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

PRESENT: DIANE A. LEBEDEFF PART 8

0604120/2002

ALLIANZ UNDERWRITERS INS. CO.
vs
LANDMARK INS. CO.

INDEX NO. _____

MOTION DATE 3/3/03

SEQ 1

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. 1

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits X-motions	1-9
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

SCANNED
MAY 08 200

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: APR 30 2003

J.S.C.

Check on : ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY 1 A S PART 8

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ALLIANZ UNDERWRITERS INSURANCE COMPANY,

Plaintiff.

-against-

Index No 604120/02
Mot Seq No 001

LANDMARK INSURANCE COMPANY, GENERAL STAR INDEMNITY CORPORATION, THE NEW YORK STATE INSURANCE FUND, DUNLOP TIRE CORPORATION, GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD, NICHOLSON & HALL CORPORATION, UNDERBERG & KESSLER, LLP, SMITH, MURPHY & SCHOEPPERLE, LLP, MARY-BETH K HUTHMACHER, as Administratrix of the Estate of MICHAEL D HUTHMACHER.

Defendants

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DIANE A. LEBEDEFF, J.:

Various parties here advance requests for dismissal, consolidation of this matter with an action pending in Erie County, and a change of venue.

As to background, this suit and another companion pending matter concern insurance coverage issues relating to an underlying wrongful death action in which an $8 million verdict was rendered against Dunlop Tire Corp., and Goodyear Dunlop Tires North America, Ltd. (together, "Dunlop"), and, as to which, an appeal is being pursued before the Appellate Division, Fourth Department (*Huthmacher v. Dunlop Tire Corp., et al.*, Erie Co. Sup Ct , Index No 120000/7359 [the "underlying action"]) Also currently pending in Erie County Supreme Court is a declaratory judgment action commenced by Landmark

Insurance Co ("Landmark"), against the plaintiff herein, Allianz Underwriters Insurance Company ("Allianz"), which involves an insurance coverage dispute (*Landmark Insurance Company v. Allianz Underwriters Insurance Company*, Index No 1-2002-008826 [the "Erie County Action"]), in that matter, Landmark seeks a declaration that Allianz is obligated to participate in the funding of (1) the appeal in the underlying action and (2) any judgment or settlement of the underlying action In the instant action, Allianz seeks a declaration that it is not obligated to participate in Dunlop's defense in the underlying action and adds certain supplementary claims and parties [1]

Prior Action Pending and Consolidation

Defendants Landmark, Mary-Beth Huthmacher, as Administratrix, and Underberg & Kessler, LLP (the "Underberg Firm"),' move to dismiss the instant action on the ground that the Erie County Action is a prior pending action (CPLR 3211 [a][4]). The parties who do not advocate dismissal of the instant action, agree that it should be consolidated with the Erie County Action to avoid duplicative litigation and the possibility of divergent results. There are divergent views on the venue of the consolidated matter in that (1) the Smith

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Plaintiff asserts alternative asserts claims for bad faith and breach of fiduciary duty against General Star Indemnity Company ("GenStar"), Landmark, Underberg & Kessler, L L P ("the Underberg Firm), and Smith, Murphy & Schoepperle, L L P ("the Smith Firm") Allianz also names Dunlop, Nicholson & Hall, Corp ("Nicholson"), the State Insurance Fund, and the Administratrix of the Huthmacher Estate as defendants

In the Erie County Action, Allianz moved to dismiss for failure to name GenStar, Dunlop, Nicholson, and SIF as necessary parties (see the Smith Firm Cross-Motion, Exhibit C) That motion was denied

The Underberg Firm also moves to dismiss the claims asserted against it for failure to state a cause of action (CPLR 3211 [a][7])

Firm seeks to change the venue of this action to Erie County and have the actions consolidated for joint trial there (CPLR §§ 510 [1] and [3], 602), while (2) plaintiff Allianz, supported by GenStar, favors consolidating the actions for joint trial in New York. The remaining parties take no position on the venue and consolidation issues. The only party with offices in New York County, the State Insurance Fund, does not raise any objection to a transfer of the matter

CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action (*Whitney v. Whitney*, 57 N.Y.2d 731 [1982]), and empowers the court not just to dismiss but to "make such order as justice requires" *(White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 93 [1st Dept 19971). To warrant dismissal on the ground of another action pending, it is necessary that there be a "sufficient identity as to both the parties and the causes of action asserted in the respective actions" ***(id.,)*** The "presence of additional parties, however, will not necessarily defeat a motion ... where ... both suits arise out of the same subject matter or series of alleged wrongs" (*ibid.*, 231 A.D.2d at 94).

In the matter at hand, the two actions involve the same core dispute, and both actions seek declaratory relief. The single difference is that in this action Allianz asserts alternative damages claims and names additional parties, which it views as necessary or helpful to resolution of the coverage issues and the consequences of that dispute. Since both actions involve the same subject matter and involve the same two primary parties, notwithstanding the presence of additional parties and issues, consolidation is a more

appropriate action than dismissal (see *MediaAmerica, Inc. v. Rudnick*, 156 A.D.2d 174 [1st Dept 1989])

As for venue, the general rule is that the appropriate county for the trial of a consolidated action is the one where jurisdiction was first invoked, in this case Erie County (*Bernstein v. Silverman*, 228 A D 2d 325 [1 st Dept 19961) The papers indicate that the Erie County litigation was commenced approximately four months before this action. that motion practice has already been underway and motions decided therein, and that discovery is on-going Numerous relevant records and documents are located in Erie County The non-institutional parties, including the Smith Firm, Nicholson, and the administratrix of the Huthmacher estate all are located or reside in Erie County.

