SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS

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

Plaintiff,

-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.

Index No.: 700712/2016

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT OF DEFENDANT AFI ASSOCIATES, INC. d/b/a THE KOCH-GLACKEN AGENCY

PRELIMINARY STATEMENT

Plaintiffs Chipotle Mexican Grill, Inc., Chipotle Mexican Grill of Colorado, LLC, and Chipotle Services, LLC (collectively referred to as "Chipotle"), by its attorneys, Messner Reeves LLP, submit this memorandum of law in opposition to Defendant AFI Associates, Inc. d/b/a The Koch-Glacken Agency ("Koch-Glacken"), sued herein as The Koch-Glacken Agency a/k/a Glacken Group, Inc., motion to dismiss and motion for summary judgment for an order pursuant to CPLR §§ 3211(a)(7) and 3212 (the "Motion").

This is a declaratory judgment action seeking declarations regarding the parties' respective rights and obligations in relation to an insurance policy.

Chipotle has asserted cognizable claims against Koch-Glacken in this action based on Koch-Glacken's role as an agent or apparent agent of defendant RLI Insurance Company. As such a motion to dismiss is not appropriate at this time. Further, at the time Chipotle's opposition to the motion was drafted, Chipotle had not received any response to discovery demands it served on Koch-Glacken on April 1.[1] ON the day the opposition to Koch-Glacken's motion was due, counsel for Chipotle received a response to its discovery demands.

STATEMENT OF FACTS

The instant action is a lawsuit for declaratory judgment seeking declarations regarding the parties' respective rights and obligations for damages arising as a result of the claims asserted in the lawsuit Afmat Wazadally v. Chipotle Mexican Grill, Inc., et al. filed in Supreme Court, Queens

[1] Chipotle served the discovery demands on Koch-Glacken on April 1, 2016. Pursuant to CPLR 3120, Koch-Glacken's response was due April 26, 2016. On or about May 27, 2016, Koch-Glacken served responses to Chipotle's demands. The response was received by our office after 5 p.m. on June 2 - one day before this opposition was due, and more than one month past the CPLR deadline. The response was not received by the attorneys handling this opposition until 1 p.m. on June 3, the day the opposition was due. Nonetheless, discovery on the issues addressed in this motion remains outstanding.

County under Index No. 1064/15 (the "*Wazadally* Action"). In that matter, plaintiff Afmat Wazadally alleges he was injured when he fell from a ladder while working for defendant PIECE MANAGEMENT INC. (hereinafter "Piece Management") at the Chipotle restaurant located in the Roosevelt Field Mall. Piece Management had been hired by Chipotle to perform maintenance work at the restaurant.

According to invoices found in Chipotle records, Piece Management has performed work for Chipotle since 2005. *See* Invoices, annexed to Affirmation of Abigail Nitka (the "Nitka Affm.") as Exhibit A. As part of their agreement, Piece Management was required to obtain additional insured coverage for Chipotle before it could work on Chipotle premises, and in fact it appears that Piece Management did attempt to obtain additional insured coverage in favor of Chipotle prior to starting the work when Wazadally was injured. *See e.g*. ServiceChannel Screenshot, annexed to the Nitka Affm. as Exhibit B; and Certificate of Insurance, annexed to the Nitka Affm. as Exhibit C. Chipotle relied on representations that it was covered by the insurance policy when it allowed Piece Management to perform work at the restaurant.

Koch-Glacken is the insurance broker for Piece Management. Piece Management apparently asked Koch-Glacken to obtain additional insured coverage for Chipotle. *See* Affidavit of Jeffrey Koch, paragraph 5, Exhibit H to Koch-Glackens's Motion. Koch-Glacken also holds itself out as being an agent of defendant RLI insurance. *See* Koch-Glacken website, annexed to the Nitka Affm. as Exhibit D. Notably, Koch-Glacken's motion to dismiss or motion for summary judgment does not seek dismissal of Chipotle's Second Cause of Action in the Verified Complaint, which alleges that Koch-Glacken was RLI Insurance Company's agent.

As a result of the *Wazadally* Action, Chipotle tendered its defense and indemnification to Piece Management's insurer, defendant RLI Insurance Company ("RLI"). RLI rejected Chipotle's tender on grounds including that there was no written contract between Piece and Chipotle. See Ex. K of Koch-Glacken Motion. One of the issues in this lawsuit and the underlying lawsuit is the existence of a contract or agreement between Piece Management and Chipotle.

Accordingly, Chipotle filed the complaint in the instant declaratory judgment action on January 20, 2016. See Exhibit A of Koch-Glacken Motion (Complaint). Chipotle subsequently served discovery demands on April 1, 2016 on Koch-Glacken, RLI Insurance Company and Piece Management. *See* Discovery Demands and Affidavit of Service, annexed to Nitka Affm. as Exhibit E. At the time Chipotle's opposition to Koch-Glacken's Motion was drafted, Chipotle had not received any response to the discovery demands it served on Koch-Glacken, RLI Insurance Company and Piece Management on April 1, 2016. Chipotle's counsel only received Koch-Glacken's 11th hour responses to the discovery demands the day Chipotle's opposition to Koch-Glacken's Motion was due. Accordingly, Chipotle was only able to conduct a preliminary review of Koch-Glacken's responses and production of documents in response to Chipotle's discovery demands. Nonetheless, the documents support Chipotle's argument that there is privity between Chipotle and Koch-Glacken, evidenced by e-mails between Walter Manzick of Chipotle, Gary D'Annunzio and Clare Baxter of Piece Management, and Debbie Falkman of Koch-Glacken. See Correspondence, annexed to Nitka Affm. at Exhibit F. Further review of the documents produced is required.

Ultimately, Koch-Glacken was an agent, or held itself out as an agent of RLI Insurance Company and therefore may have some obligation to Chipotle either contractually, negligently or otherwise. Moreover, Chipotle cannot determine the existence of any contract or relationship

between Koch-Glacken and RLI without further discovery. There are still questions of fact about Koch-Glacken's obligations to Chipotle. As such, Koch-Glacken's Motion should be denied.

ARGUMENT

POINT I: Koch-Glacken's Motion to Dismiss and Motion for Summary Judgment Should be Denied Because Chipotle has Alleged Cognizable Legal Theories and There are Questions of Fact that Preclude Judgment at this Time.

A. Motion to Dismiss

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR § 3211(a)(7) is well settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR § 3211(a)(7), the sole criterion is whether the pleading states a cause of action. *See Cooper v. 620 Property Association*, 242 A.D.2d 359 (2d Dept. 1997). If factual allegations are discerned, from the pleadings and submissions, which manifest any cause of action cognizable at law, a motion to dismiss will fail, regardless of whether the plaintiff will ultimately prevail on the merits. *See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002); *Cooper v. 620 Property Association*, 242 A.D.2d 359 (2d Dept. 1997); *Given v. County of Suffolk*, 187 A.D.2d 560 (2d Dept. 1992).

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Integrated Constr. Servcs., Inc. v. Scottsdale Ins. Co.*, 82 A.D.3d 1160, 1162, 920 N.Y.S.2d 166 (2d Dept. 2001). Moreover, the court must also accept as true any factual submissions made in opposition to the motion. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 773 N.E.2d 496, 499 (2002).

Where a cause of action is sufficient to invoke the court's power to "render a declaratory judgment…as to the rights and other legal relations of the parties to a justiciable controversy" (CPLR § 3001; see CPLR § 3017(b)), a motion to dismiss that cause of action should be denied. *See Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150, 930 N.Y.S.2d 34, 36-37, (2d Dept. 2011); *Staver Co. v. Skrobisch*, 144 A.D.2d 449, 450 (2d Dept. 1988); *St. Lawrence Univ. v. Trustees of Theol. School of St. Lawrence Univ.*, 20 N.Y.2d 317, 325, 229 N.E.2d 431, 282 N.Y.S.2d 746 (1967); *Ackert v. Union Pac. R. R. Co.*, 4 A.D.2d 819, 821, 165 N.Y.S.2d 330 (1957); *see also* 5-3001 Weinstein-Korn-Miller, NY Civ. Prac. ¶ 3001.13.

The facts alleged in the Complaint must be accorded the benefit of every favorable inference to be drawn from them. The only reasonable inference to be derived from these facts is that regardless of the legal theory applied, Koch-Glacken has failed to meet its burden of showing the complete absence of any valid claim against it, requiring that Koch-Glacken's Motion to dismiss be denied.

B. <u>Motion for Summary Judgment</u>

Additionally, summary judgment is also not appropriate in this matter. There are still significant issues of fact which have not been resolved. It is well settled law Courts must grant summary judgment *only* where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is *no* genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Ugarizza v. Schmieder*, 46 N.Y.2d 471, 36 N.E.2d 1324 (1979) (*emphasis* added).

In determining whether material facts are in dispute, courts must resolve all ambiguities and draw all inferences in favor of the non-moving party. *Rizzo v. Lincoln Diner Corp.*, 215 A.D.2d 546 (2d Dept. 1995). One of the most fundamental and often repeated concepts of civil

litigation is that summary judgment is the equivalent of a trial. *See Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 384 (2d Dept. 2012). It is a drastic remedy which deprives a party of his day in court and should only be applied when there is no doubt as to the absence of triable issues. *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 (1974). For this reason, summary judgment should only be granted where there is no merit to the action or no genuine issue to be resolved. *Great Neck Pennysaver, Inc. v. Catalano*, 97 A.D.2d 395, 467 N.Y.S.2d 219 (2d Dept. 1983).

The court's role in ruling on a motion for summary judgment is one of issue finding, and not issue resolving. *Amatulli v. Delhi Construction Corp*., 77 N.Y.2d 525 (1991); *Cunningham v. General Electric Credit Corp*., 96 A.D.2d 502 (court's focus must be on issue identification rather than issue determination). When reviewing the record, if the court's determination depends upon the credibility of evidence, or upon the choice between several reasonable inferences that can be drawn from the extrinsic evidence, summary judgment will not be granted. *Hartford Accident & Indemnity Co. v. Wesolowsky*, 33 N.Y.2d 169 (1973). Accordingly, denial is proper if any party shows facts sufficient to require a trial on any issue of fact. CPLR § 3212(f).

Similarly, pursuant to CPLR § 3212(f):

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

The essence of opposition to a motion for summary judgment under CPLR § 3212(f) is that there are facts essential to the party's opposition to the motion, yet they cannot be stated by the party because of incomplete discovery in the matter. *See Franklin National Bank of LI v. Giacomo*, 20 A.D. 2d 797 (2d Dept. 1969) (summary judgment should not be granted if the facts upon which

the motion is predicated are exclusively within the knowledge of the moving party, or clearly not within the knowledge of the opponent). A motion for summary judgment made under these circumstances is, at best, premature. *See Lazri v. Kingston City. Consol. School Dist.*, 95 A.D.3d 1642, 945 N.Y.S.2d 487 (3d Dept. 2012).

Courts have established in construing CPLR § 3212(f), that where the record lacks evidence needed to resolve an issue, any motion for summary judgment must be denied. *See American Home Assurance Co. v. American International*, 200 A.D.2d 472, 606 N.Y.S.2d 229 (1st Dept. 1994) (motion for summary judgment denied where discovery considered incomplete because EBT of defendant, while noticed, was not yet conducted); *Soto v. City of Long Beach,* 197 A.D.2d 615, 602 N.Y.S. 691 (2d Dept. 1993) (summary judgment motion denied where defendant city failed to comply with discovery obligations); *Watson v. Work Wear Corp.*, 202 A.D.2d 231, 608 N.Y.S.2d 459 (1st Dept. 1994) (motion for summary judgment denied where outstanding discovery still remained).

Accordingly, Koch-Glacken's Motion should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 233 (1976). The moving party has the burden to show that he is entitled to judgment as a matter of law by providing sufficient evidence indicating the absence of any material fact. *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728 (2014).

Koch-Glacken bases its Motion upon a self-serving affidavit. However, it has long been held that self-serving affidavits are insufficient to support a motion for summary judgment. *See Todd v. 800 Tenth Ave. Dev. LP*, 2015 N.Y. Slip Op. 50552(U) (Sup. Ct. Queens Co. 2015) (finding that defendant's self-serving, conclusory affidavits submitted in support of motion for summary judgment are insufficient to demonstrate prima facie case to award motion for summary judgment);

Haddock v. Turner Const. Co., 2009 NY Slip Op. 32055(U) (Sup. Ct. NY Co. 2009) (finding plaintiff's self-serving affidavit is insufficient to support motion for summary judgment).

In the instant case, Chipotle has not only been deprived of the opportunity to conduct a limited amount of discovery, but until Friday, had been given no opportunity to conduct any discovery whatsoever into Koch-Glacken's obligations to Chipotle in relation to its relationship with RLI. Significant issues of fact remain open regarding the relationships between Koch-Glacken and Chipotle and Koch-Glacken and RLI Insurance Company. The responses and information Koch-Glacken did produce on the day Chipotle's opposition to Koch-Glacken's Motion was due are now under review. However, certain documents appear to raise a question of fact about the relationship between Chipotle and Koch-Glacken. See Exhibit F, Correspondence. Moreover, certain other documents and communications relating to Koch-Glacken's issuance of a certificate of insurance for Chipotle naming it as an additional insured in April 2014 are missing. As such, Koch-Glacken's motion for summary judgment and motion to dismiss is, at the very least, premature, and should be denied.

POINT II: A Declaratory Judgment is the Appropriate Remedy in this Case

CPLR § 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds." A declaratory judgment action differs from other types of actions in that its object is a declaration of the rights of the parties, while other actions seek some form of coercive relief. See David T. Siegel, New York Civil Practice 5th § 436, at 763. Declaratory relief is available to settle a wide variety of disputes. *See Mogenthau v. Erlbaum*, 59 N.Y.2d 143 (1983) ("the jurisdictional impediments to obtaining declaratory judgment are

virtually coextensive with those to any normal lawsuit"); *E.g.*, *Long v.* Long, 281 A.D. 254, 119 N.Y.S.2d 341 (1st Dept. 1953) (declaratory judgment appropriate to declare the validity of a marriage); *Bunis v. Conway*, 17 A.D.2d 207, 234 N.Y.S.2d 435 (4th Dept. 1962) (declaratory judgment appropriate to determine the meaning of a statute); *City of Rye v. Metropolitan Tramp. Auth.*, 24 N.Y.2d 627 (1969) (declaratory judgment appropriate to determine the constitutionality of a statute).

To constitute a "justiciable controversy," there must be a real dispute between adverse parties, involving substantial legal interest for which a declaration of rights will have some practical effect. *See Reliance Ins. Co. of N.Y. v. Garsart Bldg. Corp*., 122 A.D.2d 128 (1986). A controversy is particularly appropriate for a declaratory judgment determination so as to clarify the disputed relationships and the parties' present and prospective obligations. *Id.*

In this case, Chipotle seeks a declaration that it is entitled to defense and indemnity from RLI Insurance Company, Koch-Glacken or elsewhere based on representations made regarding insurance coverage. Thus, the appropriate means to challenge RLI and Koch-Glacken's rejection of Chipotle's tender of defense in the underlying action is a declaratory judgment. While Koch-Glacken is correct to state that it is not insurer, this fact does not preclude Koch-Glacken's liability as a broker. See Point III below.

POINT III: Koch-Glacken May Be Liable to Chipotle as A Broker, Regardless of its Relationship to the Policy

New York Courts have permitted third party claims against insurance brokers in a number of instances including when there is near-privity, when the third-party was an intended beneficiary of the broker's action or where there is fraud. See, *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d 435 (1985)(near-privity), *Dominion Finance Corp. v. Asset Indemnity Brokerage*, 60 A.D.3d 461, 874 N.Y.S.2d 115 (1st Dept. 2009) (intended beneficiary),

Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc., 18 A.D.3d 590, 795 N.Y.S.2d 619 (2d Dept. 2005)(fraud).

Piece Management and Chipotle had an agreement that Piece Management was required to not only obtain insurance but also name Chipotle as an additional insured. See e.g. ServiceChannel Screenshot, annexed to Nitka Affm. as Exhibit B. Koch-Glacken was Piece Management Inc.'s insurance broker. Koch-Glacken issued a certificate of insurance naming Chipotle as an additional insured. See Certificate of Insurance, annexed to Nitka Affm. as Exhibit C. Koch-Glacken holds itself out as being an agent of RLI. See Koch-Glacken Website, annexed to Nitka Affm. as Exhibit D. In fact, Koch-Glacken did obtain a commercial general liability policy issued by RLI. See RLI Policy, Exhibit G of Koch Motion. Chipotle reasonably relied on the fact that it was insured under the policy and would not have permitted Piece Management Inc. to work on its premises if Chipotle was not an additional insured. Only with the knowledge that Chipotle was protected as an additional insured did Chipotle allowed piece Management to commence its operations.

Koch-Glacken states that "Chipotle can[not] provide any evidence that Chipotle and Koch-Glacken had a contractual relationship or a relationship approaching privity that would sustain a direct claim for damages by Chipotle against Koch-Glacken." At the time Chipotle's opposition was drafted, Koch-Glacken had not provided any of the requested discovery on this issue. The documents Koch-Glacken produced at the 11th hour in response to Chipotle's discovery demands support Chipotle's claims that there may have been some privity between Koch-Glacken and Chipotle, based at least initially on e-mails between Walter Manzick of Chipotle, Gary D'Annunzio and Clare Baxter of Piece Management, and Debbie Falkman of Koch-Glacken. See Correspondence, annexed to Nitka Affm. as Exhibit F. Additionally, it does not appear initially

that Koch-Glacken provided any correspondence relating to the issuance of a certificate of insurance naming Chipotle as an additional insured in April 2014.

Notably, Koch-Glacken cites to *Saraco Glass Corp. v. Yeled V'Yalda Childhood Center, Inc.*, 11 Misc. 3d 1071(A), (Sup. Ct., Kings Co., 2006) in support of its contention that there is no privity between Koch-Glacken and Chipotle. However, in that case, the broker produced an agency agreement that provided the broker with limited agency authority to bind the insurer.

Ultimately, there remain issues of fact. As such, Koch-Glacken's motion for summary judgment to be denied.

POINT IV: The Motion Should Be Denied Because Additional Discovery Is Necessary In Order to Determine Koch-Glacken's Relationship with RLI

A certificate of insurance is sufficient to raise an issue of fact on summary judgment. *Long v. Tishman/Harris,* 2008 WL 9338467 (1st Dept. 2008); *Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200, 774 N.Y.S.2d 11, 13 (1st Dept. 2004). In *Lakeside Construction v. Depew & Schetter Agency, Inc.*, 154 A.D.2d 512 (2d Dept. 1989), the court reversed an order granting summary judgment because there was a question of fact whether the defendant had apparent authority to bind the defendant insurance company.

In *Lenox Realty Inc. v. Excelsior Ins. Co*., 255 A.D.2d 655, 679 N.Y.S.2d 749 (3d Dept. 1998), the Appellate Division held that a liability insurer was equitably estopped from denying coverage to its additional insureds, a property owner and property manager that were defending an underlying personal injury action, where owner and property manager reasonably relied upon the insurance certificate issued by the insurance agent despite language in the certificate stating that that certificate does not "amend, extend or alter" coverage. *See Niagara Mohawk Power Corp. v. Skibeck Pipeline Co. Inc.*, 270 A.D.2d 867, 705 N.Y.S.2d 459 (4th Dept. 2000) (given the

uncontroverted proof that Whittingham [agent] acted within the scope of its actual or apparent authority in adding Niagara Mohwak [additional insured], we conclude that Aetna was bound by Whittingham's actions in issuing the certificate of insurance designating Niagara Mohawk as an additional insured); *New York City Transit Authority v. Firemen's Fund Ins. Co.,* 251 A.D.2d 166, 673 N.Y.S.2d 906 (1st Dept. 1998) (questions of fact exist as to whether plaintiff's [insured] reliance on the certificate of insurance was reasonable in view of the certificate's provisions that it was issued 'for information only' and 'does not confer any rights upon the certificate holder.').

Moreover, there are certain basic principles concerning an insurance company and its agent:

> It is fundamental to the principal/agent relationship that an insurance company is liable to a third person for the wrongful or negligent acts and misrepresentations of its agent when made within the general or apparent scope of the agent's authority, although the acts or statements exceeded the agent's actual authority or disobeyed the principal's general or express instructions to the agent.

Gleason v. Temple Hill Associates, 159 A.D.2d 682 (2d Dept. 1990).

One of the questions in this case is whether Koch-Glacken had authority to bind RLI whether by actual or apparent authority. The Court can only know the answer to this question after RLI and Koch-Glacken are deposed and the agency agreements, along with other documents relating to the specific certificate of insurance are produced via discovery. *See Meraner v. Albany Medical Center*, 199 A.D.2d 740, 605 N.Y.S.2d 442 (3d Dept. 1993) (a motion for summary judgment may be opposed with the claim that facts essential to justify a position may exist but that such material facts are within the exclusive knowledge and possession of the moving party); *Boyer v. New York Property Ins. Under. Assoc.*, 90 A.D.2d 737, 455 N.Y.S.2d 797 (1st Dept. 1982) (plaintiff should have a reasonable opportunity for disclosure proceedings before a motion for

summary judgment is finally determined). Notably, it does not appear that Koch-Glacken produced the requested discovery on this issue.

A self-serving affidavit from Jeffrey Koch of Koch-Glacken stating that Koch-Glacken did not have the authority to bind RLI is not sufficient support for a motion for summary judgment. Self-serving affidavits are insufficient to support a motion for summary judgment. *See Todd v. 800 Tenth Ave. Dev. LP*, 2015 N.Y. Slip Op. 50552(U) (Sup. Ct. Queens Co. 2015) (finding that defendant's self-serving, conclusory affidavits submitted in support of motion for summary judgment are insufficient to demonstrate prima facie case to award motion for summary judgment); *Haddock v. Turner Const. Co.*, 2009 NY Slip Op. 32055(U) (Sup. Ct. NY Co. 2009) (finding plaintiff's self-serving affidavit is insufficient to support motion for summary judgment).

Based upon the foregoing, Koch-Glacken's motion for summary judgment and motion to dismiss is premature because there are issues of fact as to whether Koch-Glacken had authority to add Chipotle as an additional insured on Piece Management Inc.'s liability policy. The central issue in this case, whether Koch-Glacken is RLI's agent, can only be resolved with further discovery. Koch-Glacken and RLI are in the exclusive possession of the agency agreement and knowledge of the respective roles in binding coverage. Chipotle is entitled to full discovery on these issues. Koch-Glacken's motion for summary judgment and motion to dismiss should be denied to allow for that additional discovery to be had. *See* CPLR § 3212(f) ("[s]hould it appear from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion, or permit a continuance to permit disclosure to be had…").

POINT V: The Existence of A Contract is In Dispute, and Koch-Glacken May Be a Proximate Cause of Chipotle's Damages

In its motion, Koch-Glacken incorrectly identifies the endorsement in the RLI policy that applies to this matter. Koch-Glacken identifies the additional insured endorsement entitled "Additional Insured—Owners, Lessees or Contractors – Completed Operations". This endorsement does not apply here since the operations were ongoing at the time of Wazadally's accident. *See Travelers Property Casual Company of America v. Selective Insurance Company of New York*, 41 Misc.3d 1201(A) (Sup. Ct. N.Y. Co. 2013); *Petrillo Stone Corp. v. QBE Ins. Corp.*, 42 Misc.3d 1207(A) (Sup. Ct. Westchester Co. 2014).

The endorsement that does apply in here is entitled "Additional Insured—Owners, Lessees or Contractors Automatic Status When Required in Construction Agreement With You." This includes as an additional insured, any person or organization with whom Piece Management has "agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."

RLI denied coverage to Chipotle under the RLI Policy on the alleged grounds that there is no written agreement between Chipotle and Piece Management. However, the issue of whether or not Piece Management and Chipotle had a written contract is still being litigated in the Wazadally Action. Furthermore, whether or not it is required that Chipotle and Piece Management Inc. be parties to a written contract is in dispute.

When the terms and conditions of an insurance policy are ambiguous, the ambiguity must be resolved against the insurer, which drafted the policy. *See Superior Ice Rink, Inc. v. Nescon Contr. Cor*p., 52 A.D.3d 688, 691, 861 N.Y.S.2d 362 (2d Dept. 2008); *See also Tri Town Antlers Found. v. Fireman's Fund Ins. Co.*, 76 N.Y.2d 841, 841 (1990).

In *Travelers Indem. Co of Am. V. Royal Ins. Co. of Am*., 22 A.D.3d 252, 253, 802, N.Y.S.2d 125 (1st Dept. 2005), the policy at issue, in relevant part, qualified as an additional insured, "[a]ny person or organization [the insured is] required by written contract, agreement or permit to name as an insured…" The Court found that the phrase was ambiguous as to whether the word "written" modified not just "contract" but also "agreement" and "permit." Thus, the Court held that there was an issue of fact as to whether an oral agreement to procure insurance qualified the tendering party as an additional insured under the policy. *See also Superior Ice Rink, Inc. v. Nescon Contr. Corp*., 52 A.D.3d 688, 691, 861 N.Y.S.2d 362 (2d Dept. 2008).

Similarly, in *Erie Ins. Group v. National Grange Mut. Ins. Co*., 63 A.D.3d 1412, 1414, 883 N.Y.S.2d 601 (3d Dept. 2009), the policy at issue provided that "[e]ach of the following is added as an Additional Insured… [a]ny general contractor, subcontractor or owner for whom you are required to add as an additional insured on this policy under a written construction contract or agreement whether a certificate of insurance showing that person or organization as an additional insured has been issued and received by defendant prior to the time of loss." The Court found this provision to be ambiguous, noting the provision could be read as containing two alternate ways of including a person or organization as an additional insured: if a written construction contract so requires, regardless of whether NGM is ever notified; or if any agreement—oral or written—so requires and a certificate of insurance listing that person or organization is received by NGM prior to the loss-inducing incident.

Koch-Glacken argues that there is no causal nexus between Koch-Glacken's conduct and Chipotle's loss. However, as RLI's actual or apparent agent, Koch-Glacken may be liable to Chipotle for losses Chipotle incurs in the defense of the *Wazadally* Action, as well as this action, because of RLI's denial of coverage if it is determined that Koch-Glacken acted outside its

authority to bind coverage and therefore Koch-Glacken's acts or negligence are the cause of Chipotle's damages. As previously indicated, until Friday, June 3, Chipotle's counsel had not received any discovery from Koch-Glacken. Koch-Glacken only submitted one self-serving affidavit that denies an agency relationship, which is insufficient to support a motion for summary judgment. *See Todd v. 800 Tenth Ave. Dev. LP*, 2015 N.Y. Slip Op. 50552(U) (Sup. Ct. Queens Co. 2015); *Haddock v. Turner Const. Co*., 2009 NY Slip Op. 32055(U) (Sup. Ct. NY Co. 2009). The discovery Koch-Glacken did produce is deficient. Accordingly, because facts essential to justify Chipotle's opposition may exist but cannot be stated, Chipotle respectfully requests that Koch-Glacken's Motion be denied. CPLR § 3212(f).

POINT VI: <u>Koch-Glacken Has Been Unjustly Enriched</u>

The opposing party on a motion for summary judgment is not required to show that he or she is entitled to judgment as a matter of law. It is enough if the opposing party shows that one or more questions of material fact require a trial before the moving party could win. CPLR § 3212.

In this case, Koch-Glacken appears to have had actual or apparent authority to bind coverage in favor of Chipotle. Either way, Chipotle relied on, among other things, a certificate of insurance issued by Koch-Glacken, naming Chipotle as an additional insured. Koch-Glacken now claims that wholesale broker CRC/Crump issued the subject certificate. See paragraph 6 of Affidavit of Jeffrey Koch, Exhibit H of Koch Motion. However, that does not resolve the issue of whether Koch also had authority to bind RLI on its own behalf or its own role in obtaining the certificate from CRC/Crump. Regardless, Chipotle will have been damaged directly by the failures of Koch-Glacken to indemnify and defend Chipotle if it acted outside the scope of its authority or acted fraudulently.

The theory of unjust enrichment lies as a quasi-contract claim and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *See IDT Corp. v. Morgan Stanley Dean Witter & Co.,* 12 N.Y.3d 132 (2009), quoting *Goldman v. Metropolitan Life Ins. Co.,* 5 N.Y.3d 561, 572 (2005). Koch-Glacken argues that Chipotle's unjust enrichment claim is duplicative of a breach of contract or tort claim. However, Chipotle's cause of action against Koch-Glacken for unjust enrichment is not *duplicative* of its breach of contract claim, it is plead in the alternative. *See Auguston v. Spry,* 282 A.D.2d 489 (2d Dept. 2001) (causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively). With this in mind, Chipotle's causes of action do not fail to state a cognizable cause of action against Koch-Glacken.

CONCLUSION

For the reasons stated, it is respectfully submitted that Koch-Glacken's motion for summary judgment and motion to dismiss be denied, together with other and further such relief as this Court deems just and proper.

Dated: New York, New York
June 3, 2016

Yours etc.

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