

**Peters, Berger, Koshel & Goldberg, P.C. v Liberty
Intl. Underwriters Inc.**

2007 NY Slip Op 33118(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0115389/2004

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Peters Berger Koshel

INDEX NO. 115389/04

MOTION DATE 8/17/07

- v -

MOTION SEQ. NO. 002

Liberty International

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

Based on the accompanying Memorandum Decision, it is hereby


ORDERED that the motion by Liberty Insurance for summary judgment (1) declaring that it has no duty to defend or indemnify plaintiffs with respect to the Legal Malpractice Action, (2) dismissing the Verified Complaint, and (3) awarding Liberty Insurance costs and disbursements is granted; and it is further

ORDERED and DECLARED that Liberty International Underwriters Inc. has no duty to defend or indemnify plaintiffs with respect to the legal malpractice action captioned Monica Leadbeater, individually and as mother and natural guardian of Kctewa Edwards, an infant under the age of sixteen years v. Peters, Berger, Koshel & Goldberg, P.C., Richard Goldberg and Bonnie B. Berger (Index No. 19903/2003); and it is further

ORDERED that defendant Liberty Insurance serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

Dated: 9/27/07


J.S.C.

Check one: FINAL DISPOSITION

HON. CAROL EDMEAD
NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
PETERS, BERGER, KOSHEL & GOLDBERG, P.C.,
RICHARD GOLDBERG AND BONNIE BERGER,

Plaintiffs,

-against-

LIBERTY INTERNATIONAL UNDERWRITERS INC.,
AND MONICA LEADBEATER, INDIVIDUALLY
AND AS MOTHER OF KETEWA EDWARDS,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 115389-2004

DECISION/ORDER

FILED
OCT 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiffs, Peters, Berger, Koshel & Goldberg, P.C. (“Peters, Berger”), Richard Goldberg (“Goldberg”) and Bonnie Berger (“Berger”) (collectively “plaintiffs”) commenced this action against defendants Liberty International Underwriters Inc. (“Liberty Insurance”)¹ and Monica Leadbeater, individually and as mother of Ketewa Edwards (“Leadbeater”) (collectively, “defendants”) for a judgment declaring that Liberty Insurance is obligated to provide coverage for Leadbeater’s underlying legal malpractice action against plaintiffs (the “Legal Malpractice Action”). The underlying Legal Malpractice Action, for which plaintiffs seek coverage, arises out of plaintiffs’ legal representation of Leadbeater in connection with her medical malpractice action against Dr. Yvon C. Beaubrun (“Dr. Beaubrun”) and The Brooklyn Hospital Center (“the Hospital”) (the “Leadbeater Action”). In her medical malpractice action, Leadbeater alleged that Dr. Beaubrun and the Hospital were negligent in diagnosing her twin gestation, resulting in one

¹ Liberty International Underwriters, Inc. is not the correct name of defendant, as the insurance policy in question was issued by Liberty *Insurance* Underwriters, Inc.

of her babies being deprived of oxygen at birth and suffering cerebral palsy.

Liberty Insurance now moves for summary judgment (1) declaring that it has no duty to defend or indemnify plaintiffs with respect to the Legal Malpractice Action, (2) dismissing the Verified Complaint, and (3) awarding Liberty Insurance costs and disbursements.

Background

During their representation of Leadbeater in the Medical Malpractice Action, plaintiffs moved, on behalf of Leadbeater, for a default judgment against Dr. Beaubrun. In response, Dr. Beaubrun cross moved to dismiss the complaint. By order dated September 14, 2000, Hon. Michelle Weston Patterson (“Judge Patterson” or the “Court”) dismissed Leadbeater’s complaint on the grounds that plaintiffs failed to seek a default judgment within one year period prescribed in CPLR 3215(c) (the “September 2000 order”).

Thereafter, the Hospital moved to dismiss the Complaint for failure to effect service upon the Hospital within the time period permitted under CPLR 306-b. Plaintiffs cross moved for an extension of time to effect service. By order dated September 18, 2001, Judge Patterson dismissed Leadbeater’s action against the Hospital and deemed plaintiffs’ cross-motion moot. On October 11, 2001, plaintiffs appealed the order dismissing the Hospital from the action.

