

Vlachos v Zurich N. Am.

2010 NY Slip Op 33382(U)

December 7, 2010

Supreme Court, Suffolk County

Docket Number: 08-14585

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8-27-10
ADJ. DATE 10-1-10
Mot. Seq. # 001 - MotD; CDISPSUBJ

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GEORGE C. VLACHOS, P.C. and	:	GEORGE C. VLACHOS, P.C.
GEORGE C. VLACHOS,	:	Attorney for Plaintiffs
	:	320 Carleton Avenue, Suite 6100
	:	Central Islip, New York 11722
	:	
Plaintiffs,	:	
	:	
- against -	:	STEINBERG & CAVALIERE, LLP
	:	Attorney for Defendants
	:	50 Main Street, Suite 901
ZURICH NORTH AMERICA and AMERICAN	:	White Plains, New York 10606
GUARANTEE AND LIABILITY INSURANCE	:	
COMPANY,	:	
	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27 - 28; Replying Affidavits and supporting papers ; Other memoranda of law 25 - 26, 29 - 30; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order granting summary judgment (i) declaring that they are not obligated to defend or indemnify the plaintiffs in a legal malpractice action entitled “Darin Gioeli, plaintiff, against George C. Vlachos and George C. Vlachos, P.C., defendants” (Supreme Court, Suffolk County, Index No. 08-1426), (ii) dismissing the complaint, and (iii) awarding them costs, disbursements, and reasonable attorney’s fees, is granted to the extent of granting summary judgment declaring that they are not obligated to defend or indemnify the plaintiffs in the underlying action, with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and is otherwise denied.

In this action, the plaintiffs seek a declaratory judgment against the defendants Zurich North America and American Guarantee and Liability Insurance Company (collectively, American Guarantee)¹

¹ Counsel for the defendants asserts that Zurich North America is not a legal entity, but is instead a trade name under which American Guarantee operates. As the motion has been made on behalf of both named defendants, the Court finds the issue moot.

vacating the disclaimer letter issued by American Guarantee on July 12, 2007 and requiring it to defend and indemnify the plaintiffs in the underlying action. The disclaimer letter purports to deny coverage on the grounds that the claim against the plaintiffs was neither made nor reported during the period of coverage under the relevant insurance policy. Gioeli, the plaintiff in the underlying action, alleges that the plaintiffs herein are liable for legal malpractice for failing to properly prosecute an action against the State of New York (the State) for wrongful conviction of a crime.

The plaintiffs, as Gioeli's attorney, commenced a wrongful conviction action on his behalf against the State on or about August 5, 2003. On December 11, 2003, the State served an answer which included, in pertinent part, the affirmative defense that Gioeli had failed to comply with the pleading requirements of Court of Claims Act § 8-b, which requires the inclusion of certain enumerated documents. On September 9, 2005, the State moved for summary judgment dismissing the complaint based on its affirmative defense. On March 16, 2006, the State's motion was granted. On April 24, 2007, the Appellate Division affirmed the order dismissing Gioeli's action against the State.

The plaintiffs first notified American Guarantee of a possible legal malpractice claim against them by letter dated May 14, 2007. On May 21, 2007, American Guarantee acknowledged receipt of the plaintiffs' letter and reserved all of its rights under the insurance policy previously issued to the plaintiffs. The policy in dispute is a claims-made professional liability policy. The policy covered the periods March 20, 2003 to March 20, 2004, March 20, 2004 to March 20, 2005, March 20, 2005 to March 20, 2006, and March 20, 2006 to July 19, 2006. It is uncontroverted that the final policy was terminated for non-payment of premiums effective July 19, 2006.

By letter dated July 12, 2007, American Guarantee disclaimed coverage on the ground that coverage terminated before notice of a potential claim was given or an actual claim was reported. This declaratory judgment action followed.

American Guarantee now moves for summary judgment declaring that it is not obligated to defend or indemnify the plaintiffs in the underlying legal malpractice action and dismissing the complaint.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the opposing party which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, American Guarantee submits the most recent policy issued to the

plaintiffs. On April 1, 2006, American Guarantee issued a Lawyers Professional Liability Insurance Policy, Policy Number LPL 5278915-3 (the Policy) to George C. Vlachos, P.C. for the period March 20, 2006 to March 20, 2007. The Policy contains an endorsement entitled New York Changes, U-PL-941-A NY, which includes the following relevant language:

SECTION I. INSURING AGREEMENT

A. COVERAGE

The Company will pay on behalf of an Insured, subject to the limit of liability, all amounts in excess of the deductible shown in the Declarations that an Insured becomes legally obligated to pay as Damages and Claim Expenses because of a Claim that is made during the Policy Period and reported to the Company during the Policy Period, any subsequent renewal of the policy or any extended reporting period based on an act or omission in the Insured's rendering or failing to render Legal Services for others.

In addition, the Policy contains an endorsement entitled New York Regulation 121 Notice and Disclosure Statement, U-PL-899-A NY, which states:

Claims Made Policy

This policy is written on a claims-made basis. This policy provides no coverage for Claims arising out of incidents, occurrences or alleged wrongful acts which took place prior to the retroactive date shown on the declarations or endorsed onto this policy. This policy only covers Claims actually made against an Insured while the policy remains in effect and the 60 day automatic extended reporting period unless the insured purchases additional extended reporting period coverage. When purchased, the additional extended reporting period coverage includes the 60 day automatic extended reporting coverage.

Claims-made rates are comparatively lower than occurrence rates and the Insured can expect substantial annual premium increases, independent of overall rate level increases, until the claims-made relationship reaches maturity.

As a general rule, claims-made policies may not be provided in any policy issued or renewed in New York (11 NYCRR § 73.2). However, New Yorkers may obtain claims-made coverage for specific enumerated risks, including professional liability insurance, pursuant to 11 NYCRR 73.2 upon certain terms and conditions as set forth at 11 NYCRR §73.3.

Claims-made policies differ from traditional occurrence or accident policies in at least three basic respects. First, coverage under a claims-made policy is triggered when the claim is made (and not when the bodily injury or property damage occurred); second, depending upon the wording of the claims-made policy, there may not be coverage for acts prior to a certain date if the claim is made after the policy goes into effect; and third, depending upon policy wording, there may still be coverage for claims made after the

policy if the insured had obtained “discovery” or extended coverage.

(3 Dunham, New York Insurance Law § 39.03 [2] [d]).

As to the declaratory relief requested, the Court finds that American Guarantee established its entitlement to summary judgment. It is undisputed that the Gioeli action was commenced after the policy period of the claims-made policy and beyond the automatic 60-day extended reporting period. American Guarantee made a prima facie showing that no “claim,” as that term is defined in the Policy, was made against the plaintiffs within the policy period, or the extended reporting period, and that this claim falls outside the scope of the claims-made policy (*Valentin v Mann & Just*, 75 AD3d 638, 904 NYS2d 676 [2d Dept 2010]; *Gomez v Feder, Connick & Goldstein*, 260 AD2d 348, 687 NYS2d 679 [2d Dept 1999]; *Hunt v Galaxy Ins. Co.*, 223 AD2d 821, 636 NYS2d 194 [3d Dept 1996]). The only means by which the plaintiffs could have obtained coverage in this matter would have been to provide the insurer with notice of a potential claim pursuant to section V of the Policy, U-PL-1090-A NY, which states in pertinent part:

V. CONDITIONS

B. NOTICE TO THE COMPANY

3. NOTICE OF POTENTIAL CLAIM

... If during the Policy Period the Insured shall become aware of any act or omission that may reasonably be expected to be the basis of a Claim against an Insured and gives Notice to the Company of such act or omission and the reasons for anticipating a Claim, then any such Claim that is subsequently made against the Insured and reported to the Company shall be deemed to have been made and reported at the time such Notice was given.

The plaintiffs do not dispute that the Policy was cancelled on July 19, 2006 and that the first notice of a claim or potential claim was forwarded to American Guarantee on May 14, 2007, approximately 10 months after cancellation of the Policy and beyond the automatic extended reporting period.

However, American Guarantee failed to establish its right to attorney’s fees because it has not provided proof of an agreement between the parties, a statute or court rule which authorizes such a recovery (*Hunt v Sharp*, 85 NY2d 883, 626 NYS2d 57 [1995]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 416 NYS2d 559 [1979]).

In opposition to the motion, the plaintiffs submit the affirmation of George C. Vlachos, Esq. The affirmation lacks probative value, as an attorney who is a party to an action must submit an affidavit (CPLR 2106; *LaRusso v Katz*, 30 AD3d 240, 818 NYS2d 17 [1st Dept 2006]; *Pisacreta v Joseph A. Minniti, P. C.*, 265 AD2d 540, 697 NYS2d 160 [2d Dept 1999]; *Sassower v Greenspan, Kanarek, Jaffe & Funk*, 121 AD2d 549, 504 NYS2d 31 [2d Dept 1986]). However, irrespective of this deficiency, the plaintiffs failed to raise a material issue of fact requiring a trial in this matter.

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Accordingly, American Guarantee is entitled to entry of judgment declaring that it has no obligation to afford coverage, defend or indemnify the plaintiffs in the underlying action.

Submit judgment.

Dated:

12/7/10



THOMAS F. WHELAN, J.S.C.