Demari Servs. Inc. v Queens Medallion Brokerage Corp.
2022 NY Slip Op 33361(U)
September 27, 2022
Supreme Court, New York County
Docket Number: Index No. 655885/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

- X

DEMARI SERVICES INC., THE RESIDENTIAL BOARD OF MANAGERS OF THE CENTURY CONDOMINIUM a/a/o DEMARI SERVICES INC., and THE RESIDENTIAL BOARD OF MANAGERS OF THE CENTURY CONDOMINIUM, individually,

Plaintiffs,

– against –

QUEENS MEDALLION BROKERAGE CORP., SCOTTISH AMERICAN INSURANCE GENERAL AGENCY, INC., ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY,

Defendants.

- X

INDEX NO. 655885/2020

MOT SEQ 001 002

DECISION AND ORDER

NANCY M. BANNON, J:

I. INTRODUCTION

Plaintiffs Residential Board of Managers of the Century Condominium ("Century"), suing individually and as assignee of its contractor, and Century's contractor, plaintiff Demari Services Inc. ("Demari"), bring this action against defendants Queens Medallion Brokerage Corp. ("Queens Medallion"), Scottish American Insurance General Agency, Inc. ("Scottish American"), and defendant insurers Endurance American Specialty Insurance Company ("Endurance") and Navigators Insurance Company ("Navigators"), seeking indemnification for the amount of any judgment or settlement in the underlying personal injury action in excess of applicable primary coverage. The forty-two count complaint asserts the following causes of action against defendants Scottish American and Queens Medallion: (1) negligent misrepresentation (first through fourth causes of action); (2) negligent failure to procure

insurance (fifth through eighth causes of action); (3) breach of contract (eighth through twelfth causes of action); (4) fraud (thirteenth through sixteenth causes of action); (5) breach of fiduciary duty (seventeenth through twentieth causes of action); and (6) promissory estoppel (twenty-first through twenty-fourth causes of action). Plaintiffs also assert the following causes of action against defendants Endurance and Navigators: (1) declaratory judgment (twenty-fifth through twenty-eighth causes of action); (2) waiver and estoppel (twenty-ninth through thirty-sixth causes of action); and (3) waiver and estoppel based on unreasonable notice (thirty-seventh through fortieth causes of action). Lastly, plaintiffs seek reformation of contract against Endurance (forty-first and forty-second causes of action).

Endurance is the only defendant to answer. In its answer, it cross-claims against Queens Medallion and Scottish American for indemnification and contribution.

In motion sequence number 001, Scottish American moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint as against it. It also seeks dismissal pursuant to CPLR 1001, for failure to join necessary parties.

In motion sequence number 002, Queens Medallion moves pursuant to CPLR 3211 (a) (1), (3) and (7) to dismiss the complaint and Endurance's cross claims.

Endurance cross-moves pursuant to CPLR 3212. "[I]n the event that the Court grants Queens Medallion's motion to dismiss Endurance's cross-claim [sic] for indemnification against Queens Medallion," Endurance seeks "partial summary judgment as to all claims asserted by plaintiffs as against Endurance to the extent based on the alleged acts, omissions, representations and/or misrepresentations of defendant [Queens Medallion] as an alleged agent of Endurance or otherwise" (NYSCEF Doc No. 78, notice of cross motion at 1). Endurance also seeks a declaration "that Endurance has no obligation to defend or indemnify plaintiffs in connection

with the underlying [personal injury action] based on the alleged acts, omissions, representations and/or misrepresentations of Queens Medallion as an alleged agent of Endurance or otherwise" (*id.* at 1-2).

II. BACKGROUND

In January 2017, Century allegedly accepted Demari's bid to perform exterior restoration work (the "Work") to 25 Central Park West, New York, New York, a residential condominium with commercial space (*see* NYSCEF Doc No. 2, complaint, ¶¶ 16, 17). On February 16, 2017, Century allegedly furnished Demari with a "draft contract," which "required Demari to provide and maintain additional insured coverage for Century in the amount of $1 million primary and $10 million excess per occurrence on a primary and non-contributory basis for claims arising out of the Work" (*id.*, ¶ 18).

