Federal Insurance Company v Allied World Assurance Company
2006 NY Slip Op 30219(U)
July 31, 2006
Supreme Court, New York County
Docket Number: 0603926/2005
Judge: Charles E. Ramos
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SCANNED ON 8/3/2006

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

PRESENT: Charles Edward Ramos PART 53

Index Number : 603926/2005

FEDERAL INS. CO.

vs

ALLIED WORLD ASSURNACE CO.

Sequence Number : 001

DISMISS ACTION

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits ____	
Replying Affidavits ____	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

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

FILED
AUG 03 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/31/06

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
--X
FEDERAL INSURANCE COMPANY, individually and as subrogee of GALAXY CONTRACTING CORP.,

Plaintiffs,

Index No. 603926/06

- against -

ALLIED WORLD ASSURANCE COMPANY (U.S.), INC., f/k/a COMMERCIAL UNDERWRITERS COMPANY, BRUCE A. BENDIX, and RIVKIN RADLER, LLP.,

Defendants.
--X

FILED
AUG 03 2006
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Plaintiff Federal Insurance Company (Federal) was the excess insurer for the co-plaintiff, Galaxy Contracting Corp. (Galaxy) in another action (hereinafter, the Bermejo action). Federal claims that the defendants in the instant action, consisting of Galaxy's primary insurer in the Bermejo action and the law firm hired by the primary insurer, manipulated the Bermejo case so as to enrich the primary insurer at plaintiff's and Galaxy's expense. In so doing, Federal alleges, the law firm committed legal malpractice and the primary insurer violated the antisubrogation rule, the purpose of which is to prevent an insurer from acting against the interests of its insured. Defendants Rivkin Radler, LLP (Rivkin), the law firm, and Bruce Bendix, a partner in the firm, move to dismiss the claims against them. Defendant primary insurer, which the parties refer to as CUIC, cross-moves likewise.

I. Events Leading Up To This Complaint

Upon being hired to act as contractor for a construction

project, Galaxy purchased two insurance polices from CUIC and one from Federal. One CUIC policy provided Galaxy with primary insurance of up to $1 million per occurrence. The other CUIC policy provided the owner of the site and two other parties (hereinafter, all will be referred to as the owners) with primary insurance, also with a limit of $1 million per occurrence. Both CUIC policies insured against the same risks. The Federal policy provided Galaxy with excess insurance of up to $10 million per occurrence, once Galaxy's damages exceeded the primary coverage provided by CUIC.

Rafael Bermejo, an employee of a subcontractor on the project, was injured at work and commenced the Bermejo action against Galaxy and the owners, alleging violations of Labor Law §§ 240 and 241 (6) and common-law negligence. CUIC undertook to defend Galaxy and the owners, and assigned their defense to the same law firm, which is not a party here. In February 2002, Bermejo filed a note of issue indicating that his case was ready for trial.

In June 2002, CUIC requested that Rivkin represent Galaxy in the Bermejo action. Allegedly, the reason for changing attorneys was that CUIC realized that there was a conflict of interest between the owners and Galaxy.

In December 2002, the owners moved to amend their answers in the Bermejo case to add cross claims for common-law and contractual indemnification and breach of contract against Galaxy. At the same time, the owners moved for summary judgment

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on the indemnity claims. Galaxy, though its counsel, Rivkin, opposed the motion. By order dated March 18, 2003, the court allowed the amendment and awarded the owners a conditional grant of summary judgment. The court determined that Galaxy, not the owners, controlled and supervised Bermejo's work and that the owners did not cause Bermejo's accident. Pursuant to the Labor Law, any liability for Bermejo's accident imputed to the owners would necessarily be vicarious. Therefore, if a jury determined that the owners had to pay Bermejo damages pursuant to the Labor Law statutes, Galaxy would have to indemnify the owners.

Shortly after the court's decision, Galaxy/Rivkin moved to reargue or renew the owners' motion on the ground that the antisubrogation rule barred Galaxy from indemnifying the owners. The court denied the motion, because Galaxy should have, but did not, raise the antisubrogation argument in its opposition to the owners' motion. The court stated that Galaxy had no reasonable excuse for failing to raise the antisubrogation issue at the appropriate time.

After some negotiations, Bermejo agreed to a $3 million settlement. Galaxy was the only defendant to enter into the settlement with Bermejo. The owners' cross claims against Galaxy were not settled. CUIC paid Bermejo $1 million, the limit of the primary policy it issued for Galaxy. Federal paid $2 million, pursuant to the excess policy it issued for Galaxy.

According to Federal, it agreed with CUIC that a settlement of $3 million was reasonable, that if Bermejo's case were tried,

the jury would find the owners and Galaxy liable under the Labor Law statutes, and that the settlement was without prejudice to Federal's right to recover from CUIC. Federal decided not to oppose the settlement when it was made, but to recoup its alleged losses in this action.

The gist of Federal's complaint is that CUIC, with Rivkin's help, manipulated the litigation so that the settlement was against Galaxy only. If the $3 million settlement had been against the owners and Galaxy, CUIC would have paid Bermejo $2 million: $1 million on behalf of Galaxy and $1 million on behalf of the owners. Federal's excess coverage would have kicked in to the extent of $1 million only. But as the settlement involved Galaxy alone, CUIC only had to pay $1 million and Federal had to pay $2 million in excess coverage. Federal seeks to recover the allegedly extra $1 million that it paid on behalf of Galaxy.

Federal also alleges that defendants failed to take any measures to avoid or limit Galaxy's liability to the owners in the Bermejo action. For instance, defendants made no effort during discovery to find evidence that would contribute to Galaxy's defense. CUIC allegedly engaged in these improper practices during the time that the owners and Galaxy had the same attorneys, as well as after Rivkin became Galaxy's counsel.

Federal further alleges that the settlement was unfair to Galaxy. CUIC caused Galaxy to bear the entire brunt of the settlement. CUIC thus violated the antisubrogation rule, by acting against the interests of its insured, Galaxy. If Rivkin

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had argued the antisubrogation rule at the proper time, the owners' claims for indemnity against Galaxy would have been barred, and the settlement would have included the owners, along with Galaxy. By failing to argue the antisubrogation rule, Rivkin enabled CUIC to keep the owners out of the settlement, thus reducing the amount of money that CUIC had to pay Bermejo, and increasing the amount that Federal had to pay Bermejo.

The first cause of action in the complaint alleges that CUIC violated the antisubrogation rule and must indemnify Federal for $1 million. The second cause of action alleges that CUIC treated Federal with bad faith. In the third cause of action, Federal, as Galaxy's subrogee, alleges bad faith against CUIC. The fourth cause of action alleges legal malpractice against CUIC and Rivkin on Federal's behalf. The fifth cause of action alleges legal malpractice against CUIC and Rivkin on Galaxy's behalf.

II. Discussion

A. Standard For Determining The Motions

Rivkin's motion and CUIC's cross motion are made pursuant to CPLR 3211 (a) (1) (defense founded on documentary evidence), (3) (no legal capacity to sue), and (7) (failing to state a cause of action). On a CPLR 3211 motion, the sole question for review is whether the plaintiff's complaint states a cause of action (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]). The court assumes the truth of the allegations in the complaint and makes no determination of facts (*id.*). When a party submits evidentiary material on a CPLR 3211 motion, the

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criterion is whether the evidence shows that a material fact as claimed by the pleader to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, the complaint should not be dismissed (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977] [citations omitted]). If a defendant shows that allegations in the complaint are flatly contradicted by documentary evidence, the allegations are not entitled to belief (*Herman v Greenberg,* 221 AD2d 251, 251 [1st Dept 1995]).

B. Antisubrogation And Bad Faith

In order to determine whether Federal has a cause of action for antisubrogation against CUIC, the court must first address subrogation. Subrogation is the equitable doctrine that "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" its insured (*Kaf-Kaf, Inc. v Rodless Decorations,* 90 NY2d 654, 660 [1997]; *see also Winkelmann v Excelsior Ins. Co.,* 85 NY2d 577, 581 [1995]). But where the same insurance company provides coverage for the injured and the wrongdoer for the same risk, the insurance company may not recover from the wrongdoer. This is the antisubrogation exception to subrogation. An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered (*Pennsylvania General Ins. Co. v Austin Powder Co.,* 68 NY2d 465, 471 [1986]). The antisubrogation rule bars the insurer from recovering from its insured up to the policy limits (*Federated*

Dept. Stores, Inc. v Twin City Fire Ins. Co., 28 AD3d 32, 40 [1st Dept 2006]).

The antisubrogation rule is commonly triggered when the insurer provides coverage to both sides of a third-party action for the same incident. Typically, the third-party plaintiff seeks indemnity from the third-party defendant on the ground that the latter actually caused the incident and the former's liability is vicarious (*see Blanco v CVS Corp.*, 18 AD3d 685, 686 [2d Dept 2005]; *Fitch v Turner Constr. Co.*, 241 AD2d 166, 170 [1st Dept 1998]; *Valentin v City of New York*, 187 AD2d 343, 344 [1st Dept 1992], *affd sub nom. North Star Reinsurance Corp. v Continental Ins. Co.*, 82 NY2d 281 [1993]). The third-party defendant objects that the antisubrogation rule bars the indemnity claim. Given that the insurer may not recoup from the third-party defendant a payment it makes on behalf of the third-party plaintiff, the third-party action will be barred (*id.*). If a third-party plaintiff were permitted to maintain an action against the third-party defendant, it would be compelling their common insurer to demand subrogation from the third-party defendant (*see Valentin*, 187 AD2d at 344).

Important public policy considerations underlie the antisubrogation doctrine. It prevents an insurance company from passing its loss to its own insured, and thus avoiding the coverage which the insured purchased and paid premiums for (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 181 [1st Dept 1998]). It also prevents the insurer from

encountering a conflict of interest which may inhibit the insurer's incentive to provide a vigorous defense for an insured (*id.*). An insurer able to recover from the third-party defendant-insured will have no incentive to determine the merits of that insured's defense to the claims of the third party-plaintiff-insured (16 Couch on Insurance, § 224:3 [Westlaw 3d ed]). Instead, the insurer has an incentive to fashion the litigation so as to minimize its liability under the policy, and trigger coverage under other policies held by the insured (*see North Star*, 82 NY2d at 296).

Federal asserts that CUIC managed the litigation to ensure that Galaxy, through Federal's policy, paid what the owners should have paid. CUIC thus avoided paying from the owners' policy and saved itself $1 million. Federal asserts that CUIC violated the antisubrogation rule by favoring the owners' and its own interests against those of Galaxy. CUIC caused Galaxy/Federal to indemnify the owners. CUIC states that it did not violate the antisubrogation rule, in that it did not receive any money from Galaxy, and that Galaxy has no damages.

Whether or not CUIC actually expected or received payment from Galaxy is not dispositive of the claim that CUIC violated the antisubrogation rule (*see Alinkofsky v Countrywide Ins. Co.*, 257 AD2d 70, 74 [1st Dept 1999]). The danger that one insured will be favored over another exists the instant "that the competing coverages are triggered" (*id.* at 73). Although CUIC has not sued or collected from its own insured, Federal has

sufficiently alleged that CUIC managed the Bermejo action in a manner that wrongly shifted the entire loss from the owners to Galaxy.

CUIC asserts that Galaxy properly bore the brunt of the entire settlement, because it was responsible for Bermejo's accident. This argument ignores the owners' possible vicarious liability. CUIC also states that a jury might not have found the owners liable for Bermejo's accident and might have found only Galaxy liable. Additionally, if a jury had found all the Bermejo defendants liable, Bermejo could have chosen to collect from Galaxy alone. This could have happened. It is also true that a jury could have awarded more than $3 million in damages, thus making Federal liable for an even larger amount. But these possibilities do not bar Federal's claim that CUIC wrongly managed the Bermejo case to Federal's disadvantage.

It must be noted that Federal's claim for antisubrogation is as Galaxy's subrogee. Antisubrogation is a claim for an insured against an insurer and Federal was not CUIC's insured. Regarding the bad faith claim, however, Federal may assert a claim on its own and as subrogee. The claim rests on the same allegations as the antisubrogation claim. A primary carrier owes its insured and the excess insurer a duty to exercise good faith in handling a claim (*Hartford Acc. and Indem. Co. v Michigan Mut. Ins. Co.*, 93 AD2d 337, 341 [1st Dept 1983], *affd* 61 NY2d 569 [1984]). A prima facie case of bad faith must include allegations that the insurer deliberately or recklessly failed to place its insured's

interests on an equal footing with its own interests (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453 [1993]). The complaint sufficiently alleges bad faith.

The first, second, and third causes of action are not dismissed.

C. Malpractice

According to Federal, if Rivkin had used the antisubrogation rule to oppose the owners' motion, the result would have been the same as in cases where third-party plaintiffs cannot claim indemnification from third-party defendants. The court would not have allowed the owners to add cross-claims for indemnity against Galaxy and would not have granted the owners' conditional summary judgment on the indemnity claims. As a consequence, CUIC would not have kept the owners out of the settlement. Federal also contends that Rivkin failed to apprise it in a timely manner that the owners had moved to add indemnity cross claims against Galaxy. The owners moved on December 12, 2002 and Rivkin informed Federal on January 27, 2003, by which time the motion was fully submitted.

Federal states a malpractice claim against Rivkin, for itself and as subrogee. To state a cause of action for legal malpractice, a plaintiff must plead that its attorney was negligent, and that the plaintiff suffered some "actual ascertainable damage" because of the negligence (*Franklin v Winard*, 199 AD2d 220, 221 [1st Dept 1993]). Federal alleges that it suffered $1 million in damages due to the alleged malpractice,

but says nothing about Galaxy's damages. Nonetheless, because Federal has stated a malpractice claim, the court will allow the malpractice claim to stand for both plaintiffs. Federal's damages may have led to some damages also being suffered by Galaxy.

The next question concerns Federal's standing to assert malpractice against Rivkin. CPLR 1004 allows an insurer's subrogation claim to be prosecuted in the name of the insured. An excess insurer may sue the attorneys assigned by the primary insurer to represent the insured on the ground that the counsel owes a duty to the insured and the excess insurer, as the insured's subrogee (*see Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174-175 [1st Dept 2004]).

In addition, near privity exists between Federal and Rivkin. Generally, attorneys are not liable for professional negligence to third parties not in privity (*id.* at 175). To show that a relationship approached near privity, for the purposes of maintaining a legal malpractice claim, the plaintiff must allege that the attorney knew that its services would be used for a specific purpose, that the plaintiff relied upon those services, and that the professional engaged in conduct evincing some understanding of the plaintiff's reliance (*id.*). Federal sufficiently pleads that Rivkin knew that Federal was relying on its representation of Galaxy, and that the communication between them evinces Rivkin's knowledge.

Regarding whether Federal may assert malpractice against

CUIC, the doctrine of vicarious liability, which imputes liability to a defendant for another person's fault, rests on the theory that the defendant controlled the other person (*Feliberty v Damon*, 72 NY2d 112, 117-118 [1988]). Generally speaking, a liability insurer may not be held vicariously liable for the lapses of retained counsel exercising independent judgment on behalf of the insured (*id.* at 120). Federal does not dispute that the law firm and the attorney are independent contractors. In theory, independent contractors are not subject to control by the hiring party. Also, Federal incorrectly argues that CUIC had a nondelegable duty to defend its insured. The duty to defend is perforce delegable, as an insurance company is legally prohibited from practicing law (Judiciary Law § 495; *id.* at 120).

Federal has not stated a cause of action for vicarious legal malpractice against CUIC. Federal does not state facts to support its theory that CUIC was responsible for Rivkin failing to raise the antisubrogation doctrine in the owners' motion and failing to apprise Federal of the motion. Rivkin may have acted negligently and the negligence may have been to CUIC's advantage. But that does not mean that CUIC controlled Rivkin. In regard to CUIC's other allegedly manipulative conduct, Rivkin did not take part in them. Rivkin did not become Galaxy's counsel until after disclosure was concluded.

III. Conclusion

It is

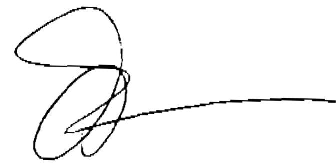
ORDERED that the motion to dismiss the complaint is denied;

and it is further

ORDERED that the cross motion to dismiss the complaint is granted to the extent of dismissing claims of legal malpractice against defendant Allied World Assurance Company (U.S.) f/k/a Commercial Underwriters Company in the fourth and fifth causes of action and is otherwise denied; and it is further

ORDERED that defendants are directed to serve their answers to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: July 31, 2006



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
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