Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Acting Justice

IAS PART 30

Index No. 700712/2016

CHIPOTLE MEXICAN GRILL, INC., CHIPOTLE MEXICAN GRILL OF COLOARADO, LLC and CHIPOTLE SERVICES, LLC

Plaintiff,

Motion
Date: June 17, 2016

Motion Cal. No. 26

Motion Sequence No. 2

-against-

RLI INSURANCE COMPANY and THE KOCH-GLACKEN AGENCY a/k/a GLACKEN GROUP, INC., PIECE MANAGEMENT INC., SIMON PROPERTY GROUP, INC., THE RETAIL PROPERTY TRUST, and AFMAT WAZADALLY,

Defendants,

The following efile papers numbered 45-64, 66-69 submitted and considered on this motion by defendant AFI Associates, Inc.,, d/b/a The Koch-Glacken Agency ("Koch Glacken") s/h/a The Koch-Glacken Agency for an Order pursuant to CPLR sections 3211 (a) (7) and 3212, dismissing the first, third and fourth causes of action set forth in the verified complaint on the ground that plaintiff failed to state a cause of action and pursuant to section 3211 (a) (7) dismissing the fifth and sixth causes of action on the ground that plaintiff failed to state a cause of action.

	Papers Numbered
Notice of Motion -Affidavits-Exhibits.....	EF 45-58
Affirmations in Opposition-Affidavits-Exhibits.....	EF 59-64
Reply Affirmations-Affidavits-Exhibits.....	EF 66-69

This action is predicated upon coverage under a comprehensive liability policy issued by RLI Insurance Company (hereinafter "RLI") to Piece Management Inc. (hereinafter "Piece") or alternatively, against Koch-Glacken ("Koch Glacken") for failing to obtain an insurance policy naming Plaintiff, Chipotle Mexican Grill, Inc., Chipotle Mexican Grill of Coloarado, LLC and Chipotle Services, LLC, (hereinafter "Chipotle") as an additional insured. Koch-Glacken acted as Piece's insurance broker. Piece provided Koch-Glacken with a list of certificates to issue. Chipotle sent Piece a letter asking it to hold Chipotle harmless and indemnify Chipotle as an additional insured under the insurance policy, however, RLI on behalf of Piece, denied Chipotle's request for defense and indemnification because Chipotle failed to provide a written contract naming Chipotle as an additional insured.

Plaintiff, Chipotle Mexican Grill, Inc., Chipotle Mexican Grill of Coloarado, LLC and Chipotle Services, LLC, (hereinafter "Chipotle") filed a summons and verified complaint on January 20, 2016, alleging that defendant Afmat Wazadally (hereinafter "Wazadally") , an employee of co-defendant Piece Management, Inc., (hereinafter "Piece") commenced an action in the Supreme Court of the State of New York, County of Queens titled *Azadally v Chipotle Mexican Grill*, etal, Index number 1064/15, wherein Chipotle filed a third-party action against Piece.

Wazadally was injured at a Chipotle premises in Roosevelt Field Mall while working for Piece and Piece was performing work at Chipotle pursuant to a work order. Wazadally alleged that he was injured on December 14, 2014 when he fell off a ladder at the Chipotle premises. Chipotle alleged that pursuant to a written agreement executed on or about February 19, 2013, with co-defendants Simon Property Group, Inc., and the Retail Property Trust (hereinafter "Simon"), pursuant to the terms of the written agreement, Chipotle was required to hold harmless the landlord and indemnify it in certain instances it incurred as a result of the Wazadally litigation. Piece was required to obtain additional insurance coverage in favor of Chipotle for any losses sustained as a result of its work, whether it was course of dealing, oral or contractual, or implied in fact.

Chipotle alleged in its First and Third causes of action that RLI and Koch-Glacken must indemnify Chipotle in the Wadally action and it seeks a determination of their rights. It alleged in its Second cause of action that Koch-Glacken was RLI's agent and it issued Chipotle a Certificate of Insurance under the RLI insurance policy on April 16, 2014, which it relied upon to its detriment. By refusing to defend and indemnify Chipotle in the Wazadally action, RLI violated its contractual and fiduciary duties, causing damages, and RLI should be equitably estopped from denying insurance coverage to Chipotle. In the Fourth cause of action Chipotle seeks a declaratory judgment and damages for past defense costs in the Wazadally action. In the Fifth and Sixth causes of action it alleged unjust enrichment.

Defendant AFI Associates, Inc.,, d/b/a The Koch-Glacken Agency ("Koch Glacken") s/h/a The Koch-Glacken Agency alleged that as to Chipotle's First, Third and Fourth causes of action must be dismissed as they seek a declaratory judgment against Koch-Glacken, which is an equitable remedy. Moreover these cause of action, under New York Law must be dismissed because there is

no privity between Chipotle and Koch-Glacken. As to the Fourth cause of action, Koch-Glacken is not a party to the RLI Insurance policy and a non-party cannot be liable for breach of any obligations under a contract of insurance to which it is not a party; and it was not the proximate cause of Chipotle's damages. The Fifth and Sixth causes related to unjust enrichment duplicate prior causes of action.

In opposition, Chipotle maintained that Piece has performed work for Chipotle since the year 2005, and as part of the agreement between Chipotle and Piece, Piece was required to maintain additional insurance coverage for Chipotle prior to beginning its work, which is evidenced by the Certificate of Liability Insurance dated April 16, 2014, which names Chipotle, the certificate holder as an additional insured under Piece's insurance, which Koch-Glacken was the producer. Chipotle tendered its defense and indemnification to RLI, which was denied by RLI on grounds that there was no written contract between Chipotle and Piece. Chipotle alleged privity between Koch-Glacken and Chipotle may exist based upon certain e-mails between Walter Manzick of Chipotle and Gary D'Annunzio and Clare Baxter of Piece and Debbie Falkman of Koch-Glacken. Thus, Chipotle has a cognizable claim against Koch-Glacken based upon its role as agent of RLI; and questions remain as to whether Koch-Glacken owed a duty to Chipotle. Moreover, the motion should be denied as premature, since discovery is still being exchanged by the parties.

In opposition, co-defendants Simon Property Group, Inc. and The Retail Property Group submitted opposition, the attorney affirmation of Eugene O. Morenus, Esq. and its verified answer. Mr. Morenus alleged, among other things, that Koch-Glacken was aware of what type of work Piece was performing and that it performed work for Chipotle, and it knew that Piece needed to name Chipotle as an additional insured in order for Piece to perform work at Chipotle. It also maintained that Koch-Glacken issued certificates of insurance to Chipotle indicating that they were additional insureds under the policy, however, since it has not been determined by the Court that Chipotle was an additional insured under the RLI policy, the motion is premature. Moreover, Koch-Glacken issued the very certificate of insurance that Chipotle relied upon, and should be estopped from alleging that there is no privity of contract between Chipotle and Koch-Glacken.

In determining whether a complaint should be dismissed pursuant to CPLR 3211 (a) (7), the Court shall consider whether the plaintiff has a cause of action, not whether it has stated one (*see generally Davis v South Nassau Comm. Hosp.*, 26 NY3d 563, 572 [2015]; *Leon v Martinez*, 84 NY2d 83 [1994]).

A motion for summary judgment should be denied in instances where the opposing party alleges that further discovery would lead to relevant evidence, or that facts essential to opposing the motion were exclusively in the knowledge and control of the moving party (*see generally Turner v Butler*, 139 AD3d 715 [2d Dept 2016]; *Kimyagarov v Nixon Taxi*, 45 AD3d 736 [2d Dept 2007]; *Lambert v Bracco*, 18 AD3d 619 [2d Dept 2005]).

Now, in consideration of the submissions and arguments presented by the parties, the Court finds that the motion is premature. Chipotle, a third-party seeking benefits of coverage under the

RLI policy, has sufficiently pled a cause of action and whether there was an intent by Piece to add Chipotle as an additional insured has not yet been adjudicated by the Court *(see generally Hargob Realty Assoc., Inc. v Fireman's Fund Ins. Co., 73 AD3d 856* [2d Dept 2010]).

Therefore, the motion is denied without prejudice.

This constitutes the decision and order of the Court.

Dated: December 21, 2016

Hon. Cheree A. Buggs, AJSC

FILED
JAN 17 2017
COUNTY CLERK
QUEENS COUNTY

FILED
JAN [redacted] 2017
COUNTY CLERK
QUEENS COUNTY