

Lee & Amtzis, LLP v American Guar. & Liab. Ins. Co.
2013 NY Slip Op 30018(U)
January 7, 2013
Supreme Court, New York County
Docket Number: 653050/2011
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

LEE & AMTZIS, LLP, MICHAEL M. AMTZIS,
and R. RANDY LEE,

Plaintiffs,

INDEX NO. 653050/2011
MOTION DATE Aug. 29, 2012
MOTION SEQ. NO. 1
E-FILED

-against-

AMERICAN GUARANTEE AND LIABILITY
INSURANCE COMPANY and JANE KURTIN,

Defendants.

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

<u>Papers</u>	<u>Papers numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Notice of Cross-Motion-Affidavits-Exhibits	2
Reply Affidavit	3
Reply Memorandum of Law	4
Cross-Motion: Yes	

In this action plaintiffs seek, *inter alia*, a declaratory judgment that defendant American Guarantee and Liability Insurance Company ("AGLIC"), their professional liability malpractice carrier, is obligated to defend and indemnify them in a pending New Jersey action brought by defendant Kurtin. Plaintiffs now move for summary judgment. AGLIC cross-moves for summary judgment declaring that it does not have such a duty and for dismissal of plaintiffs' Third Cause of Action for punitive damages.

In her New Jersey action Kurtin alleged that R. Randy Lee (plaintiff herein and defendant in the New Jersey action) is a

partner in the law firm Lee & Amtzis, LLP and is managing member of Astoria Station, LLP. ("Astoria") (NJ Complaint, paras. 2, 8; Exh. 5 to the Affidavit of R. Randy Lee sworn to April 5, 2012). She further alleged that Michael M. Amtzis (plaintiff herein and defendant in the New Jersey action) is a partner in the law firm Lee & Amtzis, LLP (NJ Complaint, para. 5). She alleged that in 2006 she made a loan to Astoria, guaranteed by Lee, and that in 2010 she made a loan to Lee (NJ Complaint, paras. 7-9, 14).

Kurtin alleged that Lee, Amtzis and their law firm represented her in each of the two loans, and that she made the loans in reliance on their professional advice (NJ Complaint, paras. 19, 21, 22). Her complaint alleged six counts: negligence; legal malpractice; breach of contract; respondeat superior; promissory notes; unjust enrichment; and Lee's personal guarantee.

The Superior Court of New Jersey granted partial summary judgment to Kurtin against Astoria and Lee upon the promissory notes, and denied her claim for unjust enrichment (Opinion dated October 27, 2011; Exh. 10 to the Lee Aff.). As to the counts arising from the lawyers' alleged malpractice, the New Jersey Court entered an Order staying the case pending resolution of the instant New York County action (Order dated 12/15/11; Exh. 11 to the Lee Aff.).

Effective March 30, 2010, AGLIC issued a Lawyers

Professional Liability Insurance Policy covering the firm of Lee & Amtzis and its attorneys as insureds for a one-year period (Exh. 4 to the Lee Aff.). Kurtin commenced her New Jersey action against plaintiffs on or about June 30, 2010 (Exh. 5 to the Lee Aff.). On or about July 26, 2010 plaintiffs gave notice to AGLIC of the Kurtin lawsuit (Exh. 6 to the Lee Aff.).

AGLIC responded by letter dated August 12, 2010 (Exh. 7 to the Lee Aff.). It denied coverage to plaintiffs. First, it contended that Kurtin's allegations of negligence, legal malpractice, *respondeat superior* and breach of contract arose out of the "Insured's" alleged conflict of interest and breach of fiduciary duty due to the fact that Lee's ownership and management of Astoria were "adverse" to Kurtin's. Thus, it claimed that there was no coverage for Kurtin's claims pursuant to the following policy exclusions:

This policy shall not apply to any **Claim** based upon or arising out of, in whole or in part:

D. the **Insured's** capacity or status as:

1. an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise, charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust;
2. a public official, or an employee of a governmental body, subdivision, or agency unless the **Insured** is privately retained solely to render **Legal Services** to the governmental body, subdivision or agency and the remuneration for the **Legal Services** is paid directly or indirectly to the **Named Insured**;

E. the alleged acts or omissions by any **Insured**, with or without compensation, for any business enterprise, whether for profit or not-for profit, in which any **Insured** has a **Controlling Interest**....

(Letter at 3; Exh. 7 to the Lee Aff.).

AGLIC's letter claimed that since the Kurtin complaint alleged that the lawyers' personal business interests (by virtue of Lee's ownership and management of Astoria) were "adverse" to Kurtin's, there was no coverage under the Policy pursuant to Exclusion D. Thus, it refused to provide defense or indemnity coverage to Lee, Amtzis and their firm (Letter at 3-4; Exh. 7 to the Lee Aff.).

In addition, AGLIC stated that pursuant to Exclusion E, claims based upon or arising out of, in whole or in part, acts performed by an Insured for a business enterprise in which the Insured has a controlling interest are not covered by the Policy. Since the Kurtin complaint alleged that Lee is sole owner and managing member of Astoria, Exclusion E would bar coverage or defense or indemnity of such claim (Letter at 4; Exh. 7 to the Lee Aff.).

AGLIC also stated that the Kurtin complaint, seeking payment of principal and interest on her loans, failed to trigger the provision of the Policy providing coverage for claims seeking Damages as defined by the Policy. The Policy, by its terms, excluded damages consisting of "personal profit or advantage to which the **Insured** was not legally entitled" (Letter at 4-5; Exh.

7 to the Lee Aff.). AGLIC contended that since the Kurtin complaint sought payment of the principal and interest on the two loans alleged, Kurtin's alleged damages were not covered by the Policy (Letter at 5; Exh. 7 to the Lee Aff.).

Finally, AGLIC noted that for a claim to be covered under the Policy, it must arise from an act or omission by the Insured in the rendering or failing to render Legal Services (a defined term under the Policy) for others. AGLIC contended that Kurtin's complaint arose out of the failure to repay her loans, a 2006 loan to Astoria incident to Lee's real estate development business, and a 2010 personal loan to Lee. Thus, AGLIC reserved its right to deny coverage on this basis (Letter at 6-7; Exh. 7 to the Lee Aff.).

Significantly, in denying coverage and relying upon its policy exclusions, AGLIC failed to distinguish the positions of Amtzis and the law firm, on the one hand, from that of Lee, on the other. Nowhere in her complaint did Kurtin allege that Amtzis or the law firm received any proceeds or otherwise benefitted from her loans. That notwithstanding, AGLIC's refusal to defend the parties was wholesale. Indeed, AGLIC did not even address the differing positions of the parties as characterized by the allegations and claims in Kurtin's complaint.

It is well settled that an insurer's obligation to defend is determined by a review of the allegations of the complaint .

against the insured without regard to the merits of the claims, and that an insurer's duty to furnish a defense is broader than the duty to indemnify (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310-311, [1984]).

The duty to defend insureds--long recognized as broader than that to indemnify--is derived from the allegations of the complaint and the terms of the policy. If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.

(*Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989][citations omitted]; see also *A. Meyers & Sons Corp. v Zurich Am. Ins. Group*, 74 NY2d 298, 302 [1989] ["[i]f the facts alleged raise a reasonable possibility that the insured may be liable for some act or omission covered by the policy, then the insurer must defend"]; *Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 41 [1st Dept 2005] ["[t]he ultimate validity of the underlying complaint's allegations is irrelevant"]).

"To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the burden of demonstrating that the allegations of the complaint in the underlying claim cast the pleadings wholly within that exclusion, that the exclusion is not subject to any other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer might be eventually obligated to indemnify its insured." (*Utica First Ins. Co. v Star-Brite Painting &*

Paperhanging, 36 AD3d 794, 796 [2d Dept 2007][citations omitted]).

Plaintiffs argue that the outcome in this case must be determined in accordance with the recent First Department, Appellate Division decision involving the very same defendant in *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*¹ In *K2 AGLIC* relied on the precise policy exclusion provisions (D1 and E) it invokes here. The First Department noted that the underlying complaint for which coverage had been sought did not allege that the lawyer was negligent in rendering legal services to his own business enterprise (Goldan, LLC), but instead that the action was based exclusively on the lawyer's obligation to his clients (the plaintiffs). "With respect to [AGLIC]'s duty to indemnify, Daniels's alleged controlling interest in Goldan did not affect his obligations to plaintiffs as their lawyer. His liability to plaintiffs is premised solely on the attorney-client relationship between him and plaintiffs, not on any interest that he had in Goldan." (*K2 Inv. Group, LLC*, 91 AD3d at 403). Thus, the appellate court held that AGLIC failed to meet its burden of demonstrating that the allegations of the complaint in the underlying claim cast the pleadings wholly within the exclusion; that the exclusion was not subject to any other reasonable interpretation; and that there was no possible factual or legal

¹91 AD3d 401 (1st Dept), *lv granted* 19 NY3d 886 (2012).

basis upon which the insurer might be eventually obligated to indemnify its insured. (*K2 Inv. Group, LLC*, 91 AD3d at 403).

This court can find no significant distinction between the instant case and *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.* There AGLIC relied upon the exact policy exclusion provisions upon which it relies in the instant case. In deciding *K2*, the First Department cited *Niagara Fire Ins. Co. v Pepicelli, Pepicelli, Watts & Youngs, P.C.* (821 F2d 216, 220 [3d Cir 1987]), a case which noted that the analysis should focus on "the character of the specific legal claims, rather than the malpractice suit's general factual background. [T]he malpractice claims are not omitted from coverage by the two exclusions [d]esigned to exclude business risk and collusive suits from coverage under the policy." "[T]hese types of exclusions are designed to apply to legal work performed by the insured for his enterprise." (*K2 Inv. Group*, 91 AD3d at 404) (emphasis in text).

Similarly, AGLIC's exclusion based on the nature of the damages Kurtin seeks fails to bar coverage for defense of her action. "[W]here the policy includes an obligation to defend, if there is a doubt as to whether the claim comes within the insurer's duty to indemnify, the insurer is generally required to furnish a defense, leaving the issue of indemnification to be settled after establishment of the insured's liability." (*Village of Sylvan Beach, N.Y. v Travelers Indem. Co.*, 55 F3d 114, 115 [2d

Cir 1995)). Thus, the duty to defend would "endure[] unless and until there is a point in the [underlying] proceeding at which the factual nature of [the] allegation[s]...is clarified 'with certainty' to exclude any issue relating to [covered] conduct." (*Century 21, Inc. v Diamond State Ins. Co.*, 442 F3d 79, 84 [2d Cir 2006]).

AGLIC has failed to meet its burden to establish as a matter of law that the injuries Kurtin claims in the New Jersey action are expressly excepted from coverage under its policy.

(*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 651 [1993]; *Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v American Guarantee & Liability Ins. Co.*, 85 AD3d 1291, 1295 [3d Dept 2011]; *Atlantic Mut. Ins. Co. v American Motorists Ins. Co.*, 181 AD2d 519 [1st Dept 1992]). The subject policy provides coverage "based on an act or omission in the Insured's rendering or failing to render Legal Services for others." (Policy, Sec.1 A; Exh. 4 to the Schwartz Aff.).

The Kurtin New Jersey complaint alleges that she made the two loans "in reliance upon the professional advice given by the Attorney Defendants" (NJ Compl., para. 19); that the "Attorney Defendants" represented Kurtin in each of the two loans (NJ Compl., paras. 21, 22); that the Attorney Defendants failed to advise Kurtin to obtain an appraisal of any of the properties which were to be sold in connection with the 2006 loan (NJ

Compl., para. 33). The complaint further alleges that the Attorney Defendants agreed to represent Kurtin "in a proper, skillful, and diligent manner as required by them as attorneys at law"; that they owed her a duty of professional care; that they should have advised her to obtain an appraisal of the properties concerning the 2006 loan; and that they failed to advise her that she should retain independent counsel in connection with the loans; and that they breached their duty of care in their representation of Kurtin (NJ Compl., Count I-Negligence, paras. 2, 3, 6, 7, 11, 12, 13). These allegations are repeated in Kurtin's claims for Legal Malpractice and Respondeat Superior.

Whether or not Kurtin's malpractice claims may ultimately bear fruit is not before this Court. Instead, the issue is whether the allegations, liberally construed, potentially fall within the scope of the risks undertaken by AGLIC. (*Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1063 [2d Dept 2009]). The Court finds that they do. Kurtin's claims in her causes of action for negligence, legal malpractice and respondeat superior all are based exclusively on the Attorney Defendants' obligation to Kurtin, not to Astoria or to Lee individually.

Thus, the exclusions relied upon by AGLIC are patently inapplicable. That Lee is an owner of Astoria or might have been acting in Astoria's interests instead of those of Kurtin does not change the essence of the malpractice causes of action of the New

Jersey complaint, or the basis of liability, which is that the Attorney Defendants committed legal malpractice in their representation of Kurtin. (See *K2 Inv. Group*, 91 AD3d at 403; *American Guar. & Liab. Ins. Co. v Moskowitz*, 58 AD3d 426, 427 [2009]). Here, as in *K2*, the Kurtin complaint alleges that Lee committed legal malpractice while he was an owner, officer, etc., of Astoria. However, the policy does not exclude coverage for all conduct occurring while he was an owner or officer but only for claims arising out of his capacity as such. (*K2 Inv. Group*, 91 AD3d at 403).

Thus, the Court concludes that AGLIC must defend the plaintiffs herein in the New Jersey action. However, determination of AGLIC's duty to indemnify must await the outcome of the New Jersey action. As AGLIC notes, Kurtin's claim of damages on her malpractice causes of action are identical to her claims for damages on the note and guaranty. She has been awarded summary judgment on the latter claims; thus, any award she may receive on her malpractice claims may be duplicative. Accordingly, to the extent that plaintiffs seek summary judgment on the issue of AGLIC's duty to indemnify, such motion is premature.

In light of the foregoing, it is

ORDERED that plaintiffs' motion for summary judgment on their First Cause of Action is granted to the extent that it

seeks a declaratory judgment that defendant American Guarantee and Liability Insurance Company is obligated to defend plaintiffs in the Kurtin Action, and is otherwise denied without prejudice; and it is further

ORDERED that the cross-motion of defendant American Guarantee and Liability Insurance Company is hereby denied, without prejudice to renewal on the issue of defendant's obligation to indemnify plaintiffs; and it is further

ADJUDGED and DECLARED that defendant American Guarantee and Liability Insurance Company is obligated to provide a defense to plaintiffs herein in the action brought by Jane Kurtin against them in Superior Court of New Jersey, Law Division, Somerset County under Docket No. SOM-L-1098-10; and it is further

ORDERED that the balance of the action is severed and shall proceed.

Dated: January 7, 2013

ENTER:



AJSC

Non-final disposition

HON. ELLEN M. COIN