

East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal
2014 NY Slip Op 33883(U)
March 27, 2014
Supreme Court, Nassau County
Docket Number: 600963/13
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

EAST RAMAPO CENTRAL SCHOOL
DISTRICT,

Plaintiff,

-against-

NEW YORK SCHOOLS INSURANCE
RECIPROCAL,

Defendant.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 600963/13

MOTION DATE: Feb. 21, 2014
Motion Sequence # 006

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affirmation in Support..... X
- Memorandum of Law..... X

Motion by plaintiff East Ramapo Central School District for leave to renew and reargue is **granted**. Upon renewal and reargument, defendant New York Schools Insurance Reciprocal's motion for summary judgment is granted to the extent indicated, and the order granting defendant's motion to compel discovery is clarified, to the extent indicated below.

This is an action for a declaratory judgment that the defendant insurer has a duty to defend under a school board legal liability policy. Defendant New York Schools Insurance Reciprocal issued the policy to plaintiff East Ramapo Central School District for the period July 1, 2012 to July 1, 2013. The policy provides coverage for claims both first

made against the insured and reported to the insurer during the policy period “for a wrongful act(s) by the insured in the performance of duties for the school entity.”

The policy also has an exclusion for claims arising out of “any fraudulent, dishonest, malicious, criminal or intentional wrongful act or omission by an insured.” The policy also has an exclusion for “claims arising out of the failure to provide an appropriate individualized education program.” The policy contains an aggregate limit of liability in the amount of \$1 million.

On August 8, 2012, parents of students who attend school in the District commenced an action against the school board members in the United States District Court for the Southern District of New York, *Rebecca Montesa, et al v Daniel Schwartz, et al*, 12-cv-06057. According to the amended complaint in *Montesa*, plaintiffs allege that the District entered into contracts with private schools to provide remedial services for children in the district, resulting in the district’s funds being expended for religious education. Plaintiffs further allege that the District engaged in collusive settlements with Hasidic parents of special needs children. More specifically, after parents of special needs children challenged the district’s placement of their children under the Individuals with Disabilities Education Act (“IDEA”), the Board allegedly agreed to place the children in private religious schools, paying both tuition and the parents’ attorneys’ fees. Plaintiffs further allege that District funds were used to purchase textbooks of a religious nature. Additionally, plaintiffs allege that the school board members had approved a sale of the Hillcrest Elementary School to a religious congregation for \$3.1 million when the fair market value of the property was between \$11 million and \$13.9 million. Plaintiffs allege that the Board leased the Colton Elementary School to a religious congregation under a five year lease and failed to collect \$85,000 rent which was in arrears. Plaintiffs allege that the Board had attempted to sell Colton Elementary to the tenant congregation at a below market price, but the sale was challenged by a taxpayer.

Plaintiffs in *Montesa* asserted claims under the Establishment Clause of the First Amendment, Article 8, Section 1 (the “anti-gift provision”) of the New York State Constitution, and other state law claims. Plaintiffs seek to bring the *Montesa* action as a civil rights class action on behalf of all parents of students attending school, and also all taxpayers, within the District.

On September 13, 2012, New York Schools Insurance Reciprocal disclaimed coverage under the policy with regard to the *Montesa* action. In disclaiming coverage, the insurer relied upon the exclusion for claims based upon fraudulent,

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dishonest, and malicious acts, as well as the exclusion for failing to provide an appropriate individualized education program.

This action was commenced April 17, 2013. In its first cause of action, the District seeks damages for breach of contract based on New York Schools' failure to provide a defense under the policy. The second cause of action is for breach of the implied covenant of good faith and fair dealing by disclaiming coverage. In the third cause of action, plaintiff seeks a declaratory judgment that New York Schools is under a duty to defend the school district in the Montesa action and indemnify the District up to the limit of the policy.

By order dated October 17, 2013, this court granted East Ramapo's motion for summary judgment to the extent of declaring that New York Schools Insurance Reciprocal was obligated to defend the District and its board members in Rebecca Montesa, et al v Daniel Schwartz, et al, 12-cv-06057. The court made no determination with regard to the insurer's duty to indemnify.

Meanwhile, on September 30, 2013 Judge Seibel in the U.S. District Court issued an order dismissing certain of plaintiffs' claims in the federal action against certain of the defendants. Nevertheless, Judge Seibel allowed plaintiffs' Establishment Clause claims based upon IDEA settlements to continue against all defendants. Plaintiffs' Establishment Clause claims based upon textbook purchases were allowed to continue against all defendants, except defendant D'Agostino, an attorney for the District, and defendant Rothschild, a board member. Plaintiffs' Establishment Clause claims based upon real estate transactions were allowed to continue against all defendants, except defendant D'Agostino. Plaintiffs' claims under the New York State Constitution based upon IDEA settlements were allowed to continue as to all defendants. Plaintiffs' New York State Constitution claims based upon textbook purchases and lease transactions were allowed to continue as to all defendants, except D'Agostino and Rothschild. The plaintiffs in the Montesa action filed a second amended complaint on November 4, 2013, and a third amended complaint on December 11, 2013, in an effort to conform their pleading to Judge Seibel's order. As noted, Judge Seibel's September 30 order was not submitted to this court on New York Schools' prior summary judgment motion.

