

Slip Copy, 2014 WL 1330932 (E.D.N.Y.)
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United States District Court,
 E.D. New York.
 RP FAMILY, INC., Plaintiff
 v.
 COMMONWEALTH LAND TITLE INSURANCE
 COMPANY, a division of Fidelity National Title
 Group, Inc., Defendants.
 Commonwealth Land Title Insurance Company, a
 division of Fidelity National Title Group, Inc.,
 Third-Party Plaintiff,
 v.
 Pacific Title, Inc., Warren Sussman, James Samuel,
 263 Edge Grove, LLC, Vito Grippo, Joseph V.
 Romanelli, John Peerless, Jandever LLC, Vanick
 Holdings Corp., Vanick Property Management,
 LLC, Vanick Equities, LLC, and John Doe d/b/a
 Morgan Financial, Third-Party Defendants.
 Warren Sussman and Pacific Title, Fourth-Party
 Plaintiffs,
 v.
 Executive Settlement Services, Ltd., Executive Set-
 tlement Services I LLC, Executive Settlement Ser-
 vices LLC, and David Cemma, Fourth-Party
 Defendants.
 No. 10-CV-1149 (DLI)(CLP).
 Signed March 31, 2014.
 Filed April 1, 2014.

[Scott Evan Agulnick](#), Greenblatt & Agulnick P.C.,
 Great Neck, NY, for Plaintiff.

[Claudia L. Grossman Jaffe](#), [David K. Fiveson](#), But-
 ler, Fitzgerald, Fiveson & McCarthy A Professional
 Corporation, New York, NY, for Defendants/
 Third-Party Plaintiff.

[Ronald W. Weiner](#), Steinberg & Cavaliere, LLP,
 White Plains, NY, for Third-Party Defendants/
 Fourth-Party Plaintiffs.

[Wojtek Scott Krol](#), Busson Sikorski, New York,

NY, for Fourth-Party Defendants.

MEMORANDUM AND ORDER

[DORA L. IRIZARRY](#), District Judge.

*1 RP Family, Inc. (“Plaintiff” or “RP Fam-
 ily”) brought this action against Commonwealth
 Land Title Insurance Company (“Defendant” or
 “Commonwealth”), claiming breach of contract and
 other state law claims arising out of Defendant’s al-
 leged failure to satisfy its obligations under
 Plaintiff’s title insurance policy. Commonwealth
 brought a third-party complaint against Pacific
 Title, Inc. (“Pacific”), Warren Sussman
 (“Sussman”), and others, seeking indemnification.
 Plaintiff RP Family moves for summary judgment
 against Commonwealth, pursuant to [Rule 56 of the
 Federal Rules of Civil Procedure](#). Defendant Com-
 monwealth crossmoves for summary judgment,
 seeking dismissal of RP Family’s claims against it.
 Third-party Defendants Pacific and Sussman also
 seek summary judgment dismissing Common-
 wealth’s claim for indemnification. For the reasons
 set forth below, each motion is denied in its en-
 tirety.

BACKGROUND

I. Local Rule 56.1

Pursuant to [Local Civil Rule 56.1\(a\)](#), all parties
 included in their motions for summary judgment “a
 separate, short and concise statement, in numbered
 paragraphs, of the material facts as to which the
 moving party contends there is no genuine issue to
 be tried.” However, RP Family’s response to Com-
 monwealth’s motion fails to comply with Local
 Rule 56.1(b), which requires that papers opposing a
 motion for summary judgment include a
 “correspondingly numbered paragraph responding
 to each numbered paragraph in the statement of the
 moving party...” RP Family disregarded this re-
 quirement entirely and provided no counterstate-
 ment of facts in response to Commonwealth’s mo-
 tion. Therefore, the Court deems “[e]ach numbered
 paragraph in the statement of material facts set

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forth in [Commonwealth's 56.1] statement ... admitted for purposes of the motion." Local Rule 56.1(c).