Indeed, Allianz has asserted no reason for retaining venue in New York County other than that the State Insurance Fund resides in New York County, and that the convenience of the parties' attorneys would be promoted by retention of the matter in New York County Clearly, these considerations do not warrant departure from the general rule

Accordingly, the motions to dismiss, consolidate and change venue are granted to the extent that the court directs that the instant action be consolidated with the Erie County Action for discovery and trial in Erie County. The judge presiding over the consolidated matter is free to order such adjustment of the consolidation as he or she finds appropriate.

Underberg Firm Dismissal Request

With respect to its motion to dismiss for failure to state a cause of action, the Underberg Firm argues that Allianz has no claim against it because the firm was not in

privity with Allianz.[3] As is undisputed, in the underlying action, the Underberg Firm was appointed by GenStar to represent Dunlop. Under the facts as pleaded, the only fiduciary obligation the Underberg Firm had was to its client, Dunlop:

> "[T]he paramount interest independent counsel represents is that of the insured, not the insurer The insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client (*Trieber v. Hopson*, 27 A D 2d 151, 153, *American Employers Ins. Co. v Goble Aircraft Specialties*, *205* Misc 1066, 1075, see also, Code of Professional Responsibility EC 5-17, 5-21, 5-23)" (*Feliberty v. Damon*, 72 N Y 2d 112, 119 [1988])

Nonetheless, Allianz claims support for this claim exists in *Hartford Accident v. Michigan Mutual*, 93 A D 2d 337 (1st Dept 1983), aff d, 61 N Y.2d 569 (1984), which recognized an excess insurer could claim a primary insurer took an adverse position based upon its self-interest to the prejudice of the excess insurer This authority is found insufficient given that the decision does not endorse extending such a claim to the counsel appointed by the primary insurer Plaintiff advances no other legally cognizable basis for this novel claim.

The coinplaint alleges, as relevant to the Underberg Firm, that, in defiance of "repeated requests" by Dunlop, Allianz and Nicholson, the Underberg Firm refused to implead plaintiff-decedent's employer, Nicholson, in the underlying action "despite knowing that Nicholson was the only directly negligent tortfeasor and that Dunlop was only statutorily negligent" (Allianz motion, exhibit A, paras 31, 33, 62).

The motion also urges that Allianz has not yet sustained any damages and, in fact, the complaint alleges no existing damages. Allianz's contention of damages is suspect because the allegations in the complaint suggest application of the anti-subrogation rule would have barred the law firm from taking the action they maintain should have been taken – impleader of the employer – who was the named insured under the Landmark policy, with Dunlop having been recognized as an additional insured under that policy. Allianz entirely fails to address this point or point to any possible exception to the anti-subrogation rule.

'Thus, support for this claim must be found within generally applicable principles, if at all In relation to claims raised against an attorney by a third party. the general rule is that "[w]hile privity of contract is generally necessary to state a cause of action for attorney malpractice, liability is extended to third parties, not in privity, for harm caused by professional negligence in the presence of fraud, collusion, malicious acts or other special circumstances" (*Good Old Days Tavern, Inc. v. Zwirn*, 259 **A** D 2d 300 [1st Dept 19991, accord, same test, *Block v. Brecher, Fishman, Feit, Heller, Rubin & Tannenbaum*, 301 A D 2d 400, 2003 [1st Dept 20031, *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, *80* N Y 2d 377 [1992], rearg den 81 N Y 2d 955 [1993]) No authority is presented to show that any other different rule applies because the claim is recast as one sounding in breach of fiduciary duty (see *Linden v. Moskowitz*, 294 **A** D 2d 1 14, 115 [1st Dept 20021, "The breach of fiduciary duty claim fails against defendants [law firms] since none of these defendants represented appellant in the prior litigation" and the "complaint fails to allege the existence of an attorney-client relationship, or indeed, any other contractual relationship with defendants")

Allianz has not identified any basis for finding that the Underberg Firm owed any duty to Allianz in the course of its representation of Dunlop Since no cognizable cause of action is discernable "within the four corners of the complaint" (see *Scott v. Bell Atlantic Corp.*, 282 A D 2d 180 [1st Dept 2001]), the motion to dismiss the complaint as against the Underberg Firm is granted [4]

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[4] The allegations as to the Smith Firm differ somewhat in that the Smith Firm was allegedly retained for the purpose of bringing a third party action against Nicholson. The court does not opine as to whether this difference should result in a different conclusion.

* * *

Based on the foregoing, the motions to dismiss pursuant to CPLR 3211(a)(4), to consolidate, and to change venue are granted to the extent that the court orders that this action is consolidated with the Erie County action, and that the venue of this action is changed from this court to the Supreme Court, County of Erie. The cross-motion of defendant Underberg to dismiss the action as against it is granted, and that claim is severed and dismissed. The motions and cross-motions are otherwise denied.

No sooner than five days after service of a copy of this order with notice of entry upon plaintiff and a proposed judgment, the clerk shall enter judgment dismissing the action as against defendant Underberg & Kessler, LLP, together with costs and disbursements, upon the presentation of appropriate papers.

Further, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any, the clerk of this court is directed to transfer the papers on file in this action to the clerk of the Supreme Court, County of Erie, who is thereupon directed to consolidate the matters under Index No. I-2002-008826. Following consolidation, the caption of the instant action shall appear beneath the caption of the Erie County action.

This decision constitutes the order of the court.

Dated. April 30 , 2003

J.S.C