By order dated January 30, 2014, this court granted defendant New York Schools Insurance Reciprocal's motion for leave to renew its motion for summary judgment based upon Judge Seibel's September 30 order. Upon renewal, the court determined, as a matter of law, that the school board action alleged in support of remaining Establishment Clause and

anti-gift state constitutional claims, purchasing religious textbooks, paying religious school tuition, and transferring district facilities to religious schools at less than fair value, fell within the exclusion for intentional, wrongful conduct. Thus, this conduct could not potentially give rise to a covered claim (*Barkan v New York Schools Ins Reciprocal*, 65 AD3d 1061, 1063 [2d Dept 2009]). Accordingly, defendant New York School's motion for summary judgment was granted to the extent of declaring that defendant had no duty to indemnify the District for the activity alleged in the *Montessa* action and no duty to defend the District after September 30, 2013, the date of Judge Seibel's order.

In the order, defendant's motion to compel discovery was granted to the extent that plaintiff was directed to produce all documents exchanged in the *Montesa* action, correspondence between counsel for plaintiffs and counsel for defendants in the *Montesa* action, and all legal bills for defense of the *Montesa* action, up to the date of Judge Seibel's order.

Finally, plaintiff's motion to compel discovery of documents relating to its claim that the insurer disclaimed coverage in bad faith was denied. The court determined, for purposes of the motion to compel, that New York Schools' disclaimer of coverage for the *Montesa* action was not in bad faith.

Plaintiff East Ramapo Central School District moves for leave to reargue defendant's motion for summary judgment, as well as the parties' motions to compel discovery. Additionally, plaintiff in effect seeks renewal of the insurer's motion for summary judgment based upon a subsequent decision of Judge Seibel issued on March 12, 2014. In her most recent order, Judge Seibel dismissed the *Montessa* plaintiffs' anti-gift provision claims on the ground that taxpayers lacked standing to maintain such claims against a school district.

Plaintiff argues that the court erred by requiring defendants to establish whether any individual board member was an "innocent insured" who had no knowledge of the fraudulent and dishonest conduct. The New York Schools Insurance Reciprocal policy provides that, where coverage is excluded for intentional wrongful acts, coverage is applicable to any insured "who did not participate in, acquiesce to, or remain passive after having personal knowledge of, such conduct."

Judge Seibel's ultimate ruling on the motions to dismiss is that the Establishment Clause claims may proceed as against all defendants, except D'Agostino. Where the judge in the underlying action has determined that one of the insureds did not participate in the wrongdoing, the burden should be on the school district to show why other board members

are entitled to a defense, despite the terms of the federal judge's order. Although Judge Seibel has further limited the claims in the *Montessa* action, her decision does not change the conclusion of this court that the Establishment Clause claims fall within the policy exclusion for intentional and wrongful conduct. Accordingly, plaintiff's motion for leave to renew defendant's motion for summary judgment is **granted**. Upon renewal, defendant New York School's motion for summary judgment was granted to the extent of declaring that defendant had no duty to indemnify the District for the activity alleged in the *Montessa* action and no duty to defend the District after March 12, 2014, the date of Judge Seibel's most recent order.

By suing to obtain indemnification for legal expenses, a party "at a minimum places at issue the reasonableness of the amounts it spent" in defending the underlying action (*Deutsche Bank v Tri-Links Investment*, 43 AD3d 56, 64 [1st Dept 2007]). The need to determine the reasonableness of the amount spent does not however place at issue the legal advice, or the attorney's work product, in the underlying proceeding (Id at 65). The same rule should apply when reimbursement for legal expenses is sought under a policy of insurance.

While the parties to the present action interpret this court's order as covering attorney-client communications and attorney work product, that was not the intent of the court's order. Accordingly, leave to reargue defendant's motion to compel discovery is **granted**. Upon reargument, defendant's motion to compel discovery is granted to the extent that plaintiff shall produce all documents exchanged in the *Montesa* action, correspondence between counsel for plaintiffs and counsel for defendants in the *Montesa* action, and all legal bills for defense of the *Montesa* action for services rendered up to March 12, 2014. Plaintiff shall produce these documents within 15 days of the date of this order. In case of any conflict between this order and the order of January 30, 2014, this order shall control.

The trial court is afforded broad discretion in supervising disclosure (*Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843 [2008]). In determining whether requested items of disclosure are material and necessary to the prosecution of the action, the court may consider the apparent merits of the claims. Plaintiff has failed to establish that the court overlooked or misapprehended any matter of fact or law in denying its motion to compel discovery

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concerning the insurer's alleged breach of the implied covenant of good faith. Plaintiff's motion for leave to reargue its motion to compel discovery is **denied**.

So ordered.

Dated MAR 27 2014


J.S.C.

ENTERED

MAR 28 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE