Chao Jiang v Ping An Ins.
2018 NY Slip Op 31534(U)
July 7, 2018
Supreme Court, New York County
Docket Number: 652260/15
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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CHAO JIANG,

Plaintiff,

- v -

PING AN INSURANCE, PING AN PROPERTY & CASUALTY INSURANCE CO. OF CHINA, LIMITED, CHINA PING AN INSURANCE OVERSEAS (HOLDINGS) LIMITED, HUATAI INSURANCE GROUP OF CHINA, ACE INSURANCE LIMITED, ACE GROUP HOLDINGS INC., CHUBB CORPORATION, FEDERAL INSURANCE COMPANY, CHUBB INSURANCE (CHINA) COMPANY,

Defendant.

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INDEX NO. 652260/15

MOTION DATE 11/01/2017

MOTION SEQ. NO. 013

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 013) 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 516, 517, 519, 560, 562
were read on this motion to/for DISMISS

MASLEY, J:

This matter concerns the alleged failure of defendants-insurers to satisfy policy obligations to plaintiff Chao Jiang. As relevant to this motion, Jiang alleges that two insurance providers—defendants Chubb Insurance [China] Company Limited (Chubb) and Federal Insurance Company (Federal) (together, Chubb Defendants)—engaged in deceptive business practices and breached directors and officers liability coverage policies issued to Jiang's former employer.

The Chubb Defendants now move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the amended complaint as against them.

Background

Except as otherwise noted, the following factual allegations are taken from the September 29, 2016 amended complaint.

Jiang is a citizen of China who resided, at the relevant time, in New York and New Jersey (plaintiff's amended complaint [compl.] ¶ 5). Jiang is the former secretary and vice-president of corporate finance for nonparty China North East Petroleum Holding Ltd. (CNEP), a company which had business addresses in California and New York (*id.* ¶¶ 62-63).

The Policies

In 2010, CNEP bought two insurance policies to provide claims made liability coverage to its directors and officers. First, a primary coverage policy (2010 Primary Policy) was issued on June 7, 2010 to CNEP by nonparty Chartis Insurance Company China Limited (Chartis) and defendant Ping An Property & Casualty Insurance Company of China Shanghai Branch (Ping An), each of which was responsible for 50% of qualifying coverage. The 2010 Primary Policy provides aggregate coverage to CNEP's officers and directors, as insureds, for the first $5 million in loss arising from any claim first made against an insured for qualifying acts during the coverage period of May 1, 2010 through April 30, 2011 (Kronley aff, ex 2).

Section 2.2 of the 2010 Primary Policy defines "claim," in pertinent part, as "[a]ny *claim* or *claims* arising out of, based upon or attributable to a *single wrongful act* shall be considered to be a single *claim* for the purposes of this policy" (*id.* [emphasis in

original]). Section 5.6 of the 2010 Primary Policy, entitled "Advancement of Costs," requires the primary insurer to advance to the insured or CNEP defense costs prior to the final disposition of any claim. Endorsement No. 10 of the 2010 Primary Policy requires that the premium be paid within 60 days of the policy's inception date or else the policy "shall be cancelled *ab inito*."

Second, an excess coverage policy (2010 Excess Policy) was issued on June 18, 2010 by Chubb to CNEP (Kronley aff, ex 3). The 2010 Excess Policy provides directors and officers liability coverage for an aggregate $5 million in excess of the $5 million coverage provided by the 2010 Primary Policy; the "Insuring Clause" provides that the excess coverage "shall attach only after all such Underlying Insurance has been exhausted by payment of claim(s)." The 2010 Primary Policy issued by Chartis and Ping An is identified as the "Underlying Insurance" in the 2010 Excess Policy (*id.* at 1-2). Section 6 of the 2010 Excess Policy provides that "[Chubb] may, at its sole discretion, elect to participate in the investigation, settlement or defence [sic] of any claim covered by this Policy," whether or not the underlying insurance has been exhausted (*id.* at 2).

CNEP subsequently renewed the 2010 Primary Policy for the period of May 1, 2011 to April 30, 2012. That primary coverage policy (2011 Primary Policy) was issued on June 3, 2011 by Chartis, as 50% co-insurer, and defendant Huatai Insurance Company of China Limited (Huatai) as 50% co-insurer; Ping An had refused to provide coverage for the renewed 2011 Primary Policy. Endorsement No. 19 of the 2011 Primary Policy capped the "combined total aggregate limit of liability" under the 2010 and 2011 Primary Policies at $5 million (Kronley aff, ex 4A, at 47).

A corresponding excess coverage policy for the period of May 1, 2011 to April 30, 2012 was issued by Chubb to CNEP on June 13, 2011 (2011 Excess Policy). The relevant provisions of the 2010 Excess Policy are repeated in the 2011 Excess Policy (*see* Kronley aff, ex 5, at 1-2). The underlying insurance identified in the 2011 Excess Policy is the 2011 Primary Policy (*id.* at 1).

DOJ and SEC Actions, Jiang's Primary Coverage

In his capacity as CNEP's former employee, Jiang was the subject of "parallel criminal and civil securities fraud investigations and actions" (together, Actions) commenced by the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) (compl. ¶ 1). The SEC's "formal investigation" of CNEP and CNEP's directors and officers, including Jiang, in August 2010 (*id.*); in Fall 2010, the DOJ began its investigation of CNEP and CNEP's directors and officers (*id.* ¶¶ 32, 93).

On June 1, 2011, the SEC issued a subpoena to Jiang seeking his deposition and production of certain documents (*id.* ¶ 33). In November 2012, a civil action, captioned *SEC v China North East Petroleum Holdings. Ltd.* (No. 12-cv-8696 [SDNY]) (SEC Action), was commenced against CNEP and former CNEP officers and directors, including Jiang. A criminal action, captioned *United States v Jiang* (2014 WL 11071979, No. 13-cr-00152 [D DC Dec. 18, 2014]) (DOJ Action), was initiated against Jiang in early 2013.

The DOJ Action was resolved when Jiang pleaded guilty of certain crimes, including knowing failure to devise and maintain a system of internal accounting controls, and was sentenced to a three-year term of probation and fined $10,000 (*see*

id.; compl. ¶ 48). The SEC Action was later settled against Jiang, and, as memorialized in a July 14, 2015 final judgment, he was prohibited from serving as an officer or director of certain types of SEC-regulated entities for a five-year period and was penalized $75,000.

Jiang alleges that he incurred significant legal fees and costs in the defense of the Actions (compl. ¶¶ 33-36, 96). He was represented in both Actions by the law firm Gibson Dunn & Crutcher LLP (Gibson) (*id.* ¶ 36).

Chartis, as co-insurer under both the 2010 and 2011 Primary Policies, advanced $2.5 million for defense costs to Jiang in connection with the Actions, amounting to Chartis's full 50% share of the 2010 and 2011 Primary Policies' combined aggregate limit of liability (*id.* ¶ 39; *see* Kronley aff, ex 4A, at 47).

The 2010 Primary Policy co-insurer, Ping An, and 2011 Primary Policy co-insurer, Huatai, refused to advance or otherwise cover Jiang's defense costs. Ping An denied coverage on the basis that, among other reasons, CNEP had failed to timely make premium payments to maintain the 2010 Primary Policy (*see* compl. ¶ 40). Huatai denied coverage on the ground that Chartis's $2.5 million payment under the 2010 Primary Policy and Ping An's refusal to pay its 50% share of liability coverage under the 2010 Primary Policy had "reduce[d] the limit of liability of the [2011 Primary Policy] to zero" (*id.* ¶ 105).

Chubb's Denial of Excess Coverage

Beginning in March 2014 and continuing through July 2014, claims specialists informed Jiang, on behalf of Chubb,[1] that coverage under the 2010 Excess Policy had

[1] The claims specialists communicated this information to Jiang using stationery bearing Chubb's name, as well as that of the Chubb Group of Insurance Companies (*see* Kronley aff, ex 15).

not been triggered because the underlying 2010 Primary Policy coverage had not been exhausted; specifically, the $5 million primary coverage was not exhausted as Ping An had not paid its 50% share of coverage under 2010 Primary Policy.

