SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE **PART** 63M

Justice

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126-128 WEST LLC,

Plaintiff,

- v -

HARLEYSVILLE WORCESTER INSURANCE COMPANY, STARR INDEMNITY & LIABILITY GROUP ACCIDENT AND HEALTH INSURANCE TRUST, STARR INDEMNITY & LIABILITY BLANKET ACCIDENT AND HEALTH INSURANCE TRUST, COLONY INSURANCE COMPANY, THE HANOVER INSURANCE GROUP, INC.,RSUI INDEMNITY COMPANY, UNITED SPECIALTY INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, UNITED STATES LIABILITY INSURANCE COMPANY, ROUGE TOMATE NEW YORK LLC,ROUGE TOMATE CORPORATION, ALIB HOLDINGS, INC. A/K/A A. LOGAN INSURANCE BROKERAGE, USI INSURANCE SERVICES LLC,SVALENCIA INSURANCE AGENCY LLC,JAHEL1, INC.,F/K/A MORSTAN GENERAL AGENCY, INC.,HORIZON PLANNING SERVICES LTD.

Defendant.

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INDEX NO. 655555/2020

MOTION DATE 02/17/2021, 02/17/2021, 02/17/2021, 02/17/2021, 05/07/2021, 04/06/2021, 05/25/2021, 06/10/2021, 07/14/2021, 07/23/2021

MOTION SEQ. NO. 002 003 004 005 006 007 008 009 010 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 60, 61, 86

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 62, 63

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 64, 65, 87

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 66, 67, 78

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 82, 83, 84, 85, 90, 93

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 88, 89, 92, 94

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 96, 97, 98, 99, 100, 113, 115, 116, 125

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 122, 123, 124

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 117, 118, 119, 120, 121, 126, 127, 148, 149

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 128, 129, 130, 131, 132, 133, 150, 151, 152, 153

were read on this motion to/for DISMISS.

Motion sequence numbers 002 through 011 are consolidated for disposition.

This is an action, inter alia, to recover damages for breach of contract and for a judgment declaring that certain defendants are obligated to defend and indemnify plaintiff in an action to recover damages for personal injuries entitled *Matos v 126-128 West LLC*, currently pending before the Supreme Court, New York County, under Index No. 150611/2017 (the underlying action).

In motion sequence number 002, defendant Colony Insurance Company ("Colony") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 003, defendant SValencia Insurance Agency LLC ("SValencia") moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint insofar as asserted against it.

In motion sequence number 004, defendant Merchants Mutual Insurance Company ("Merchants") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 005, defendant United States Liability Insurance Company ("United States Liability"), moves pursuant to CPLR 3212, to dismiss the complaint insofar as asserted against it

In motion sequence number 006, defendant United Specialty Insurance Company ("United Specialty") moves pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 007, defendant Harleysville Worcester Insurance Company ("Harleysville") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 008, defendant Jahell Inc., f/k/a Morstan General Agency Inc. ("Morstan") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 009, defendant USI Insurance Services, LLC ("USI Insurance Services") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 010, defendant The Hanover Insurance Group, Inc. ("Hanover") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

In motion sequence number 011, defendant Alib Holdings, Inc. a/k/a Logan Insurance Brokerage ("Logan") moves, pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it.

BACKGROUND

The accident giving rise to the underlying action occurred at 126-128 West 18th Street in Manhattan (the "Premises"). Plaintiff owns the premises and leased a space on the ground and second floors (the restaurant space) to Rouge Tomate Chelsea LLC (Rouge Tomate) (Lease [NYSCEF Doc. No. 61]). As part of plaintiff's lease with Rouge Tomate (the Rouge Lease), Rouge Tomate agreed to obtain commercial general liability insurance coverage against claims for, inter alia, bodily injury "occurring upon, in about or adjacent to the . . . Premises" and that all insurance policies must name the "Landlord" as an additional insured (Rouge Lease && 18.01 & 18.02, NYSCEF Doc. No. 61).

Rouge Tomate hired CPM Builders Inc. ("CPM") to renovate the restaurant space (Standard Form of Agreement Between Owner and Contractor, AIA Document A102- 2007 [NYSCEF Doc. No. 13]). CPM, in turn, subcontracted with Master Glass Corp. ("Master Glass") to install glass windows for the renovation project and Day & Nite Refrigeration Corp. ("Day & Nite") to perform work on a stove at the site.

On June 22, 2016, Jeffrey Matos, an employee of Day & Nite, was allegedly injured when a glass window in the process of being installed fell on Matos. Matos commenced the underlying action against plaintiff, among others, asserting claims for negligence and various Labor Law violations (Underlying Complaint, NYSCEF Doc. No. 16).

