Advanced Integrative Wellness LLC v Merchants Ins. Group
2010 NY Slip Op 30646(U)
March 19, 2010
Supreme Court, Nassau County
Docket Number: 6346/08
Judge: Denise L. Sher

Scan

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ADVANCED INTEGRATIVE WELLNESS LLC and HEALTHBRIDGE MEDICAL ASSOCIATES, P.C.,

Plaintiffs,

- against -

MERCHANTS INSURANCE GROUP,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 6346/08
Motion Seq. Nos.: 01, 02
Motion Date: 12/16/09
02/26/10

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion for Summary Judgment, Affidavit, Memorandum of Law and Exhibits	1
Notice of Cross Motion for Summary Judgment, Affirmation, Affidavit and Exhibits	2
Reply Affidavit in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment and Exhibit	3
Affirmation in Opposition and Exhibits	4
Reply Affirmation	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

The motion by the plaintiffs, Advanced Integrative Wellness, LLC and Healthbridge Medical Associates, P.C., (Motion Sequence No. 1) for an order pursuant to CPLR 3212 granting them summary judgment declaring that the defendant Merchants Insurance Group is obligated to defend and indemnify them in the action *Dziegielewski v. Advanced Integrative*

Wellness LLC, et al., (Supreme Court Nassau County [Index No. 018467/09]) and that the insurer is liable to them for the costs they have incurred in defending themselves in that action is granted as provided herein.

The cross-motion by the defendant, Merchants Insurance Group, (Motion Sequence No. 2) for an order pursuant to CPLR 3212 granting it summary judgment declaring that it is not obligated to defend or indemnify the plaintiffs, Advanced Integrative Wellness LLC and Healthbridge Medical Associates, P.C., in the action *Dziegielewski v Advanced Integrative Wellness LLC, et al.*, (Index No. 018467/09) is denied.

Dziegielewski, plaintiff in the related action *Dziegielewski v Advanced Integrative Wellness LLC, et al.*, seeks to recover from Advanced Integrative Wellness, LLC, Healthbridge Medical Associates, P.C., Elysium Day Spa and Dynatronics, Inc., for personal injuries to her leg allegedly sustained as a result of Synergie cellulite reduction services which she received at Elysium Day Spa between November 10, 2003 to June 2004. She alleges that she was treated with a Synergie AMS Device which was manufactured by Dynatronics and that her treatments were provided by an employee of Advanced Integrative Wellness. She has advanced causes of action sounding in negligence, violations of General Business Law § 349 which prohibits deceptive business practices, General Business Law § 350 which prohibits false advertising and negligent misrepresentation. She also seeks exemplary damages.

It is not disputed that plaintiffs provided timely notice to defendant of Dziegielewski's claim and that defendant timely disclaimed. However, the propriety of defendant's disclaimer is contested in this action. It disclaimed plaintiffs' defense and indemnification on several grounds: (1) because "professional services are specifically excluded" by the policy; (2) because

deceptive and false advertising are intentional acts which are specifically excluded by the policy; and, (3) because "exemplary damages are punitive and would not be covered by insurance as it is against public policy." Whether even a possibility of coverage under the policy exists is the issue to be resolved here: An examination of the complaint in *Dziegielewski v. Advanced Integrative Wellness LLC, et al.*, (Index No. 018467/09) and the parties' policy is required. *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *See Sheppard-Mobley v. King,* 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept. 2004), *aff'd as mod.*, 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005), *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *See Sheppard-Mobley v. King*, *supra*, at 74; *Alvarez v. Prospect Hospital*, *supra*; *Winegrad v. New York University Medical Center*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v. Prospect Hospital*, *supra*, at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006), *citing Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 (2d Dept. 1990). An insurer's disclaimer is strictly limited to the

grounds set forth in its disclaimer. *See Adames v. Nationwide Mut. Fire Ins. Co.*, 55 A.D.3d 513, 866 N.Y.S.2d 210 (2d Dept. 2008). A reservation of additional grounds for disclaiming may only be advanced for grounds reasonably unknown by the insurer. *See Estee Lauder, Inc. v. OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dept. 2009). *See also General Acc. Ins. Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979); *State of N.Y. v. AMRO Realty Corp.*, 936 F.2d 1420, 1431 (2d Cir. 1991). Therefore, any attempt by defendant to rely on any grounds for disclaiming of which it had notice but failed to disclaim early is flatly rejected.