Nevertheless, the Court "does not blindly accept [Commonwealth's] 56.1 Statement at face value, as allegations are not deemed true simply by virtue of their assertion in the Local Rule 56.1 statement." *Suares v. Cityscape Tours, Inc.*, 2014 WL 969661, at *2 (S.D.N.Y. Mar.12, 2014) (quoting *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir.2001)). The Court has disregarded any allegations in each parties' 56.1 Statement that are actually legal conclusions, allegations that are not accompanied by citation to admissible evidence, and allegations that are not supported by the cited evidence. See *Great Am. E & S Ins. Co. v. Hartford Fire Ins. Co.*, 2012 WL 3186086, at *9 (S.D.N.Y. Aug.3, 2012), as amended (Aug. 9, 2012); *F.T.C. v. Med. Billers Network, Inc.*, 543 F.Supp.2d 283, 302 (S.D.N.Y.2008). The facts as summarized below are undisputed except where otherwise noted.

II. Factual Background

In early September 2008, Dariusz Mruczynski ("Mruczynski") entered the office of World Wide Alliance, a marketing company located in Staten Island, where he met Paul Sukholinskiy ("Sukholinskiy"), who worked at the company, and William Martin ("Martin"), who happened to be in the office. (Commonwealth's 56.1 Stmtnt ¶¶ 43, 45, Doc. Entry No. 141; Fiveson Aff., Ex. A at 10, 16, Doc. Entry No. 137-1.) Sukholinskiy and Mruczynski had never met before. (*Id.* ¶ 44.) Mruczynski told Sukholinskiy and Martin that he wanted to refinance a residential property located at 263 Edgegrove Avenue, Staten Island, New York (the "Property") in order to raise money to finish construction on a house he was building in Pennsylvania and to avoid foreclosure of another property he owned in Pennsylvania. (*Id.* ¶¶ 6, 43, 46-48.) Mruczynski stated that he needed to raise \$200,000 to \$300,000. (*Id.* ¶¶ 47.)

*2 On September 17, 2008, Sukholinskiy ordered an appraisal of the Property, which indic-

ated that it was worth \$725,000. (*Id.* ¶¶ 29, 50-51.) On September 24, 2008, RP Family was incorporated under the laws of the state of New Jersey by Sukholinskiy and Leslie Benita Martin ("Leslie Martin"), William Martin's mother. (*Id.* ¶¶ 1-3, 4, 52-53.) Sukholinskiy and Leslie Martin owned 5% and 95% of RP Family, respectively. (*Id.* ¶¶ 3, 5, 53.) RP Family's shareholder agreement is identical to the shareholder agreement used by Bielsko, a company owned by Mruczynski. (*Id.* ¶¶ 54.)

In November 2008, Sukholinskiy, Martin, and Mruczynski held a second meeting. (*Id.* ¶ 55.) At this meeting, Mruczynski offered to sell the Property for \$250,000. (*Id.*) Sukholinskiy contacted Trustar Funding, LLC ("Trustar"), a hard money lender, to obtain financing to purchase the Property from Mruczynski. (*Id.* ¶ 57.) Trustar denied RP Family's application for a \$250,000 loan, but offered to lend RP Family \$100,000 plus closing costs. (*Id.* ¶ 59.) Mruczynski then agreed to lower the sale price of the Property to \$100,000, despite the Property's \$725,000 appraisal value. (*Id.* ¶ 60-62.) Sukholinskiy testified that Mruczynski represented that he could not seek financing from a commercial bank because he had poor credit and needed money quickly. (*Id.* ¶¶ 48, 58.)

On December 8, 2008, RP Family signed a contract with Mruczynski's company, Bielsko, in which RP Family agreed to purchase the Property from Bielsko for \$100,100 with a down payment of \$100. (*Id.* ¶ 6, 63; RP Family's 56.1 Stmtnt ¶¶ 43, 45 Doc. Entry No. 146.) The closing date in the contract is listed as December 16, 2008. (Commonwealth's 56.1 Stmtnt ¶ 64.) In connection with its motion, Commonwealth also provided two partially completed Real Property Transfer Reports: one report lists the date of sale as December 16, 2008 and the sale price as \$100,000; the other report lists the date of sale as December 30, 2008 and the sale price as \$0. (*Id.* ¶ 74; Fiveson Aff., Ex. C, Doc. Entry No. 137-3.)

