

Vogel v American Guar. & Liab. Ins. Co.

2014 NY Slip Op 33870(U)

July 20, 2014

Supreme Court, Nassau County

Docket Number: 6748/12

Judge: Robert A. Bruno

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----X
BERNARD H. VOGEL and SEAVEY VOGEL &
OZIEL, LLP,

Plaintiffs,

-against-

AMERICAN GUARANTEE & LIABILITY INSURANCE
COMPANY, ZURICH AMERICAN INSURANCE
COMPANY, and CNA INSURANCE COMPANIES,

Defendants.

TRIAL/IAS PART 19
INDEX No.: 6748/12
Submission Date: 05/21/14
Motion Sequence: 002

DECISION & ORDER

Papers Numbered

Sequence #002

Notice of Motion, Affirmation & Exhibits	1
Memorandum of Law in Support of Motion	2
Affidavit in Opposition & Exhibits	3
Memorandum of Law in Support of Opposition	4
Reply Memorandum of Law in Support of Defendant's Motion	5

Defendants, American Guarantee & Liability Insurance Company [hereinafter American Guarantee] and Zurich American Insurance Company [hereinafter Zurich], move pursuant to CPLR §3212 for an order dismissing the plaintiffs' Second Amended Complaint in its entirety and declaring that the moving defendants do not owe coverage to the plaintiffs under the Professional Liability Insurance Policy issued by American Guarantee to Seavey, Vogel and Oziel, LLP (Sequence #002).

Plaintiff, Bernard Vogel, together with Robert Oziel [hereinafter Oziel], a nonparty, were former partners in the law firm of Seavey, Fingerit, Vogel, Oziel & Skoller [hereinafter SFVOS], the predecessor firm to Seavey, Vogel & Oziel, LLP [hereinafter SVO], the latter of which is also a plaintiff herein (*see* Pascoe Affirmation in Support at Exh. 47 at ¶24). Defendants, American Guarantee and Zurich, purportedly issued a Lawyers Professional Liability Insurance Policy [hereinafter the policy] to SVO, for the period between December 5, 2005 through December 5, 2006 (*Id.* at Exh. 24).

[* 2]
Vogel v. American Guarantee
Index No.: 6748/12

Since 1972, Oziel was both a friend and attorney to Melvin and Judith Zwiebach (*Id.* at Exh. 47 at ¶21). On October 4, 1991, Melvin died testate, in connection to which SFVOS was engaged to probate the decedent's will (*Id.* at Exh. 47 at ¶24). Thereafter, on or about December 26, 1991, SFVOS was retained by Judith to commence a wrongful death action on behalf of Melvin's estate, which was ultimately settled in or about July 1999 for the sum of \$2,010,000.00 (*Id.* at 47 at ¶¶26,27,42).¹ On November 18, 1999, the Nassau County Surrogate Court issued a Decree authorizing the distribution of the settlement proceeds to Judith and her three children, Peter, Robert and Liza [hereinafter the Zwiebachs], with the net amount to be disbursed equaling \$1,594,511.67 (*Id.* at Exh. 25 at ¶20; Exh. 47 at ¶43). The Zwiebachs alleged that notwithstanding this Decree, Oziel wrongfully withheld \$274,511.67 of the settlement proceeds, which were then on deposit in SVO's escrow account (*Id.* at Exh. 47 at ¶¶ 45-47,50,77).

On August 13, 2004, Judith Zwiebach filed a grievance [hereinafter the Grievance] whereby she accused Oziel of "wrongfully holding the money that is due me and my children from the settlement of the wrongful death action"² (*Id.* at Exh. 10). In response thereto, Oziel produced a Stipulation signed by the Zwiebachs whereby they acknowledged that at the time the wrongful death action was settled "there remain[ed] outstanding legal fees in the amount of \$270,000.00 for the services performed by [SVO]" and that "[o]ut of the sums due each of the individuals named in the [wrongful death action], said individuals shall pay to Robert I. Oziel, Esq. of [SVO] a proportionate share of the legal fee of \$270,000" (*Id.* at Exh. 11).

On or about March 28, 2006, the Zwiebachs commenced an action in Supreme Court, New York County against Oziel, Robert W. Seavey, Vogel and SVO [hereinafter the Zwiebach action], seeking damages based upon Oziel's improper retention of the remaining \$274,511.67 in settlement proceeds (*Id.* at Exh. 47).³ During the course of that litigation, the Zwiebach's original complaint was amended twice and ultimately contained causes of action for fraud, conversion, negligence, breach of fiduciary duty, unjust enrichment, constructive trust, breach of contract and violations of the New York State Judiciary Law (*Id.*; *see also* Vogel Affidavit in Opposition at Exh. 1).

On or about April 11, 2006, SVO notified American Guarantee of the Zwiebach action by providing copies of the summons and complaint (*see* Vogel Affidavit in Opposition at ¶40; Exhs.11,12). On August 30, 2006, American Guarantee disclaimed coverage for the following reasons: the Zwiebach action demanded relief which included "restitution or forfeiture of fees"

¹ SVO was formed in or about 1998 and succeeded SFVOS (*see* Pasco Affirmation in Support at Exh 47 at ¶25).

² As a result of the Grievance, on August 4, 2009, the Appellate Division, Second Department, ordered that Oziel be suspended from the practice of law for the period of five years (*see* Pascoe Affirmation in Support at Exh. 2).

³ Robert Seavey, who was a former partner in SFVOS, was dropped from the Zwiebach action as he had retired prior to the happening of the events which gave rise to that action (*see* Vogel Affidavit in Support at ¶2).

[* 3]
Vogel v. American Guarantee
Index No.: 6748/12

and thus was outside the scope of the policy; the conduct alleged in the complaint did not “arise out of the rendering or failure to render legal services, but instead arises out of a fee dispute”; the failure “to provide timely notice of a claim or potential claim (including, but not limited to, the August 2004 grievance)”, and; the failure to disclose the Grievance on the renewal application for the 2006 policy (*Id.* at Exh. 13).

Several years later, on or about October 21, 2010, Vogel and SVO renewed their request for coverage under the policy (*id.* at ¶48). On December 22, 2010, American Guarantee again disclaimed coverage on the basis that SVO failed to identify the Grievance on the renewal application and to notify American Guarantee thereof (*see* Pascoe Affirmation in Support at ¶63; Exh. 40).

On August 14, 2013, a settlement was reached in the Zwiebach action whereby Vogel agreed to pay the Zwiebachs the sum of \$388,000.00 (*see* Vogel Affidavit in Support at ¶50; Exh. 20). As set forth in the Amended Order issued by Justice Rakower, Supreme Court, New York County, “[t]he Settlement Amount shall be deemed to have been made entirely with reference to and in satisfaction of Count Three of Plaintiffs [*sic*] Second Amended Complaint which count charges Bernard Vogel with negligence” (*Id.* at Exh. 20). The Amended Order further provided that “[u]pon payment of the Settlement Amount, all counts in the Second Amended Complaint shall be dismissed with prejudice” (*Id.*)

Prior to settlement having been reached in the Zwiebach action, Vogel and SVO commenced the underlying action on May 25, 2012 asserting the following three causes of action: the First cause of action alleges that the moving defendants breached the terms of the policy by failing to provide the plaintiffs with a defense in the Zwiebach action; the Second cause of action seeks an order declaring that the moving defendants were obligated to provide the plaintiffs with a defense in the Zwiebach action, to indemnify Vogel for any recovery awarded to the Zwiebachs, and to reimburse Vogel for legal fees and costs incurred to date, and; the Third cause of action alleges that in failing to provide the plaintiffs with a defense, the defendants acted in bad faith (*Id.* at Exh. 22). The application interposed by the moving defendants seeking dismissal of the plaintiffs’ Second Amended Complaint ultimately ensued and is determined as set forth below.

In moving for dismissal of the First and Second causes of action, the central contentions posited by counsel for the moving defendants are that the plaintiffs failed to timely notify the defendants of an “actual claim” and that the sum paid by Vogel to the Zwiebachs did not constitute damages as defined in the policy and is thus not recoverable thereunder (*see* Defendants’ Memorandum of Law at pp. 21,23-26). With respect to the purported lack of timely notice, counsel specifically asserts that as the Grievance sought return of the \$274,511.67 it was a “demand for money” and an “actual claim” as defined in the policy, and notwithstanding being cognizant thereof the plaintiffs delayed providing notice to the defendants until April of 2006 (*Id.*). As to the issue of damages, counsel argues that the settlement paid by Vogel was to satisfy liability incurred by Oziel’s improper withholding of legal fees and is accordingly exempt from coverage under that section of the policy which expressly states that “[d]amages do not include *

[* 4]
Vogel v. American Guarantee
Index No.: 6748/12

* * legal fees, costs and expenses paid to or incurred or charged by the Insured” (*Id.* at pp. 13, 25,26).

In addition to the foregoing, counsel posits that the defendants had a valid basis upon which to deny coverage and as such the plaintiffs’ Third cause of action sounding in bad faith must be dismissed (*Id.* at pp. 28-30). Finally, counsel asserts that Zurich is not a proper party to this action as is evidenced by the Declarations page, which clearly provides that the policy is “Insured by the stock company * * * AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY” (*Id.* at p. 11).