Demari allegedly obtained insurance policies from Endurance and Navigators through Queens Medallion and Scottish America (*id.*, ¶ 19). According to the complaint, Endurance's policy was effective January 30, 2017 through January 30, 2018, was "excess to Demari's underlying $1,000,000 per occurrence primary policy issued by United Specialty Insurance Company (the 'USIC Policy')" and had a "$4 million per occurrence limit[]" (*id.*, ¶¶ 20, 21). Navigators's policy was allegedly effective March 9, 2017 through January 30, 2018 (the "Navigators Policy"), was also excess to the USIC Policy and had a "$5 million per occurrence limit[]" (*id.*, ¶¶ 22, 23).

The Endurance Policy contained form EXL 6084 0813, entitled "Residential Work Exclusion Except Remodel/Repair and Apartments" (the "Residential Work Exclusion"). The Residential Work Exclusion provides as follows:

> "This insurance does not apply to any liability arising out of your operations or 'your work' on any 'residential project'.

> "'Residential project' shall mean . . . condominiums or cooperatives, 'mixed-use buildings', timeshares, or any other place of domicile, and shall include appurtenant structures and common areas.
>
> ***
>
> "'Mixed-use buildings' shall mean structures and improvements thereto, which contain both residential units and commercial space.
>
> ***
>
> "However, in so far as coverage is provided in the 'underlying insurance', this exclusion does not apply to your operations or 'your work':
>
> > "1. That is on or in commercial space in 'mixed-use buildings';
> >
> > "2. On a single family dwelling, townhouse or condominium unit (including those in 'mixed-use buildings') after they have been sold and certified for occupancy and 'your work' for repairs or remodeling contracted directly with an individual unit owner, individual home owner or contractor working under direct contract with same; or
> >
> > "3. On apartments (including those in 'mixed-use buildings') unless those apartments are converted or are being converted to condominiums or cooperatives (including any project converted or being converted for individual or collective residential ownership).
>
> "We shall have no duty or obligation to provide or pay for the investigation or defense of any loss, cost, expense, claim or 'suit' excluded by this endorsement" (NYSCEF Doc No. 20, Endurance Policy, form number EXL 6084 0813; *see* complaint, ¶ 24).

After reviewing the Endurance Policy, Century was allegedly concerned about whether the Residential Work Exclusion would apply to the Work, which involved façade restoration of a mixed-use building (complaint, ¶ 25). Century allegedly communicated its concerns regarding the Residential Work Exclusion, among other issues, to Demari, Queens Medallion and Scottish

American (*id.*). Demari and Century allegedly "made multiple direct requests to Queens Medallion and Scottish American to ensure that the insurance obtained by Demari, through Queens Medallion and Scottish American, i.e., the Endurance and Navigators Policies, provided coverage for Century, as an additional insured, for claims arising from Demari's operations, and the Work" (*id.*, ¶¶ 38, 39).[1]

On April 3, 2017, Tony Anton ("Anton") of Queens Medallion, emailed Stamatios Georgalos ("Georgalos") of Scottish American, seeking guidance in connection with Century's requests, including a request for an "endorsement stating that policy covers the entire property at 25 Central Park West, New York, NY 10023 without regard to the meaning of 'residential work' exclusion" (*id.*, ¶ 32, exhibit 1). Georgalos replied the following day, instructing that his email be forwarded to Century's attorney. In pertinent part, the email states as follows: "As per our conversation the residential exclusion is only for ground up Condominiums. This project at 25 Central Park west is a restoration project and will be afforded full coverage under the policy contract. Kindly hold this email as confirmation." (*Id.*, ¶ 33;, exhibit 2.) Anton forwarded Georgalos's email to Century's attorney (*id.*, ¶ 34, exhibit 3)

[1] Notably, plaintiffs allege that Queens Medallion and Scottish American were "[Demari's] insurance brokers" (complaint, ¶ 25) and that they were the "authorized representatives of" defendant insurers Endurance and Navigators (*id.*, ¶¶ 26-31). Insurance Law makes clear that these are two distinct roles, with an insurance broker acting "on behalf of an insured" and the insurance agent acting as an "authorized or acknowledged agent of an insurer" (Insurance Law § 2101 [a], [c]). However, "a plaintiff may plead alternative, inconsistent theories" (*Kerzher v G4S Govt. Solutions, Inc.*, 138 AD3d 564, 565 [1st Dept 2016], citing CPLR 3014), which is what plaintiffs are doing. Some of plaintiffs' claims seek to hold Queens Medallion and Scottish American liable for breaches of obligations owed to plaintiffs, while other seek to hold the insurer defendants liable for the conduct of their purported agents, Queens Medallion and Scottish American.