At some point in December 2008, Trustar employee Brian Stark ("Stark") requested that Suss-

man act as Trustar's closing attorney in connection with RP Family's purchase of the Property, which Sussman understood was scheduled to close on December 30, 2008. (Sussman's 56.1 Stmtnt ¶¶ 1, 4, Doc. Entry No. 151.) Sussman's company, Pacific, **FN1** had been hired to conduct a title search of the Property, secure the mortgage loan, prepare a title report, and issue a loan title insurance policy to Trustar on behalf of Commonwealth. (*Id.* ¶ 2; Commonwealth's 56.1 Stmtnt ¶¶ 18, 87, 90; RP Family's 56.1 Stmtnt ¶ 5.)

FN1. Commonwealth disputes Sussman's claim that he and Brian Gere ("Gere") are equal shareholders in Pacific. (Sussman's 56.1 Stmtnt ¶ 3; Commonwealth's Resp. 56.1 Stmtnt ¶ 3.)

On December 16, 2008, Bielsko executed a deed conveying the Property to James Samuel ("Samuel"). (Commonwealth's 56.1 Stmtnt ¶¶ 7, 21, 26, 65.) Bielsko sold the Property to Samuel for \$720,000, and Samuel executed a mortgage against the Property in the amount of \$432,000 (the "Samuel Mortgage"). (*Id.* ¶¶ 27, 65.) An agent of Commonwealth issued a title insurance policy to Samuel. (RP Family's 56.1 Stmtnt ¶ 8.) Although the HUD-1 Statement signed by Samuel indicated that Samuel paid \$318,172.36, Samuel testified that he did not contribute any money towards the purchase price other than the amount borrowed. (Commonwealth's 56.1 Stmtnt ¶¶ 69-70.) Samuel also admitted that he falsely stated on his loan application that he would reside in the Property following the closing. (*Id.* ¶ 71.) Samuel understood that he would be paid \$20,000 at closing and that the mortgage would be repaid by Vito Grippo, who Samuel testified "orchestrated the deal." (*Id.* ¶ 72; Fiveson Aff., Ex. J at 40, Doc. Entry No. 137-10.)

*3 The closing of the sale of the Property from Bielsko to RP Family took place on December 30, 2008 at Pacific's office in Brooklyn, New York. (Commonwealth's 56.1 Stmtnt ¶¶ 30, 84, 91.) In attendance were: Mruczunski; Bielko's attorney, Boris Nikham; Leslie Martin; RP Family's attorney,

David Reich; Gere, representing Pacific; and Sussman. (Sussman's 56.1 Stmtnt ¶ 13.)

On the day of the closing, Sussman received a letter addressed to Pacific via email from Lance P. Vanzant ("Vanzant") containing escrow instructions from Emerald Isle Lending Company ("Emerald") (the "Vanzant Letter"). (Sussman's 56.1 Stmtnt ¶¶ 5-6.) According to the Vanzant Letter, loan funds of approximately \$115,000 would be wired into Sussman's attorney trust account once Pacific was "unconditionally and irrevocably committed" to issue a title insurance policy to Emerald. (*Id.* ¶¶ 7, 9.) The Vanzant Letter also indicated that Trustar would assign its interest in the RP Family mortgage loan to Emerald. (*Id.* ¶ 8.) Until he received the Vanzant Letter, Sussman was unaware of any involvement by Emerald in the transaction between Bielsko and RP Family. (*Id.* ¶ 10.) Sussman signed and returned the Vanzant Letter. (*Id.* ¶ 11.)

To fund the purchase, RP Family borrowed \$115,571 from Trustar and Emerald, representing the purchase price of \$100,000 and \$15,571 in closing costs. (Commonwealth's 56.1 Stmtnt ¶¶ 33-34, 76, 89.) In exchange, RP Family gave Trustar a note in the amount of the loan, guaranteed by Leslie Martin (the "Note"). (*Id.* ¶¶ 11-12, 33, 35, 56, 75.) The Note provided that RP Family would make six monthly payments of \$1,444.64, with the remaining principal and interest due on June 30, 2009. (*Id.* ¶ 75.) Based on representations from her son, Leslie Martin understood that she would receive approximately \$200,000 soon after the closing and that she would not have to make any payments on the Note. (*Id.* ¶¶ 81-82.)

Sussman disbursed the loan proceeds and, according to RP Family, assumed the responsibility of making any necessary filings. (Sussman's 56.1 Stmtnt ¶ 15; Commonwealth's 56.1 Stmtnt ¶¶ 18, 87, 90; RP Family's 56.1 Stmtnt ¶ 5.) From the proceeds, \$50,000 was paid to Bielsko, and \$41,425 was paid to Patron Estates, which was owned by Sukholinskiy and Martin. (Commonwealth's 56.1 Stmtnt ¶¶

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19, 38–39, 78, 79.) The payment to Patron Estates was not disclosed on the HUD–1 Statement signed by RP Family and Bielsko. (*Id.* ¶¶ 37, 40, 77, 80.) Gere delivered the RP Family deed and mortgage to Executive Settlement Services (“Executive”), a company that recorded instruments for Pacific. (*Id.* ¶¶ 24, 86, 88, 92–94.)

On the date of the closing, a title search was performed that revealed no recorded encumbrances against Bielsko's interest in the Property. (*Id.* ¶¶ 23, 31.) Pacific, acting as an agent for Commonwealth, issued a title insurance policy insuring RP Family for a fee simple interest in the Property in the amount of \$450,000 (the “Policy”). (*Id.* ¶¶ 14–17, 36; RP Family's 56.1 Stmt ¶¶ 4, 6; Sussman's 56.1 Stmt ¶ 18.) Pacific also issued a title insurance policy insuring Trustar's loan for approximately \$115,000. (Sussman's 56.1 Stmt ¶¶ 16–17.)

*4 On February 13, 2009, the Samuel Mortgage was recorded. (Commonwealth's 56.1 Stmt ¶ 28.) RP Family claims to have first discovered Bielsko's transfer to Samuel on the same date. (RP Family's 56.1 Stmt ¶ 7.) On February 27, 2009, RP Family submitted a claim under the Policy to Commonwealth. (*Id.* ¶ 9; Sussman's 56.1 Stmt ¶ 23.)

On March 4, 2009, Executive sent a fax to Robert Giuffre (“Giuffre”), a title searcher for Richmond County, inquiring whether any mortgages had been recorded against the Property in 2009. (Commonwealth's 56.1 Stmt ¶ 95.) On the same date, Giuffre sent a reply to Executive by fax, indicating that the Samuel mortgage had been recorded in February 2009. (*Id.* ¶ 96.) On March 5, 2009, the RP Family deed was recorded. (*Id.* ¶ 41; Fiveson Aff., Ex. EE, Doc. Entry No. 140–5.) On March 12, 2009, Giuffre faxed to Executive a cover page for the recorded RP Family deed. (Commonwealth's 56.1 Stmt ¶ 97.) Sussman claims that he did not learn of Bielsko's sale to Samuel until March 2009. (Sussman's 56.1 Stmt ¶¶ 21–22.)

By letter dated May 26, 2009, Commonwealth

indicated that RP Family's claim was covered under the Policy and that Commonwealth was continuing its investigation of the claim and possible remedies. (RP Family's 56.1 Stmt ¶ 10.) Commonwealth retained counsel to investigate RP Family's claim and ordered a professional appraisal of the Property. (*Id.* ¶¶ 11, 14, 17.) On July 28, 2009, Trustar and Emerald initiated a lawsuit against RP Family and others in the United States District Court for the Eastern District of Ohio (the “Trustar action”). (*Id.* ¶ 18.) When RP Family sought defense and indemnification, Commonwealth hired counsel to represent RP Family, but did not provide counsel for Sukholinskiy and Leslie Martin individually. (*Id.* ¶ 19.) On March 12, 2010, Plaintiff RP Family commenced the instant action, seeking, *inter alia*, defense and indemnification of Sukholinskiy and Leslie Martin in connection with the Trustar action, as well as payment under the Policy. (*See* RP Family's Compl., Doc. Entry No. 1.)

On May 21, 2010, Commonwealth disclaimed coverage, as well as any obligation to defend or indemnify RP Family or its principals, on the basis that RP Family's claim was barred by certain exclusions in the Policy. (Commonwealth's 56.1 Stmt ¶ 42; RP Family's 56.1 Stmt ¶¶ 919, 24.) Specifically, paragraph 3 of the Policy excludes from coverage any losses that “arise by reason of: Defects, liens, encumbrances, adverse claims, or other matters: (a) created, suffered, assumed, or agreed to by the Insured Claimant; [or] (b) not known to the Company, not recorded in the Public Records at Date of the Policy, but known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy.” (Commonwealth's 56.1 Stmt ¶ 42.)

*5 On March 1, 2011, Commonwealth filed its second amended third-party complaint against Pacific, Sussman, and others, seeking indemnification for any judgment arising out of RP Family's claims. (*See* Commonwealth's Compl., Doc. Entry No. 46.) On May 24, 2013, RP Family moved for summary

judgment against Commonwealth, seeking monetary damages as well as a declaratory judgment stating that Commonwealth is obligated to defend^{FN2} and indemnify Sukholinsky and Martin in connection with the Trustar action. On the same date, Commonwealth cross-moved for summary judgment, seeking to dismiss RP Family's claims against it. Pacific and Sussman also moved for summary judgment, seeking to dismiss Commonwealth's claims against them.

FN2. Since the parties' submissions fail to address adequately Commonwealth's alleged obligation to defend RP Family or its principals in the Trustar action, the Court will permit further briefing as to this issue only.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed.R.Civ.P. 56(a)*. “In ruling on a summary judgment motion, the district court must resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment and determine whether there is a genuine dispute as to a material fact, raising an issue for trial.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir.2007) (internal quotations omitted).

A fact is “material” within the meaning of *Rule 56* when its resolution “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is “genuine” when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* To determine whether an issue is genuine, “[t]he inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion.” *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir.1995) (citing

United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam) and *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir.1989)). “[T]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

However, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

The moving party bears the burden of “informing the district court of the basis for its motion, and identifying those portions of [the record] ... which it believes demonstrates the absence of a genuine issue of fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotations omitted). Once the moving party has met its burden, “the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’ ” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (emphasis omitted). The nonmoving party must offer “concrete evidence from which a reasonable juror could return a verdict in [its] favor.” *Anderson*, 477 U.S. at 256. The nonmoving party may not “rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the nonmoving party's pleading.” *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532–33 (2d Cir.1993) (citations and internal quotations omitted). “Summary judgment is appropriate only ‘[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.’ ” *Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 141 (2d Cir.2012) (quoting *Matsushita*, 475 U.S. at 587).

II. Commonwealth's Motion

*6 Commonwealth moves for summary judgment dismissing RP Family's claims against it on the grounds that: 1) RP Family obtained the Policy through fraud, and 2) RP Family's claim under the Policy is precluded by exclusions from coverage because the title defect was created by or known to RP Family. Commonwealth argues that "the evidence unmistakably demonstrates [that] RP Family acted in concert with Mruczynski and Bielsko to defraud," and "therefore knew of the defect in title and/or assumed the title defect as of the December 30, 2008 transfer." (Fiveson Aff. ¶ 2.)

Specifically, Commonwealth contends that it has established that the December 30, 2008 transaction between RP Family and Bielsko was fraudulent because the evidence shows that: 1) Bielsko and RP Family's principals divided the proceeds of the sale; 2) Bielsko and RP Family signed a HUD-1 Statement containing false information; 3) Bielsko sold the Property for \$100,000 despite its \$725,000 appraisal value; 4) Bielsko and RP Family used identical shareholder agreements; 5) Bielsko sold the Property to Samuel on December 16, 2008, despite having signed a Real Property Transfer Report with Leslie Martin listing the date of transfer to RP Family as December 16, 2008; 6) Leslie Martin believed she was not obligated to make any payments on the Note, despite having guaranteed the Note; and 7) Bielsko continued to possess the Property after both sales.^{FN3} (Memorandum of Law in Support of Commonwealth's Motion for Summary Judgment Dismissing the Claims of RP Family ("Commonwealth's Mem.") at 7-8, Doc. Entry No. 142.)

^{FN3}. Although Commonwealth asserted in its 56.1 Statement that Bielsko remained in exclusive possession of the Property after the December 30, 2008 sale, Commonwealth did not cite any evidence in support of this contention. (Commonwealth's 56.1 Stmt ¶ 83.) Accordingly, this assertion has been disregarded by the Court.

Although Plaintiff's opposition to Defendant's

motion is largely unhelpful,^{FN4} the Court finds that Commonwealth has failed to establish that there is no genuine dispute as to any material fact such that no rational trier of fact could find for RP Family. Commonwealth urges the Court to conclude, based on the evidence presented in its 56.1 Statement, that RP Family knowingly participated in a fraud with Bielsko or was aware of the title defect created by Bielsko's transfer of the Property to Samuel. While the evidence cited by Commonwealth could support an inference that RP Family's transaction with Bielsko was not made at arms' length, such an inference is not required. The ambiguity of the evidence in the record, which reflects potentially innocuous explanations for RP Family's activities, precludes disposition of this case through summary judgment.

^{FN4}. As noted above, Plaintiff did not submit a counterstatement of facts as required by Local Rule 56.1. Moreover, Plaintiff's opposition papers focus on largely irrelevant and sometimes incorrect assertions. For example, Plaintiff contends, citing one thirty-four-year-old district court case, that Defendant cannot meet its burden of showing that there are no genuine issues of material fact without submitting affidavits. Plaintiff's argument clearly contradicts [Federal Rule of Civil Procedure 56](#), which provides that a motion for summary judgment may be granted based on evidence in the form of "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." [Fed.R.Civ.P. 56](#). Affidavits are just one type of evidence, among several others, that may be considered in connection with the instant motion.

Accordingly, Defendant's motion is denied.

III. RP Family's Motion

RP Family moves for summary judgment

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against Commonwealth on the basis that: 1) Commonwealth has failed to meet its burden of showing that Plaintiff's claim is excluded from coverage under the Policy, and 2) Commonwealth is equitably estopped from denying Plaintiff's claim. (Plaintiff RP Family, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment ("RP Family's Mem.") at 21, Doc. Entry No. 146.)

A. Policy Exclusion

*7 Commonwealth bears the burden of showing that an exclusion in the Policy applies to exempt RP Family's claim from coverage. *MBA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 158 (2d Cir.2011) (citing *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 276 (2d Cir.2000)) (finding that "[t]he insured bears the burden of showing that an insurance coverage covers the loss, but the insurer bears the burden of showing that an exclusion applies to exempt it from covering a claim.") "In order to 'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case and that its interpretation of the exclusion is the only construction that could fairly be placed thereon.'" *Aquatectonics, Inc. v. Hartford Cas. Ins. Co.*, 2012 WL 1020313, at *5 (E.D.N.Y. Mar.26, 2012) (quoting *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir.2006)).

RP Family contends that Commonwealth has failed to show that the exclusions provided by Paragraph 3 of the Policy apply in this case. According to RP Family, Commonwealth's assertions regarding RP Family's conduct are "nothing short of a fictitious conspiracy theory." (RP Family's Mem. at 10.) In particular, RP Family argues at length that the lack of evidence showing that it was responsible for recording the RP Family deed and mortgage precludes a finding that RP Family was aware of or participated in the alleged fraud. (*Id.* at 12–16.) RP Family also argues that Samuel and RP Family would not have sought title policies from the same

insurance provider if the parties intended to commit a fraud. (*Id.* at 19.)

Notwithstanding RP Family's assertions, this case is replete with factual disputes and issues of credibility that must be decided by the trier of fact. See *Eurospark Indus., Inc. v. Underwriters at Lloyds Subscribing to Risk on Cover No. 97FA0071010A*, 567 F.Supp.2d 345, 353 (E.D.N.Y.2008). As the Court found in connection with Commonwealth's motion, the admissible evidence in the record does not clearly demonstrate whether RP Family's transaction with Bielsko was made at arms' length or whether RP Family was aware of the title defect when the Policy was issued. Indeed, the parties' inartfully drafted submissions reflect little more than a fundamental disagreement as to the inferences to be drawn from the ambiguous evidence on record.

Accordingly, the Court finds that RP Family has failed to meet its burden, as the moving party, to show that no reasonable trier of fact could find that an exclusion in the Policy applies to exempt RP Family's claim from coverage.

B. Equitable Estoppel

RP Family also contends that Commonwealth is equitably estopped from denying its claim under the Policy because Commonwealth previously admitted that RP Family's claim was covered by the Policy in its May 26, 2009 letter. (RP Family's Mem. at 21.) RP Family argues that Commonwealth failed to reserve its right to assert defenses to coverage. (*Id.* at 22.) Although Defendant Commonwealth failed to address this argument in its opposition to Plaintiff's motion, the Court finds RP Family's equitable estoppel argument to be without merit. See *Intelligent Digital Sys., LLC v. Beazley Ins. Co., Inc.*, 906 F.Supp.2d 80, 95 (E.D.N.Y.2012), *reconsideration denied*, 962 F.Supp.2d 451 (E.D.N.Y.2013) (finding that "[e]stoppel is usually a question of fact inappropriate for summary judgment").

*8 "The doctrine of equitable estoppel pre-

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cludes a party at law and in equity from denying or asserting the contrary of any material fact which he has induced another to believe and to act on a particular manner.” *Intelligent Digital*, 906 F.Supp.2d at 94 (quoting *Sterling v. Interlake Indus.*, 154 F.R.D. 579, 585 (E.D.N.Y.1994)). New York law requires that a party claiming equitable estoppel show: 1) an act constituting a concealment of facts or a false misrepresentation; 2) an intention or expectation that such acts will be relied upon; 3) actual or constructive knowledge of the true facts by the wrongdoers; and 4) reliance upon the misrepresentations which causes the innocent party to change its position to its substantial detriment. *Id.* at 94–95 (quoting *General Elec. Capital Corp. v. Eva Armadora, S.A.*, 37 F.3d 41, 45 (2d Cir.1994)). It is not necessary that the misrepresentation be intentional. *Ritchie RiskLinked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 163–64 (S.D.N.Y.2012). “Rather, it is sufficient that the party being estopped knew or had reason to believe that their acts or inaction might prejudice the party asserting the estoppel. Accordingly, even an innocent misleading of another party may estop one from claiming the benefits of his or her deception.” *Id.*

The evidence does not support RP Family's contention that Commonwealth made a false representation. Commonwealth's May 26, 2009 letter (“the Letter”) states that RP Family's claim was covered under a provision of the Policy. (Agulnick Aff., Ex. E, Doc. Entry No. 146.) The letter continues,

As such, Commonwealth is currently investigating all available remedies under the policy, and Commonwealth will take appropriate action in accordance with and pursuant to the terms and conditions of the policy.... Please note that reference to any particular provision of the policy in this letter shall not be construed as a waiver of any other term or provision. Commonwealth retains the right to supplement this letter.

