SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 652632/2022

UTICA MUTUAL INSURANCE COMPANY and UTICA NATIONAL ASSURANCE COMPANY,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

DECISION + ORDER ON MOTION

CRYSTAL CURTAIN WALL SYSTEM CORP. et al.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39, 40, 41, 42, 43, 44, 45, 54, 55, 56, 57, 58

were read on this motion to DISMISS.

Rivkin Radler LLP, Uniondale, NY (M. Paul Gorfinkel and Jay D. Kenigsberg of counsel), for plaintiffs.
Cohen Ziffer Frenchman & McKenna LLP, New York, NY (Keith McKenna and Chelsea Ireland of counsel), for defendants Crystal Curtain Wall System Corporation and Crystal Window and Door Systems, Limited.

Gerald Lebovits, J.:

This declaratory-judgment action arises from a construction-related property damage action pending in this court. (*See Board of Managers of the A Building Condominium v 13th & 14th St. Realty, LLC*, Index No. 100061/2011 [Sup Ct, NY County] [Leslie Stroth, J.].) Plaintiffs, Utica Mutual Insurance Company and Utica National Assurance Company (collectively, Utica), issued insurance policies to defendants Crystal Curtain Wall System Corp. and Crystal Window and Door Systems, Ltd. (collectively, the Crystal Entities). Utica does not dispute that it has a duty to defend the Crystal Entities in the underlying action. But it seeks a declaration that it has no duty to indemnify the Crystal Entities for any judgment or settlement reached in that action.[1]

The Crystal Entities move to dismiss under CPLR 3211 (a) (2) and (a) (7) or, alternatively, move under CPLR 2201 to stay this action pending the outcome of the underlying action. The Crystal Entities also seek their attorney fees incurred in defending this action. Utica cross-moves under CPLR 3212 for partial summary judgment. The Crystal Entities' motion to dismiss is granted. Utica's cross-motion for summary judgment is denied. The Crystal Entities'

[1] Plaintiffs have also named as defendants the (many) other parties to the underlying action. But Utica's only live claims in the action, and on this motion, concern the Crystal Entities.

fee request—which implicates an issue of law on which there is little New York appellate precedent—is granted.

BACKGROUND

A. The Underlying Action

The underlying action concerns the construction of two mixed use residential and commercial buildings, one of which, "Building A," was located at 425 East 13th Street, New York, New York. (NYSCEF Doc No. 1 ¶ 83.) Crystal Window entered into a subcontract with the project's general contractor (Hudson Meridian Construction Group, LLC) to design and install window and curtain systems as well as various other items, such as terrace doors and a glass parapet for Building A.[2] (*Id.* ¶ 85.) On March 22, 2007, Crystal Window assigned to Crystal Curtain some or all of its rights and obligations under the subcontract. (*Id.* ¶ 90.) In connection with this project, Utica issued various insurance policies to the Crystal Entities for the period from February 28, 2008, through February 28, 2012. (*Id.* at 13-15.)

Gordon H. Smith Corp (GHSC) was retained by 13th & 14th Street Realty LLC (13th & 14th), the owner of Building A, as a consultant in connection with the construction of Building A. (*Id.* ¶ 93.) Allegedly on August 29, 2006, GHSC wrote that it had serious concerns with the curtain wall system's performance, and in 2007, GHSC reported leaking conditions. (*Id.* ¶¶ 93, 97.) In 2008, GHSC allegedly made extensive remediation recommendations to fix the curtain wall, with which Crystal Window and Crystal Curtain claim to have complied. (*Id.* ¶ 98.) In January 2008, unit owners began taking possession of individual units. However, after a significant rainstorm on May 28, 2008, water infiltration during the storm caused property damage in the building including moldy conditions. (*Id*. ¶¶ 99-100.)

In January 2011, the underlying action was commenced in connection with the alleged construction defects that led to the water damage. The complaint asserted claims against the Crystal Entities for the cost of repair or replacement of the allegedly defective curtain wall, damage to unit owners' personal property, diminution in value of the unit owners' units, and delay damages consisting of increasing interest and carrying costs that allegedly resulted from delays in completion of the construction work. (*Id.* ¶ 106.)

The parties to the underlying action—which includes numerous third-party actions—remain engaged in motion practice.