Thereafter, Liberty Insurance issued plaintiffs a “claims made” lawyers professional liability insurance policy, effective February 8, 2002 through February 8, 2003 (the “Policy”). The Policy was renewed for the following year for the period of February 8, 2003 through February 8, 2004.

On November 18, 2002, the Appellate Division affirmed the order dismissing the action

against the Hospital.²

Approximately six months later on May 16, 2003, Leadbeater commenced the Legal Malpractice Action against plaintiffs for failing to properly prosecute her claims against Dr. Beaubrun and Brooklyn Hospital. When plaintiffs received the Summons and Complaint, plaintiffs served such pleadings on Liberty Insurance on June 5, 2003.

Liberty Insurance disclaimed coverage for defense and indemnity of the legal malpractice action. In its disclaimer letter, Liberty Insurance stated, *inter alia*, that based on the court's orders dismissing the medical malpractice complaint, plaintiffs knew or should reasonably have known that they breached a professional duty or committed a wrongful act, and that therefore, the legal malpractice action fell within the "Known Claims or Circumstances" exclusion. The Policy also excluded claims against plaintiffs for punitive damages. Further, Liberty Insurance reserved its rights and defenses under the policy.

Instant Motion

In support of dismissal of plaintiffs' declaratory judgment action, Liberty Insurance argues that under the unambiguous terms of the Policy, Liberty is not obligated to provide a defense or indemnity in connection with the Leadbeater Action because (1) prior to the February 8, 2002 inception of the Policy, plaintiffs had a reasonable basis to believe they breached a

² In affirming the dismissal, the Appellate Division held:

[P]laintiff did not offer a reasonable excuse for her failure to serve the hospital within 120 days after commencement of the action. Moreover, despite the fact that the hospital raised the failure to effect service within the statutory time frame as an affirmative defense in its July 1998 answer, the plaintiff did not seek to validate the late service until after the hospital moved for summary judgment in February 2001. In addition, the record is insufficient to determine whether the plaintiff has a potentially meritorious medical malpractice claim against the hospital, and an extensive period of time has elapsed since the accrual of the claim.

professional duty or committed a wrongful act, or to foresee a claim, arising out of the procedural mishandling of Leadbeater's medical malpractice action, and (2) notice of a potential claim was not provided to Liberty in accordance with the terms of the Policy. Plaintiffs' allegation in their Complaint that Liberty Insurance failed to send the disclaimer letter to Leadbeater or her counsel lacks merit, since section 3420 of the Insurance Law requires that such disclaimer letter be sent when the letter disclaims bodily injury or death claims arising from accidents in New York. Further, plaintiffs' allegation in their Complaint that they reasonably believed that the dismissal of the action would be reversed on appeal and that no malpractice claim would be asserted lacks factual and legal merit. According to Liberty Insurance, no appeal was taken with respect to the order dismissing the action against Dr. Beaubrun. Further, their pursuit of an appeal of the order dismissing the Hospital from the action does not affect their insurance coverage, since plaintiffs were aware, prior to the inception of their Policy, of their procedural errors.

Liberty Insurance also contends that it was not provided with timely notice of Leadbeater's potential claim pursuant to the notice of claims provision of the Policy. Plaintiffs' awareness that their procedural mishandling of Leadbeater's malpractice action put them on reasonable notice of a potential claim. Compliance with the Policy's notice provision is a condition precedent to coverage, and plaintiffs' failed to meet their burden of demonstrating that this condition precedent was satisfied. Plaintiffs were obligated to disclose a potential claim as soon as the first policy went into effect on February 8, 2002, and notice was first provided to Liberty on June 5, 2003, 16 months after the inception of the first policy.

In response, Leadbeater contends that despite the unity in interest she has with plaintiffs that they receive coverage for their acts of professional negligence, throughout the legal

malpractice case, she has always espoused that her Medical Malpractice Action had merit.