Plaintiff thereafter sought to obtain insurance coverage for the underlying action from Colony, Merchants, United States Liability, United Specialty, Harleysville, and Hanover, among other insurers, contending that it was an additional insured under their respective policies. After the insurers denied coverage, plaintiff commenced the instant action against them to determine their responsibility for defense and indemnification of plaintiff in the underlying action. Plaintiff

also names as defendants, inter alia, Rouge Tomate New York, LLC and Rouge Tomate Corporation (hereinafter together the Rouge defendants), as well as SValencia, Morstan, Logan and USI Insurance Services, entities who allegedly served as insurance brokers with respect to the policies at issue. The complaint sets forth the following nine causes of action: a judgment declaring that defendants are required to defend and indemnify plaintiff as an additional insured in the underlying action; violation of Insurance Law §3420(d)(2); breach of contract against the Rouge defendants for failure to procure coverage naming plaintiff as an additional insured; breach of contract against United Specialty; equitable estoppel; misrepresentation; fraud; breach of contract against all defendants; and (9) violation of General Business Law ' 349 (a).

Now before the court are motions by Colony (mot. seq. no. 002), SValencia (mot. seq. no. 003), Merchants (mot. seq. no. 004), United States Liability (mot. seq. no. 005), United Specialty (mot. seq. no. 006), Harleysville (mot. seq. no. 007), Morstan (mot. seq. no. 008), USI Insurance Services (mot. seq. no. 009), Hanover (mot. seq. no. 010), and Logan (mot. Seq. no. 011) to dismiss the complaint as asserted against them.

During the pendency of these motions, plaintiff discontinued the action against United Specialty (Notice of Discontinuance, NYSCEF Doc. No. 95). Accordingly, United Specialty's motion to dismiss is denied as academic (mot. seq. no. 006). The remaining motions brought by Colony, SValencia, Merchants, United States Liability, Harleysville, Morstan, USI Insurance Services and Hanover (hereinafter collectively the moving defendants) are decided as follows.

DISCUSSION

Motion to Dismiss Standard

"When . . . a defendant moves for dismissal of a cause of action under CPLR 3211 (a) (1), their documentary evidence must utterly refute[] the plaintiff's factual allegations, conclusively

establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 175 [2021][internal quotation marks and citations omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . , dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"Dismissal under CPLR 3211(a)(7) is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP Matthew Bender & Co.*, 37 NY3d at 175 [internal quotation marks and citations omitted]). "When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017][internal quotation marks and citations omitted]).

Motion for Summary Judgment Standard

On a motion for 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" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.,* 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). If the moving party fails to make such a showing, the motion must be denied "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see*

Matter of New York City Asbestos Litig., 176 AD3d 506, 506 [1st Dept 2019]). However, where "the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the facts must be viewed in the light most favorable to the non-moving party (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020]; V*ega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

First Cause of Action - Declaratory Judgment

"[I]t is well established that the party claiming insurance coverage bears the burden of proving entitlement, and . . . a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage" (*Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). In order to be entitled to a defense or indemnification, the party claiming coverage must demonstrate that it is an insured or additional insured under the subject policy (*Long Is. Rail Rd. Co. v New York Mar. & Gen. Ins. Co.*, 198 AD3d 888, 890 [2d Dept 2021]; *Assevero v Hamilton & Church Props., LLC*, 189 AD3d 1146, 1148 [2d Dept 2020]). "Where a third party seeks the benefit of coverage, the terms of the policy must clearly evince such intent" (*Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co.*, 73 AD3d 856, 857 [2d Dept 2010]). "When determining whether a third party is an additional insured under an insurance policy, a court must ascertain the intention of the parties to the policy, as determined from within the four corners of the policy itself" (*Long Is. Rail Rd. Co. v New York Mar. & Gen. Ins. Co.*, 198 AD3d at 890 [quotation marks and citation omitted]).

Colony

Colony issued a policy to Rouge Tomate effective July 8, 2015 to April 8, 2016, which was subsequently extended through August 8, 2016 (the Colony Policy) (Colony Policy, NYSCEF Doc. No. 27; Denial Letter, NYSCEF Doc. No. 28). In support of its motion to dismiss the complaint, Colony asserts it has no duty to defend or indemnify plaintiff in the underlying action because the Colony Policy conclusively establishes that plaintiff does not and cannot qualify as an additional insured. In support, Colony provides a copy of the additional insured endorsement to the Colony Policy which states:

> **"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
> CG 20 18 11 85
>
> **ADDITIONAL INSURED-MORTGAGEE, ASSIGNEE, OR RECEIVER**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> **SCHEDULE**
> **Name of Person or Organization:**
> As required by contract/loan provided the written contract/loan was executed and signed prior to loss.
>
> **Designated Premises:**
> As designated in written contract with the Named Insured
>
> (If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)
>
> 1. WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule *but only with respect to their liability as mortgagee, assignee, or receiver* and arising out of the

> ownership, maintenance, or use of the premises by you and shown in the Schedule.
>
> 2. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization"

(Colony Policy, NYSCEF Doc. No. 27 [emphasis added]).