On April 13, 2017, Anton emailed Century, Demari and Georgalos, among others, providing them with the policies, the completed endorsements and an explanation of the endorsements. In pertinent part, the email states as follows:

> "D. PDF Page 61 is the email from our General Agent underwriter Steven Georgalos Explaining the following:
>
> ***
>
> "2. ***The residential exclusion is only for around up Condominiums. This project at 25 Central Park West is a restoration project and will be afforded full coverage under the policy contract***." (*Id.*, ¶ 35; exhibit 4)

Allegedly, on "April 17, 2017, relying upon express representations of Queens Medallion and Scottish American as the authorized agents of Endurance and Navigators, Century executed a Standard Form of Agreement Between Owner and Contractor with Demari for the Work" (*id.*, ¶ 44). Notably, the executed contract, which is annexed to the complaint, is dated February 16, 2017 (*id.*, exhibit 5).

Luis Guerra, an employee of Demari, was allegedly injured on November 8, 2017 and, on February 8, 2018, he commenced a personal injury action in the Supreme Court, County of Queens, captioned *Luis Guerra v Century Apartments Associates, et al.*, under index No. 702047/2018 (the "Guerra Action") (*see* complaint, ¶¶ 1, 50, 51, exhibit 6).

Demari and Century allegedly tendered the Guerra Action to Endurance and Navigators (*id.*, ¶ 52). Navigators has not responded (*id.*, ¶ 53). By letter dated April 19, 2018, Endurance disclaimed coverage pursuant the Residential Work Exclusion (*id*, ¶ 54, exhibit 7). The letter also noted that coverage was excess to the USIC Policy (*see id.*, exhibit 7 at 5).

"On October 16, 2020, Demari [allegedly]: (i) assigned to Century its rights as against Queens Medallion, Scottish American, Endurance, and Navigators for claims arising out of the Work; and (ii) authorized Century to prosecute this action" (*id.*, ¶ 59).

III. ANALYSIS

A. Scottish American and Queens Medallion's Motions to Dismiss the Complaint

As a preliminary matter, the parties dispute whether Demari, having assigned its claims to Century, has standing to bring claims in the instant action. The court need not decide this issue. First, because the language of the assignment has not been provided, the court cannot determine the precise nature of the assignment. Moreover, since plaintiffs state that "Demari does not allege any individual causes of action" (NYSCEF Doc No. 84 at 15; NYSCEF Doc No. 77 at 18), the issue is academic.

In addition, contrary to Scottish American's contention, the failure to add as parties Century's attorney and managing agent, who reviewed the policies at issue and advised Century on potential coverage issues, does not require dismissal. The absence of alleged co-tortfeasors is not fatal to the complaint, because they are not necessary parties (*see Amsellem v Host Marriott Corp.*, 280 AD2d 357, 360 [1st Dept 2001] [explaining that, because a non-party was "at most, . . . a joint tortfeasor," it was "not a necessary party"), citing *Hecht v City of New York*, 60 NY2d 57, 62 [1983] [explaining that when there are multiple tort-feasors, "[l]iability is said to be 'joint and several'" and that "[a] plaintiff may proceed against any or all defendants"]).

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st

Dept 2004]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011] [internal quotation marks and citation omitted]). Additionally, "factual allegations that . . . . consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to" an assumption of their truthfulness or the drawing of favorable inferences (*Skillgames, LLC*, 1 AD3d at 250).

A motion pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [internal citation omitted]).

1. Negligent Misrepresentation, Negligent Failure to Procure Insurance, Fraud and Breach of Fiduciary Duty

Scottish American and Queens Medallion make many of the same arguments for dismissal of the complaint. Looming large among these is that the claims fail since the excess coverage at issue has not been triggered in the Guerra Action and may never be. As such, defendants argue, plaintiffs have not been damaged. Plaintiffs respond that the Guerra Action presents a significant potential exposure and that they were damaged upon denial of coverage. Additionally, the parties dispute whether the various claims fail for, among other things, lack of privity, lack of a fiduciary relationship and lack of reasonable reliance.

"In tort, . . . there is no enforceable right until there is loss" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 96 [1993]). This is because,the purpose of tort law is "the compensation of *losses*" rather than the "vindicate[ion] [of] nonexistent or amorphous inchoate rights" (*id.*). Therefore, to state a claim for negligent misrepresentation, negligent failure to procure insurance, fraud and breach of fiduciary duty, plaintiffs must allege that defendants' conduct proximately caused damages (*see Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 128 [1st Dept 2002] [affirming dismissal of claims for, among other things, negligence, negligent misrepresentation and fraud, "as the result of plaintiffs' failure to plead any actual injury"]; *see also Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011] [stating that "[t]o state a claim for breach of fiduciary duty, plaintiffs must allege that . . . they suffered damages caused by (the defendant's) misconduct"]).

Generally, in failure to procure cases, injury is sustained upon the insurer's denial of coverage (*see Lavandier v Landmark Ins. Co.*, 26 AD3d 264, 264 [1st Dept 2006] [explaining that the negligence claim against insurance broker accrued at time of injury, "i.e., . . . when (the insurer) disclaimed"]; *see also Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527, 530 [2d Dept 2011] [explaining that "the plaintiff could not have established any harm of a tortious nature" and that its negligence claim against the insurance broker did not accrue until "its request for coverage and a defense was denied by (the insurer)"]; *Lewiarz v Travco Ins. Co.*, 82 AD3d 1464, 1466 [3d Dept 2011] [stating that "where . . . a claim against an insurance agent or broker relating to the failure of insurance coverage sounds in tort, the injury occurred and the plaintiffs were damaged when coverage was denied"]). However, where, as here, the failure to procure involves excess coverage, "[i]t is only after exhaustion of the primary insurance that plaintiff can sustain any damage as a result of a denial of coverage under the

excess policy" (*Cutro v Sheehan Agency*, 96 AD2d 669, 669 [3d Dept 1983] [affirming dismissal of a negligent procurement claim, following a denial of excess coverage by insurer, where "[t]he underlying personal injury action ha[d] yet to be resolved"]). This is because "[t]he liability of the excess carrier does not attach until the limits of the collectible insurance under the primary policy or policies has been exceeded" (*id.*).

Here, plaintiffs fail to state a cause of action for negligent misrepresentation, negligent failure to procure insurance, fraud and breach of fiduciary duty. The alleged damages are loss of excess coverage in the Guerra Action under the Endurance and Navigator Policies (*see e.g.* complaint, ¶¶ 67-68, 103-104, 158-159, 190-193). As plaintiffs make clear in their prayer for relief, they seek to recover "the amount of any judgment or settlement in the Guerra Action in excess of applicable underlying coverage, up to the combined limits of the Endurance and Navigators Policies" (complaint at 45-48). However, there has been no judgment or settlement in the Guerra Action. As such, plaintiffs do not to allege how defendants' failure to procure excess coverage for the Work has injured them. The defect is fatal to their tort claims (*see Kronos, Inc.*, 81 NY2d at 96; *Arena Riparian LLC v CSDS Aircraft Sales & Leasing Co.*, 184 AD3d 509, 510 [1st Dept 2020] [internal quotation marks and citations omitted] [dismissing fraud claim, because "plaintiffs ha[d] not adequately alleged actual pecuniary loss sustained as the direct result of defendants' alleged fraud"]; *Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582, 583 [1st Dept 2012] [affirming dismissal of "plaintiffs' fraud, negligent misrepresentation, unjust enrichment and breach of fiduciary duty claims," because "[p]laintiffs failed to allege any compensable damages"]; *compare Cutro*, 96 AD2d at 669 [dismissing a negligent procurement claim for failure to allege damages, where there had been no judgment or settlement and primary coverage had not been exhausted and the plaintiff sought indemnification

for any judgment in the underlying personal injury action in excess of the primary coverage], *with Booth Mem. Hosp. & Med. Ctr. v Merson & Co.*, 162 AD2d 100, 100 [1st Dept 1990] [finding that the plaintiff's negligence claim "properly state[d] a cause of action," because the plaintiff "alleg[ed] that it sustained damages . . . in premiums paid as a result of defendants' procurement of worthless excess insurance"], *and Kings Park Indus., Inc. v Affiliated Agency, Inc.*, 22 AD3d 466, 467-468 [2d Dept 2005] [reinstating the causes of action for breach of contract and negligent procurement, where those claims sought to recover paid insurance premiums, rather than indemnification for excess coverage that had yet to be triggered by the exhaustion of primary coverage]).

In light of this determination, it is unnecessary for the court to consider defendants' remaining challenges to the sufficiency of plaintiffs' tort claims.

However, the court notes that Scottish American and Queens Medallion correctly point out that the complaint is devoid of factual allegations of defendant's misconduct as concerns the Navigators Policy. In fact, the complaint fails to allege that excess coverage under the Navigators Policy is lacking in any regard.

For the foregoing reasons, Scottish American and Queens Medallion's motions to dismiss are granted to the extent of dismissing the causes of action for negligent misrepresentation, negligent failure to procure insurance, fraud and breach of fiduciary duty.

2. Breach of Contract

As with the tort claims, the parties dispute whether plaintiffs have adequately alleged damages to state a claim for breach of contract. In addition, Scottish American and Queens Medallion point out that the Endurance and Navigators Policies were issued prior to commencement of the Work. They argue that the allegations concerning the parties' subsequent

dealings fail to allege the existence of a new agreement to procure additional coverage. They also maintain that the claim fails for lack of contractual privity. Scottish American argues that it was in privity with Queens Medallion only. Queens Medallion argues that the complaint fails to allege that Century was a third-party beneficiary to any agreement between Queens Medallion and Demari. Lastly, both defendants contend that, having had an opportunity to read the policies, plaintiffs are now barred from suing for breach of contract.

Plaintiffs respond that the allegations of the complaint and the annexed emails adequately plead that Scottish American and Queens Medallion agreed to procure coverage for the Work and that defendants breached that contract, resulting in damages. Plaintiffs also contend that the allegations and emails demonstrate that Century was the intended third-party beneficiary to this alleged contract.

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [internal citation omitted]).

Here, plaintiffs fail to state a claim for breach of contract. The claim is based on defendants' purported agreement to "to procure insurance . . . providing coverage for claims arising from Demari's operations, and the Work" (complaint, ¶¶ 132, 138, 144, 150). Even assuming plaintiffs made a specific request for such coverage and that defendants promised to furnish such coverage, plaintiffs fail to allege what consideration they provided in exchange for this promise. The Endurance and Navigators Policies were already in effect when plaintiffs sought excess coverage for the Work under those policies (*see* complaint, ¶¶ 20, 22, 32-35). Yet plaintiffs do not allege that, in exchange for such additional coverage, they either provided a

"benefit to the promisor" or suffered a "detriment [as] the promisee[s]" (*Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 536 [1st Dept 2016] [internal quotation marks and citation omitted] [explaining what constituted "[c]onsideration sufficient to create a contract"]). In other words, Demari was already paying the premiums on these policies and "a promise to perform an existing obligation is not valid consideration" (*Zheng v City of New York*, 93 AD3d 510, 512 [1st Dept 2012], *affd* 19 NY3d 556 [2012]). In their opposition, plaintiffs do not address this glaring defect.

Moreover, as with the tort claims, plaintiffs fail to allege damages. They allege that Scottish American and Queens Medallion breached by failing to procure excess coverage for the Work and that plaintiffs have been damaged by the lack of such coverage (*see* complaint, ¶¶132-134, 138-140,144-146, 150-152). However, "[i]n the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint . . ." *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988] [finding that the complaint was "fatally deficient because it [did] not demonstrate how the defendant's alleged breach . . . caused plaintiffs any injury"]; *Landmark Ventures, Inc. v Kreisberg & Maitland, LLP*, 179 AD3d 492, 492 [1st Dept 2020] [affirming dismissal of breach of contract claim, where among other things, "plaintiffs also failed to adequately allege damages"]). Here, plaintiffs do not allege how they have been damaged and, in their briefs in opposition to the instant motions, plaintiffs merely assert that the Guerra Action "presents significant potential exposure" (NYSCEF Doc No. 77 at 15; NYSCF Doc No. 84 at16). While that may be, "[a]t this juncture the plaintiff[s] ha[ve] not sustained any damages as the result of the alleged negligence [and breach of contract] of the defendant[s], as there has neither been a judgment nor a settlement

against [them] in the underlying personal injury action" (*Kings Park Indus., Inc.*, 22 AD3d at 467-468 [internal quotations marks and citation omitted]).

As concerns the Navigators Policy, the complaint is also deficient in that it contains no factual allegation of a breach by Scottish American or Queens Medallion.

In light of the above, it is unnecessary to consider defendants' remaining challenges to the sufficiency of plaintiffs' breach of contract claims.

For the foregoing reasons, Scottish American and Queens Medallion's motions to dismiss are granted to the extent of dismissing the breach of contract claims.