Further, contrary to plaintiffs' claims, there was never any communication to Leadbeater that her underlying case was dismissed. Nor was Leadbeater ever instructed that her Medical Malpractice Action had no merit. Plaintiff Berger's affirmation in opposition to Dr. Beaubrun's motion to dismiss the medical malpractice Complaint states that Dr. Beaubrun rendered prenatal treatment to the infant Ketewa Edwards, who later suffered from cerebral palsy. Further, Leadbeater signed an affidavit in support of her motion for default judgment against Dr. Beaubrun, swearing that plaintiffs, her then attorneys, advised her that her action had merit.

Plaintiffs oppose dismissal, arguing that the September 2000 and September 2001 orders did not give them any reason to believe that a professional duty was breached.

The September 14, 2000 order did not arm plaintiffs with knowledge of a future legal malpractice claim, did not discuss the merits of Leadbeater's claim, or discuss the late service of the Summons and Complaint. The Court based its decision solely on the fact that Peters, Berger did not provide a reasonable excuse for the delay in moving for default judgment. Plaintiffs also assert that Dr. Beaubrun was uninsured, and thus, Leadbeater could not demonstrate that any judgment in the medical malpractice case would have been collectible from Dr. Beaubrun. Further, although the liability of Dr. Beaubrun was based on her failure to diagnose twins, it was Brooklyn Hospital's management of Leadbeater's labor, which led to the cerebral palsy. Thus, there was no viable claim against Dr. Beaubrun, who was not present during the delivery.

Further, plaintiffs argue that they had a good faith and reasonable basis to believe that in light of the uncertainty of existing law, the Court's dismissal of Leadbeater's claims against Brooklyn Hospital was erroneous, would be reversed on appeal based on the decision entitled

Leader v Maroney, Ponzini & Spencer, and that no malpractice claim would be asserted. At the time of the Court's September 2001 decision, the law of CPLR section 306-b was in flux. Plaintiffs contend that it appealed the September 2001 order on October 11, 2001 based on a trio of Court of Appeal cases. Two months after the September 2001 order was issued, on November 20, 2001, the Court of Appeals decided that the "interest of justice" and "good cause" standards should be considered separately, and that the absence of "good cause" did not preclude the granting of an extension to serve the summons and complaint in the "interest of justice." Thus, Peters, Berger had a reasonable belief that it would be successful on appeal of the dismissal order. Peters, Berger could not foresee that a claim of legal malpractice would be made against them. Therefore, Liberty Insurance cannot disclaim coverage based on the "Known Claims and Circumstances Exclusion."

Moreover, the terms of such Exclusion are ambiguous. Upon a fair reading of subsection [b], plaintiffs were led to assume that notice was only required where it had a reasonable basis to believe that a malpractice claim would be brought against it. If the terms "error, omission or personal injury" are omitted, the term "Wrongful Act" is then defined as "any actual or alleged act . . . , which arises out of the rendering or failure to render professional legal services." This, argues plaintiffs, logically would require all attorneys insured under the Policy to give notice every time they performed legal services. Plaintiffs' reasonable belief in non-liability, then meant that they were not required to give notice. And because the phrase is ambiguous, it can be given no meaning under settled rules of construction. Further, the Policy's definition of "wrongful" cannot cure the ambiguity.

Plaintiffs further argue that they had a reasonable belief of non-liability based upon the

fact that Leadbeater's case had no merit. Leadbeater sought legal services from Peters, Berger when Ketewa was nine years old. At that time, plaintiffs had no medical records from Dr. Beaubrun, and Dr. Beaubrun claimed that the records were lost or destroyed. Plaintiffs consulted with two experts, who reviewed the records available and stated that no deviation from accepted practice proximately caused Ketewa's injuries. Plaintiffs advised Leadbeater of these conclusions, and thus, Peters, Berger stated in the Certificate of Medical Malpractice that they "were unable to obtain the consultation required by Paragraph 1 . . . because of a limitation of time" Plaintiffs also advised Leadbeater that the Second Department noted that the record was insufficient to determine whether she had a potentially meritorious medical malpractice claim against the Hospital.

