UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WOMEN'S INTEGRATED NETWORK, INC., Plaintiff,	
v.	**MEMORANDUM DECISION**
U.S. SPECIALTY INSURANCE COMPANY, Defendant.	12 CV 7072 (VB)

Briccetti, J.:

Plaintiff Women's Integrated Network, Inc. ("WIN"), brought this action against defendant U.S. Specialty Insurance Company ("USSIC"), seeking a declaration that WIN was not obligated to repay the money USSIC paid to defend WIN in two lawsuits. On August 9, 2013, the Court granted USSIC's motion to dismiss the complaint. Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., 2013 WL 4799265, at *1 (S.D.N.Y. Aug. 9, 2013).[1] Only USSIC's two counterclaims remain. USSIC seeks a declaration that WIN must repay the defense costs, and alleges WIN breached its insurance policy by refusing to reimburse USSIC.

Before the Court is USSIC's motion for summary judgment on its counterclaims and for an order requiring WIN to pay USSIC's attorneys' fees in this case. (Doc. #36). For the following reasons, the motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

BACKGROUND

The parties have submitted briefs, statements of facts pursuant to Local Civil Rule 56.1, and declarations with supporting exhibits, which reflect the following factual background.

[1] The Court also denied WIN's motion for judgment on the pleadings.

USSIC insured WIN under a Directors, Officers and Organization Liability Insurance Policy covering the period from May 31, 2007, to May 31, 2008 (the "Policy"). In Condition (D)(2) of the Policy, USSIC agreed to "pay covered Defense Costs on an as-incurred basis" if WIN was sued. (Emphasis in original). But Condition (D)(2) further provided, "[i]f it is finally determined that any Defense Costs paid by the Insurer are not covered under this Policy, the Insureds agree to repay such non-covered Defense Costs to the Insurer." (Emphasis in original).

In September 2007 and again in May 2008, Robert Knuppel, a former WIN employee, sued WIN for wrongful termination. USSIC initially denied coverage, but eventually agreed to pay a portion of WIN's defense costs subject to a reservation of rights. In a letter dated October 22, 2008, USSIC expressly reserved its right "to take the position at a later date that coverage is not available for any aspect of [Knuppel's] Complaints, including but not limited to fees and costs incurred in the defense." USSIC ultimately paid $201,551.07 in defense costs.

On October 31, 2008, WIN filed a lawsuit against USSIC in Supreme Court, Westchester County, seeking, among other things, a declaration that USSIC had to pay WIN's defense costs in the Knuppel litigation (the "Coverage Action"). The Coverage Action was subsequently removed to this Court.

On August 11, 2010, Judge Robinson granted USSIC's motion for judgment on the pleadings in the Coverage Action, holding "there is no coverage under the Policy for 'Defense Costs' or the settlement in the Knuppel litigation." WIN moved for reconsideration, but that motion was denied. Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., 2011 WL 1347001, at *2 (S.D.N.Y. Apr. 4, 2011). On September 6, 2012, the Second Circuit affirmed the decision denying WIN's motion for reconsideration. Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., 495 F. App'x 129, 132 (2d Cir. 2012) (summary order).

On September 7, 2012, USSIC demanded repayment of the defense costs it had paid in the Knuppel litigation. In response, WIN filed this action, seeking a declaration that it was not required to reimburse USSIC. WIN alleged USSIC could not recover the defense costs because (i) USSIC failed to assert a claim for repayment as a compulsory counterclaim in the Coverage Action and, consequently, the doctrine of res judicata barred USSIC from bringing such a claim in any future action; and (ii) USSIC waived its right to demand reimbursement under Condition (D)(2) by failing to mention that Condition in its October 22, 2008, reservation of rights letter.

USSIC moved to dismiss the complaint for failure to state a claim and filed counterclaims for a declaratory judgment and breach of contract, alleging WIN breached Condition (D)(2) by failing to repay USSIC upon demand. WIN, in turn, moved for judgment on the pleadings.

By Memorandum Decision dated August 9, 2013, the Court granted USSIC's motion and denied WIN's motion, concluding WIN did not plausibly allege (i) USSIC failed to reserve its right under Condition (D)(2), and (ii) Federal Rule of Civil Procedure 13(a)—the compulsory counterclaim rule—required USSIC to bring a repayment counterclaim in the Coverage Action.[2] Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., 2013 WL 4799265, at *4-5.

On October 16, 2013, USSIC moved for summary judgment and for its attorneys' fees.

DISCUSSION

I. Summary Judgment Standard

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material

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[2] Rule 13(a) provides, in pertinent part: "A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction."

fact and it is clear the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A fact is material when it "might affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary" are not material and thus cannot preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A dispute about a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. See id. The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010).