In the underlying action, Matos is not seeking to impose liability upon plaintiff as a "mortgagee, assignee, or receiver." Rather, Matos seeks to impose liability against plaintiff as the owner of the premises. Since the policy does not include any language insuring plaintiff in its actual capacity as the owner of the premises, plaintiff is not covered as an additional insured.

In opposition, plaintiff essentially acquiesces that Matos is not seeking to hold it liable as a "mortgagee, assignee, or receiver." It points out, however, that the additional insured endorsement schedule extends coverage "[a]s required by contract" and that the Rouge Lease obligates Rouge Tomate to obtain commercial general liability insurance coverage against claims for, inter alia, bodily injury "occurring upon, in about or adjacent to the . . . Premises" and that all insurance policies must name the "Landlord" as an additional insured (Lease && 18.01 & 18.02, NYSCEF Doc. No. 61). Plaintiff contends that as the "Landlord" of the premises, it is entitled to additional insured status. However, regardless of Rouge Tomate's obligations under the lease, plaintiff is not covered as an additional insured under the Colony Policy in its capacity as the owner/landlord of the premises.

Plaintiff further claims that it is nevertheless entitled to coverage based upon a Certificate of Liability Insurance which designates plaintiff as the "CERIFICATE HOLDER" and states: "CERTIFICATE HOLDER IS INCLUDED AS ADDITIONAL INSURED AS REQUIRED BY WRITTEN CONTRACT" (NYSCEF Doc. No. 29). Plaintiff asserts that the Rouge Lease is a "written contract" that requires it be named as an additional insured and therefore, it is entitled to

additional insured status by virtue of the certificate. However, the certificate does not confer coverage. Indeed, it expressly states: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER" (NYSCEF Doc. No. 29). In addition, it states that it "DOES NOT CONSTITUTE A CONTRACT" and does not "AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES" (*id.*). In this respect, controlling case law holds

> "that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies . . . A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists"

(*County of Erie v Gateway-Longview, Inc.*, 193 AD3d 1336, 1337-1338 [4th Dept 2021][internal quotation marks and citations omitted]). As such, the certificate of insurance does not establish that plaintiff qualifies as an additional insured under the terms of the Colony Policy (*see Harco Constr., LLC v First Mercury Ins. Co.*, 148 AD3d 870, 872 [2d Dept 2017]; *ALIB, Inc. v Atlantic Cas. Ins. Co.*, 52 AD3d 419, 419 [1st Dept 2008]).

Since plaintiff is not an additional insured under the Colony policy, Colony is entitled to a declaration that it has no duty to defend or indemnify plaintiff in the underlying action (*see Assevero v Hamilton & Church Props., LLC*, 189 AD3d at 1148).

SValencia, Morstan Logan and USI Insurance Services

In the first cause of action, plaintiff indicates that it is seeking a judgment declaring that all of the defendants in this action are required to defend and indemnify plaintiff in the underlying action. However, SValencia, Morstan, Logan and USI Insurance Services are not being sued as insurers. They are being sued as insurance brokers. Therefore, they are not obligated to defend or

indemnify plaintiff pursuant to any insurance policy. To the extent the first cause of action may be understood as seeking a declaration that plaintiff is entitled to damages against them, as insurance brokers, for failing to procure coverage naming it as an additional insured and for producing certificates of insurance that incorrectly indicate it had been so named, there is no indication that these defendants were under any duty to plaintiff. Moreover, a "plaintiff may not seek a declaratory judgment when other remedies are available" (*Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]; *see Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]; *see Ness Tech. S.A.R.L. v Pactera Tech. Intl. Ltd.*, 173 AD3d 635, 635 [1st Dept 2019][where plaintiff has a legal remedy available, cause of action for declaratory judgment should be dismissed]; *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54 [1st Dept 2017][same]). Here, even assuming SValencia, Morstan, Logan and/or USI Insurance Services were under a duty to plaintiff, plaintiff may assert its claims against them in their alleged capacity as insurance brokers via a cause of action for negligence or breach of contract (*see generally American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012]).

Thus, the declaratory judgment cause of action is dismissed insofar as asserted against SValencia, Morstan, Logan and USI Insurance Services.

Merchants

Merchants issued a policy of insurance to Master Glass, effective January 27, 2016 to January 27, 2017 (Merchants Policy) (Merchants Policy, NYSCEF Doc. No. 40). In moving to dismiss the complaint, Merchants argues that the policy conclusively establishes that plaintiff does not and cannot qualify as an additional insured. In support of its motion, it provides a copy of the Merchants Policy which includes an endorsement stating that additional insureds include "[a]ny person or organization, when *you* and such person or organization have agreed in writing in a

contract, agreement or permit that was signed and executed prior to the 'bodily injury' . . . , that such person or organization be added as an additional insured on your policy" (*id.* [emphasis added]).

Plaintiff argues that the Rouge lease, which requires Rouge Tomate to obtain insurance coverage for plaintiff as an additional insured, qualifies as the writing required by this provision. However, the First Department has interpreted this same provision as requiring the execution of a written agreement between the policy's named insured and the entity seeking coverage as an additional insured (*see AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426-427 [1st Dept 2013]; *see also Dynatec Contr., Inc. v Burlington Ins. Co.,* 184 AD3d 475, 475 [1st Dept 2020]; *City of New York v Nova Cas. Co.*, 104 AD3d 410, 410 [1st Dept 2013]). As such, in order for plaintiff to qualify as an additional insured under the Merchants Policy, the policy's named insured, Master Glass, must have had a written agreement with plaintiff, agreeing to add plaintiff as an additional insured (*id.*). The writing relied upon by plaintiff is a written agreement between plaintiff and Rouge Tomate. Thus, the Merchants Policy's additional-insured provision does not include plaintiff as an additional insured.

To the extent plaintiff is arguing that it is an additional insured because it is a third-party beneficiary of the construction contract between Rouge Tomate and CPM or the subcontract between Rouge Tomate and Master Glass, this contention is also misplaced. Even if plaintiff were found to be a third-party beneficiary of these contracts, it would simply mean that plaintiff has standing to sue for breach of a provision in them requiring procurement of insurance for plaintiff as an additional insured. It would not mean that the Merchants Policy should be rewritten to name plaintiff as an additional insured (*see Linarello v City University of New York*, 6 AD3d 192, 195 [1st Dept 2004]).

In opposition to Merchants' motion, plaintiff relies on a Certificate of Insurance listing it as an additional insured (Certificate of Liability Insurance, NYSCEF Doc. No. 41). However, as already discussed, a certificate of insurance does not create coverage and the certificate itself clearly specifies that it was issued "AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER," that it "DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTENT OR ALTER THE COVERAGE AFFORDED BY THE POLICIES" and "DOES NOT CONSTITUTE A CONTRACT" (*id.*).

Thus, Merchants is entitled to a judgment declaring that it has no obligation to defend or indemnify plaintiff in the underlying action.

United States Liability

United States Liability issued a policy of excess liability insurance to Master Glass for the term January 29, 2016 to January 29, 2017 (United States Liability Excess Policy) (NYSCEF Doc. No. 47), the primary policy being the Merchants Policy. The United States Liability Excess Policy provides that "each person or organization who is an insured in the 'underlying insurance' is an insured under This policy" (*id.* at ' IV). Since the court has already determined that plaintiff is not an additional insured in the underlying Merchants Policy, United States Liability is entitled to a declaration that it is not obligated to defend or indemnify plaintiff in the underlying action.

Harleysville

Harleysville issued a policy to CPM effective October 7, 2015 to October 7, 2016 (Harleysville Policy)(Harleysville Policy, NYSCEF Doc. No. 71). In moving to dismiss the complaint, Harleysville argues that plaintiff does not qualify as an additional insured under the Harleysville Policy. In support of its motion, Harleysville provides a copy of the policy which includes an endorsement entitled "ADDITIONAL INSURED - OWNERS, LESSEES OR

CONTRACTORS - AUTOMATIC STATUS *WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU*" (*id.* [emphasis added]). The endorsement states that an additional insured is "any person for whom you are performing operations only as specified under a written contract . . . that requires that such person or organization be added as an additional insured on your policy" (*id.*). It further states that the insurance provided to additional insured by the endorsement is limited to "such damages...to which the additional insured is entitled to be indemnified by the 'Named Insured' pursuant to the 'written contract'" (Harleysville Policy NYSCEF Doc. No. 71).

By the plain terms of this endorsement, plaintiff is not an additional insured under the Harleysville Policy inasmuch as CPM did not perform operations for plaintiff pursuant to a written contract (*see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662, 663 [1st Dept 2020]; *Downing St. Devs., LLC v Harleysville Ins. Co.*, 2016 NY Slip Op 30204 [U] [Sup Ct, NY County, Ling-Cohan, J.]). Rather, CPM performed operations for Rouge Tomate pursuant to a written construction agreement between CPM and Rouge Tomate. Moreover, the construction agreement does not require plaintiff to be added as an additional insured on CPM's commercial liability policies. In this regard, the Construction Agreement states:

> The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) *the Owner*, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) *the Owner* as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

(Construction Agreement, Document A201-2007 at 31 [NYSCEF Doc. No. 109][emphasis added]) and repeatedly identifies the "Owner" as "Rouge Tomate Chelsea LLC, 33 West 19th Street, 4th Floor, New York, NY 10011" (*id.*, Document A102-2007 at 1, 11-13; Document A201-

2007 at 1, 11; *see Trapani v 10 Arial Way Assoc*, 301 AD2d 644, 647 [2d Dept 2003]["A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated"]).

Plaintiff's reliance on a certificate of insurance to create coverage is misplaced for the reasons already discussed (Certificate of Insurance, NYSCEF Doc. No. 76). Moreover, the certificate plaintiff relies upon with respect to Harleysville specifically states that the policy provides additional insured status to plaintiff "only when there is a written contract that requires such status" (*id.*).

Thus, Harleysville is entitled to a declaration that is not obligated to defend or indemnify plaintiff in the underlying action.

Hanover

Hanover issued a policy to Rouge Tomate that was in effect from July 8, 2015 to July 8, 2016 (the Hanover Policy) (NYSCEF Doc. No. 121, pdf page 4). In moving for summary judgment, Hanover asserts that even assuming plaintiff is an additional insured under the Hanover Policy, the policy does not provide coverage for personal injury claims. Rather, it only provides coverage for property damage and therefore Hanover has no duty to defend or indemnify plaintiff in the underlying action.

In support of its motion, Hanover relies upon language in the "BUILDER'S RISK COVERAGE FORM" of the policy (NYSCEF Doc. No. 121, pdf pages 32-50). Hanover asserts that that this form evinces that the Hanover Policy does not provide defense or indemnity to plaintiff in the event of a third-party personal injury lawsuit, nor does it contain any language referencing personal injury coverage. In this regard, the form states that Hanover "will pay for direct physical 'loss' to Covered Property caused by or resulting from any of the Covered Cause

of Loss" and defines "Covered Property," to include "'[b]uildings and structures' in the course of construction and described on the Builders' Risk Schedule of Coverages and located at the described construction site," "[c]onstruction materials and supplies," "temporary structures," and "trees, plants, lawns and shrubs that are, or will become, permanently installed...at the described construction site" (*id.* at ' A.1). The form also sets forth "Additional Coverages" that are limited to physical loss to property and not persons (*id.* at ' 3). Further, it specifically states: "This policy is written covering specific 'Buildings and Structures' in the course of construction" (*id.* at ' F.2).

The "BUILDERS' RISK RENOVATION OR REHABILITATION SCHEDULE OF COVERAGES- NEW YORK" states under a section entitled "Description of Covered Property":

> "the following building(s) or structure(s) under renovation are covered:
> INTERIOR RENOVATION OF MNC BUILDING TO BE USED AS A RESTAURANT AT 126-128 WEST 18TH ST. NEW YORK, NY 10011"

(NYSCEF Doc. No. 121, pdf page 14, ' 1). The foregoing can only be interpreted as providing coverage solely for property damage.

In opposition to Hanover's motion, plaintiff appears to be arguing that an endorsement concerning the cancellation and nonrenewal of the Hanover Policy entitled "NEW YORK CHANGES – CANCELLATION AND NONRENEWAL" sets forth that "injury to persons" is covered when the "Commercial Property Coverage Part" is made part of the policy (NYSCEF Doc. No. 121, at PDF pages 28). Plaintiff argues that since the "Commercial Property Coverage Part" is mentioned repeatedly throughout the policy, injury to persons is covered. Plaintiff's reliance on this section of the cancellation and nonrenewal endorsement is misplaced.

The section relied upon by plaintiff states:

> "**D.** The following provisions apply when the Commercial Property Coverage Part, the Farm Coverage Part or the Capital

> Assets Program (Output Policy) Coverage Part is made a part of this policy:
>
> **1.** *Items D.2. and D.3. apply if this policy meets the following conditions*:
>
> **a.** The policy is issued or issued for delivery in New York State covering property located in this state; *and*
>
> **b.** The policy insures:
>
> **(1)** For loss of or damage to structures, other than hotels or motels, used predominantly for residential purposes and consisting of no more than four dwelling units; or
>
> **(2)** For loss of or damage to personal property other than farm personal property or business property; or
>
> **(3)** *Against damages arising from liability for loss of, damage to or injury to persons* or property, except liability arising from business or farming; *and*
>
> **c.** The portion of the annual premium attributable to the property and contingencies described in 1.b. exceeds the portion applicable to other property and contingencies"

(*id.* [emphasis added]). Contrary to plaintiff's contention, this section of the endorsement does not provide that the policy insures against damages arising from liability for loss of, damage to or injury to persons. Rather, it merely provides that items D.2 and D.3 (which pertain to certain cancellation and renewal provisions in the policy) apply when (1) "the Commercial Property Coverage Part, the Farm Coverage Part or the Capital Assets Program (Output Policy) Coverage Part are made a part of this policy" and (2) certain other criteria are met. That the policy insures "[a]gainst damages arising from liability for loss of, damage to or injury to persons or property" is merely part of those criteria (*id.*). Therefore, regardless of whether the "Commercial Property Coverage Part" was made part of the policy, this provision does not set forth, or even indicate, that the Hanover policy covers personal injuries.

Thus, Hanover is entitled to a declaration that it is not obligated to defend or indemnify plaintiff in the underlying action.