By letter, dated March 5, 2014, Thad A. Davis of Gibson wrote on Jiang's behalf to Megan Shao—identified by Jiang's counsel's as a "Regional Specialist and Casualty Claims Specialist, Greater China" of the "Chubb Group of Insurance Companies"; Davis requested written confirmation that "Chubb will accept and provide insurance coverage when the [2010 Primary Policy] is exhausted," which he anticipated would occur within the following 60 days (*see* Kronley aff, ex 11).

In support of an order to show cause seeking a preliminary injunction in a separate 2014 action in this court against the Chubb Defendants (First NY Action[2]), Davis stated in an affirmation that he spoke to Shao by telephone on March 12, 2014 (*see* Kronley aff, ex 12, ¶ 4). According to Davis, Shao verbally confirmed that Chubb would provide coverage under the 2010 Excess Policy once the 2010 Primary Policy coverage was exhausted (*id.*). Additionally, Shao told Davis that "Chubb would not 'drop down' insurance coverage to fill the Ping-An [sic] layer," "at no time . . . state[d] that Chubb would deny excess coverage," and represented that "[Shao] had 'some discretion' with respect to payments to" Jiang (*id.*).

Davis again wrote to Shao on May 8, 2014; in that letter, Davis stated that $6.5 million in legal fees and expenses had been "expended" on Jiang's defense the Actions, and requested that Chubb reimburse Gibson for $1.5 (Kronley aff, ex 13). Shao responded to Gibson by email, dated May 21, 2014, in which she stated that the 2010

[2] The First NY Action, *Jiang v Federal Insurance Company and Chubb Insurance (China) Company Limited*, index number 652334/2014, was subsequently discontinued.

Excess Policy would only "attach" after the 2010 Primary Policy "has been exhausted by payment of claim(s)," and that Chubb would not provide coverage under the 2010 Excess Policy before the entire $5 million in primary coverage was "paid out" (Kronley aff, ex 14). Shao reiterated Chubb's position by letter to Davis, dated July 3, 2014, and further indicated that Chubb learned that Ping An "effectively cancelled its [2010 Primary Policy] for CNEP's failure to pay the premium"; thus, if true, the 2010 Excess Policy would terminate immediately under paragraph 13 of the 2010 Excess Policy (Kronley aff, ex 15, at 1-2).

On July 29, 2014, Jiang commenced the First NY Action against the Chubb Defendants. By order to show cause, filed August 5, 2014, Jiang moved this court, then presided over by Justice Jeffrey Oing, for a preliminary injunction compelling Federal and/or Chubb to advance defense costs under the 2010 Excess Policy. At oral argument on September 5, 2014, Justice Oing denied the motion, and stated that there was no evidence that "a total payment of claims . . . exhausted the underlying [2010] primary policy" (Kronley aff, ex 19, at 50). The First NY Action was later discontinued.

In this action, Jiang asserts, as to the Chubb Defendants, the following four claims: (1) deceptive business practices, in violation of New York's General Business Law (GBL) § 349; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) declaratory judgment. The Chubb Defendants now move to dismiss the amended complaint.

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 subsection (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]).

1. Claims against Federal

The Chubb Defendants contend that the amended complaint must be dismissed as against Federal, Chubb's parent company, because Federal is not a party to any of the insurance policies and the policies were not assumed by, or assigned to, Federal. Plaintiff responds that the claims are properly raised and sufficiently pleaded against Federal, and Federal manifested its intent to be bound by the 2010 and 2011 Excess Policies by participating in the negotiation of the agreements, as well as by accepting and acting upon the agreements. The Chubb Defendants reply that Jiang's conclusory allegations in the amended complaint are insufficient to pierce the corporate veil.

Preliminarily, Federal is not a signatory to, or mentioned in, either the 2010 or 2011 Excess Policies. Jiang asserts in the amended complaint that "Federal employees negotiated and signed the Excess Policy . . . and denied [him] the insurance coverage and advancement" of litigation costs and expenses; however, Jiang then asserts that Chubb employees negotiated and signed the same policy, and were responsible for

denying coverage under that policy (*compare* compl. ¶ 26 *with id.* ¶ 27). The documentary evidence plainly establishes that Federal is not a party or signatory to either the 2010 or 2011 Excess Policies; rather, those policies were each issued by Chubb and signed by an "Authorized Representative" of Chubb (*see* Kronley aff, exs 3, 5).

