SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD, Justice — PART 49

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC., THE ANDY WARHOL ART AUTHENTICATION BOARD, INC., VINCENT FREMONT and VINCENT FREMONT ENTERPRISES,

Plaintiffs,

-against-

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

INDEX NO. 650917/2011
MOTION DATE Nov. 21, 2012
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 15 to 55 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	15-39
Answering Affidavits — Exhibits	40
Replying Affidavits	42-55

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that the motion for summary judgment is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 6, 2012

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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DECISION AND ORDER

Index No. 650917/2011

O. PETER SHERWOOD, J.:

Defendant, Philadelphia Indemnity Insurance Company ("PIIC") moves pursuant to CPLR 3212 for summary judgment to dismiss the complaint. For the reasons discussed in this Decision and Order, the motion must be DENIED.

BACKGROUND

Plaintiff, The Andy Warhol Foundation for the Visual Arts, Inc. (the "Foundation"), is a non-profit New York corporation whose primary purpose is to advance the visual arts by making grants to arts organizations. The Foundation is also responsible for advancing and protecting the legacy of the late artist, Andy Warhol. Plaintiff The Andy Warhol Art Authentication Board, Inc. (the "Board") is a non-profit New York corporation, whose primary purpose is to review pieces of artwork submitted to it, and determine whether they were created by Andy Warhol (the Foundation and Board are collectively referred to as "Plaintiffs").

From 2002 to 2003, Plaintiffs purchased the following four insurance policies from PIIC:

- Policy No. PHSD042626 (Directors and Officers Protection Flexi Plus Insurance Policy) ("2002 D&O Policy"). This policy, effective from December 18, 2002 to December 18, 2003, has a $10 million liability limit.
- Policy No. PHSD045136 (Professional Liability for Specified Professions) ("2002 E&O Policy"). This policy, effective from December 18, 2002 to December 18, 2003, has a $2 million liability limit.

- Policy No. PHSD072415 (Flexi Plus Five) ("2003 D&O Policy"). This policy, effective from December 18, 2003 to December 18, 2004, has a $10 million liability limit.
- Policy No. PHSD072477 (Professional Liability for Specified Professions) ("2003 E&O Policy"). This policy, effective from December 18, 2003 to December 18, 2004 has a $2 million liability limit.

Plaintiffs state that they purchased the policies out of fear of litigation that could ensue from owners of artwork that the Board concluded were not created by Andy Warhol.

In 2001, Joe Simon-Whelan ("Simon") requested that the Board examine a painting he believed was created by Andy Warhol. Simon and the Board subsequently entered into a submission agreement whereby the Board agreed to review the painting without charge. On February 7, 2002, the Board issued its determination that Andy Warhol did not create Simon's painting. In January 2003, Simon re-submitted the painting for a second determination and executed a second submission agreement with the Board, dated January 31, 2003. On March 7, 2003, the Board informed Simon that the Board would conduct "further research" prior to issuing an opinion letter, and requested that the painting remain with the Board to be reviewed at the Board's June 9, 2003 meeting. By letter, dated March 17, 2003, Simon's counsel requested permission to appear before the Board at its next meeting. The Board replied that it "does not invite or permit personal presentations by attorneys or their clients on behalf of a work under review." Simon's counsel responded by letter on April 7, 2003, requesting that the Board "(a) identify for us now in writing the specific subject matter respecting which the Board believes 'further research is required' and (b) provide us with an opportunity to present our case to the Board and defend against whatever assertions that have been made or may be made that these Self-Portraits are not authentic."

By letter, dated April 11, 2003, the Board's counsel notified PIIC of a potential claim and attached the April 7, 2003 letter from Simon's counsel. On May 21, 2003, the Board issued an opinion letter, again determining that Simon's painting was not created by Andy Warhol. On April 26, 2004, plaintiffs received a draft complaint and jury demand from Simon, which alleged a conspiracy by the Board. On July 13, 2007, Simon filed a class action complaint against plaintiffs in Southern District of New York on behalf of a putative class "of all persons who signed submission

agreements and submitted Warhol artwork to the [Board] for review with claims that are timely." The class action complaint recited, *inter alia*, allegations of fraud, conduct in violation of the Lanham Act, and acts of monopolization and conspiracy in violation of the Sherman Act. On July 24, 2007, ARC Excess & Surplus, LLC, Plaintiffs' insurance broker, notified PIIC under the 2003 D&O Policy and 2003 E&O Policy of the class action complaint. On May 26, 2009, United States District Court Judge Laura Taylor Swain granted in part and denied in part a motion to dismiss the class action complaint. On January 15, 2010, Susan Shaer filed a complaint against the plaintiffs in the present matter, reciting essentially the same allegations in Simon's class action complaint. Plaintiffs notified PIIC of the Shaer suit six days later.

PIIC initially denied coverage for the Simon and Shaer actions. However, on August 18, 2008, PIIC agreed to cover $225,000 of Plaintiffs' defense costs for the Simon class action under the 2002 E&O Policy but refused to cover any of Plaintiffs' defense costs under either of the D&O policies. Plaintiffs then filed an arbitration against PIIC pursuant to the 2003 D&O Policy, seeking a declaration of full coverage for all legal fees and expenses incurred as a result of the Simon class action. In response, PIIC filed a motion to stay arbitration in Supreme Court, New York County. Before the motion to stay arbitration was decided, Plaintiffs and PIIC executed a Standstill and Preservation of Rights Agreement ("Standstill Agreement"). Under the Standstill Agreement, PIIC agreed to pay Plaintiffs $1,775,000 under the 2002 E&O Policy (the remaining balance of the $2 million policy limit). Plaintiffs agreed not to pursue coverage under either of the D&O policies until both the Simon and Shaer actions had been completely adjudicated and good faith efforts had been made to obtain reimbursement from Simon and Shaer for Plaintiffs' legal costs and expenses.

Once it became clear that Simon and Shaer had no evidence to support their claims, both Simon and Shaer agreed to dismiss their claims with prejudice for no consideration. Plaintiffs then had to decide whether to pursue their counterclaims against Simon and Shaer for indemnification (pursuant to the submission agreements Simon and Shaer signed). In making this determination, Plaintiffs hired K2 Global to research whether Simon and Shaer had assets to satisfy a judgment. K2 Global ultimately concluded that Simon and Shaer lacked sufficient assets to justify pursuing the counterclaims for indemnification. As a result, plaintiffs agreed to settle the cases for $0. Plaintiffs subsequently sought to recover the remaining balance of its defense costs ($4.6 million plus interest)

from PIIC, pursuant to the D&O policies. PIIC refused to pay and Plaintiffs commenced the present action.

DISCUSSION

PIIC advances the motion for summary judgment on two grounds. First, the Simon and Shaer actions are not covered by the D&O policies because the D&O policies contain a "Professional Services Exclusion" Endorsement. Second, Plaintiffs failed to satisfy two conditions precedent to bringing this action pursuant to the Standstill Agreement. PIIC also argues in the alternative for partial summary judgment on the basis that the Lanham Act claims in the Simon class action are not covered by the D&O policies.

I. Summary Judgment Standard

To succeed on a motion for summary judgment, a movant must establish its claim or defense "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212[b]), and it "must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To defeat a motion for summary judgment, the opposing party must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent "has met its burden, it is incumbent upon [the opposing party] to establish, by admissible evidence, that a triable issue of fact exists" (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]).

II. The Professional Services Exclusion Endorsement

PIIC argues that it is entitled to summary judgment because the Simon and Shaer actions are not covered by the D&O policies. Specifically, each of the D&O policies contains an endorsement excluding "professional services" from coverage.

The 2002 D&O Policy Professional Services Exclusion endorsement states:

> "In consideration of the premium paid, it is hereby agreed that the Company shall not be liable to make any payment for 'loss' or 'defense cost' in connection with any 'claim' made against the 'Insured' based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
>
> 1. The furnishing or failure to furnish *professional services* by an attorney, architect, engineer, accountant, real estate agent, financial consultant, securities dealer, veterinarian or insurance agent or broker.

2. The furnishing or failure to furnish *professional services* by an [sic] physician, dentist, psychologist, anesthesiologist, nurse, nurse anesthetist, nurse practitioner, nurse midwife, x-ray therapist, radiologist, chiropodist, chiropractor, optometrist or other medical or mental health professional.
3. A 'professional incident' as defined herein. 'Professional incident' means any actual or alleged negligent:
   a) act;
   b) error; or
   c) omission

   in the actual rendering of *professional services* to others, including counseling services, in your capacity as [sic] social service organization. *Professional services* include the furnishing of food, beverages, medications or appliances in connection therewith."

(Emphasis added). PIIC argues that the Board's authentication services constitute "professional services," thus excluding the Simon and Shaer actions from coverage. It also maintains that the Foundation fits within the category of a "social services organization" under section 3 of the professional services endorsement. PIIC also notes that the Foundation is listed as "social service organization" in the Yellow Pages.

The 2003 D&O Policy's Professional Services Exclusion provides as follows:

> "With respect to coverage under Part(s) 1, 2, the Underwriter shall not be liable to make any payment for Loss in connection with any Claim made against the Insured based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving, the Insured's performance of or failure to perform *professional services* for others.
> Provided, however, that the foregoing shall not be applicable to any derivative action Claim alleging failure to supervise those performed or failed to perform such professional services."

(Emphasis added). The court notes that the term "professional services" is not defined in the 2003 D&O Policy. PIIC claims however that the Board's art authentication service constitutes a professional service, thus excluding claims arising from those services from coverage. Since the Simon and Shaer actions arose directly from the Board's art authentication services (indeed, art authentication is the only service that the Board provides), PIIC argues that the Professional Services Exclusion applies.

The Appellate Division Second Department, quoting a long line of Court of Appeals and Appellate Division cases, recently stated the controlling standard as follows:

> "Generally, where an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. . . . Such exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. . . . Thus the insurance company bears the burden of establishing that the exclusions apply in a particular case and that they are subject to no other reasonable interpretation. . . . The burden is a heavy one, and if the language is doubtful or uncertain in its meaning, any ambiguity will be construed in favor of the insured and against the insurer"

(*Bentoria Holdings, Inc. v Travelers Indem. Co.*, 84 AD3d 1135, 1136 [2d Dept 2011], *rev'd on other grounds*, ____ NY3d ____ [2012] [internal quotation marks and citations omitted]). Thus, in order for the exclusion to apply, PIIC must meet the heavy burden of proving that the Board's art authentication services constitute "professional services," and that there is no other reasonable interpretation of "professional services" that would exclude art authentication services from its definition (*see id.*) PIIC cannot carry its burden, at least as to the Professional Service Exclusion in the 2002 D&O Policy. The Exclusion lists specific occupations that involve specialized knowledge, training or skill. Authentication services is not listed. It also lists "the actual rendering of professional services to others, including counseling services, in your capacity as [sic] social service organization." PIIC asserts that the Foundation is a "social service organization". Because the examples of "professional services" listed do not relate in any way to art authentication services, PIIC cannot show that the policies state the exclusion "in clear and unmistakable language" (*see id.*). As a result, the term "professional services" is at best ambiguous and must "be construed in favor of [Plaintiffs] and against [PIIC]" (*see id.*) The Professional Services Exclusion does not apply, and summary judgment based on PIIC's interpretation of this endorsement must be denied.

III. The Standstill and Preservation of Rights Agreement

PIIC argues that it is entitled to summary judgment for the independent reason that Plaintiffs failed to comply with conditions precedent to bringing suit pursuant to the Standstill Agreement. The Standstill Agreement provides the following relevant conditions precedent:

> "[T]he Warhol Defendants shall not pursue any further payments from PIIC for the Claim under the 2002 D&O Policy and 2003 D&O Policy until after both of the Underlying Litigations have been completely adjudicated, including any Appeals, and the Warhol Defendants have made good faith efforts to obtain reimbursement from

> the plaintiffs in the Underlying Litigations for all costs and expenses incurred with respect to the Underlying Litigations should the Warhol Defendants prevail in the Underlying Litigations. The parties agree that "good faith efforts" in the context of this agreement means that the Warhol Defendants will undertake those measures that are reasonable given the individual circumstances related to seeking reimbursement from each plaintiff."

PIIC contends that Plaintiffs failed to comply with two conditions precedent: (1) that the Simon and Shaer actions were never "completely adjudicated," and (2) that plaintiffs failed to make "good faith efforts to obtain reimbursement from" Simon and Shaer.

PIIC contends that the term "completely adjudicated" does not include a settlement and that Plaintiffs were "required to obtain a judicial ruling with respect to the [counterclaims] against Simon and Shaer. . . . Here, there was no judicial ruling as to the claims brought by Simon and Shaer; rather, only a stipulated settlement of the two litigations. Thus, there was no adjudication of the underlying actions." PIIC notes that Black's Law Dictionary defines "adjudicated" to mean "to rule upon judicially." A settlement is as much a complete adjudication of a disputed claim as a judgment entered after a trial.

PIIC also contends that plaintiffs failed to make "good faith efforts to obtain reimbursement from" Simon and Shaer. The Standstill Agreement defines "good faith efforts" as "undertak[ing] those measures that are reasonable given the individual circumstances related to seeking reimbursement from each plaintiff." The steps Plaintiffs took were entirely reasonable under the circumstances. Plaintiffs hired K2 Global to determine whether Simon and Shaer could pay a potential judgment on the counterclaims. Based on a K2 Global determination that Simon and Shaer lacked assets sufficient to satisfy a judgment, plaintiffs settled the case for $0. Pursuing the counterclaims would have led to increased litigation costs with no possibility of recovery from Simon and Shaer. Pursuit of such a course would have been pointless.

IV. The Lanham Act Claims

PIIC argues in the alternative that it should be awarded partial summary judgment on the basis that the Lanham Act claims in the Simon class action are not covered by the D&O policies. The 2002 D&O Policy excludes from coverage any "oral or written publication or material, done by or at the direction of the 'Insured' with knowledge of its falsity." PIIC argues that since "Simon clearly alleges in his Complaint that the Board and Foundation publicized that Simon's work was not an

authentic Warhol despite knowing that such publication was false," Simon's Lanham Act claims fall within this exclusion. The argument must be rejected.

Although PIIC contends that the Lanham Act claims could only be proven "with knowledge of . . . falsity," in deciding the motion to dismiss in the Simon class action, Judge Swain stated that "[i]n order to be actionable under the Lanham Act, a challenged advertisement must be literally false or, *though literally true, likely to mislead or confuse customers*" (*Simon-Whelan v Andy Warhol Found. for the Visual Arts, Inc.*, 2009 WL 1457177, at *8 [SDNY May 26, 2009], quoting *Groden v Random House, Inc.*, 61 F3d 1045 [2d Cir 1995]). As a result, the class could have recovered without proving that Plaintiffs had knowledge of its falsity. PIIC thus had a duty to defend Plaintiffs, because the allegations in Simon's class action complaint "state[d] a cause of action that [gave] rise to a reasonable possibility of recovery under the policy" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 29 [1st Dept 2003]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is DENIED.

This constitutes the decision and order of the court.

DATED: December 6, 2012

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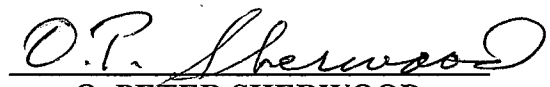

O. PETER SHERWOOD
J.S.C.