Plaintiffs also contend that they timely notified Liberty Insurance with notice of Leadbeater's legal malpractice action. The duty to give notice of a potential claim arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the Policy's involvement. Plaintiffs argue that an insured's good-faith belief in non-liability, when reasonable under the circumstances, may excuse a delay in notifying an insurer of an occurrence of a potential claim. Questions of the insured's good faith and reasonableness in believing that he or she would not be sued and in delaying notification to the insurer are issues to be resolved by the trier of fact. At issue is whether the insured has a reasonable basis for a belief that no claim will be asserted against him.

Plaintiffs complied with the notice provision of the Policy when they notified Liberty International by facsimile of the Leadbeater action the day after service upon plaintiffs of Leadbeater's Summons and Complaint. Plaintiffs could not reasonably foresee a future

malpractice action until it was served with papers on June 4, 2003.

In reply, Liberty Insurance maintains that the subject Exclusion is unambiguous, enforceable, and applicable to bar coverage here. Before the first policy inception in 2002, Peters, Berger procedurally mishandled Leadbeater's Action, resulting in dismissal of the action entirely.

The subject Exclusion is only concerned with whether a legal malpractice claim reasonably could be foreseen, not whether such a claim actually would result in malpractice liability to the insured. There is a serious question concerning the merit of Leadbeater's claim against Dr. Beaubrun. Also, plaintiffs' hearsay assertion that Dr. Beaubrun did not have insurance coverage does not mean that Dr. Beaubrun had no other available assets. Thus, even assuming the merits of the malpractice claim against Dr. Beaubrun was necessary to determine the applicability of the Exclusion, there were serious questions concerning those merits. Further, an insured's lawyer's subjective speculation that his or her remediation efforts (*i.e.*, an appeal) might undo the damage to a client is insufficient to show that a legal malpractice claim could not reasonably be foreseen. Further, the trilogy of Court of Appeals cases were not even decided until two months after the claim against the Hospital was dismissed. Thus, it is incomprehensible how Peters, Berger could have had a good faith belief in anything at the time of the dismissal. And, when the Court of Appeals' decisions were rendered, they merely offered additional judicial guidance concerning the timeliness-of-service issues; they did not guarantee success of the appeal.

Moreover, plaintiffs' notice was untimely as a matter of law. Plaintiffs conflate the Exclusion and notice provisions. The merits of Leadbeater's medical malpractice claim have no

bearing on whether timely notice of the legal malpractice claim was given. And, the absence of any threat by Leadbeater of a legal malpractice claim is not an excuse for an insured's failure to give timely notice of a potential claim, which is otherwise reasonably foreseeable.

Analysis

In order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 N.Y.2d at 562; *Silverman v. Perlbinder*, 307 A.D.2d 230, 762 N.Y.S.2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 A.D.2d 10, 11, 751 N.Y.S.2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v. Rovello*, 262 A.D.2d 172 [1st Dept 1999]).

Once this showing is made, however, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so ((CPLR § 3212 [b];

Vermette v. Kenworth Truck Co., 68 N.Y.2d 714, 717 [1986]; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562; *Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546, 765 N.Y.S.2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

Policy Exclusion

“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” (*National Football League v Vigilant Ins. Co.*, 36 A.D.3d 207, 211, 824 N.Y.S.2d 72, 75 [1st Dept 2006] *citing Continental Cas. Co. v Rapid-American Corp.*, 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506 [1993]). Thus, “policy exclusions are given strict and narrow construction, with any ambiguity resolved against the insurer” (*Belt Painting Corp. v TIG Ins. Co.*, 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790, 795 N.E.2d 15 [2003]; *Seaboard Sur. Co. v Gillette Co.*, 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272 [1984]). The insurer bears the burden of proving that the exclusions apply in a particular case (*Steadfast Ins. Co. v Stroock & Stroock & Lavan LLP*, 277 F.Supp.2d 245, 252 [S.D.N.Y. 2003] *citing State of N.Y. v Blank*, 27 F.3d 783, 789 [2d Cir.1994] [*citing Continental Casualty Co. v Rapid-American Corp.*, 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506 [1993]). A construction favorable to the insurer will be sustained only if it is the “only construction which may fairly be placed on the [words used].” (*Vargas v Insurance Co. of North Am.*, 651 F.2d 838, 842 [2d Cir.1981]).

