on the appeal to the First Department.

In opposition, Republic argues that: the AD Decision rejected the argument made by United in the instant motion; that United misstates the *Ryba* holding; that there were claims for bodily injury against STS in the underlying action at the time of the settlement, not just a contractual indemnification claim; and that the current motion violates the single motion rule contained in CPLR 3211(e).

The sole reference in the AD Decision to §3420(d) was as follows: "We also find an issue of fact surrounding the timeliness of United National's disclaimer." The Appellate Division cited two cases, both of which involved whether an insurer's disclaimer under §3420(d) was timely. *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64 (2003); *Hernandez v Am. Tr. Ins. Co.*, 31 AD3d 343 (1st Dept 2006). Neither case addressed an underlying contractual indemnification claim.[3]

Whether the AD considered the argument that the statute does not apply to claims for contractual indemnification is unclear. Republic argues that United raised the issue in its appellate brief, in a footnote, which argued:

> It is also uncertain that any Insurance Law §3420(d) disclaimer could have been required to be sent to STS Steel even if notice had been provided, since its only liability was for contractual indemnity to Rye City School District, and not because of bodily

[3] *First Financial* decided that an insurer's delay to investigate other sources of coverage is impermissible and found unreasonable a 48-day delay in issuing a disclaimer, measured from when the insurer received notice of the ground for disclaimer, which had not been given by the insured. *Id.* *Hermandez* held that the duty to disclaim was never triggered because neither the plaintiff nor the injured party notified the insurer, although it received notice from a co-defendant. *Id.* *Hernandez* distinguished *First Financial* on the ground that the insurer acknowledged in writing that it had received late notice of the claim from another source and that it was reserving the right to deny coverage on the basis of untimely notice. *Hernandez*, *supra*, at 344.

> injury. See, *Iafallo v. Nationwide Mut. Fire Ins. Co.*, 299 A.D.2d 925, 750 N.Y.S.2d 386 (4th Dep't 2002) (no 3420(d) disclaimer was due where the claim was for defamation not bodily injury).

Dkt 253, p 2, fn 14. *Iafallo* held that §3420's notice requirement did not apply to claim for defamation, which is not a claim for death or bodily injury arising from an accident.

In its appellate reply brief, Republic responded to United's argument in a footnote, which stated that United was raising the issue for the first time on appeal and that the underlying action had claims for bodily injury.

> In a footnote, United suggests that §3420(d) does not pertain because STS's only liability was for contractual indemnity, not "bodily injury." (Def. Br. at 45 n.14). Besides amounting to an entirely new argument on appeal, this argument fails because, as United's cited case declares, the statute applies when "the underlying action is for 'death or bodily injury…'" *Iafallo v. Nationwide Mut. Fire Ins. Co.*, 299 A.D.2d 925, 926-27, 750 N.Y.S.2d 386 (4th Dep't 2002); see also *Fairmont Funding, Ltd. v. Utica Mut. Ins. Co.*, 264 A.D.2d 581, 694 N.Y.S.2d 389 (1st Dep't 1999). In the present matter, the underlying action and claim undisputedly were for bodily injury.

Dkt 254, p 2, fn 5. Republic contends that the Appellate Division rejected United's footnote argument with the language, "We have considered the remaining arguments and find them unavailing." *Old Republic Ins. Co. v United Natl. Ins. Co.*, 135 AD3d 662, 663 (1st Dept 2016).

This court can only speculate as to whether the issue United now raises was considered by the First Department. The parties have chosen to provide the court with only excerpts of their appellate briefs and STS previously made other arguments relating to §3420(d), i.e., that STS and Conception never tendered their defense, untimely disclaimer under §3420 is not a defense available to an insurer, and that Republic did not have standing to raise it. Thus, it is unclear from the record what the Appellate Division was ruling on when it found a question of fact.

However, it is unnecessary to resolve whether the issue was decided by the Appellate Division because the underlying factual predicate for United's motion is demonstrably false. It contends that the only remaining third-party claim against STS at the time of settlement of the underlying action was contractual indemnification. Republic rightly disputes this, pointing out that the fourth third-party claim for common law indemnification/apportionment against STS was unresolved when the underlying action was settled. Compare Dkt 239, 243-245. The common law indemnification/apportionment claim was based, in part, on the allegation that STS's negligence caused Pollock's bodily injuries. The summary judgment decision in the underlying action finding Conception negligent did not preclude a finding by the jury that STS was negligent as well.

Furthermore, STS misstates the *Ryba* holding with respect to contractual indemnification. *Ryba* held that the notice requirement of Insurance Law §3420(d) does not apply to a claim for breach of contract. Its ruling on contractual indemnification was that the policy in question contained an exclusion barring coverage for that claim.[4] A claim for common law indemnification falls within the notice provisions of 3420(d). *Endurance Am. Specialty Ins. Co. v Utica First Ins. Co.*, 132 AD3d 434, 436 (1st Dept 2015); *QBE Ins. Corp. v Adjo Contr. Corp.*, 121 AD3d 1064, 1081 (2nd Dept 2014) (common law indemnification claim triggered insurers' duty to timely disclaim pursuant to 3420(d)).

It is unnecessary to reach the single motion rule argument in light of the other reasons for denying United's motion. Nevertheless, the court notes that this is the third time that United has

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[4] "Further, ***since the policy explicitly excludes coverage for any liability assumed under a contract, Preserver must neither defend nor indemnify East Coast Stucco for the contractual indemnification*** or breach of contract causes of action. And even if the policy were "issued for delivery" in New York, ***Preserver still would not be barred from denying coverage for Almeida's breach of contract claim since Insurance Law § 3420 (d) requires timely disclaimer only for denials of coverage "for death or bodily injury."*** *Ryba*, *supra* at 642.

moved to dismiss based on documentary evidence and failure to state a claim, CPLR 3211(a)(1) and (7), respectively. Unfortunately, United's submissions failed to state what documentary evidence was supposedly dispositive, or point to any pleading deficiencies, which makes it impossible to apply 3211(e), which lists the exceptions to the single motion rule.[5] Accordingly, it is

ORDERED that United National Insurance Company's motion (Sequence 009) to dismiss the amended complaint of Old Republic Insurance Company is denied; and the parties shall call chambers for status conference on April 20, 2017 at 3:30 pm.

Dated: April 19, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[5] United moved to dismiss the complaint and amended complaint on the basis of CPLR 3211(a)(1) and (7) on September 24, 2012 (Motion Sequence 001) and January 1, 2013 (Motion Sequence 002). Dkt 2 & 21. The issue that 3420(d) does not apply to contractual indemnification claims was not raised by the prior motions. Nor was it raised in United's answer to the amended complaint, which asserted forty-two affirmative defenses. Dkt 67. If the motion were based on documentary evidence, the argument, therefore, would be waived. CPLR 3211(e). However, a motion to dismiss for failure to state a claim can be made at any time. CPLR 3211(e).