3. Promissory Estoppel

As with the other claims, Scottish American and Queens Medallion argue that the claim for promissory estoppel must fail, because plaintiffs have not been injured. In addition, they each argue that there was no promise made. Scottish American contends that it merely issued a non-actionable opinion as to the meaning of the Residential Work Exclusion, while Queens Medallion contends that it merely forwarded Scottish American's statement without comment. Both argue that reliance was not reasonable, as plaintiffs had copies of the policies and Century had its own experts review them. Lastly, both contend that plaintiffs fail to allege what they did in reliance on the alleged promise of coverage. In particular, Scottish American argues that Demari and Century could not have entered the contract for the Work in reliance on its statements concerning coverage, because the statements were made months after the contract was executed.

Plaintiffs reiterate their position, that they were damaged upon denial of coverage. They also argue that the repeated statements from Queens Medallion and Scottish American, that the Work would be afforded full coverage, constitute an unambiguous promise. Plaintiffs also argue

that their opportunity to review of the Endurance Policy does not require outright dismissal of their claims. Lastly, they argue that they plead a change of position in reliance on defendants' promise, by alleging that Century and Demari "executed the [] Contract" and "perform[ed]the Work" in reliance "upon express representations by Queens Medallion [and Scottish American] that the Endurance and Navigators Policies provided insurance coverage for claims arising from Demari's operations, and the Work" (complaint, ¶¶ 46-49). They argue that the court must accept these allegations as true on the instant motion.

To state a claim for promissory estoppel, plaintiff must allege: "(i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance" (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016] [internal citation omitted]).

Here, plaintiffs are unable to plead a prejudicial change in position in reliance on Scottish American and Queens Medallion's representations. The contract that plaintiffs annex to their complaint is fully executed and dated February 16, 2017 (complaint, exhibit 5). It predates defendants' assurances, in April 2017, that the Work would be fully covered (*see id.*, ¶¶ 32-35, exhibit 1-4). Plaintiffs do not provide an explanation for why the agreement was fully executed, merely alleging that Century provided Demari with a "draft contract" on February 16, 2017 (*id.*, ¶ 18). While on a motion to dismiss, the court must accept allegations as true and afford plaintiffs every favorable inference, "factual allegations that . . . are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250 [internal citation omitted]). Accordingly, the motions to dismiss are granted to the extent of dismissing the equitable estoppel claims (*see Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 175 [1st Dept 2004] [dismissing a claim for equitable estoppel, where "the complaint fail(ed) to allege that plaintiff was injured 'by reason of' its reliance on (the

defendant's) promise"]; *see also Tierney v Capricorn Invs.*, 189 AD2d 629, 632 [1st Dept 1993] [internal quotation marks and citation omitted] [dismissing claim where the plaintiff "failed to allege an essential element of a promissory estoppel, i.e., that the alleged reliance resulted in some prejudicial change in his position"]).

For the foregoing reasons, Scottish American and Queens Medallion's motions to dismiss the complaint as against them is granted.

A. Queens Medallion's Motion to Dismiss Endurance's Cross Claims

1. Common Law Indemnification[2]

Queens Medallion contends that it is entitled to dismissal of the cross claim for indemnification. It argues that any determination requiring Endurance to provide excess coverage in the Guerra Action would necessarily be based on the interpretation of the Endurance Policy. It then argues that its representations could not constitute a modification of the policy, as the Endurance Policy provides that it "can only be changed by a written endorsement signed by one of [Endurance's] authorized representatives . . . " (NYSCEF Doc No. 63, Endurance Policy, form EXL 0203 081, Excess Liability Coverage Follow Form [Short Form], § VI [A]). Queens Medallion concludes that, because it did not alter the text of the Endurance Policy, any finding that Endurance is required to provide plaintiffs coverage will be premised, not on the actions of Queens Medallion as agent, but upon the terms of the policy itself.

Endurance responds that dismissal of its indemnification cross claim must be denied. While it avers that Queens Medallion was not its agent and had no authority to bind it,

[2] Queens Medallion also argues that, to the extent the indemnification cross claim seeks contractual indemnification, it should be dismissed for failure to allege the existence of a contract that entitles Endurance to indemnification. However, the first cross claim is unambiguously a claim for common law indemnification only. As such, the court does not address this non-existent cross claim.

Endurance argues that this has yet to be established and the court must accept as true plaintiffs' allegations to the contrary. As such, it argues, dismissal of this counterclaim is improper, as several of the causes of action asserted against Endurance seek to bind Endurance based on Queens Medallion's conduct.