The Policy Exclusion at issue provides:

1. **Known Claims or Circumstances.**

This policy does not apply to any **claim** arising out of a **wrongful act** occurring prior to the **policy period** if, prior to the effective date of the first Lawyers Professional Liability Insurance Policy issued by **us** to the **named insured** and continuously renewed and maintained in effect to the inception of this **policy period**:

* * * * *

- b. **you** had a reasonable basis to believe that **you** had breached a professional duty, committed a **wrongful act**, violated a disciplinary rule, engaged in professional misconduct or to foresee that a **claim** would be made against **you**;

“Wrongful Act” is defined as such:

wrongful act means any actual or alleged act, error, omission or **personal injury** which arises out of the rendering or failure to render **professional legal services**.

(Emphasis in original)

Contrary to plaintiffs’ contention, the Exclusion is clear and unambiguous. The Exclusion precludes the underlying legal malpractice claim to the extent that (1) it arises out of plaintiffs’ actual or alleged act, error or omission which arose from plaintiffs’ rendering professional legal services, occurring prior to the policy period and (2) *that plaintiffs had a reasonable basis to believe that they breached a professional duty, committed a wrongful act, violated a disciplinary rule, engaged in professional misconduct, or to foresee that a claim would be made against them.* (Emphasis added).

In *Fogelson v Home Ins. Co.*, (129 AD2d 508 [1st Dept 1987]), plaintiffs attorneys sought summary judgment declaring that the Home Insurance Company (“Home Insurance”) was obligated to defend and indemnify them in a malpractice action. Plaintiffs admitted their failure to file an answer during their representation of James and Elizabeth Farrell’s mortgage foreclosure action. Plaintiffs were also unsuccessful in their efforts to vacate a default judgment

entered against the Farrells. The professional liability insurance policy at issue provided covered “Provided always that such act, error or omission ... happens: (aa) during the policy period, or (bb) prior to the policy period, provided that prior to the effective date of this policy: . . . 2) the insured had no basis to believe that the insured had breached a professional duty or committed a personal injury. . . .” The Court concluded that Home Insurance was not obligated to defend or indemnify plaintiffs in the malpractice action, as it was “clear” that plaintiffs “did have a basis to believe that they had breached a professional duty prior to the effective date of The Home policy.”

Here, both of the dismissals of Leadbeater’s action were the result of plaintiffs’ own failure to timely and diligently prosecute the Medical Malpractice Action against Dr. Beaubrun, and their failure to timely serve Brooklyn Hospital. When Judge Patterson dismissed the medical malpractice Complaint against Dr. Beaubrun, she found that plaintiffs’ “failed to satisfy the requisite standard” of demonstrating “a reasonable excuse for the delay” in seeking default judgment. The Court held that plaintiffs’ “assertion that their office had communicated with Dr. Beaubrun’s attorney regarding the defendant’s lack of insurance is insufficient to rebut the presumption of abandonment. A telephone call inquiring as to the defendant’s insurance status is not a reasonable excuse for the delay.”

When Judge Patterson dismissed the medical malpractice Complaint against Brooklyn Hospital, she found that good cause was not shown to permit an extension of time to serve the Hospital since (1) plaintiffs proffered no excuse for failing to serve the Hospital within the 120-day time period, (2) plaintiffs failed to demonstrate any difficulty in locating or effecting service upon such readily accessible and identified defendant, and (3) the inability to obtain Dr.

Beaubrun's records in no manner impacted upon plaintiffs' ability to serve the Hospital. Judge Patterson further found that an extension of time to serve the Hospital was unwarranted under the interest of justice standard, since a weighing of the applicable factors indicated that (1) plaintiffs failed to offer any explanation for the failure to diligently move for an extension of time during the three year period after the action was commenced, and (2) plaintiffs' failed to offer any explanation for failing to timely serve the Hospital.

The plaintiffs' fatal errors were the result of plaintiffs' own lack of due diligence. Judge Patterson clearly and explicitly noted the errors committed by plaintiffs warranting dismissal of the Medical Malpractice Action, and the errors made by plaintiffs were considered inexcusable. Any failure by plaintiffs' to recognize that their actions (or inactions) leading to the dismissal of Leadbeater's action constituted a wrongful act or breach of professional duty owed to Leadbeater, is wholly unreasonable under the circumstances. Plaintiffs' knowledge of such dismissals was alone sufficient to (1) create the reasonable expectation or foresee that a malpractice claim would be made against them, (2) indicate that they breached a professional duty to Leadbeater, or (3) committed a wrongful act as defined by the Policy as "any actual or alleged act, error, omission or personal injury which arises out the rendering or failure to render professional legal services."

That plaintiffs appealed the dismissal of the action against Brooklyn Hospital and that the status of the law was purportedly "in flux" are inconsequential (*see Bellefonte Ins. Co. v Albert, P.C.*, 99 A.D.2d 947, 472 N.Y.S.2d 635, 636 [1st Dept 1984] *discussion, infra* at 17).

Thus, the subject Policy Exclusion applies to Leadbeater's underlying Legal Malpractice Action so as to bar coverage under the Policy.

Duty to Provide Notice of Claim

As to the duty to give notice, the Policy provides that:

1. **Notice of Claims.** You must give us written notice of any **claim(s)** or potential **claim(s)** made against you as soon as practicable. In the event suit is brought against you, you must immediately forward to us every demand, notice, summons, complaint or other process received directly or by your representatives. (Emphasis in original).

By such language, the Policy imposes three notice conditions. The first sentence comprises two conditions requiring timely notice of a claim *and* of a *potential* claim. The second sentence refers to notice of an actual suit (*see e.g. Sirignano v Chicago Ins. Co.*, 192 F.Supp.2d 199, 202 [S.D.N.Y. 2002]). As the insurance policy requires notice of a potential claim, the insured plaintiffs herein, had a duty to promptly notify Liberty Insurance when they reasonably might expect to be the subject of a malpractice claim (*see Bellefonte Ins. Co. v Albert, P.C.*, 99 A.D.2d 947, 472 N.Y.S.2d 635, 636 [1st Dept 1984]). Since the provision also requires that notice be given “as soon as practicable,” such notice be given within a reasonable time under all the circumstances (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]).

Such notice provisions have “several purposes”:

“They enable insurers to make a timely investigation of relevant events and exercise early control over a claim. Early control may lead to a settlement before litigation and enable insurers to take steps to eliminate the risk of similar occurrences in the future. When insurers have timely notice of relevant occurrences, they can establish more accurate renewal premiums and maintain adequate reserves.” Notice of occurrence provisions particularly in a legal malpractice insurance context allow carriers to become involved in determining, and possibly assisting in, any appropriate efforts to mitigate or remediate the

errors of their insureds. (Internal citations omitted).

(*Sirignano v Chicago Ins. Co.*, 192 F.Supp.2d 199 [S.D.N.Y. 2002]).

The requirement that an insured notify its liability carrier of a potential claim operates as a condition precedent to the insurer's defense and indemnity obligations (*see DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344 [1st Dept 2004]; *White v City of New York*, 81 N.Y.2d 955, 957, 598 N.Y.S.2d 759, 760, 615 N.E.2d 216 [1993]). And, absent a valid excuse, a failure to satisfy the notice requirement vitiates the insurance policy, and no showing of prejudice is required in order for the insurer to raise the issue of untimely notice (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzimons Corp.*, 31 NY2d 436 [1972]).