Second Cause of Action - Violation of Insurance Law ' 3420 (d) (2)

Insurance Law §3420(d)(2) provides that if an insurer disclaims liability or denies coverage for death or bodily injury "it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage" (Insurance Law § 3420 [d] [2]). In the second cause of action, plaintiff alleges that defendants violated Insurance Law §3420(d)(2) by failing to disclaim liability or deny coverage "as soon as is reasonably possible."

In *Matter of Worcester Ins. Co. v Bettenhauser* (95 NY2d 185 [2000]), the Court of Appeals held that a disclaimer "pursuant to [Insurance Law §] 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420 (d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered." (95 NY2d at 188-189; *see Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982][explaining that the purpose of former Insurance Law § 167 (8) (the predecessor of Insurance Law § 3420 [d]) "was not...to provide an added source of indemnification which had never been contracted for and for which no premium had ever been paid"]).

Here, Colony, Merchants, United States Liability, and Harleysville established that plaintiff did not qualify as an additional insured under their respective policies. Therefore, they were "not required to disclaim coverage as to [plaintiff], 'as [their] denial of coverage was based on the lack of coverage, rather than on a policy exclusion'" (*Harco Constr., LLC v First Mercury Ins. Co.*, 148 AD3d at 872, quoting *Maxwell Plumb Mech. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 116 AD3d 740, 741 [2d Dept 2014]). Similarly, Hanover established that the underlying claim

falls outside the scope of the Hanover Policy's coverage portion. As such, a disclaimer pursuant to section 3420 (d) was not necessary (*see generally Matter of Worcester Ins. Co. v Bettenhauser,* 95 NY2d at 856).

As to SValencia, Morstan, and USI Insurance Services, they are being sued as insurance brokers, not insurers. Therefore, section 3420(d) does not apply in the first instance.

Thus, the cause of action alleging that defendants violated Insurance Law § 3420(d) is dismissed insofar as asserted against all of the moving defendants.

Third and Fourth Causes of Action

The third and fourth causes of action are not at issue on these motions inasmuch as the third cause of action is for breach of contract against the Rouge defendants only. The fourth cause of action is for breach of contract against United Specialty and, as already noted, plaintiff has discontinued the action against United Specialty.

Fifth Cause of Action – Equitable Estoppel

In the fifth cause of action, plaintiff alleges that defendants are equitably estopped from denying coverage because plaintiff reasonably relied, to its detriment, upon the certificates of liability insurance that stated it was an additional insured under their respective policies.

As an initial matter, since SValencia, Morstan, Logan and USI Insurance Services, are being sued as insurance brokers, not insurers, the cause of action alleging that they should be estopped from denying coverage is dismissed insofar as asserted against them. As to the remaining moving defendants, it is noted that "estoppel cannot create coverage when none existed under the policy's terms" (*Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 370 [1998]; *see Waknin v Liberty Ins. Corp.*, 187 AD3d 821, 823 [2d Dept 2020]; *QBE Ams., Inc. v ACE Am. Ins. Co.*, 164 AD3d 1136, 1139 [1st Dept 2018]; *Penske Truck Leasing Co., v Home Ins. Co.*, 251

AD2d 478, 479 [2d Dept 1998]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 424 [2d Dept 1998]). Therefore, these defendants cannot be estopped from denying the existence of coverage.

As plaintiff points out, there is an exception to this rule where a certificate of insurance was issued by the insurer itself or by an agent of the insurer, in which case, estoppel may be invoked if the party reasonably relied on the certificate of insurance to its detriment (*see e.g. County of Erie v Gateway-Longview, Inc.*, 193 AD3d 1336, 1338 [4th Dept 2021]; *Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]["Nor does it appear in this case that (the) broker had the authority to bind the carrier, for which it did not act as agent, so that we would not on that basis estop the carrier from denying the existence of coverage"]). Here, even assuming it was reasonable to for plaintiff to rely on the certificates of insurance, there are no allegations in the complaint from which it may be inferred that the certificates were issued by the defendant insurers themselves or by an entity acting as their agent.

An insurance broker is ordinarily the agent of the insured and in order "[t]o establish that [a] broker was acting as the insurer's agent, there must be evidence of some action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred" (*Lopez v Rutgers Cas. Ins. Co.*, 298 F Supp 3d 503, 514 [ED NY 2018] [internal quotation marks and citations omitted]; *see also Warnock Capital Corp. v Hermitage Ins. Co.*, 21 AD3d 1091, 1094 [2d Dept 2005]["(a)lthough an insurance broker is generally considered to be an agent of the insured, a broker will be held to have acted as the insurer's agent where there is some evidence of action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred"][internal quotation marks and citation omitted]).