B. This Action

Utica brought this action in 2022. It seeks various forms of declaratory relief defining the parameters of its duty to indemnify the Crystal Entities in the underlying action. (*See id.* at ¶ 216 [a]-[m].) The Crystal Entities now move to dismiss under CPLR 3211 (a) (2) on the ground that the scope and parameters of Utica's indemnification obligations are not yet ripe for

[2] Utica originally named Hudson Meridian as a defendant in this action, but later discontinued the claims against it. (*See* NYSCEF No. 47.)

determination. And the Crystal Entities request an award of attorney fees, should they prevail in this action. Utica cross-moves for partial summary judgment under CPLR 3212 on its request for a declaration that it has no duty to indemnify the Crystal Entities in connection with the costs of repair or replacement of the curtain wall. (NYSCEF Doc No. 28.)

DISCUSSION

I. Whether Utica's Declaratory-Judgment Claim is Subject to Dismissal

CPLR 3001 provides that the 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." A declaratory-judgment action "thus requires an actual controversy between genuine disputants with a stake in the outcome, and may not be used as a vehicle for an advisory opinion" (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006] [internal quotation marks omitted]). Absent a ripe, justiciable controversy, this court lacks subject-matter jurisdiction to render a declaratory judgment. The Crystal Entities argue that no justiciable controversy exists here, and therefore that the action should be dismissed under CPLR 3211 (a) (2). This court agrees.

A. Whether Utica's Declaratory-Judgment Claim Implicates a Justiciable Controversy

An insurance-coverage declaratory-judgment action is "premature"—and therefore subject to dismissal—"where the complaint in the underlying action alleges several grounds of liability, some of which invoke the coverage of the policy, and where the issues of indemnification and coverage hinge on facts which will necessarily be decided in that underlying action." (*Hout v Coffman*, 126 AD2d 973, 973 [4th Dept 1987]; *accord Allstate Ins. Co. v Santiago*, 98 AD2d 608, 608 [1st Dept 1983] [reversing denial of motion to dismiss declaratory-judgment action] ["[T]he policy in this State has been to deny the declaratory judgment where the matter in dispute can be determined in the basic negligence action. . . ."].) If, on the other hand, the coverage question can be resolved as a matter of law in advance of fact-finding in the underlying action, a declaratory-judgment action about the scope of the duty to indemnify may be maintained. (*See Brookhaven Mem. Hosp. Med. Ctr. v County of Suffolk*, 155 AD2d 404, 406 [2d Dept 1989] [holding that when the policy language at issue is clear, such that "the matter in dispute does not depend upon any fact that may be determined in the underlying action, there is no reason to suspend resolution of this matter until after its adjudication"].)

The question, then, is whether the current record permits this court to determine now either that Utica's policies do not extend coverage to the Crystal Entities' claimed losses for which coverage disputes exist, or that exclusions within the policies oust otherwise-applicable coverage for those losses.

The Crystal Entities argue that Utica's entitlement (or not) to the various sub-declarations requested in the complaint (*see* NYSCEF No. 1 at ¶ 216) turns on unresolved factual questions

with respect to each of those declarations.[3] (*See* NYSCEF No. 17 at 16-19.) Utica effectively concedes that all but one of the requested declarations "depend on facts developed in the Underlying Action," such that their declaratory-judgment claim is, to that extent, not ripe for resolution. (NYSCEF No. 44 at 3-4; *see also id.* at 7 ["Utica recognizes that its obligations with respect to other claims cannot be determined now, because they depend on facts to be determined in the underlying case."].) The sole declaratory-judgment claim that Utica insists is ripe now for decision is its request for a declaration that "no coverage is available under the Utica policies for the cost of repair or replacement of the curtain wall." (*Id.* at 7.) This request is not justiciable.[4]

Utica advances three reasons why this court can conclude now that no coverage is available for curtain-wall replacement or repair costs: (i) those costs do not qualify as a covered "occurrence" under the policies; (ii) coverage for the costs is barred by the "your work" policy exclusion; and (iii) coverage for the costs is barred by the "your product" policy exclusion. None of these reasons are persuasive.

With respect to whether the curtain-wall costs are a covered occurrence, Utica relies on a line of Appellate Division cases holding that policies like the ones at issue here "do not insure against faulty workmanship in the work product itself, but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product." (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept. 1994].) Because the glass curtain wall at issue is the Crystal Entities' own work product, Utica argues, the Crystal Entities do not have coverage for the costs to repair or replace the wall. But this argument begs the crucial question: Whether the damage to the curtain wall necessitating its repair or replacement stemmed from defective design or installation of the wall itself (by the Crystal Entities or their subcontractors), or instead from defective work on other components of the building carried out by other parties. As the Crystal Entities point out (*see* NYSCEF No. 54 at 24), Utica has not identified evidence that answers that question in advance of fact-finding in the underlying action.

The "your product" exclusion ousts coverage for "'[p]roperty damage' to 'your product' arising out of it or any part of it." (NYSCEF No. 3 at 45.) This exclusion does not *necessarily* oust coverage for the costs of repairing or replacing the curtain wall, for the same reasons just discussed. The record does not (yet) establish whether the damage to the curtain wall requiring its repair/replacement "ar[ose] out of it"—*i.e.*, from defects in the wall itself—or arose instead from defects in other components of the building.

The "your work" exclusion bars coverage for "[p]roperty damage' to 'your work' arising out of it or any part of it"—but not "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (*Id.*) Again, it is not yet clear how the

[3] The Crystal Entities also contend that several of the requested declarations would serve no purpose, because those declarations concern issues about which the parties do not disagree, such that no justiciable *controversy* exists that could properly be the subject of a declaratory judgment. (*See* NYSCEF No. 17 at 14-15.)

[4] Given this conclusion, the court does not reach the Crystal Entities' alternative argument that Utica's declaratory-judgment claims are time-barred.

damage to the curtain wall arose; or what part of the work on the curtain wall was performed by the Crystal Entities themselves, and what part by one or more subcontractors. Absent that information, this court cannot now determine the applicability of the "your work" exclusion.

In short, like the other coverage issues raised by Utica's declaratory-judgment complaint, whether coverage exists for curtain-wall-related costs depends on further fact-finding. That issue is not ripe for decision now.

Utica asserts that a justiciable controversy nonetheless exists because it needs to assess properly their obligations to accept or reject any possible settlement offer that may be within the limits of plaintiff's policies. (*See* NYSCEF No. 44 at 3.) But the relevance of coverage for the costs to repair/replace the curtain wall is contingent: it will arise only if (i) a settlement demand is made against the Crystal Entities in the underlying action that includes curtain-wall-related costs and is within the limit of the applicable Utica policies; and (ii) the Crystal Entities then demand that Utica pay to settle the claims against them. Utica provides no information on the likelihood of this contingent possibility being realized, nor when that might occur. In these circumstances, a declaratory judgment would be premature. (*See Murad v Russo*, 74 AD3d 1823, 1824 [4th Dept 2010] [holding that plaintiff's request for a declaratory judgment about the extent of her entitlement to insurance proceeds is not ripe for adjudication because "although the record establishes that defendant's insurer was amenable to settling the actions for the limits of the policy in question, it cannot be said with certainty that such settlements would occur"].)

Utica's declaratory-judgment claims, therefore, are unripe and not justiciable at this time. Utica's cross-motion for partial summary judgment on its curtain-wall claim is denied.[5]

B. Whether Utica's Declaratory-Judgment Claim Should be Dismissed or Stayed

Utica contends that this court should stay, rather than dismiss, any declaratory-judgment claims that the court concludes are unripe, because the "factual predicate that will be necessary to resolve these other issues may be developed in the underlying case before that case is concluded, and those issues would therefore become ripe for determination in this case." (NYSCEF No. 44 at 18.) Although a court lacks jurisdiction to *issue* a declaratory judgment absent a justiciable controversy, a court does have discretion, in appropriate circumstances, to stay an unripe declaratory-judgment action, instead of dismissing it altogether. (*See Allstate Ins. Co. v Kemp*, 144 AD2d 853, 854 [3d Dept 1988] [affirming order that stayed a premature declaratory-judgment action].) This court concludes, however, that staying Utica's action would not be appropriate here. The underlying action is complex and slow-moving. It is unclear to this court—and Utica does not attempt to provide clarity—when the factual questions bearing on Utica's potential duty to indemnify the Crystal Entities will be resolved in that action. This court declines to leave the current action in a holding pattern for an open-ended (and presumably lengthy) period. This action is therefore dismissed without prejudice to its renewal once it is no longer premature.

[5] Because the court denies Utica's cross-motion on this ground, the court does not reach the Crystal Entities' argument that the cross-motion is premature because issue has not yet been joined. (*See* NYSCEF No. 54 at 20-21.)

II. Whether the Crystal Entities are Entitled to Reimbursement from Utica for their Defense Costs Incurred in this Action

The Crystal Entities seek reimbursement of their reasonable attorney fees incurred in defending this declaratory-judgment action. (*See* NYSCEF No. 16 [notice of motion]; NYSCEF No. 17 at 21-22 [mem. of law].) This attorney-fee request implicates a legal question about the parameters of a prevailing insured's entitlement to attorney fees from its insurer that New York appellate courts appear not to have considered. For the reasons set forth below, the request is granted.

A. Reasons Why the Crystal Entities Should be Entitled to Reimbursement of Defense Costs

When an insured "is cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and the insured then prevails, it may recover attorney fees "incurred in defending against the insurer's action." (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597-598 [2004].) This principle is not a policy-based "exception to the American rule," under which each party bears its own litigation costs unless a statute or contract shifts the obligation to pay fees. (*Chase Manhattan Bank v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1, 5 [1st Dept 1999] [emphasis added].) Rather, it derives from the insurer's duty as a matter of contract to defend its insured—akin, analytically, to a fee-shifting contractual indemnity provision.[6] (*See id.*)

In this case, Utica's declaratory-judgment action cast the Crystal Entities in a defensive posture by asserting that Utica need not indemnify them for various increments of their potential obligations under a judgment or settlement in the underlying action. And, for the reasons given above, this court concludes that the Crystal Entities should prevail, because the action is subject to dismissal as premature.

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[6] *See Mighty Midgets, Inc. v Centennial Ins. Co.* (47 NY2d 12, 21-22 [1979] [holding that in light of the American rule, an insured that successfully *brings* a coverage action against its insurer may not recover attorney fees, although the same insured would be able to recover fees if it successfully defended the insurer's coverage action]). Thus, in *Hertz Vehicles, LLC v Cepeda*, the Appellate Division, First Department, rejected a policy-based argument that a medical provider assigned no-fault-insurance benefits by non-policyholder assignors should be able to recover declaratory-judgment attorney fees in the same way as an insured. (156 AD3d 440, 441 [1st Dept 2017].) The Court explained that these attorney fees may be recoverable by an insured because "an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action." (*Id.*, quoting *City Club Hotel*, 3 NY3d at 597-598.) In *Cepeda*, on the other hand, the assignors had the right to no-fault benefits because they had been *passengers* in an insured vehicle, not the policyholders for the vehicle themselves; and as a result, the insurer had not owed them, or their assignees, a duty to defend. (*See id.*; *accord Fiduciary Ins. Co. of Am. v Medical Diagnostic Servs., P.C.*, 150 AD3d 498, 498-499 [1st Dept 2017] [same].)

It would appear to follow straightforwardly, therefore, that the Crystal Entities are entitled to attorney fees. Utica claims, however, that the answer is not so simple. As noted at the outset of this decision, Utica did not, and does not, dispute its duty to defend the Crystal Entities in the underlying action. Utica argues that in this unusual scenario, the Crystal Entities' fee request falls outside the scope of the holding of the Court of Appeals's decision in *City Club Hotel* and its forerunner precedents. That is, Utica contends, "[w]hen it is only the duty to indemnify that an insurer has placed at issue," not also the duty to *defend*, a prevailing "policyholder is not entitled to attorney fees." (NYSCEF No. 44 at 17 [emphasis added].)

The parties do not cite, and this court has not found, *any* decision of the Court of Appeals or the Appellate Division discussing whether a prevailing policyholder is entitled to attorney fees when the insurer has acknowledged a duty to defend but contested the duty to indemnify.[7] At most, in *Public Service Mutual Insurance Co. v Jefferson Towers, Inc.* (186 AD2d 10, 11 [1st Dept 1992]), the First Department held that the insured was entitled to attorney fees, after the insurer had paid defense costs in the underlying action but challenged, unsuccessfully, its obligation to pay the judgment rendered against the insured in that action. (*See Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co.*, 195 AD2d 311, 312 [1st Dept 1993] [discussing the background of the Court's decision on the prior appeal].) But the *Jefferson Towers* Court did not consider whether the insurer's duty-to-defend/duty-to-indemnify split in that case should affect the insurer's obligation to pay the insured's attorney fees. Nor can one tell from the decision whether the insurer even raised an argument on that point.[8] (*See Jefferson Towers*, 186 AD2d at 11.)

Absent binding appellate precedent considering the question, this court concludes for itself that a policyholder is entitled to attorney fees when it prevails in the defense of an action brought by an insurer to challenge only the insurer's duty to indemnify. New York doctrine in this area rests on the insurer's duty to defend its insured in "*any action arising out of the occurrence*, including a defense against an insurer's declaratory-judgment action." (*City Club Hotel*, 3 NY3d at 598 [emphasis added].) This is true when an insurer contests both the duty to

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[7] The Court of Appeals and Appellate Division decisions cited by the Crystal Entities each involve circumstances in which the duty to defend was contested by the insurer. (*See* NYSCEF No. 17 at 21-22 [collecting cases]; NYSCEF No. 54 at 29-30 [same].)

Utica cites the Appellate Division decisions in *Insurance Co. of Greater N.Y. v Clermont Armory, LLC* (84 AD3d 1168, 1170-1171 [2d Dept 2011]) and *Medical Diagnostic Services* (150 AD3d at 498-499). (*See* NYSCEF No. 44 at 17.) But in those cases, the Appellate Division denied fees because the insurers in those cases *did not owe* a duty to defend in the first place (thereby obviating any defense-based obligation to pay fees)—not because the insurers had conceded the duty to defend and disputed only the duty to indemnify, as Utica has done here. (*See Clermont Armory*, 84 AD3d at 1171; *Medical Diagnostic Servs.*, 150 AD3d at 499.)

[8] In *Reliance Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (262 AD2d 64 [1st Dept 1999]), the First Department held that an insurer that had unsuccessfully challenged its obligation to pay the costs of a settlement in the underlying action, but not sought reimbursement of defense costs, was required to pay its insured's attorney fees in the coverage action. But it is not clear from that decision whether or not that insurer had conceded its duty to defend. Nor, in any event, did the Court discuss the particular question presented here.

defend and to indemnify. (*See id.*) No logical reason exists why it should be different—why an insurer's duty to defend its insured should suddenly cease—when the insurer disputes only the duty to indemnify. And the Court of Appeals's holdings in this area have always been phrased in broad terms that would encompass an insurer's indemnification-only challenge: They permit recovery by the insured that prevails against "the legal steps an insurer takes in an effort to free itself *from its policy obligations*," period—not merely the insurer's policy obligation to defend. (*Id.* at 597 [emphasis added].)

B. Utica's Counter-Arguments

In arguing otherwise, Utica relies on decisions of the U.S. Court of Appeals for the Second Circuit. Those decisions hold, Utica says, that "if the insurer has not placed the duty to defend at issue, the insurer need not reimburse the policyholder's attorney's fees, even if the policyholder is successful." (NYSCEF No. 44 at 17, citing *New York Marine & Gen Ins. Co. v Lafarge N. Am.*, 599 F3d 102 [2d Cir 2010]; *Liberty Surplus Ins. Co. v Segal Corp.*, 420 F3d 65 [2d Cir 2005]; *see Employers Mut. Cas. Co. v Key Pharmaceuticals*, 75 F3d 815, 824 [2d Cir 1996]).) This court concludes, though, that these Second Circuit decisions misapprehend the governing precedents in this area of the Court of Appeals and the Appellate Division.

In *Key Pharmaceuticals*, the Second Circuit's holding rested on its reading of the First Department's decision in *Aetna Casualty & Surety Co. v Dawson* (84 AD2d 708, 709 [1st Dept 1981]), in which the First Department declined to require the insurer to pay attorney fees. The *Key Pharmaceuticals* court understood *Dawson* to hold that the a "fundamental" reason for its decision "was that the insurer's duty to defend was not at issue" in the case. (75 F3d at 824.) Thus, the Second Circuit concluded, the New York doctrine "does no more than carve out a narrow exception to the general rule that litigation costs are not recoverable by a winning litigant" that arises only "when a policyholder has been cast in a defensive posture by its insurer in a dispute over the insurer's duty to defend," in particular. (*Id.*, citing *Mighty Midgets Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979].) But *Dawson* did not rest its holding on the absence of a dispute between insurer and insured over the duty to defend. It held, instead, that in the particular context of the parties' dispute (which rested on the uninsured-motorist endorsement to an automotive insurance policy), the parties seeking attorney fees were not *owed* a duty to defend by the insurer. (84 AD2d 708, 709.) Instead, "[w]hat is essentially in dispute here is a *contract* claim," not an insurance claim invoking an insurer's duty to defend. (*Id.* [emphasis added].) No duty to defend, no defense-based obligation to pay attorney fees incurred in the coverage action.

In *Segal*, the Second Circuit declined to revisit its decision in *Key Pharmaceuticals*. The *Segal* court stated that although the New York Court of Appeals had described its doctrine in "broad language" that permitted an insured to recover fees whenever it is defending an insurer's "'effort to free itself from its policy obligations,'" *Key Pharmaceuticals* had instead glossed the doctrine as applying only when the insured "has been cast in a defensive posture by its insurer in a dispute over the insurer's duty to defend." (*Segal*, 420 F3d at 67, quoting *Mighty Midgets*, 47 NY2d at 21 [internal quotation marks and emphasis omitted].) The insured in *Segal* argued that the Court of Appeals's decision in *City Club Hotel* had undermined the holding of *Key Pharmaceuticals*, because the insurer's declaratory-judgment claims in *City Club Hotel*

contested the duty to indemnify. (*Segal*, 420 F3d at 68.) The Second Circuit rejected this argument. Because *City Club Hotel* clearly involved a dispute over both the duty to defend *and* the duty to indemnify, the award of fees to the insured in that case did not call into question the ruling in *Key Pharmaceuticals*. (*See id.*)

Curiously, the *Segal* Court recognized that the rationale of *Mighty Midgets* and *City Club Hotel* "is that an insurer with a duty to defend must provide a defense (or reimburse the insured's litigation expenses) for *any* action arising out of the claim or occurrence that triggers the duty to defend, including an action brought by the insurer itself." (*Id.* at 69 [emphasis added].) But *Segal* refused to accept that "any action" means "any action"—that the duty to defend, where one exists, is triggered even when the insurer's action against the insured challenges only the duty to indemnify. This refusal may have stemmed from the concern expressed by the Second Circuit in *Segal* that ruling that "attorneys' fees are due whenever an insurer brings suit to disclaim the duty to indemnify, or whenever an excess insurance policy incorporates a primary policy with a duty to defend," would "dramatically expand" the "*Mighty Midgets* exception to the point that it swallows the rule." (*Id.* at 70.) But the solution to that problem would be for courts to consider carefully, before awarding fees, whether an insurer bringing the unsuccessful coverage action has a duty to defend its insured in the particular circumstances of the case.[9] It is not to hold instead, as the Second Circuit has done, that where a duty to defend *does* exist, an insurer need not pay fees if it has unsuccessfully challenged only the duty to indemnify.

Finally, in *Lafarge North America*, the Second Circuit simply applied its holdings in *Key Pharmaceuticals* and *Segal*, without considering those holdings fresh. (*See* 599 F3d at 128.) The objections raised to those two prior decisions thus apply equally to *Lafarge North America*.

In short, this court is not persuaded by the Second Circuit decisions applying New York law on which Utica relies, and declines to follow them here.

Accordingly, it is

ORDERED that the branch of the Crystal Entities' motion seeking dismissal of the complaint is granted, and the action is dismissed, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Utica's cross-motion for partial summary judgment is denied; and it is further

ORDERED that the branch of the Crystal Entities' motion seeking an award of its reasonable attorney fees incurred in defending this action is granted; and it is further

[9] Indeed, the Second Circuit undertook that precise inquiry in *Segal*, as an alternative basis for its holding. (*See* 420 F3d at 68-70.) But the *Segal* court did not then draw the relevant connections between that inquiry and the court's concerns about how to limit meaningfully the scope of the "*Mighty Midgets* exception" to the American rule on attorney fees. (*See id.* at 70.)

ORDERED that the Crystal Entities may enter a supplemental judgment for the amount of their reasonable attorney fees, with the amount of those fees to be determined by motion made on notice; and it is further

ORDERED that the Crystal Entities serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

11/27/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

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