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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 111435/2009

DELOS INSURANCE CO. F/K/A/

VS.

SMITH & LAQUERCIA LLP

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

n 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: MAR 31 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☒ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Delos Insurance Company f/k/a
Sirius America Insurance Company,
Dennis Organization, Inc., and Rick Dennis,

Plaintiff (s),

-against-

Smith & Laquercia, LLP,

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 111435/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m (3211) w/SAC affid, exhs	1
Pltff's opp w/DAP affirm, JAP affid, exhs	2
Def's reply	3

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

This is an action for legal malpractice. Plaintiff Delos Insurance Company f/k/a Sirius America Insurance ("Delos/Sirius") is an insurance company. Dennis Organization, Inc. and Rick Dennis are its named insureds (collectively "Dennis"). Defendant Smith & Laquercia, LLP is the law firm that the Delos/Sirius hired to represent its insureds in a personal injury action commenced against them and others. Presently before the court is Smith & Laquercia's motion for the pre-answer dismissal of the complaint based upon documentary evidence and failure to state a cause of action

(CPLR 3211 [a][1][7]). Delos/Sirius and Dennis (collectively "plaintiffs") oppose the motion in all respects.

When deciding a motion to dismiss, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]). The following facts are contained in the complaint and are the subject of this motion:

Facts alleged and Arguments Presented

Dennis is in the construction business. They were insured by Delos/Sirius during the policy period commencing June 20, 2002 and ending June 20, 2003. While that policy was in effect, non-party Michael George ("George") was injured while working on a construction project at 90-11 165th Street, Howard Beach, New York ("Howard Beach project"). The injury occurred on October 21, 2002. The Dennis Organization was the construction manager on that project. Non-party Fleming Contracting Corp. ("Fleming") and W&D Contracting, Inc. ("W&D") were subcontractors that the Dennis defendants hired for that project. Marcus Fleming is a principal in each of these companies and apparently Fleming does business as WD. George was employed by W&D at the time of his accident.

In July 2003, George commenced a personal injury action against Dennis, Fleming, W&D and Marcus Fleming (George v. Dennis Organization, Inc., et al, Supreme Court, Kings County Index No. 25755/03) ("George action"). Delos/Sirius retained Smith & Laquercia to represent its insureds (Dennis) in the personal injury

action and an answer was filed by Smith & Laquercia on behalf of Dennis.

Smith & Laquercia, at the request of Delos/Sirius, then commenced a declaratory judgment action against Indian Harbor Insurance Company on behalf of Dennis and Delos/Sirius (Dennis et al v. Indian Harbor Insurance Company, et al, Supreme Court, Kings Co. 28624/04) ("Dennis DJ"). The claim was that Fleming and/or Fleming doing business as W&D or W&D, had an insurance policy with Indian Harbor encompassing the period for the George claim (*i.e.* June 3, 2002 to June 3, 2003) and therefore, Indian Harbor owed Dennis a defense in the George action as its additional insured. Dennis tendered its claim in the George action to Indian Harbor, as an additional insured, but Indian Harbor denied the claim based on late notice by its named insured (W&D) and because there was an injury to employees exclusion in W&D's policy with Indian Harbor.

Shortly thereafter, Indian Harbor commenced a separate declaratory judgment action against W&D, Dennis, the Fleming defendants and George seeking a declaration that it had no duty to defend W&D (Indian Harbor v. W&D, et al, Supreme Court, Kings Co., Index No. 33927/04) ("Indian Harbor DJ"). Smith & Laquercia interposed an answer on behalf of the Dennis defendants in that action, setting forth a general denial. The two declaratory judgment actions were consolidated for joint trial by Judge Schack in Kings County.

Plaintiff moved for summary judgment in the George action on the issue of liability, which Smith & Laquercia opposed. George prevailed on his Labor Law § 240[1] claim against Dennis and W&D and a trial on damages was scheduled (Order, Schmidt J., 7/24/06). Delos/Sirius settled the claims against Dennis before trial by paying George a settlement of $975,000 on April 27, 2007.

Before the George action was settled, Indian Harbor brought a motion for summary judgment in the Dennis DJ. It also brought a motion for summary judgment in the Indian Harbor DJ. The underpinnings of each motion was the Dennis defendants' response to Indian Harbor's notice to admit regarding the written contract between Dennis and W&D for the Howard Beach project. The response was that "no written contract existed between the Dennis Organization and W&D Contracting, Inc. . . " Each motion was decided and granted on default (see Orders, Schack J., 8/18/06 and Ruditzky J., 10/27/06). Judge Schack dismissed the Dennis DJ and Judge Ruditzky decided that Indian Harbor did not owe W&D a defense or indemnification in the George Action.