In this regard, the complaint alleges the following: "Upon information and belief, that certain Certificates of Liability Insurance were produced by agents of the insurance companies that issued the policy, which Certificates were relied upon by Plaintiff herein and mislead Plaintiff into believing policies were purchased on Plaintiff's behalf" (Complaint at & 255 [NYSCEF Doc. No. 1]). While the court must "accept as true the facts as alleged in the complaint" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), the allegation that the certificates of insurance were issued by defendants' "agents" is a legal conclusion (*see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]["duty owed by one member of society to another is a legal issue for the courts"]; *see also Philadelphia Indem. Ins. Co. v Horowitz, Greener & Stengel, LLP*, 379 F Supp 2d 442, 452 [SD NY 2005][disregarding sworn statement that broker was insurer's agent because statement was legal conclusion]). As such, it is not entitled to be deemed true for the purposes of deciding a motion to dismiss (*see generally Simkin v Blank,* 19 NY3d 46, 52 [2012]["On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration"][internal quotation marks omitted]).

Thus, the cause of action alleging that defendants are estopped from denying additional insured coverage to plaintiff is dismissed insofar as asserted against the moving defendants.[1]

[1] The fifth cause of action also asserts that defendants breached the implied covenant of good faith and fair dealing (Complaint at ¶ 261 [NYSCEF Doc. No. 1]). As to the insurers, the basis for this claim appears to be that they failed to exercise good faith and deal fairly in fulfilling the terms and promises contemplated by their respective insurance policies. However, as already determined, plaintiff is not entitled to defense or indemnification for the underlying claim under these policies. As to the insurance brokers, plaintiff fails to allege that it entered into a contract with these defendants and "[a]bsent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing" (*Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]). Thus, plaintiff cannot prevail on this claim insofar as asserted against the moving defendants.

Sixth and Seventh Causes of Action – Misrepresentation and Fraud

In the sixth cause of action, plaintiff alleges that "Defendants produced and/or knowingly allowed its agent to produce a Certificate of Liability Insurance which deceptively listed Plaintiff as an additional insured" and that "[u]pon information and belief, Defendants misrepresented their ultimate intentions of not insuring Plaintiff by purposely producing misleading Certificates of Liability to the Plaintiff which prominently displays Plaintiff's name as an additional insured and thus misled the Plaintiff into thinking Plaintiff was insured when it is Defendants contention that Plaintiff is not insured" (Complaint at && 265-266 [NYSCEF Doc. No. 1]). In the seventh cause of action, plaintiff similarly alleges that defendants engaged in fraud by knowingly allowing their agents to produce certificates of liability stating that plaintiff was an additional insured. Plaintiff alleges that defendants made these statements in the certificates of insurance in order to lull plaintiff into a false sense of security so as to save additional premiums and fees.

To the extent plaintiff is claiming that it is entitled to damages for negligent misrepresentation, the claim fails because "where, as here, certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation" (*Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos.*, 303 AD2d 245, 246 [1st Dept 2003]). As to the claims for intentional misrepresentation and fraud, plaintiff must plead "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages" (*Da Silva v Champ Constr. Corp.*, 186 AD3d 452, 454 [2d Dept 2020]). "The element of justifiable reliance is essential to any fraud claim" (*Waknin v Liberty Ins. Corp.*, 187 AD3d 821, 824 [2d Dept 2020][internal quotation marks and citations omitted]).

Here, since the certificates of insurance provide that they were issued as a matter of information only, warned that they conferred no rights upon the certificate holder and were limited by the underlying policies, it was "unreasonable to rely on [them] for coverage in the face of th[at] disclaimer language" (*Da Silva v Champ Constr. Corp.*, 186 AD3d at 454 [internal quotation marks and citations omitted]; *see also Greater N. Y. Mut. Ins. Co. v White Knight Restoration, Ltd.*, 7 AD3d 292, 293 [1st Dept 2004][cause of action against insurance broker for fraud "based on the inaccurate certificates…properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language"]). Moreover, in light of the warnings and the language in the certificates that they cannot amend, extend or alter the coverage provided in the policies, plaintiff could have obtained a copy of the actual policies in order to ascertain its contractual right to coverage (*see generally Cervera v Bressler,* 126 AD3d 924, 926 [2d Dept 2015]; *Stuart Silver Assocs. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]["Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations"]).

Thus, the causes of action for misrepresentation and fraud are dismissed insofar as asserted against the moving defendants.

Eighth Cause of Action – Breach of Contract

In the eighth cause of action, plaintiff alleges that the defendant insurers breached their obligations under their respective insurance policies to defend and indemnify plaintiff in the underlying action. For the reasons already discussed plaintiff is not entitled to defense or indemnification in the underlying action under the Colony, Merchants, United States Liability,

Harleysville, or Hanover insurance policies. Thus, these defendants are entitled to dismissal of this cause of action insofar as asserted again them.