In opposition,⁴ plaintiffs’ counsel argues, *inter alia*, that the settlement paid by Vogel did not constitute disgorgement of a legal fee paid to or charged thereby, but was remedial in nature and made to the Zwiebachs as compensation for the fee improperly withheld by Oziel and accordingly is recoverable as “damages” under the policy (*see* Plaintiffs’ Memorandum of Law in Opposition at pp. 21-26,29-30,42). Counsel additionally asserts that the defendants received timely notice of the Zwiebach action on April 11, 2006 and that the claim contained in the Grievance, which demanded Oziel return the \$274,511.67 he improperly withheld, fell outside that which is deemed recoverable under the policy and was thus not an “actual claim” for which any duty to notify would have been triggered (*id.* at pp. 31,33,34,36,42). Finally, counsel asserts that given the prominent and repeated appearances of Zurich’s logo on the 2006 policy, as well as language referencing the policy as being “issued by Zurich”, said defendant should remain a party herein (*id.* at p. 41).⁵

As noted above, the plaintiffs’ First and Second causes of action for breach of contract and a declaratory judgment are predicated upon American Guarantee’s failure to provide Vogel and SVO with a defense in the Zwiebach action. “The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer ‘has actual knowledge of facts establishing a reasonable possibility of coverage’ ” (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169,175 [1997] quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61,65-67 [1991]). “To be relieved of its duty to defend on the basis of a policy exclusion, the insurer

⁴ The Court notes that while plaintiffs’ counsel has not affirmatively moved for summary judgment on the relief demanded in the underlying complaint, in the memorandum of law submitted in opposition to the defendants’ instant application, plaintiffs’ counsel specifically requests the following: a finding, as a matter of law, that the claims asserted by the Zwiebachs against Vogel and SVO were not for the return of legal fees or the disgorgement of wrongfully withheld funds, and; for a finding that there are no genuine issues as to the plaintiffs having provided “timely notification” of the Zwiebach action to the defendants (*see* Plaintiffs’ Memorandum of Law in Opposition at p. 42).

⁵ The Declarations page clearly states that the policy is “[i]nsured by * * * AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY.” (*see* Pascoe Affirmation in Support at Exh. 24). Based upon this unequivocal language contained in the policy, Zurich is not a proper party herein and the action is accordingly dismissed against Zurich.

[* 5]
Vogel v. American Guarantee
Index No.: 6748/12

bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, *supra* at 175; *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640,652 [1993]).

In determining whether American Guarantee had a duty to defend requires an interpretation of the language contained in the governing policy. It is well settled, that "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance" (*Kafka Constr., Inc. v New York City School Constr. Auth.*, 40 AD3d 1038,1039 [2d Dept 2007]; *Katina, Inc. v Famiglietti*, 306 AD2d 440,441 [2d Dept 2003]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157,162 [1990]). When interpreting a contract, the goal of the court "is to determine the parties' intention as derived from the language employed in the contract" (*Katina, Inc. v Famiglietti, supra* at 441). "Thus, 'when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized' " (*Master-Built Constr. Co., Inc. v Thorne*, 22 AD3d 535,535 [2d Dept 2005] quoting *Joseph v Creek & Pines*, 217 AD2d 534,535 [2d Dept 1995]).

The policy provisions germane to resolving the legal issues raised in this matter, and upon which American Guarantee principally relies, are as follows:

Damages: "Damages do not include: legal fees, costs and expenses paid to or incurred or charged by the Insured, no matter whether claimed as restitution of specific funds, forfeiture, financial loss, setoff or otherwise, and injuries that are a consequence of any of the foregoing"

Notice of an Actual Claim: "The Insured, as a condition precedent to this policy, shall immediately provide Notice to the Company of any Claim made against an Insured. In the event suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received directly or by any Insured's representative."

Having reviewed the foregoing policy provisions, this Court finds American Guarantee failed to establish that the allegations asserted against Vogel in the Zwiebach action place the entirety of that complaint completely within the damage exclusion invoked to deny coverage (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co., supra*). Contrary to the characterizations proffered by defense counsel, the allegations asserted against Vogel in the Zwiebach action did not seek restitution for legal fees charged or received by Vogel. Rather, the claims asserted against Vogel - and in connection to which Vogel proffered a settlement - were based upon his

[* 6]
Vogel v. American Guarantee
Index No.: 6748/12

alleged negligent supervision of Oziel's actions in relation to the firm's escrow account. Accordingly, based upon the plain language of the policy, the Court finds that the damages exclusion upon which American Guarantee predicated its disclaimer was inapplicable and that coverage should have been afforded to the plaintiffs (*Master-Built Constr. Co., Inc. v Thorne, supra*).

As to the notification provisions set forth in the policy, the Court finds that the plaintiffs were in full compliance therewith. Initially, as to the Zwiebach action, American Guarantee readily concedes it received timely notice thereof on April 12, 2006. Moreover, the Court finds unpersuasive, the assertion posited by defendants' counsel that in failing to immediately notify American Guarantee of the Grievance, the plaintiffs violated those provisions of the policy which required timely notice of actual claims. Here, the claim set forth in the Grievance demanded the return of legal fees charged by Oziel and accordingly would have been exempt from coverage pursuant to the policy provision stating that "[d]amages do not include: legal fees, costs and expenses paid to or incurred or charged by the Insured." Thus, as the substance of the Grievance did not constitute a covered claim, notice thereof was not required by the language of the policy.

CPLR §3212 (b) provides, in pertinent part, "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." In searching the record, a court may "grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" (*Whitman Realty Group, Inc. v Galano*, 52 AD3d 505,506 [2d Dept 2008]).

The issues raised by the parties in relation to the plaintiffs' First and Second causes of action, which are the subject of the defendants' application, do not involve questions of fact which would be referable to a jury but rather involve issues of law to be resolved by this Court (*Kafka Constr., Inc. v New York City School Constr. Auth., supra*). Further, given this Court's determination that the defendants have failed to establish the claims asserted against Vogel were beyond the scope of coverage afforded under the policy, together with the absence of any formal request for affirmative relief by the plaintiffs, this Court finds that it is appropriate to search the record and grant summary judgment in favor of Vogel and SVO on the First and Second causes of action for breach of contract and a declaratory judgment (*Whitman Realty Group, Inc. v Galano, supra*).

As to the Third cause of action sounding in bad faith, in order to establish a cause of action based thereon "the plaintiff must establish that the insurer's conduct constituted a gross disregard of the insured's interest" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445,453 [1993][internal quotations omitted]). Stated differently, "a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference" to the interests of the insured (*Id.*). Moreover, neither "conduct amounting to ordinary negligence" nor an "error in judgment" is a sufficient basis upon which to predicate an action sounding in bad faith (*Id.*).

[* 7]
Vogel v. American Guarantee
Index No.: 6748/12

Guided by the foregoing, the Court finds that American Guarantee has met its initial burden of demonstrating it had an arguable basis upon which to disclaim coverage (*Id.*). In opposition, the plaintiffs have failed to raise a triable issue of fact as to whether American Guarantee possessed the requisite "gross disregard" when disclaiming coverage (*Id.*).

Accordingly, it is hereby:

ORDERED, that the application interposed by the Defendants, American Guarantee & Liability Insurance Company and Zurich American Insurance Company, which seeks an order dismissing the plaintiffs' Second Amended Complaint in its entirety and declaring that American Guarantee & Liability Insurance Company does not owe coverage to the plaintiffs under the Professional Liability Insurance Policy issued to Seavey, Vogel and Oziel, LLP, is GRANTED to the limited extent that the plaintiffs' Third cause of action sounding in bad faith is hereby dismissed and is DENIED in all other respects (Sequence #002); and it is further;

ORDERED, that having searched the record, this Court hereby grants summary judgment to the plaintiffs on the First and Second causes of action contained in the Second Amended Complaint and hereby declares that American Guarantee & Liability Insurance Company was obligated to defend and indemnify the plaintiffs, Bernard Vogel and Seavey, Vogel and Oziel, LLP, within the context of the legal malpractice action entitled, Peter Cooke Zwiebach, Robert Cooke Zwiebach, Liza Cooke Zwiebach, and Judith Zwiebach v Robert I. Oziel, Robert W. Seavey, Bernard H. Vogel, and Seavey, Vogel & Oziel, LLP, Index No.: 104181/2006.

This matter is referred to the Calendar Control Part (CCP) for an Inquest as to damages to be held on September 30, 2014.

The plaintiff shall file and serve a note of issue, together with a copy of this Order on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of the Court within twenty (20) days of the date of this Order.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

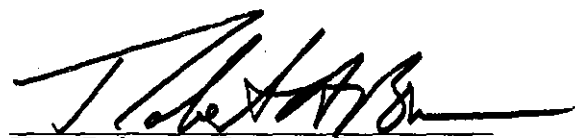
Dated: July 20, 2014
Mineola, New York

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Hon. Robert A. Bruno, J.S.C.