If the non-moving party has failed to make a sufficient showing on an essential element of his case on which he has the burden of proof, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323. If the non-moving party submits "merely colorable" evidence, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (internal citations omitted). The mere existence of a scintilla of evidence in support of the non-moving party's position is likewise insufficient; there must be evidence on which the jury could reasonably find for him. Dawson v. Cnty. of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court construes the facts, resolves all ambiguities, and draws all permissible factual inferences in favor of the non-moving party. Dallas Aerospace, Inc.

v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003). If there is any evidence from which a reasonable inference could be drawn in favor of the non-moving party on the issue on which summary judgment is sought, summary judgment is improper. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

II. USSIC's Counterclaims

There are no genuine issues of material fact in this case. WIN all but concedes USSIC has proven its declaratory judgment and breach of contract counterclaims. Indeed, WIN does not dispute: (i) under Condition (D)(2) of the Policy, WIN must repay defense costs paid by USSIC if "it is finally determined that any Defense Costs paid by [USSIC] are not covered under this Policy" (emphasis in original); (ii) Judge Robinson held "there is no coverage under the Policy for 'Defense Costs' or the settlement in the Knuppel litigation"; (iii) WIN's motion for reconsideration was denied; (iv) the Second Circuit affirmed the denial of WIN's motion for reconsideration; and (v) WIN has not repaid the defense costs paid by USSIC.

WIN nevertheless argues res judicata precludes USSIC from bringing its repayment counterclaims in this action because USSIC could have brought these counterclaims in the Coverage Action. The Court disagrees.

"Only compulsory, and not permissive, counterclaims are subject to res judicata." Cousins v. Duane St. Assocs., 2001 WL 327084, at *2 (2d Cir. Apr. 2, 2001) (summary order); accord Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc., 233 F.3d 697, 702 (2d Cir. 2000) ("'[T]hat [a claim] might have been asserted as a [permissive] counterclaim in the prior suit . . . does not mean that the failure to do so renders the prior judgment res judicata as respects it.'") (quoting Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 671 (1944)). As the Court concluded in its Memorandum Decision, USSIC did not need to bring a repayment claim as a

compulsory counterclaim in the Coverage Action because Rule 13(a) requires a party to assert only those claims ripe "at the time of [their] service," and, under Condition (D)(2), USSIC did not have a ripe repayment claim until it was "finally determined" there was no coverage. Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., 2013 WL 4799265, at *5. Thus, because USSIC did not have a compulsory counterclaim for repayment in the Coverage Action, res judicata does not bar its counterclaims here.

Moreover, when a party "engages in actionable conduct" after the commencement of a lawsuit, res judicata does not preclude the adverse party from bringing a subsequent suit based on that conduct. Maharaj v. Bankamerica Corp., 128 F.3d 94, 97 (2d Cir. 1997); accord Waldman v. Vill. of Kiryas Joel, 207 F.3d 105, 113 (2d Cir. 2000) ("[R]es judicata will not bar a suit based upon legally significant acts occurring after the filing of a prior suit that was itself based upon earlier acts.") (emphasis in original). Here, the "actionable conduct" giving rise to USSIC's breach of contract counterclaim—WIN's decision to bring this case rather than repay the defense costs upon USSIC's demand—occurred after the filing of the Coverage Action.

Accordingly, res judicata does not bar USSIC's breach of contract counterclaim for this additional reason.

Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190 (2d Cir. 2008), upon which WIN relies, is distinguishable. There, the district court dismissed, on res judicata grounds, claims it had previously dismissed as unripe in a prior declaratory judgment action between the same parties. Id. at 192-93. The Second Circuit affirmed, explaining the claims sought "recovery based on the same legal issue that was previously decided when the declaratory judgment action was resolved, namely, the scope of coverage under the Policy. This issue has already been determined, and [plaintiff] may not reassert it now." Id. at 200.

Here, however, USSIC does not ask the Court to construe the Policy to determine "the scope of [its] coverage," as Judge Robinson did in the Coverage Action. Id.

In sum, because there is no genuine dispute of material fact and res judicata does not apply here, USSIC is entitled to summary judgment on its counterclaims.

III. Attorneys' Fees

For substantially the reasons stated in WIN's opposition brief, the Court, in exercising its "very broad discretion," declines to award USSIC the "unusual remedy" of attorneys' fees. Mali v. Fed. Ins. Co., 720 F.3d 387, 394 (2d Cir. 2013); accord Wilson v. Citigroup, N.A., 702 F.3d 720, 725 (2d Cir. 2012) (attorneys' fees are a "severe sanction"). The Court does not find "clear evidence" WIN's "claims were entirely without color, and [] the claims were brought in bad faith—that is, motivated by improper purposes such as harassment or delay." Eisemann v. Greene, 204 F.3d 393, 396 (2d Cir. 2000) (internal quotation marks omitted).

Accordingly, USSIC's application for attorneys' fees is denied.

CONCLUSION

Defendant USSIC's motion for summary judgment and for attorneys' fees is GRANTED insofar as USSIC seeks summary judgment on its counterclaims, and is DENIED insofar as USSIC requests an order requiring WIN to pay USSIC's attorneys' fees.

The Clerk is instructed to terminate the motion. (Doc. #36).

By March 14, 2014, defendant is directed to submit a proposed Judgment in accordance with S.D.N.Y. Local Rule 77.1.

Dated: March 7, 2014
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge