

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

LEAVITT, KERSON & DUANE, et al., X

Plaintiffs,

- against -

AMERICAN GUARANTEE AND LIABILITY
INSURANCE COMPANY, et al.,

Defendants.

INDEX NO: 12792/2007

MOTION CAL. NO: 18

MOTION SEQ. NO: 1

BY: SATTERFIELD, J.

DATED: DECEMBER 10, 2007

X

In this action for declaratory judgment plaintiffs Leavitt, Kerson & Duane, Koppell; Leavitt, Kerson & Duane LLP; Koppell, Leavitt, Kerson, Leffler & Duane, LLP (collectively "plaintiff law firm"); Paul E. Kerson, John F. Duane, and Marc C. Leavitt, seek an order granting partial summary judgment and declaring that defendant American Guarantee and Liability Insurance Company (American Guarantee) has a duty to defend and indemnify plaintiffs in the underlying legal malpractice action entitled, Urena v. Leavitt, Kerson & Duane, and to reimburse them for attorney's fees, costs and disbursements incurred to date and to be incurred in the future in the underlying action. American Guarantee cross-moves for an order granting summary judgment and declaring that it has no duty to defend and indemnify the plaintiffs in the underlying action, dismissing the complaint, and awarding it costs and disbursements incurred in the defense of this action.

Maria Urena, a defendant herein, and plaintiff in the underlying action, underwent surgery at Kings County Hospital in Brooklyn to remove a mass in her ovaries on July 23, 1994. Ms. Urena continued to experience pain, and alleges that she repeatedly sought medical attention. In November 2004, she had another operation at Kings County Hospital, in order to remove a sponge that had been left in her body. Ms. Urena was last examined at Kings County Hospital on November 24, 2003. Ms. Urena originally retained Jesus J. Pena to represent her, but was dissatisfied with him, and on April 30, 2004, she received a letter from Mr. Pena stating that he would no longer pursue her case.

Ms. Urena retained plaintiff law firm on May 6, 2004 to represent her in a medical malpractice claim against the New York City Health and Hospitals Corporation (the "HHC") and its physicians at Kings County Hospital. On October 6, 2004, plaintiffs sent a summons and complaint to Ms. Urena at her Florida address, for her signature. Plaintiff law firm thereafter purchased an index number on November 13, 2004 and commenced an against solely against the HHC, which served an answer in December 2004.

In a letter dated December 7, 2004, the Corporation Counsel's Early Settlement Unit requested that plaintiff law firm, Ms. Urena's counsel, produce all medical and hospital records, and other enumerated documents, including "any other item(s) pertinent

to an early resolution of your case." John F. Duane, a plaintiff herein, and a defendant in the underlying action, responded some ten months later by sending the Corporation Counsel's Medical Malpractice Unit a letter dated September 7, 2005, along with a copy of the verified bill of particulars and response to the combined discovery demand. On November 2, 2005, plaintiff law firm, on behalf of Ms. Urena, served a motion for leave to serve a late notice of claim; for leave to serve a supplemental summons and complaint; and to compel the HHC to provide Ms. Urena with the names of the physicians who performed the surgery in 1994. Said motion was filed with the court on November 7, 2005. The HHC cross-moved to dismiss the complaint based upon the failure to serve a notice of claim. These motions were fully submitted on February 14, 2006, and on April 12, 2006, the Hon. David Elliot granted the cross-motion to dismiss the complaint on the grounds that a timely notice of claim was not filed, a condition precedent to suit, and Ms. Urena failed to timely move for leave to file a late notice of claim. The court determined that the applicable statute of limitations expired on November 24, 2004, and that as the motion for leave to file a late notice of claim was not made until November 2, 2005, which was well beyond the period of limitations, the court lacked jurisdiction to extend the time in which to file a late notice of claim. The court also stated that as the statute of limitations had expired, Ms. Urena was not

entitled to commence a separate action against the individual doctors who were employees of the HHC. Finally, the court found that Ms. Urena's request to toll the statute of limitations was without merit. The Appellate Division in an order dated December 6, 2006, affirmed Judge Elliot's order, and further determined that Ms. Urena's contention that the HHC should have been equitably estopped from asserting the statute of limitations as a bar to her application for leave to serve a late notice of claim was without merit (Urena v. New York City Health and Hospitals Corp., 35 AD3d 446 [2006]).

On February 28, 2007, Ms. Urena commenced an action for legal malpractice in the United States District Court, Southern District of New York, entitled Maria Urena v Leavitt, Kerson & Duane, Koppell, Leavitt, Kerson & Duane LLP, Koppell, Leavitt, Kerson, Leffler & Duane, LLP, Paul E. Kerson, John F. Duane, Marc C. Leavitt and Jesus J. Pena.

Defendant American Guarantee issued a Lawyers Professional Liability Insurance Policy to Leavitt, Kerson & Duane, with a policy period of January 12, 2007 to January 12, 2008. On March 15, 2007, Mr. Kerson, on behalf of himself and the insured law firm, informed American Guarantee of Ms. Urena's federal court action. American Guarantee, in a letter dated April 19, 2007, stated that it would not provide a defense or indemnify the insureds in Ms. Urena's federal court action, on the grounds that

the insureds failed to provide notice of a potential claim, pursuant to the terms of the policy. American Guarantee specifically stated that:

"your attention is drawn to the section of the Policy entitled "CONDITIONS", which states in pertinent part as follows: B. NOTICE TO THE COMPANY

3. NOTICE OF A POTENTIAL CLAIM

The **Insured**, as a condition precedent to this policy, shall immediately provide **Notice** to the **Company** if any **Insured** has any basis to believe that any **Insured** has breached a professional duty or to foresee that any such act or omission might reasonable be the basis of a **Claim**.

Based upon the events leading to the Urena Action, it is clear that an insured had a basis to believe a professional duty was breached or to foresee a claim long before notice was first provided to American Guarantee after the Urena Action was filed. Specifically, in late November or early December 2005, the City served a cross-motion to dismiss the underlying lawsuit based on the failure to file a notice of claim and the failure to timely move for an extension of time to allow a late filing. In a decision date April 12, 2006, the court dismissed the case on those bases (sic). Yet, notice was not provided to American Guarantee until after the Urena Action was filed on February 28, 2007. Thus, based upon the failure to immediately provide notice of a potential claim, no coverage is available under the Policy for the Complaint in the Urena Action.

In view of the foregoing, American Guarantee is denying any defense or indemnity obligation to the Insureds with respect to the Complaint in the Urena Action. Thus, American Guarantee

will not appoint counsel to represent the Insureds with respect to that Complaint, nor will it pay or be held responsible to indemnify the Insureds for any settlement, award, judgment or other liability imposed upon the Insureds based thereon."

American Guarantee also cited to the policy's "Definitions" section regarding an insured, and reserved its right to deny any defense or indemnity obligation as to the additionally named law firms, defendants Koppell, Leavitt, Kerson & Duane, LLP, and Koppell, Leavitt, Kerson, Leffler & Duane, LLP, as they may not qualify under the policy's definition of an insured. American Guarantee also noted that as the damages sought in Urena complaint exceeded the policy's limits, it reserved its right to deny any indemnity obligation for any settlement, judgment, award or other liability exceeding the applicable policy limit. Finally, American Guarantee reserved all rights and defenses it has under the terms of the policy and at law to deny coverage or to rescind the policy.

Plaintiffs' commenced this action for declaratory judgment on May 17, 2007 and now moves for partial summary judgment, declaring that American Guarantee has a duty to defend and indemnify them in the underlying legal malpractice action, presently pending in federal court. Plaintiffs' counsel, in support of the motion for summary judgment, asserts that plaintiffs were not required to give American Guarantee notice of the Urena

claim prior to receipt of the federal summons and complaint, as there was no basis to believe that a potential claim existed. Plaintiffs' counsel further asserts that triable issues of fact exist as to whether or not plaintiffs had a basis to believe that Ms. Urena had a potential claim against them due to the failure to timely move for leave to file a late notice of claim. Finally, plaintiffs' counsel asserts in essence, that as the Urena legal malpractice complaint sets forth numerous acts or omissions, not limited to the notice of claim, and as they could not foresee every single act or omission asserted against them, they are entitled to a defense because each of those acts or omissions constitutes separate "claims."

Defendant American Guarantee cross-moves for an order granting summary judgment dismissing the complaint and declaring that it does not have a duty to defend and indemnify plaintiffs in the Urena action. American Guarantee asserts that plaintiffs were responsible for at least one procedural error- the failure to timely file a motion for leave to file a late notice of claim. It is asserted that in late 2005, this procedural error was cited by the HHC in opposing Ms. Urena's belated motion, and was cited by the court in its order of April 12, 2006. It is asserted that as plaintiffs never gave American Guarantee any notice of a potential claim, and as they only provided notice after the Urena legal malpractice action was filed in federal court on February 28, 2007,

such notice was untimely under the terms of the policy and New York law. Defendant American Guarantee also asserts that plaintiffs' reliance upon the fact that the Urena complaint also alleges other acts of malpractice, which they claim to have been unaware of, does not relieve them of their duty to notify American Guarantee of the potential claim arising from the dismissal of Ms. Urena's case in the Supreme Court. Finally, American Guarantee asserts that the legal malpractice complaint does not contain separate "claims" as that term is defined in the insurance policy, but rather constitutes a single claim resulting from the dismissal of one lawsuit, on behalf of one client, resulting in one damage, the loss of her case.

Mr. Kerson, in an affidavit submitted in opposition to the cross-motion, states that when he first met with Ms. Urena, she was unable to produce a notice of claim, and that the time in which to file a timely notice of claim had expired. He asserts that he explained that the failure to file a timely notice of claim made the case "problematic" and that she could only recover "settlement value" at best, rather than the full value of the case, that the HHC could assert the lack of a notice of claim as a defense and could probably succeed on that defense, but that he would collect her medical records, file a summons and complaint, and attempt to settle with the Corporation Counsel's Early Settlement Unit. He states that he has been practicing law for over 30 years and is

very familiar with the settlement procedure with the Early Settlement Unit in the Supreme Court; that as the HHC's answer did not contain a defense of a lack of notice of claim, he was encouraged that the HHC had decided to waive this defense; that plaintiff law firm received a letter from the Corporation Counsel's Early Settlement Unit offering to settle the case, and that they entered settlement discussions; that the Corporation Counsel's office then changed its mind regarding the notice of claim and refused to continue settlement negotiations unless a motion to file a late notice of claim was made; and that although said motion was made, it was denied, and the appeal was denied. Mr. Kerson states that plaintiff law firm maintained regular contact with Ms. Urena, and that although she spoke Spanish and very little English, they were able to communicate with her through her family and friends. He asserts that their relationship was always cordial and respectful, and that until they were served with the legal malpractice complaint, they did not have the "slightest idea that there was a basis for a claim by Ms. Urena," and that they immediately reported said claim to their insurer, American Guarantee. It is asserted by plaintiffs that as the Urena complaint alleges claims unrelated to the notice of claim, American Guarantee is required to defend and indemnify them in the federal court action.

American Guarantee, in its reply asserts that the evidence submitted establishes that long before plaintiffs gave notice to American Guarantee, there was a reasonable basis to believe that a professional duty was breached, or to foresee a claim, following the court's decision of April 12, 2006, dismissing the medical malpractice action.

Ms. Urena, in opposition to both plaintiffs' motion and American Guarantee's cross motion, asserts that American Guarantee's motion is procedurally defective as it relies on facts that are not established by admissible evidence. In particular, Ms. Urena's counsel objects to American Guarantee's counsel's statements regarding information conveyed to the plaintiffs' by Corporation Counsel in October 2005. It is also asserted that summary judgment is premature in the absence of discovery, as Ms. Urena has submitted an affidavit which contradicts many of Mr. Kerson's statements. Finally, it is asserted that even if plaintiffs' failed to give timely notice to their insurance carrier, American Guarantee, Ms. Urena is protected under the policy and the notice provided to American Guarantee is sufficient for the purposes of Insurance Law § 3420.

American Guarantee, in its reply, asserts that any disputed issues of fact between Ms. Urena and plaintiffs regarding their dealings with one another does not raise any issue of fact as to the issue of timely notice to the insurer. American Guarantee

also asserts that discovery is not necessary here, as Ms. Urena's counsel has not indicated what discovery would be necessary for his client to oppose the within motions. American Guarantee further asserts that regardless of the admissibility of statements that may have been made by Corporation Counsel, its cross motion is properly supported by documentary evidence. Finally, it is asserted that as Ms. Urena has yet to provide American Guarantee with direct written notice of her independent claim, no issue exists as to any rights she may have against it under Insurance Law § 3420.

It is well established that where, as here, the contract of insurance requires the insured to notify its liability carrier of a potential claim "immediately," such a requirement acts as a condition precedent to coverage (Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]; White v City of New York, 81 NY2d 955, 957 [1993]), and the insured's failure to provide timely notice of an occurrence vitiates the contract as a matter of law (Argo Corp. v Greater N.Y. Mut. Ins. Co., 4 NY3d at 339; Modern Cont. Constr. Co. v Giarola, 27 AD3d 431, 432-433 [2006]). This notice provision, which was set forth in the disclaimer letter, is unambiguous and comports with most attorney's professional liability policies (see Wilson v Quaranta, 18 AD3d 324 [2005]; Bellefonte Ins. Co. v Albert, P.C., 99 AD2d 947 [1984]; Sirignano v Chicago Insurance Co., 192 F Supp 2d 199 [2002]).

