

<b>Gladstein &amp; Isaac v Philadelphia Indem. Ins. Co.</b>
2009 NY Slip Op 32827(U)
November 30, 2009
Supreme Court, New York County
Docket Number: 601014/07
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Ling-Cohan  
*Justice*

PART 36

Index Number : 601014/2007  
**GLADSTEIN & ISAAC**  
vs.  
**PHILADELPHIA INDEMNITY**  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
5  
6, 7  
3, 4

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 + cross-motion for  
*Summary judgment are decided in accordance with  
the attached memorandum decision.*

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

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/30/09

**DORIS LING-COHAN**  
J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----x  
GLADSTEIN & ISAAC and HARVEY GLADSTEIN,  
Individually and as Winding Down  
Partner of GLADSTEIN & ISAAC,

Plaintiffs,

- against -

PHILADELPHIA INDEMNITY INSURANCE  
COMPANY,

Defendant.

Index No. 601014/07

Motion Seq. No.: 003

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

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**HON. DORIS LING-COHAN, J.:**

In this declaratory judgment action, defendant, Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against it. Plaintiffs, Gladstein & Isaac and Harvey Gladstein, individually and as Winding Down Partner of Gladstein & Isaac, oppose the motion and cross-move for summary judgment declaring that Philadelphia Indemnity is obligated to defend and indemnify them in an underlying action, entitled *Esposito v Isaacs*, Sup Ct, NY County, Index No. 109446/06 (the "underlying action").

**BACKGROUND**

Gladstein & Isaac is a former New York law firm. Harvey Gladstein and Allen H. Isaac are former partners of Gladstein & Isaac. Gladstein & Isaac was dissolved on January 31, 2006, and Harvey Gladstein is responsible for winding down its affairs. Harvey Gladstein also formed the law firm of Harvey Gladstein & Partners on February 1, 2006.

Philadelphia Indemnity is an insurance company licensed to conduct an insurance business in this State. On July 8, 2005, Philadelphia Indemnity issued a Lawyers Professional Liability Insurance Policy, Policy No. PHSD151613, to Gladstein & Isaac. The policy, effective September 15, 2005 to September 15, 2006, afforded the following professional liability coverage:

The Company will pay on behalf of any INSURED those sums in excess of the deductible which any INSURED becomes legally obligated to pay as DAMAGES as a result of CLAIMS first made against any INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD, any subsequent renewal of the policy or any extended reporting period, by reason of any WRONGFUL ACT or PERSONAL INJURY occurring on or after the RETROACTIVE DATE, if any. Coverage shall apply to any such CLAIMS arising out of services rendered or which should have been rendered by any INSURED, and arising out of the conduct of the INSURED'S profession as a Lawyer, or as a Lawyer acting in the capacity of an Arbitrator, Mediator, Title Insurance Agent or Notary Public or as a member, director or officer of any Bar Association, its governing board or any of its committees.

(Policy, Not of Mot, Exh C).

The term "claim" is defined to mean: "[A] demand made upon any INSURED for DAMAGES, including but not limited to, service of suit or institution of arbitration proceedings against any INSURED". (*id.*). The term "wrongful act" is defined to mean any actual or alleged act, error, omission, misstatement, misleading statements, or neglect or breach of duty (*id.*).

Section II(C)(2) of the "New York Changes" portion of the policy states:

If a claim with multiple allegations is made against an insured, the insurer shall provide coverage for the claim as stated in this policy, provided, however, that at least one of the allegations is covered under this policy, regardless of the fact that one or more of the allegations are specifically excluded from coverage under this policy

(*id.*).

On July 6, 2006, Luisa C. Esposito commenced the underlying action seeking to recover compensatory and punitive damages from Gladstein & Isaac, Harvey Gladstein, Allen H. Isaac and others for personal injuries she allegedly sustained as a result of the intentional torts of Allen C. Isaac and the negligence of Goldstein & Isaac and Harvey Gladstein in hiring, training, supervising, and retaining control over Allen Isaac. The underlying complaint alleges that the Allen H. Isaac, and Harvey Gladstein began a law partnership, known as Goldstein & Isaac, in 1996; that in June 2005, Goldstein & Isaac was retained as trial counsel for the law firm of Pollack, Pollack, Isaac & Decicco in a personal injury action involving Luisa C. Esposito; that Luisa C. Esposito met with Allen H. Isaac two times at his law office for the purpose of trial preparation; and that both times the Allen H. Isaac, *inter alia*, assaulted and battered Luisa C. Esposito. In particular, the underlying complaint alleges:

That on July 8, 2005 while plaintiff Luisa C. Esposito was at the aforesaid location,

defendant Allen Isaac assaulted, battered, caused offensive sexual bodily contact, verbally abused, verbally sexually abused, verbally demeaned, and sexually harassed the plaintiff Luisa C. Esposito without consent, just cause or provocation ... .

That on July 8, 2005, September 16, 2005, October 8, 2005 and at all times between those dates and continuing thereafter, defendant Allen Isaac undertook a telephone campaign seeking to further psychologically attack plaintiff Luisa C. Esposito to demean plaintiff and criticize and belittle her case so as to ensure that she assumed a submissive role to enable defendant Allen Isaac to ingratiate himself to her as her savior so as to dominate her and then to use her sexually for his own pleasure ... .

That on September 16, 2005, while plaintiff was lawfully present at the aforesaid location, more specifically in defendant, Allen H. Isaac's office, defendant, Allen H. Isaac caused offensive sexual bodily contact, approached, groped, menaced, sexually and verbally assaulted, verbally abused and battered the plaintiff causing her to be severely injured ...

(Underlying Complaint, Not of Mot, Exh D, ¶¶ 48, 59, 65). The underlying complaint also alleges that Harvey Gladstein was aware of Allen H. Isaac's reputation as a "sexual deviant, philanderer and adulterer, and to possess a lewd and lascivious nature and disposition with a propensity to sexually assault, batter, and physically and/or verbally sexually harass females" (*id.*, ¶62). In addition, the underlying complaint alleges that the actions of Allen H. Isaac violated the Disciplinary Rules, Ethical Considerations and Code of Professional responsibility, and

constituted an intentional breach of fiduciary duties owed to her.

On July 11, 2006, plaintiffs forwarded a copy of the summons and underlying complaint to Philadelphia Indemnity. By letter, dated October 10, 2006, Philadelphia Indemnity disclaimed coverage on the ground that "the allegations set forth in the underlying complaint do not fall within the insuring agreement of the Philadelphia Policy" (Disclaimer, Not of Mot, Exh F). By letter dated October 17, 2006, plaintiffs challenged the disclaimer of coverage, and Philadelphia Indemnity affirmed its disclaimer coverage in a letter, dated November 2, 2006.

Plaintiffs secured a defense in the underlying action under an insurance policy issued by Chubb Insurance group of Insurance Companies ("Chubb").

Plaintiffs commenced this action seeking a declaration that Philadelphia Indemnity is obligated to defend and indemnify them in the underlying action. Plaintiffs allege that the disclaimer of coverage by Philadelphia Indemnity was wrongful, was untimely, and violated the provisions of the insurance law. Plaintiffs also allege that Philadelphia Indemnity waived its right to disclaim coverage based on the untimeliness of the disclaimer.

Defendant answered, generally denying the allegations in the Complaint and asserting numerous affirmative defenses, including, *inter alia*, that the claims in the underlying complaint do not fall within the insuring clause of the policy.

Defendant now seeks summary judgment dismissing the Complaint. In addition to opposing the motion, plaintiffs cross-move for summary judgment declaring that defendant is obligated to defend and indemnify them in the underlying action.

#### DISCUSSION

It is well settled that an insurer's duty to defend is broader than its duty to indemnify (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). Indeed, the duty to defend is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations in the complaint "suggest a reasonable possibility of coverage" (*id.*, quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Fin, Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1993]).

In contrast, "where the facts alleged plainly do not bring the case within the coverage of the policy, there is no obligation to defend" (*George Mulhstock & Co. v American Home Assur. Co.*, 117 AD2d 117 [1<sup>st</sup> Dept 1986]). The obligation of an insurer to defend does not extend to claims that are not covered by the policy or which are expressly excluded from coverage (*30 West 15<sup>th</sup> St. Owners Corp. v Travelers Ins. Co.*, 165 AD2d 731, 733 [1<sup>st</sup> Dept 1990]).

As stated, the plaintiff in the underlying complaint sought to recover compensatory and punitive damages from Gladstein & Isaac, Harvey Gladstein, Allen H. Isaac, and others for personal injuries Luisa C. Esposito allegedly sustained as a result of the intentional torts Allen H. Isaac committed on her on July 8, 2005, September 16, 2005, and October 8, 2005, during visits to the defendant's law office for the purpose of trial preparation, and the negligence of Goldstein & Isaac and Harvey Gladstein in hiring, training, supervising, and retaining control over Allen H. Isaac.

Philadelphia Indemnity agreed to pay damages that the underlying defendants are legally obligated to pay for claims made against them during the policy period, which are reported to the insurer in writing and are caused by "any [wrongful act] or [personal injury]" of the underlying defendants resulting in "[claims] arising out of services rendered or which should have been rendered by any INSURED, and arising out of the conduct of the INSURED'S profession as a Lawyer." Wrongful acts are defined to include any actual or alleged act, error, omission, misstatement, misleading statements, or neglect or breach of duty.

"Errors and omissions policies generally provide coverage for acts of negligence and do not insure against intentional acts" (*Watkins Glen Central Sch. Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 286 AD2d 48, 51 [2d Dept 2001]).

Furthermore, sexual assaults are intentional acts that ordinarily are excluded from coverage under a general liability policy (*id.*).

While the allegations against Allen H. Isaac are intentional acts for which Philadelphia Indemnity owes no duty of defense on the claims against him in the underlying complaint, to the extent that Goldstein & Isaac may be held liable for the negligent hiring, training, supervising, and retaining control over Allen H. Isaac, this risk falls squarely within the type of errors and omissions coverage provided by the Philadelphia Indemnity policy (*see id.*).

Furthermore, while some of the acts complained of in the underlying action occurred prior to the coverage period of the policy, The "New York Changes" portion of the policy provides for a defense where, as here, at least one of the allegations is covered under this policy, regardless of the fact that one or more of the allegations are specifically excluded.

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that defendant is obligated to defend and indemnify the cross-moving plaintiffs herein in the

underlying action, entitled *Esposito v Isaacs*, Sup Ct, NY County, Index No. 109446/06.

The foregoing constitutes the decision and judgment of the Court; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendant with notice of entry.

Dated:

11/30/09

**JUSTICE DORIS LING-COHAN**

Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\GLADSTEIN&ISAAC0

**FILED**  
DEC 03 2009  
NEW YORK  
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