As to SValencia, Morstan, Logan, and USI Insurance Services, "[t]o set forth a case for...breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012]). Further, the cause of action must be dismissed where the broker was under no duty to the plaintiff (*see Greater N.Y. Mut. Ins. Co. v White Knight Restoration,* 7 AD3d 292, 293 [1st Dept 2004]; *Arredondo v City of New York*, 6 AD3d 328, 329 [1st Dept 2004]["It is well settled that the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability"]; *Fed. Ins. Co. v Spectrum Ins. Brokerage Servs.*, 304 AD2d 316, 317 [1st Dept 2003]["the (insurance) broker's duty is to its customer...and not to additional insureds"]). Here, plaintiff does not allege it had a broker-client relationship with these defendants or that it made any specific request to them to secure a policy with a certain type of coverage.

Thus, the breach of cause of action for breach of contract is dismissed insofar as asserted against the moving defendants.

Ninth Cause of Action - Violation of General Business Law § 349

General Business Law § 349 (a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." "The requisite elements of the cause of action are well established. A plaintiff must allege that: (1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result

of the deception" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d at 176).

Here, plaintiff seeks damages for a violation of General Business Law § 349, alleging that by issuing certificates of insurance misrepresenting that it was an additional insured, defendants engaged in a deceptive act under the statute. Plaintiff asserts that this is not simply an issue between the parties since there is a "public policy issue" at stake. Plaintiff argues in this regard that if certificates of insurance cannot be relied upon as a basis for coverage, then insurance brokers and insurance companies will continue to use them to create a false impression of coverage. Plaintiff contends that if that is the case, certificates of insurance serve no purpose and should cease being used by the insurance industry. If not, brokers and insurers should be held to some standard in regard to the information they include on these certificates.

A deceptive practice under section 349 must be likely to mislead a reasonable consumer acting reasonably under the circumstances (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). Where the conduct complained of is fully disclosed, it cannot be considered a deceptive practice within the meaning of the statute (*see Ludl Elecs. Prods. v Wells Fargo Fin. Leasing, Inc.*, 6 AD3d 397, 398 [2d Dept 2004]; *Citipostal, Inc. v Unistar Leasing*, 283 AD2d 916 [4th Dept 2001]). In addition, "[o]ne cannot claim to have been misled when the misrepresentations consist of material which could have been discovered through the exercise of due diligence" (*see Cohen v Nassau Educators Fed. Credit Union*, 12 Misc 3d 1164 [A], 2006 NY Slip Op 51056[U][Sup Ct, Nassau County, 2006]). In this case, the certificates of insurance fully disclose that they do not create any rights, are limited by the underlying policies, and cannot amend, extent or alter the coverage provided in the policies, which plaintiff could have obtained in order to verify its right to coverage.

Further, even assuming the certificates of insurance are considered "deceptive or misleading in a material way," the complaint does not adequately plead consumer-oriented conduct to assert a claim under General Business Law § 349. "[A]n act or practice is consumer-oriented when it has a broader impact on consumers at large," which precludes claims that are based on "[p]rivate contract disputes, unique to the parties" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d at 177 [internal quotation marks and citations omitted]). The gravamen of the complaint and the relief plaintiff is seeking involves (1) the defendant insurers' alleged contractual obligation under their respective insurance policies to defend and indemnify plaintiff in the underlying action, (2) the Rouge defendants' alleged breach of their obligation to procure insurance naming plaintiff as an additional insured, and (3) the failure to issue additional insured coverage for plaintiff as set forth in the certificates of insurance. At its core, this action involves private contract disputes specific to these parties.

Thus, the cause of action to recover damages for deceptive trade practices in violation of General Business Law § 349 is dismissed insofar as asserted against the moving defendants.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendant United Specialty Insurance Company to dismiss the complaint insofar as asserted against it (mot. seq. no. 006) is denied as academic; and it is further

ORDERED that the motions by defendants Colony Insurance Company (mot. seq. no. 002), SValencia Insurance Agency LLC (mot. Seq. no. 003), Merchants Mutual Insurance Company (mot. seq. no. 004), United States Liability Insurance Company (mot. seq. no. 005), Harleysville Worcester Insurance Company (mot. seq. no. 007), Jahel1, Inc. f/k/a Morstan General

Agency, Inc. (mot. seq. no. 008), USI Insurance Services, LLC (mot. seq. no. 009), the Hanover Insurance Group, Inc. (mot. seq. no. 010) and Alib Holdings, Inc. a/k/a Logan Insurance Brokerage (mot. seq. no. 011, to dismiss the complaint insofar as asserted against them are granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

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

ORDERED that the caption is amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ADJUDGED and DECLARED that defendants Colony Insurance Company, Merchants Mutual Insurance Company, United States Liability Insurance Company, Harleysville Worcester Insurance Company, and the Hanover Insurance Group, Inc., are not obligated to defend or indemnify plaintiff in the action entitled *Matos v 126-128 West LLC*, currently pending before the Supreme Court, New York County, under Index No. 150611/2017; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.

1/25/2022
DATE

LAURENCE LOVE, J.S.C.

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