The evidence presented establishes that, at least 10 months prior to plaintiffs giving American Guarantee notice of Ms. Urena's legal's malpractice claim, plaintiffs should have had a reasonable belief that Ms. Urena might assert a malpractice claim against them based on their failure to timely move for leave to file a late notice of claim, and the subsequent dismissal of her claim (see Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 441 [1972]; Wilson v Quaranta, supra; SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584-585 [1998]; Bellefonte Ins. Co. v Albert, supra). Plaintiffs should have given American Guarantee notice of the potential legal malpractice claim no later than the time they learned of the court's April 12, 2006 decision. At that point, plaintiffs could no longer reasonably believe that a malpractice claim could not be asserted against them, and their subsequent 10 month delay in notifying American Guarantee was unreasonable as a matter of law (see generally, 120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co., 40 AD3d 719 [2007] [2½ months delay]; Paul Developers LLC v Md. Cas. Ins. Co., 28 AD3d 443 [2006], [8 month delay]; Elkowitz v Farm Family Mutual Insurance Company, 180 AD2d 711 [1992] [10 month delay]).

The fact that plaintiffs were pursuing an appeal of the April 12, 2006 order did not relieve them of their obligation to provide timely notice to American Guarantee (see Wilson v Quaranta,

supra; Bellefonte Ins. Co. v Albert, P.C., supra; Sirignano v Chicago Insurance Co., supra). In addition, it is well established that an insured's failure to provide timely notice of a claim relieves the insurer of its obligation under the policy, regardless of whether the insurer can demonstrate that it was prejudiced by the delay (see Argo Corp. v Greater New York Mut. Ins. Co., 4 NY3d 332 [2005]; Rekemeyer v State Farm Auto Mut. Ins. Co., 4 NY3d 468, 474-475 [2005]).

Plaintiffs' argument that American Guarantee is required to provide coverage because the legal malpractice complaint alleges numerous acts or omissions, in addition to the failure to timely move for leave to file the notice of claim, is rejected. The alleged additional errors or omissions, are not separate "claims" under the terms of the policy. Rather the policy defines a "Claim" as "a demand for money or Legal Services," and the Urena legal malpractice complaint asserts a single cause of action and a single demand for money against plaintiffs based upon their alleged mishandling of Ms. Urena's medical malpractice action. Thus, the fact that Ms. Urena alleges that the dismissal of her medical malpractice action led to additional errors, does not negate the plaintiffs' obligation to timely notify American Guarantee of the potential claim for legal malpractice.

The claims raised by Ms. Urena and her counsel are rejected. Factual disputes that may exist between Ms. Urena and

plaintiffs should properly be resolved in the federal action, and do not raise a triable issue of fact as to whether plaintiffs failed to give American Guarantee timely notice of the potential claim. In addition, regardless of whether American Guarantee has personal knowledge of any conversation between plaintiffs and Corporation Counsel, the documentary evidence submitted by the parties and Mr. Kerson's affidavit are sufficient to establish that a reasonable basis existed for plaintiffs to give American Guarantee notice of a potential claim upon their receipt of the April 12, 2006 order.

Finally, although an injured person has an independent right to give notice to an insurer, and is not to be charged vicariously with an insured's delay (see Becker v Colonial Coop. Ins. Co., 24 AD3d 702 [2005]; Lauritano v American Fid. Fire Ins. Co., 3 AD2d 564 [1957], affirmed 4 NY2d 1028 [1958]), where an injured party fails to exercise the independent right to notify an insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well (see Maldonado v C.L.-M.I. Props., Inc., 39 AD3d 822 [2007]; Viggiano v Encompass Ins. Co., 6 AD3d 695 [2004]). Here, there is no evidence that Ms. Urena ever gave notice to American Guarantee (see Matter of First Cent. Ins. Co. [Malave], 3 AD3d 494, 495 [2004]). Thus, contrary to Ms. Urena's contention, American Guarantee is not

estopped from disclaiming coverage, even though the disclaimer letter did not cite Ms. Urena's failure to give timely notice as a basis for the disclaimer (see Matter of First Cent. Ins. Co. [Malave] supra; Potter v N. Country Ins. Co., 8 AD3d 1002, 1004 [2004]).

In view of the foregoing, plaintiffs' motion for partial summary judgment is denied and defendant American Guarantee's cross-motion for summary judgment is granted and it is the declaration of this court that defendant American Guarantee does not have a duty to defend and indemnify the plaintiffs in the federal court action entitled, Maria Urena v Leavitt, Kerson & Duane, Koppell, Leavitt, Kerson & Duane LLP, Koppell, Leavitt, Kerson, Leffler & Duane, LLP, Paul E. Kerson, John F. Duane, Marc C. Leavitt and Jesus J. Pena.

Settle order.

J.S.C.