A good-faith belief of non-liability may excuse or explain a seeming failure to give timely notice (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzimons Corp.*, 31 NY2d 436, *supra*). However, the belief must be reasonable under all the circumstances (*id.*). At issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him (*SSBSS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 584, 677 N.Y.S.2d 136, 138 [1st Dept 1998] *citing see, AMRO Carting Corp. v Allecity Ins. Co.*, 170 A.D.2d 394, 566 N.Y.S.2d 282; *see White v City of New York, supra*, at 958, 598 N.Y.S.2d 759, 615 N.E.2d 216; *Security Mut., supra*, at 441; *see Sirignano v Chicago Ins. Co., supra, citing Sparacino v Pawtucket Mut. Ins. Co.*, 50 F.3d 141, 143 [2d Cir.1995] ["The test for determining whether the notice provision has been triggered is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim"]). Thus, summary judgment on this issue may be

granted in Liberty Insurance's favor only if the evidence establishes as a matter of law that the insured plaintiffs' belief that Leadbeater would not assert a claim against it was reasonable (*see SSBSS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d at 584, *citing Mighty Midgets v Centennial Ins. Co.*, 47 N.Y.2d 12, 416 N.Y.S.2d 559, 389 N.E.2d 1080), taking all inferences in favor of the non-movant plaintiffs (*see, Creighton v Milbauer*, 191 A.D.2d 162, 594 N.Y.S.2d 185; *LoTempio v Safeco Ins. Co. of Amer.*, 71 A.D.2d 799, 419 N.Y.S.2d 347).

Here, the record does not support such a conclusion. Leadbeater's medical malpractice action against Dr. Beaubrun, which Leadbeater and plaintiffs argued had merit, was dismissed as abandoned in September 2000 because plaintiffs failed to take any action to prosecute the merits of her action within the 1-year period allowed by CPLR 3215. The malpractice action against Brooklyn Hospital was dismissed for failure to timely serve said defendant. Again, plaintiffs' knowledge of the dismissals was alone sufficient to create the reasonable expectation of a malpractice claim by Leadbeater (*see Wilson v Quaranta*, 18 AD3d 324 [1st Dept 2005] [for 8/1/2 months before giving notice of malpractice claim, attorney could not have had a reasonable belief that plaintiff would not or could not assert a malpractice claim against him based on his untimely filing of a notice of claim against the City that set forth the incorrect place of injury]; *see also Sirignano v Chicago Ins. Co.*, 192 F.Supp.2d 199 [S.D.N.Y. 2002] [client's case was dismissed as abandoned in January 1999 because plaintiff attorney had done nothing to restore the case to the calendar within the 1-year period allowed by CPLR 3404 and plaintiff's knowledge of that dismissal was alone sufficient to create the reasonable expectation of a malpractice claim]; *Ingalsbe v Chicago Ins. Co.*, 270 A.D.2d 684, 704 N.Y.S.2d 697, 698 [3d Dept 2000] [holding that the insured "had a reasonable basis upon which to report a potential claim to his malpractice

carrier when he knew that he had missed the statute of limitation on his client's claim]).

Thus, regardless of plaintiffs' subjective and conclusory claim that they were unaware of any conduct on their part which reasonably could give rise to a claim, the events which occurred in the Medical Malpractice Action until September 2000 and until September 2001 are such that any reasonable attorney-insured could reasonably have expected a legal malpractice claim (*Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, *supra*, 31 N.Y.2d at 442, 340 N.Y.S.2d at 907, 293 N.E.2d at 79; *Cass v American Guarantee & Liability Ins. Co.*, 13 Misc 3d 1238 [Supreme Court, New York County 2006] [an attorneys' awareness that his or her particular handling of a client's matter may adversely affect the client's interests is sufficient to put a reasonable attorney on notice of a potential claim for malpractice]).

The Court notes that in *Bellefonte Ins. Co. v Albert, P.C.* (99 A.D.2d 947 [1st Dept 1984]), the Appellate Division held that an insured lawyer is not permitted to await the outcome of an appeal he was prosecuting on behalf of the client before giving notice to his carrier, when he became aware of a potential malpractice claim some 17 months earlier. Thus, *Bellefonte* makes clear that the fact that an insured lawyer continues to represent the client in a pending matter, and that the courts have not finally spoken on the case, does not eliminate his notice responsibility to his carrier (*Sirignano v Chicago Ins. Co.*, 192 F.Supp.2d 199 [S.D.N.Y. 2002]).