In the complaint, plaintiffs allege that Smith & Laquercia committed legal malpractice in each of the three lawsuits they were involved in. In the George action, which was based on violations of Labor Law § 240, plaintiffs allege Delos/Sirius negotiated and paid George a settlement of $975,000 on April 27, 2007. Delos/Sirius states it paid the settlement based on Smith & Laquercia's legal advice that Dennis had valid contractual indemnification claims against W&D and that Dennis was an additional insured under the Indian Harbor policy. However, in opposition to Smith & Laquercia's motion to dismiss, plaintiffs have modified their claims and instead allege that had Delos/Sirius been told by Smith & Laquercia sooner that it did not have a viable contractual indemnification claim against W&D, Delos/Sirius would have settled the George case sooner, avoiding the mounting legal fees. Delos/Sirius denies it knew about the motion for summary judgment in the Dennis DJ and the insurance company contends Smith & Laquercia should not have allowed the motion to be decided on

default, but opposed it by arguing that a written contract existed between Dennis and W&D, or that "condition" had been waived, satisfied or excused. Delos/Sirius argues that Smith & Laquercia should have but failed to appeal Judge Schack's decision.

Plaintiffs' complaint alleges that plaintiffs were damaged by the law firm's carelessness and they would not have been damaged, but for Smith & Laquercia's actions and that allowing the motions to be decided on default negatively impacted the plaintiffs' ability to pursue their contractual indemnification claims.

In support of their motion to dismiss, Smith & Laquercia first challenges Delos/Sirius's standing to bring this action on the basis that Dennis, not Delos/Sirius, was Smith Laquercia's client in two of the three actions. Delos/Sirius was only a named party in the Dennis DJ, not the two others. Thus, Smith & Laquercia argues that the claims by the insurance company should be dismissed for that reason alone.

Next, Smith & Laquercia argues that based upon documentary evidence (plaintiffs' own exhibit "A" to the complaint), plaintiffs' claims fail because Dennis was not an additional insured under Indian Harbor's policy. The document, entitled "Indemnification and Contribution Agreement" ("indemnification agreement"), dated October 1, 2002 and signed by Marcus Fleming as vice president of W&D. provides as follows:

> "To the fullest extent permitted by law, Contractor shall indemnify, hold harmless and defend RYAN ALEXANDER, INC., DENNIS ORGANIZATION, INC. against any and all losses, claims, actions, damages, liabilities, or expenses, including but not limited to attorneys' fees and all other costs of defense by reason of the liability imposed by l aw or otherwise upon RYAN ALEXANDER, INC., DENNIS ORGANIZATION, INC. for damages because of bodily injuries, including death, at

> any time resulting therefrom, sustained by any persons, including Contractor's employees . . . arising directly or indirectly from the performance of Contractor's work or from any of the acts or omissions on the part of Contractor . . . and/or subcontractors . . ."

The Indian Harbor policy defines an additional insured as "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization [shall] be added as an additional insured on your policy." (Indian Harbor policy IH 246). Smith & Laquercia contend – as stated in their response to Indian Harbor's notice to admit -- that there is no written contract between Dennis and W&D for the work and the indemnification document does not provide that Dennis be added as an additional insured under its policy with Indian Harbor (or any other insurer). Thus, the law firm contends it was fruitless to have opposed either motion for summary judgment as there were no issues of fact for trial.

Defendants deny that any of the plaintiffs suffered damages and the fact that they paid George a monetary settlement is not proof of damages, but simply an indication they made a business decision to settle George's claims once Dennis was found statutorily liable under Labor Law § 240, rather risk a higher award by a jury. Furthermore, Dennis did not sustain any damages because its insurance company paid the claim and since it was within the policy limits, Dennis did not have to pay any money towards the settlement.

Discussion

It is unrefuted that Smith & Laquercia represented Dennis and Delos/Sirius in the Dennis DJ. It is also unrefuted that Delos/Sirius was not a party in either the George or

Indian Harbor DJ actions and that Delos/Sirius secured Smith & Laquercia's services for its insured, Dennis. Although a claim of legal malpractice must be based upon an attorney/client relationship, the principle of equitable subrogation places Delos/Sirius in the place of its insureds because it paid its insureds' losses (Kumar v. American Transit Ins. Co., 49 A.D.3d 1353 [4th Dept 2008]; *also* NYP Holdings, Inc. v. McClier Corp., 65 A.D.3d 186 [1st Dept 2009]). Therefore, defendant's argument, that Delos/Sirius lacks standing to maintain this action does not warrant the dismissal of this action on the basis that an insurer cannot sue assigned counsel it hired to represent its insured.

In an action to recover damages for legal malpractice, the plaintiff must demonstrate that "the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 [2007] [internal citations and quotations omitted]). To establish causation, the client must show that s/he would have prevailed in the underlying action or would not have incurred any damages, "but for" the lawyer's negligence. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, supra. Thus, to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages. For the reasons that follow, plaintiff's facts, even when accepted as true do not support a legal malpractice claim allowing the complaint a liberal construction.

The motion for summary judgment in the George action was opposed, yet the Dennis defendants were found statutorily liable under Labor Law § 240 because of the

defective safety device George was provided, which failed. The "damages" alleged by Delos/Sirius are best described as the settlement it paid to George and the extra legal fees Delos/Sirius claims it expended because it believed it had a valid contractual indemnification claim against W&D. The settlement payment to George, however, was a business decision. Once found liable to George, Dennis either had to try the issue of damages or settle George's damages claims.

Under the particular facts of this case, the presence or absence of additional insurance under W&D's policy would not have made any difference to Delos/Sirius because W&D's policy contains an employer's liability exclusion which excludes bodily injury to an employee injured during the court of his or her employment. Employee exclusion provisions similar to the one at bar have been held by various courts of this State to be unambiguous and accorded their plain and ordinary meaning (Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337 [1st Dept 2003]; 720-730 Fort Washington Ave. Owners Corp. v. Utica First Ins. Co., 26 Misc.3d 503 [Sup Ct Bronx Co. 2009]).

In any event, the indemnification or "hold harmless" agreement relied upon by Delos/Sirius does not satisfy the requirements set forth in Indian Harbor's policy (IH 246) pertaining to additional insured. Under that policy, an additional insured is "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization [shall] be added as an additional insured on your policy." The indemnification agreement does not require that W&D obtain insurance for the benefit of Dennis.

Though plaintiffs claim that Smith & Laquercia was negligent in allowing each motion for summary judgment in the declaratory judgment actions be decided on default, plaintiffs do not articulate what defense their lawyers should have mounted but failed to. Although the court must accept plaintiffs' facts as true in evaluating a motion to dismiss under CPLR 3211, allegations consisting of bare legal conclusions and facts contradicted by documentary evidence are not entitled to any such consideration. Salavtor v. Kumar, 45 AD3d 560 [2nd Dept 2007] *lv den* 10 NY3d 703 [2008]). Given there was, in fact, no written agreement between Dennis and W&D requiring W&D to name Dennis as additional insured, any argument by Smith & Laquercia that there was a contract would have been incorrect and would not have defeated those motions (Illinois Nat. Ins. Co. v. American Alternative Ins. Corp., 58 A.D.3d 537 [1st Dept 2009]). In the absence of an agreement by a subcontractor to name the general contractor, owner, etc., as an additional insured that obligation will not be inferred nor can it be conferred, even if a certificate of insurance is issued because the certificate confers no rights upon the certificate holder (Illinois Nat. Ins. Co. v. American Alternative Ins. Corp., supra).

Additional facts alleged by platinfifs in opposition to this motion, that it would have settled the George case sooner had it known the futility of its contractual indemnification claims against W&D are incapable of being proved, but even if they could be proved, do not support a legal malpractice cause of action against defendant law firm.

Plaintiffs' request for a stay of this motion so they can engage in discovery is denied. The standard relied upon by plaintiffs is applicable to motions for summary judgment (CPLR 3212 [f]). The court has accepted all of plaintiffs' facts and given the

complaint a liberal construction. Plaintiffs have no claim for malpractice against the defendants. They have not set forth facts showing the attorneys were negligent, or that their negligence (if any) was the proximate cause of the loss sustained and actual damages (Leder v. Spiegel, 31 A.D.3d 266 [1st Dept 2006] *aff'd* 9 N.Y.3d 836 [2007] *cert den* __US__, 128 S.Ct. 1696 [2008]). Even if the attorneys should have (as plaintiffs claim) opposed each motion for summary judgment, but were negligent, plaintiff have not set forth any facts tending to show that "but for" that negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any ascertainable damages (Leder v. Spiegel, *supra*). The payment of the settlement money to George ensued from Dennis having been found statutorily liable for his injuries.

Whether examined as a motion to dismiss under CPLR 3211[a][1] (documentary evidence) or CPLR 3211 [a][7] (failure to state a cause of action), defendants have met their burden of proving their defense founded upon documentary evidence and also shown that plaintiffs have no cause of action for malpractice. Plaintiffs have not defeated the motion. Therefore, defendants' motion to dismiss the complaint at the pleading stage is granted. All claims are hereby dismissed.

Conclusion

In accordance with the foregoing,

IT IS HEREBY:

ORDERED that defendants' motion to dismiss is granted in all respects; and it is further

ORDERED that the clerk shall enter judgment in favor of defendants Smith & Laquercia, LLP against Delos Insurance Company f/k/a Sirius America Insurance

Company, Dennis Organization, Inc., and Rick Dennis; and it is further

ORDERED that any relief that has not been expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.