"[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee . . ." (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). Therefore, "a principal that is vicariously cast in damages as the result of its agent's negligence may be entitled to full indemnification from the agent, who was the actual wrongdoer" (*Neil Plumbing & Heating Constr. Corp. v Providence Washington Ins. Co.*, 125 AD2d 295, 297 [2d Dept 1986] [internal citations omitted]; *see Brown v Poritzky*, 30 NY2d 289, 292 [1972], *overruled on another point of law by Lusenskas v Axelrod*, 81 NY2d 300 [1993] [internal citations omitted] [explaining the "well established (rule) that a principal is vicariously liable for the torts committed by his agent in the course of the employment" and that "(t)he agent is personally responsible to the principal and the latter may recover from the agent for the agent's negligence"]).

Here, while it is true that, generally, "the extent of coverage . . . is controlled by the relevant policy terms" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]), Endurance may, nonetheless, be required to provide coverage based on Queens Medallion's representations. For example, in *Neil Plumbing & Heating Constr. Corp.*, the court was presented with a very similar set of facts to the ones in the instant action. There, the defendant agent "negligently represented that adequate coverage had been obtained when, in fact, the bulk of the plaintiff's business activities were excluded from coverage under the policy as issued" (125 AD2d at 297). It was held that the insurer was bound by its agent's

misrepresentations to provide coverage and that it was entitled to indemnification from its agent (*id*. at 298). As in *Neil Plumbing & Heating Constr. Corp.*, to the extent that the Endurance Policy, by its terms, does not provide coverage and plaintiffs prevail on their claims against Endurance (*see e.g*. twenty-ninth and thirty-third causes of action), any liability will be entirely vicarious, entitling Endurance to indemnification from its agent. Therefore, Queens Medallion's motion to dismiss is denied with respect to the first cross claim for indemnification.

2. Contribution

Queens Medallion contends that the cross clam for contribution should be dismissed, because contribution is not available for economic damages. "Endurance agrees to the dismissal of its contribution claim against Queens Medallion" (NYSCEF Doc No. 79, Zimring affirmation, ¶14). Accordingly, the motion to dismiss, is granted to the extent of dismissing Endurance's second cross claim for contribution (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009] ["(w)here, as here, the underlying claim seeks purely economic damages, a claim for common-law contribution is not available"]).

B. Endurance's Cross Motion for Summary Judgment

In its motion for summary judgement, Endurance contends that, should this court dismiss its indemnification cross claim, then it is entitled to partial summary judgment dismissing the causes of action that seek to hold Endurance liable for Queens Medallion's conduct, including, but not limited to, the twenty-ninth and the thirty-third causes of action.

Plaintiffs oppose the motion, contending that Endurance has failed to make any showing of entitlement to summary judgment.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citation omitted]).

Here, Endurance makes no showing in support of its motion. In passing, it points to its self-serving denial of an agency relationship with Queens Medallion (*see* NYSCEF Doc No. 79, ¶ 13). This does not meet its burden on the instant motion (*see contra Bonded Waterproofing Servs., Inc.*, 86 AD3d at 530-531 [finding that the insurer "met its prima facie burden. . .by demonstrating that it could not be held vicariously liable because (defendant brokers) were not its agents, nor were they cloaked with apparent authority to act on its behalf"]; *Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253, 253 [2d Dept 2004] [stating that insurer "sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidence indicating that the insurance broker was not acting as its agent"]). Therefore, the motion is denied (*see Winegrad*, 64 NY2d at 853).

IV. CONCLUSION

Accordingly, upon the foregoing papers and after oral argument, it is hereby

ORDERED that the motion of defendant Scottish American Insurance General Agency, Inc. (MOT SEQ 001) to dismiss the complaint is granted and the complaint is dismissed in its entirety as against that defendant, and it is further

ORDERED that the motion of defendant Queens Medallion Brokerage Corp. (MOT SEQ 002) to dismiss is granted to the extent that the complaint is dismissed in its entirety as against

that defendant, and the second cross claim of defendant Endurance American Specialty Insurance Company, seeking contribution is dismissed, and it is further

ORDERED that the cross motion of defendant Endurance American Specialty Insurance Company for summary judgment is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further

ORDERED that counsel are directed to appear for a status conference on November 17, 2022, at 11:30 a.m.

This constitutes the Decision and Order of the court.

Dated: September 27, 2022

ENTER: