STATE OF NEW YORK
SUPREME COURT : COUNTY OF ORLEANS

LYNDONVILLE CENTRAL SCHOOL DISTRICT and LYNDONVILLE ELEMENTARY SCHOOL,

Plaintiffs,

vs.

UTICA MUTUAL INSURANCE COMPANY, GRAPHIC ARTS MUTUAL INSURANCE COMPANY, UTICA NATIONAL ASSURANCE COMPANY, AB 511 DOE, and AB 524 DOE

Defendants.

ATTORNEY AFFIRMATION

Index No.: E23-01101

The undersigned, Leah Costanzo, Esq., an attorney at law, affirms the following statements are true, under the penalties of perjury:

1. That I am an attorney at law with the law offices of Steve Boyd, P.C., attorneys for defendants AB 511 Doe and AB 524 Doe.

2. That I am familiar with the facts herein. This affirmation is being submitted on behalf of defendants, AB 511 Doe and AB 524 Doe, containing information which is believed to be true. Information not based upon personal knowledge is based upon matters believed to be true following telephone conversations, an investigation and review of correspondence and pleadings.

3. This Affirmation is respectfully submitted in support of defendants AB 511 Doe's and AB 524 Doe's motion to dismiss in lieu of an answer pursuant to New York Insurance Law §3420 and for premature filing, or in the alternative, an order staying the action.

PROCEDURAL BACKGROUND

4. The instant litigation and the underlying tort actions (Orleans County Index No. 20-46602 and Orleans County Index No. 21-47386) which are the basis of plaintiffs' declaratory judgment action involve claims brought under the Child Victims Act for sexual abuse of a minor by an employee of the Lyndonville Central School District. AB 511 Doe and AB 524 Doe both allege that defendants, Lyndonville Central School District and Lyndonville Elementary School ("District"), were negligent in the hiring, training and supervision, and retention of their employees and breached a statutory duty to report child sexual abuse.

5. On July 9, 2020, your affirmant commenced an action in Orleans County Supreme Court on behalf of AB 511 Doe as a plaintiff against defendant District. (**Exhibit A**).

6. On or about November 20, 2020, Utica National Insurance Group issued a "Declination of Coverage" letter to the District and AB 511 Doe's legal representation. (**Exhibit B**).

7. On January 20, 2020, your affirmant filed a supplemental summons and amended complaint on behalf of AB 511 Doe as a plaintiff against defendant District (**Exhibit C**).

8. On or about February 10, 2021, the District joined issue in AB 511 Doe's underlying Orleans County action through service of an answer. (**Exhibit D**).

9. On June 11, 2021, your affirmant commenced an action in Orleans County Supreme Court on behalf of AB 524 Doe as a plaintiff against defendant District. (**Exhibit E**).

10. On or about July 20, 2021, Utica National Insurance Group issued a "Disclaimer of Coverage" letter to the District and AB 524 Doe's legal representation. (**Exhibit F**).

11. On or about August 4, 2021, the District joined issue in AB 524 Doe's underlying Orleans County action through service of an answer. (**Exhibit G**).

12. On October 12, 2023, the District commenced a declaratory judgment action against Utica Mutual Insurance Company, Graphic Arts Mutual Insurance Company, Utica National Assurance Company (collectively, "Utica"), AB 511 Doe and AB 524 Doe in Orleans County Supreme Court. (NYSCEF Doc. No. 1).

13. Counsel for the District emailed a copy of their complaint to plaintiffs' counsel in the underlying actions and asked if affirmant would accept service on behalf of AB 511 Doe and AB 524 Doe. On October 12, 2023, affirmant agreed to accept service by email as of that date (**Exhibit H**). This motion is therefore timely.

ARGUMENT

MOTION TO DISMISS FOR PREMATURE FILING

14. Dismissal is appropriate where a defense is founded upon documentary evidence. CPLR § 3211(a)(1).

15. The District acknowledges that Utica's letters dated November 20, 2020 in AB 511 Doe's matter (Ex. B) and dated July 19, 2021 in AB 524 Doe's action (Ex. F) constitute the only coverage position letters issued by Utica (NYSCEF Doc. No. 1, ¶119, 122).

16. It is undisputed that Utica has never amended the coverage position set forth in these letters (NYSCEF Doc. No. 1, ¶60, 100).

17. While these documents are labeled "Declination of Coverage" (Ex. B) and "Disclaimer of Coverage" (Ex. F), the District acknowledges in its complaint, these letters are, in relevant part, actually reservation of rights letters in that they acknowledge that coverage may

apply and agree to provide a defense conditioned on further investigation (NYSCEF Doc. No. 1, ¶53, 54, 98, 99, 102, 106). See also, Ex. A, p. 2; Ex. F, pp. 5, 6.

18. It is well-established that a disclaimer must be unequivocal and unambiguous. QBE Ins. Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105, 1108-1109 (2014). This Court can determine on the documentary evidence submitted (the letters themselves) that these are reservation of rights letters, not disclaimers of coverage. A reservation of rights letter is not a disclaimer of coverage and cannot stand in its place. New York Cent. Mut. Fire Ins. Co. v. Hildreth, 40 A.D.3d 602 (2d Dept. 2007).

19. Because Utica has never issued a disclaimer of coverage and cannot rely on the reservation of rights letters in place of an unequivocal, unambiguous disclaimer of coverage, the District's motion is premature as no disclaimer has occurred.

20. To the extent Utica may now be seeking to deny coverage and no longer provide a defense as alleged in the complaint, Utica may not do so without issuing a proper disclaimer. Until such a disclaimer is issued, there is no basis for the District's action, Utica is required to continue providing a defense, and the District's complaint is premature.

21. With respect to the second basis for dismissal of the complaint as premature, your affirmant agrees with the District that having delayed for years since the issuance of its initial letters while purportedly conducting an investigation, Utica's delay renders any disclaimer unreasonable (NYSCEF Doc. No. 1, ¶128). See W. 16th St. Tenants Corp. v. Pub. Serv. Mut. Ins. Co., 290 A.D.2d 278 (1st Dept. 2002) (holding insurer's 30-day delay in disclaiming coverage was unreasonable as a matter of law pursuant to N.Y. Ins. Law §3420(d)); First Fin. Ins. Co., *supra* (holding a 48 day delay in disclaiming unreasonable); Utica Fire Ins. Co. v. Spagnolo, 221 A.D.2d 921 (4th Dept. 1995) (holding disclaimers of coverage made more than 2

months after an insurer possessed all facts necessary to invoke exclusion was untimely as a matter of law).

22. To the extent the District's complaint seeks a judicial determination regarding underlying issues of its knowledge, notice and foreseeability related to the abuse of AB 511 Doe and AB 524 Doe (NYSCEF Doc. No. 1, ¶31, 54, 63, 79, 82), declaratory judgment actions are not to be utilized as advisory opinions in advance of trial of the underlying action where these issues are more appropriately to be determined.

23. It is well-settled that a declaratory judgment action concerning a carrier's obligation to indemnify may not be granted in advance of the trial in the underlying tort action unless it can be concluded as a matter of law that there is no possible factual or legal basis for the insurer to be held liable. Where a potential legal or factual basis for liability exists, a declaratory judgment action must be dismissed. First State Ins. Co. v. J&S United Amusement Corp., 67 N.Y.2d 1044, 1046 (1986) (holding that it is well established that a declaratory judgment action should not be an advisory opinion, and that such relief is deemed premature in cases where a final determination on the underlying theories of liability has not been made).

24. As a result, the District's complaint should be dismissed on the basis of the attached documentary evidence which establishes that Utica has not disclaimed coverage, and on the basis that it cannot be determined that there is a possible factual or legal basis on which the insurer may eventually be held liable under its policy in advance of a trial in the underlying actions.

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