"[I]t is well settled that an insurer's 'duty to defend [its insured] is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest. . . a reasonable possibility of coverage." '" *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra*, at 714, *quoting Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 818 N.Y.S.2d 176 (2006), *quoting Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993). *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 880 N.Y.S.2d 885 (2009). "'The duty to defend [an] insured [ ] . . . is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra*, at 714, *quoting Technicon Electronics. Corp. v. American Home Assur. Co.*, 74 N.Y.2d 66, 544 N.Y.S.2d 531 (1989), *rearg den.*, 74 N.Y.2d 893, 547 N.Y.S.2d 851(1989). *See also Franklin Development Co., Inc. v. Atlantic Mut. Inc.*, 60 A.D.3d 897, 876 N.Y.S.2d 103 (2d Dept. 2009); *Global Const. Co., LLC v. Essex Ins. Co.*, 52 A.D.3d 655, 860 N.Y.S.2d 614 (2d Dept. 2008). This is so even if the complaint against the insured advances "'additional

claims which fall outside the policy's general coverage or within its exclusory provisions.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group, supra,* at 714, *quoting Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 749 N.Y.S.2d 456 (2002). "The merits of the complaint are irrelevant" and therefore, "'an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group, supra,* at 714, *quoting Town of Massena v. Healthcare Underwriters Mut. Ins. Co., supra,* at 444 and *Automobile Ins. Co. of Hartford v. Cook, supra,* at 137. *See also Franklin Development Co., Inc. v. Atlantic Mut. Inc., supra; Global Const. Co., LLC v. Essex Ins. Co., supra.* An insurer is relieved of its obligation to defend its insured only "'when "as a matter of law . . . there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy" or 'when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion.'" *Franklin Development Co., Inc. v. Atlantic Mut. Inc., supra; Global Const. Co., LLC v. Essex Ins. Co., supra,* at 900-901, *quoting Bruckner Realty, LLC v. County Oil Co., Inc.*, 40 A.D.3d 898, 838 N.Y.S.2d 87 (2d Dept. 2007); *City of New York v. Evanston Ins. Co.*, 39 A.D.3d 153, 830 N.Y.S.2d 299 (2d Dept. 2007); *Global Const. Co., LLC v. Essex Ins. Co., supra,* at 656 and *citing Automobile Ins. Co. of Hartford v. Cook, supra,* at 137; *Bruckner Realty, LLC v. County Oil Co., Inc., supra,* at 900. *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co., supra.*

"When an insurer seeks to disclaim coverage on the . . . basis of an exclusion, . . . [it] will be required to 'provide a defense unless it can "demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy's exclusions, and further, that

the allegations, *in toto*, are subject to no other interpretation." '" *See Automobile Ins. Co. of Hartford v. Cook, supra,* at 137, *quoting Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 581 N.Y.S.2d (1992). *See also Continental Cas. Co. v. Rapid-American Corp., supra,* at 648; *Essex Ins. Co. v. Pingley*, 41 A.D.3d 774, 839 N.Y.S.2d 208 (2d Dept. 2007), *lv den.*, 9 N.Y.3d 811, 846 N.Y.S.2d 601 (2007), *citing Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 486 N.Y.S.2d 876 (1984); *Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co., supra.*. "An exclusion from coverage 'must be specific and clear in order to be enforced. . .'" *See Essex Ins. Co. v. Pingley, supra*, at 776, *quoting Seaboard Sur. Co. v. Gillette Co., supra,* at 311. *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co., supra*; *Automobile Ins. Co. of Hartford v. Cook, supra,* at 137. Furthermore, "an ambiguity in an exclusionary clause must be construed most strongly against the insurer." *See Essex Ins. Co. v. Pingley, supra,* at 776, *citing Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 469 N.Y.S.2d 655 (1983); *Guachichulca v. Laszlo N. Tauber & Associates, LLC*, 37 A.D.3d 760, 831 N.Y.S.2d 234 (2d Dept. 2007); *Bassuk Bros., Inc. v. Utica First Ins. Co.*, 1 A.D.3d 470, 768 N.Y.S.2d 479 (2d Dept. 2003), *lv dism.*, 3 N.Y.3d 696, 785 N.Y.S.2d 15 (2004). *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co., supra,* at 137. "The test for ambiguity is whether the language of the insurance contract is 'susceptible of two reasonable interpretations.'"*See Essex Ins. Co. v. Pingley, supra*, at 776, *citing State v. Home Indem. Co.*, 66 N.Y.2d 669, 495 N.Y.S.2d 969 (1985); *MDW Enterprises, Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 772 N.Y.S.2d 79 (2d Dept. 2004).

The policy at issue here provides that insurance does not apply to:

> Expected or Intended Injury
> "Bodily Injury" or "property damage" expected or intended from the standpoint of the insured; and,

> Professional Services
> "Bodily injury", "property damage", "personal injury" or "advertising injury" due to rendering or failure to render any professional service which includes but is not limited to . . . [a]ny service, treatment, advice or instruction for the purpose of appearance or skin enhancement.

Defendant is correct that coverage for bodily injury or personal injury due to rendering or failing to render any service or treatment for the purpose of skin enhancement is excluded under the policy. Pursuant to her first cause of action sounding in negligence, Dziegielewski's injuries were allegedly caused by her cellulite reduction treatment. Cellulite is defined as "a deposit of subcutaneous fat within fibrous connective tissue that give a puckered and dimpled appearance to the skin surface." Simply stated, Dziegielewski's treatment was clearly for skin enhancement. The fact that Dziegielewski alleges, *inter alia*, that she suffered injuries as a result of the defective design of the synergie device does not render this exclusion inapplicable. First of all, neither Advanced Integrative Wellness, LLC nor Healthbridge Medical Associates, P.C. designed the Synergie device. In any event, the damages are still the result of services for the purpose of skin enhancement.

Additionally, defendant is correct that it may not insure plaintiffs for exemplary damages. *Town of Massena v. Healthcare Underwriters Mut. Ins. Co., supra.*

Nevertheless, defendant's reliance on the policy's exclusion for expected or intended bodily injuries is misplaced. To recover under her causes of action sounding in violations of General Business Law § 349 and 350 and negligent misrepresentation, Dziegielewski need not prove that her injuries were to be expected or intended. Intent is simply not an element of those causes of action.

The elements of deceptive business practices under General Business Law § 349 and

false advertising under General Business Law § 350 are "that the defendant has engaged 'in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.'" *See Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615 (1999), *quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529 (1995), and *citing Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958, 598 N.Y.S.2d 761 (1993), *rearg den.*, 82 N.Y.2d 706, 601 N.Y.S.2d 586 (1993); Givens, Practice Commentaries, McKinneys Cons. Laws of NY, Book 19, General Business Law § 349, at 565. "Deceptive or misleading representations or omissions are defined objectively as those 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *See Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dept. 2004), *quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, *supra*, at 26-27. "Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim." *See Small v. Lorillard Tobacco Co.*, *supra* at 55, *citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, *supra*, at 26. *See also Willner v. Allstate Ins. Co.* , __ AD2d __, 893 N.Y.S.2d 208 (2d Dept. 2010); *PG Ins. Co. of New York v. S.A. Day Mfg. Co., Inc.*, 251 A.D.2d 1065, 674 N.Y.S.2d 199 (4th Dept. 1998).

"[G]enerally a negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage." *See White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474 (1977), *citing Nichols v. Clark, Macmullen & Riley*, 261 N.Y.118 (1933). "[I]nformation is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contact or otherwise, to act with care if he acts at all." *See White v. Guarente*, *supra*, at 363,

citing *Courteen Seed Co. v. Hong Kong & Shanghai Banking Corporation*, 245 N.Y. 377, 381 (1927).

Intended or expected results is simply not an element of any of Dziegielewski's causes of action sounding in violations of General Business Law § § 349, 350 or negligent misrepresentation. Therefore, plaintiffs may be liable to Dziegielewski for those claims without a showing of intentional or knowing conduct on their part. *See Cosser v. One Beacon Insurance Group*, 15 A.D.3d 871, 789 N.Y.S.2d 586 (4th Dept. 2005), citing *PG Ins. Co. of New York v. S.A. Day Mfg. Co., Inc., supra. See also Sarin v. CNA Financial Corp.*, 21 Misc.3d 1101(A) (Supreme Ct. New York County 2008). Because "[t]here is 'a "reasonable possibility that the insured[s] may be held liable for some act or omission covered by the policy," '" defendant has wrongfully disclaimed coverage based on the exclusion for expected or intended injury. *See Cosser v. One Beacon Insurance Group, supra, quoting Fitzpatrick v. American Honda Motor Co., Inc.*, 78 N.Y.2d 61, 571 N.Y.S.2d 672 (1991), *quoting A. Meyers & Sons Corp. v. Zurich American Ins. Group*, 74 N.Y.2d 298, 546 N.Y.S.2d 818 (1989). In addition, since some of Diegielewski's " 'claims arguably arise from covered events, [defendant, Merchants Insurance Group] is required to defend the entire action.'" *Town of Massena v. Healthcare Underwriters Mut. Ins. Co., supra,* at 443, *quoting Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 667 N.Y.S.2d 982 (1997).

Defendant, Merchants Insurance Group, is directed to defend the plaintiffs, Advanced Integrative Wellness, LLC and Healthbridge Medical Associates, P.C., in the action *Dziegielewski v. Advanced Integrative Wellness LLC, et al.*, (Index No. 018467/09) and to reimburse them for all costs incurred thus far in defending themselves in that action. *See Sarin v. CNA Financial Corp., supra.* The Court additionally notes "an insurer's obligations to pay

attorney's fees and costs in connection with a declaratory judgment action is incidental to the insurer's contractual duty to defend." *See National Grange Mut. Ins. Co. v. T. C. Concrete Const., Inc.*, 43 A.D.3d 1321, 843 N.Y.S.2d 877 (4th Dept. 2007). Plaintiff's right to indemnification shall be determined upon the resolution of *Dziegielewski v. Advanced Integrative Wellness LLC, et al.*, (Index No. 018467/09). *See Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 488 N.Y.S.2d 139 (1985).

The parties are directed to appear before the Calendar Control Part (CCP) on the 18th day of May, 2010 at 9:30 a.m. for an inquest to determine the amount defendant must pay to reimburse plaintiffs for their costs incurred in defending themselves in *Dziegielewski v. Advanced Integrative Wellness LLC, et al.*, (Index No. 018467/09) thus far.

Plaintiffs shall file a note of issue on or before May 3, 2010. A copy of this order shall be served upon the County Clerk when the note of issue is filed. Failure to file a note of issue or appear as directed shall be deemed an abandonment of the claim giving rise to the inquest. A copy of this order shall be served upon defendant by May 3, 2010.

This constitutes the decision and order of this Court.

ENTER:

Denise L. Sher

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
March 19, 2010