Further, the amended complaint does not establish that Federal assumed or was assigned the 2010 or 2011 Excess Policies, or that Federal was involved in any specific act regarding the negotiation of those policies, or the denial of excess coverage. Jiang's assertions that Federal negotiated the policies and was responsible for denying excess coverage are unsupported, speculative, or conclusory. Specifically, Jiang asserts, "upon information and belief," that Shao was employed by Chubb until December 2010, at which time she was employed "by [Chubb Corporation] and/or Federal" (compl. ¶ 108). Chubb Corporation (Chubb Corp) is a holding company of which Federal is a subsidiary, and, in turn, Chubb is a wholly-owned subsidiary of Federal (*id.* ¶¶ 25-26). Jiang further asserts that Shao copied purported employees of Federal and/or Chubb Corp when she emailed Jiang's attorneys at various points during 2014: Roden Tong, of "Chubb [Corp] and/or Federal"; Irene Petillo, "Vice President of Home Office Specialty Claims at Chubb & Son, a division of Federal"; and Tracy Tkac, an "employee of Chubb [Corp] and/or Federal" (*e.g. id.* ¶¶ 110, 115). Notably, however, Jiang does not assert that Petillo or Tong engaged in activity in connection with the policies, and ascribes to Tkac only a one-sentence reply to a next-day teleconference request from Jiang's counsel (*see id.* ¶123).

Jiang later asserts in support of his GBL § 349 claim that the "Excess Policy is administered and key decision-making is performed by individuals who are employees of [Chubb's] parent corporations, Chubb [Corp] and/or Federal" (compl. ¶ 140). While Jiang alleges details about Shao's involvement in corresponding with Jiang's attorneys regarding the excess coverage claim, there are no specific factual allegations that Federal or its employees had any involvement with the underwriting, negotiation, or execution of the policies. Further, documentary evidence submitted establishes that letters sent to Jiang's attorneys by Shao and Tong relating to Jiang's coverage claim were printed on Chubb letterhead (Kronley aff, exs 15-16 [letterhead bearing "Chubb Insurance (China) Company Limited, Chubb Group of Insurance Companies"]). In her emails and other communications, Shao's title is listed as "Regional Specialty and Casualty Claims Specialist, Greater China, Chubb Group of Insurance Companies" (*see e.g.* Kronley aff, ex 14).

"A subsidiary corporation over which a parent corporation exercises control in everyday operations may be deemed an instrumentality or agent of the parent, and '[t]he determinative factor is whether the subsidiary corporation is a dummy for the parent corporation' " (*Pritchard Services (NY) Inc. v First Winthrop Properties, Inc.*, 172 AD2d 394, 395 [1st Dept 1991], quoting *A. W. Fiur Co., Inc. v Ataka & Co., Ltd.*, 71 AD2d 370, 374 [1st Dept 1979]). Discounting Jiang's conclusory, unsupported assertions surrounding Federal's involvement in the negotiation and execution of the policies, and that the policies were "administered" by, and "key decision-making" authority was vested in, Federal's employees, there is no basis in the amended complaint upon which to pierce the corporate veil. Specifically, there are no allegations

that Chubb is a mere shell or dummy company of Federal, or that Federal assumed, administered, or engaged in a continuous course of dealing with respect to the policies at issue.

The cases cited by Jiang in opposition to the motion do not compel an alternate result. Accordingly, the amended complaint is dismissed as against Federal.

2. Claims against Chubb

a. *First cause of action for violation of GBL § 349.*

GBL § 349 (h) creates a cause of action for "any person who has been injured by reason of any violation" of § 349 (a), which 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." "To successfully assert a section 349 (h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]).

Jiang fails to adequately plead each of those elements. Jiang does not allege that it is a consumer, or that defendants are merchants, within the ambit of GBL § 349. Moreover, commercial insurance contracts such as the policies at issue here do not constitute consumer-oriented conduct (*see Asimov v Trident Media Group, LLC*, 44 Misc 3d 1223(A) [Sup Ct, NY County 2014]; *see also Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 354 [1st Dept 2005] ["These allegations, liberally construed, at best show a private contract dispute over policy coverage and the processing of . . . claims, not conduct affecting the consuming public at large, and thus do not state a cause of action under Section 349"]). Accordingly, Jiang's cause of action for violation

of Section 349 of New York's General Business Law must be dismissed.

b. *Second cause of action for breach of the policy agreement*

The Chubb Defendants contend that the breach of policy agreement claim must be dismissed because Chubb properly denied coverage under the express terms of the 2010 Excess Policy, which requires that the underlying $5 million primary insurance coverage be exhausted—that is, paid to Jiang—prior to triggering Chubb's obligation to pay under the 2010 Excess Policy. Initially, Ping An refused to provide its 50% share of the underlying insurance, though Ping An later settled Jiang's primary coverage claim for less than the full $2.5 million share of primary coverage for which Ping An was responsible, leaving the underlying insurance coverage unexhausted.

Jiang responds that Chubb breached the 2010 Excess Policy by failing to advance defense costs once the costs incurred amounted to more than $5 million, despite the fact that the full $5 million was not actually paid out by the primary policy insurers. Jiang further responds that the terms "exhausted" and "payment of claim(s)" in the applicable 2010 Excess Policy are ambiguous.

"[I]nsurance contracts, like other agreements, will ordinarily be enforced as written" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citations and internal quotation marks omitted]). "Ambiguity in a contract arises when the contract[] . . . fails to disclose its purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [citations and internal quotation marks omitted]. "[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy

and employing common speech" (*id.* [citations and internal quotation marks omitted]).

The 2010 and 2011 Excess Policies clearly state that "[c]overage [under the Excess Policies] shall attach only after all such Underlying Insurance has been exhausted by payment of claim(s)" (Kronley aff, exs 3, 5). Once the coverage under the excess policy attaches, it "shall then apply in conformance with the terms and conditions of the Primary Policy as amended by any more restrictive terms and conditions of any other Underlying Insurance, except as otherwise provided by this Policy" (*id.*).

First, there is no ambiguity in the 2010 or 2011 Excess Policies as to when excess coverage attaches. Affording the language employed in the policies their plain meaning, Chubb's obligation to provide excess coverage does not attach until all underlying primary policy limits have been exhausted by payment of a claim or claims, not by incurring costs or expenses that may exceed primary policy limits but have not yet been paid. The actual payment of the underlying policy limit is an expressly-stated condition precedent to triggering the excess coverage (*see Forest Labs. v Arch Ins. Co.*, 116 AD3d 628, 628 [1st Dept], *lv denied* 24 NY3d 901 [2014]).

Additionally, where, as here, an insured has settled with a primary insurer for a below-limit amount, the primary policy limits are not deemed exhausted unless the insured "absorbs the resulting gap between the settlement amount and the primary policy limit"; there is no obligation to provide excess coverage until the gap is closed and the primary policy limits are deemed exhausted (*cf J.P. Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 25 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). Jiang does not allege that he absorbed the gap that remained following his below-limit settlement of claims with Ping An, thus, the excess coverage contemplated in the 2010

Excess Policy was not triggered.

Jiang's remaining contentions regarding ambiguity of the policies at issue are unavailing and will not be discussed.

Second, Jiang's contention that Chubb breached the agreement by refusing to advance defense costs and expenses is contrary to the express language of the 2010 Primary and Excess Policies. The 2010 and 2011 Excess Policies further state that Chubb "may, at its sole discretion, elect to participate in the investigation, settlement or defence [sic] of any claim covered by this Policy even if the Underlying Insurance has not been exhausted" (*id.*).

As to advancement of defense costs, the 2010 Primary Policy states that "the [primary insurers] shall advance *defense costs* resulting from any *claim* before its final resolution," subject to the terms and conditions of that policy (Kronley aff, ex 2, § 1 [b]). The primary insurers' advancement of defense costs is limited in that:

> "[t]he insured shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgment or incur any *defense costs* without the prior written consent of the insurer as a condition precedent to the insurer's liability for loss arising out of the claim. Only those settlements, stipulated judgments and defense costs which have been consented to by the insurer shall be recoverable as loss under the terms of this policy. The insurer's consent shall not be unreasonably withheld, provided that the insurer shall be entitled to effectively associate in the defense and the negotiation of any settlement of any claim in order to reach a decision as to reasonableness" (*id.* § 5.7 [emphasis in original]).

While the primary insurance providers are responsible for advancing defense costs and expenses, subject to various limitations, under the 2010 and 2011 Primary Policies, there is no such obligation imposed upon Chubb in the 2010 or 2011 Excess Policies (*see Fieldston Prop. Owners Assn, Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 265 [2011] [explain that, generally, "a primary insurer has the primary duty to

defend on behalf of its insureds, and it generally has no entitlement to contribution from an excess insurer. Although an excess insurance carrier may elect to participate in an insured's defense to protect its interest, it has no obligation to do so" (internal quotation marks and citations omitted)]).

Contrary to Jiang's contention, the "follow form" provisions in the 2010 and 2011 Excess Policies do not compel Chubb to extend defense coverage before the exhaustion of primary policy limits by payment of claims. The "follow form" clause here states that, once excess coverage has attached, it "shall . . . apply in conformance with the terms and conditions of the Primary Policy as amended by any more restrictive terms and conditions of any other Underlying Insurance, except as otherwise provided by this Policy" (Kronley aff, ex 3). The express language of the 2010 and 2011 Excess Policies, therefore, do not obligate Chubb to advance litigation costs to Jiang, particularly where the primary policy limits have not been exhausted (*see Bovis Lend Lease LMB v Great Am. Ins. Co.*, 53 AD3d 140, 142 [1st Dept 2008] [an "excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result.]).

Accordingly, Chubb did not breach the unambiguous excess coverage agreements, and Jiang's second cause of action is dismissed; however, in light of the possibility that the underlying primary policy limit may be exhausted through resolution of this action as a whole, this claim is dismissed without prejudice to Jiang to reassert the claim if the 2010 Primary Policy is exhausted, causing the excess coverage to then attach.

c. *Third cause of action for breach of implied covenant of good faith and fair dealing*

Jiang's third cause of action for breach of the implied covenant of good faith and fair dealing is that the Chubb Defendants "conduct[ed] themselves in a dilatory and extremely prejudicial manner through their refusals to defend, cover, and advance defense costs to Mr. Jiang, even when Defendants knew that [one primary insurer] had already accepted and paid defense costs advancements" (compl. ¶ 154). Inasmuch as the court finds that Chubb did not improperly withhold excess coverage, this claim is dismissed as against Chubb.

d. *Fourth cause of action for declaratory judgment*

The Chubb Defendants contend that Jiang is not entitled to a declaratory judgment on the basis that Jiang's excess coverage claim was properly denied, among other reasons. Jiang's memorandum in opposition to this motion states, in a point heading, that the breach of contract and declaratory judgment claims are adequately pleaded; however, Jiang does not address the declaratory judgment claim, or the Chubb Defendants' arguments on that issue, in the body of his opposition papers whatsoever. Accordingly, Jiang's declaratory judgment claim against Chubb is deemed waived. In any event, the dismissal of the preceding causes of action as against the Chubb Defendants renders the declaratory judgment claim moot; thus, the fourth cause of action is dismissed.

Accordingly, it is

ORDERED THAT

ORDERED that the motion of defendants Federal Insurance Company and Chubb Insurance (China) Company Limited to dismiss the complaint as to defendant Federal Insurance Company is GRANTED, with prejudice; and it is further

ORDERED that the motion of defendants Federal Insurance Company and Chubb Insurance (China) Company Limited to dismiss the complaint as to defendant Chubb Insurance (China) Company Limited with respect to plaintiff's cause of action for breach of contract is granted, without prejudice; and it is further

ORDERED that the motion of defendants Federal Insurance Company and Chubb Insurance (China) Company Limited to dismiss the complaint as to defendant Chubb Insurance (China) Company Limited with respect to plaintiff's causes of action for breach of the implied covenant of good faith and fair dealing, deceptive practices under Section 349 of the General Business Law, and for declaratory judgment, are GRANTED, with prejudice; and it is further

ORDERED that counsel for the parties shall appear for a conference in Part 48 of this court on August 7, 2018, at 11:30 a.m. (The August 2, 2018 conference is adjourned).

7/7/2018
DATE

HON. ANDREW S. HANSELL, J.S.C.

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

652260/2015 Motion No. 013