(*Id.*) Commonwealth did not make any repres-

entations as to the final resolution of RP Family's claim under the Policy. Indeed, the Letter indicated that Commonwealth was continuing to investigate and that it retained the right to supplement the letter and to exercise its rights under any other term or provision of the Policy.

Nor has RP Family demonstrated that its position changed to its substantial detriment based on reasonable reliance upon Commonwealth's alleged misrepresentations. RP Family makes only the conclusory assertion that it was “severely prejudiced ... insofar as Plaintiff believed for over [one] year [that it] would be defended in the [Trustar action] and [that its] title claim would be covered.” (RP Family's Mem. at 22.) RP Family does not allege, let alone demonstrate, any detrimental change in position. *See Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 165 (2d Cir.2003) (finding that “equitable estoppel requires, among other things, reliance on misrepresentations causing change of position by innocent party”); *Ritchie*, 280 F.R.D. at 164.

*9 At the very minimum, triable issues of fact exist with respect to RP Family's claim of equitable estoppel. Accordingly, RP Family's motion for summary judgment is denied.

IV. Pacific and Sussman's Motion

Pacific and Sussman move for summary judgment dismissing Commonwealth's claim for indemnification against them on the basis that there is no genuine issue of material fact as to their involvement with the sale of the Property from Bielsko to RP Family. (Memorandum of Law in Support of the Motion for Summary Judgment by Third-Party Defendants Warren Sussman and Pacific Title, Inc. (“Sussman's Mem.”) at 11, Doc. Entry No. 152.) Commonwealth contends that a reasonable trier of fact could find that Sussman and Pacific were involved with the alleged fraud based on evidence showing, *inter alia*, that: 1) Sussman caused a false HUD–1 Statement to be executed at the closing by failing to disclose the alleged payment to Patron Estates; 2) Sussman and Pacific failed to ensure

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that the RP Family deed and mortgage were promptly recorded; and 3) an employee of Executive confirmed that the Samuel deed and mortgage had been recorded before seeking to record the RP Family deed and mortgage. (Commonwealth Land Title Insurance Company's Memorandum of Law in Opposition to the Motion of Pacific Title, Inc. and Warren Sussman for Summary Judgment ("Commonwealth's Mem. in Opp.") at 5–12, Doc. Entry No. 155.)

Under New York law, an obligation to indemnify may be implied "based upon the law's notion of what is fair and proper as between the parties." *DaimlerChrysler Ins. Co. v. Jenneman*, 95 A.D.3d 928, 929, 943 N.Y.S.2d 597 (2d Dep't 2012). Whether a party has a right to indemnification is generally a jury question. *Tokio Marine & Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.*, 465 F.Supp. 790, 794 (S.D.N.Y.1978). Despite third-party defendants' contention that Commonwealth "is unable to identify any fraudulent acts" by Sussman or Pacific in connection with the transaction between Bielsko and RP Family, the Court finds that triable issues of facts exist as to Sussman's and Pacific's knowledge and involvement with the alleged fraud. Drawing all reasonable inferences in the light most favorable to Commonwealth, the non-moving party, there exists sufficient evidence upon which the trier of fact could find that Sussman and Pacific are obligated to indemnify Commonwealth. *See Deem v. Lockheed Corp.*, 1991 WL 196171, at *6 (S.D.N.Y. Sept.25, 1991) ("Given that evidence of fraud is rarely susceptible of direct proof and must ordinarily be established by circumstantial evidence and the legitimate inferences arising therefrom, the lack of other evidence of fraud does not warrant issuance of summary judgment.")

Accordingly, Sussman and Pacific's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, all three motions for summary judgment are denied in their entirety. RP Family and Commonwealth shall submit further

briefing on the issue of Commonwealth's alleged obligation to defend RP Family and its principals in the Trustar action in briefs no longer than ten pages as follows: RP Family shall file its brief on or before April 15, 2014 and Commonwealth shall file its brief on or before April 29, 2014. No further briefing will be permitted. The parties are reminded to provide chambers with hard courtesy copies immediately upon filing.

***10 SO ORDERED.**

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