The cases upon which plaintiffs rely, to establish that their excuse for the delay in providing notice to Liberty Insurance are factually distinguishable (*cf. D'Alois v Travelers Inc. Co.*, 85 NY2d 825 [notice of claim given after commencement of suit three years after the subject accident timely where injured party's parents declined insured's offer to pay medical expenses

and indicated no intention to sue insured]; *426-428 W. 46th St. Owners, Inc. v Greater N.Y. Mut. Ins. Co.*, 16 Misc 3d 1114 [Supreme Court, New York County 2007] [insured's excuse not unreasonable; insured's failure to inquire as to cause of injured tenant's fall not unreasonable due to circumstances regarding tenant's health and late payment history]).

Further, Leadbeater's purported inability to ultimately collect on any judgment against Dr. Beaubrun due to the fact that Dr. Beaubrun was (1) uninsured and (2) not liable for the cerebral palsy, did not provide a reasonable basis for plaintiffs to believe that their breach of a professional duty would lead not to a malpractice action. During the time of Leadbeater's medical malpractice action, caselaw held that "where the plaintiff client's cause of action is lost due to the defendant attorneys's negligence, proof of collectibility of the judgement is part of the plaintiff's affirmative case" (*McKenna v Forsyth & Forsyth*, 280 AD2d 79 [4th Dept 2001] *citing Larson v Cruet*, 105 AD2d 651 [1st Dept 1984]).³ However, that Dr. Beaubrun did not have insurance did not necessarily render any potential judgment against her uncollectible. And, plaintiffs' claim that they believed Dr. Beaubrun was not liable for the cerebral palsy is belied by their papers submitted in opposition to Dr. Beaubrun's cross-motion to dismiss. Thus, plaintiffs' reliance on such factors is unreasonable.

Further, plaintiffs' belief that the September 18, 2001 order was erroneous and would be reversed on appeal based on the decision entitled *Leader v Maroney, Ponzini & Spencer* is unavailing. Even assuming plaintiffs' await of the decision on appeal of its 2001 order was

³ This point of law has since been overruled by the First Department in *Lindenman v Kreitzer* (7 A.D.3d 30, 775 N.Y.S.2d 4 [1st Dept 2004]), which held that proof of the collectibility of a favorable judgment in the underlying action is not an essential element of the plaintiff's cause of action for legal malpractice.

reasonable (and this Court finds that it was not), the decision on appeal affirmed said order on November 18, 2002. Thus, any doubt plaintiffs' may have had as to whether their excuse for failing to timely serve Brooklyn Hospital was unreasonable was clarified upon the Appellate Division's affirmance of Judge Patterson's order. Yct, Liberty Insurance was not notified of anything pertaining to plaintiffs' mishandling of Leadbeater's Medical Malpractice Action until over six months later on June 5, 2003. The Court also notes that there is no indication that plaintiffs' notified or advised Liberty Insurance of a potential claim when the Policy was initiated. Thus, as plaintiffs' failed to notify Liberty Insurance "as soon as practicable" they failed to comply with the condition precedent to coverage under the Policy.

Plaintiffs' remaining contentions lack merit.


Based on the foregoing, it is hereby

ORDERED that the motion by Liberty Insurance for summary judgment (1) declaring that it has no duty to defend or indemnify plaintiffs with respect to the Legal Malpractice Action, (2) dismissing the Verified Complaint, and (3) awarding Liberty Insurance costs and disbursements is granted; and it is further

ORDERED and DECLARED that Liberty International Underwriters Inc. has no duty to defend or indemnify plaintiffs with respect to the legal malpractice action captioned Monica Leadbeater, individually and as mother and natural guardian of Ketewa Edwards, an infant under the age of sixteen years v. Peters, Berger, Koshel & Goldberg, P.C., Richard Goldberg and Bonnie B. Berger (Index No. 19903/2003); and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: September 27, 2007


Hon. Carol Robinson Edmead, J.S.C.

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