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| East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal |
| 2014 NY Slip Op 33884(U) |
| January 30, 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: Jan. 13, 2014
Motion Sequence # 003, 004, 005

The following papers read on this motion:

| | |
|--------------------------------|------|
| Notice of Motion..... | XXX |
| Affirmation in Support..... | XXX |
| Affirmation in Opposition..... | XX |
| Reply Affirmation..... | X |
| Memorandum of Law..... | XXXX |
| Reply Memorandum of Law..... | X |

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

This is an action for a declaratory judgment that the defendant insurer has a duty to defend under its policy. Defendant New York Schools Insurance Reciprocal issued a school

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board legal liability 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 acts(s) by the insured in the performance of duties for the school entity.”

The policy has an exclusion for “claims arising out of the failure to provide an appropriate individualized education program.” 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 contains a limit of liability of \$1 million in the aggregate. The annual premium is \$69,301.

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, the Equal Protection clause, 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

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insurer relied upon the exclusion for claims based upon failing to provide an appropriate individualized education program, as well as the exclusion for fraudulent, dishonest, and malicious acts.

This action was commenced April 17, 2013. Plaintiff seeks, among other relief, a declaratory judgment that New York Schools Insurance Reciprocal 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 is 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, plaintiffs Establishment Clause claims based upon IDEA settlements were allowed 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.

Judge Seibel's order was not submitted to the court on the prior motion. Although issued before this court's prior decision of October 17, 2013, and clearly pertinent and relevant to this court's determination, neither party submitted Judge Seibel's order to this court.

Defendant New York Schools Insurance Reciprocal moves for leave to renew its motion for summary judgment, seeking a declaration that it has no duty to defend or indemnify the District, based upon Judge Seibel's order. Although defendant has not offered reasonable justification for the delay in submitting Judge Seibel's order, the court will consider it in the interest of justice as a matter of discretion (See *Royal Agricola v F.D. Import & Export Corp*, 37 AD3d 693 [2d Dept 2007]). New York Schools Insurance argues

that the remaining Establishment Clause and state law claims, as limited by Judge Seibel, are within the exclusion for intentional, wrongful conduct.

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 (*Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1063 [2d Dept 2009]). If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action (Id). Nonetheless, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision (Id). The court will consider whether defendant New York Schools Insurance Reciprocal has carried its burden of establishing as a matter of law that there is no possible basis on which it might eventually be obligated to indemnify the District for the actions alleged in the federal amended complaint which were sustained by Judge Seibel.

The Supreme Court has set forth the two essential elements of a § 1983 civil rights action: 1) whether the conduct complained of was committed by a person acting under color of state law, and 2) whether this conduct deprived a person of rights, privileges, and immunities secured by the Constitution or laws of the United States (*Kost v Kozakiewicz*, 1F.3d 176, 184 [3d Cir 1993]). Among the rights protected by federal law are the Establishment and Free Exercise clauses of the First Amendment. These constitutional provisions prevent a state from enacting laws that have the purpose or effect of advancing or inhibiting religion (*Zelman v Simmons-Harris*, 536 U.S. 639 [2002]). Similarly, action by members of a school board which has the purpose or effect of advancing or inhibiting religion violates the First Amendment and may be redressed in a § 1983 action.

Members of a school board might inadvertently advance religion in various ways, such as by closing school, or avoiding scheduling extra-curricular activities, on religious holidays. However, the allegations sustained by Judge Seibel, purchasing religious textbooks, paying religious school tuition, and transferring school property to religious schools, were clearly of a deliberate and intentional nature. Thus, these acts come within the exclusion for fraudulent, dishonest, malicious, criminal or intentional wrongful conduct. The District has not established that any of its board members are innocent insureds in that they had no knowledge of the fraudulent and dishonest conduct. The court concludes that New York Schools has established as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify the District for the actions alleged in the Establishment Clause causes of action.

The federal plaintiffs' New York State constitutional claim is based on Article VIII, Section 1 which provides in pertinent part that no school district shall give or loan any money or property to or in aid of any individual or private corporation or association. The anti-gift provision of the New York Constitution was intended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit to the municipal corporation (*New Windsor Volunteer Ambulance Corp. v Meyers*, 442 F.3d 101 [2d Cir 2006]). Claims under the anti-gift provision may be enforced in a § 1983 action (Id). Because the anti-gift and Establishment Clause claims are based upon the same conduct, the court similarly concludes that plaintiff has established as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify the District for the anti-gift provision claim.

Accordingly, defendant New York Schools Insurance Reciprocal's motion for leave to renew its motion for summary judgment is **granted**. Upon renewal, defendant's motion for summary judgment is **granted** to the extent of declaring that defendant has no duty to indemnify the District for the activity alleged in the *Montessa* amended complaint, and no duty to defend the District after September 30, 2013, the date of Judge Seibel's order.

After the insurer disclaimed coverage, the District undertook its own defense in the *Montesa* action. The District seeks to recover the cost of defending the *Montesa* action in the present action. On May 14, 2013, defendant served a discovery demand seeking production of all documents exchanged in the federal action, correspondence among counsel, all legal bills for defense of the *Montesa* action, and a variety of other documents. Plaintiff has objected to the discovery demand based upon the attorney-client privilege and other grounds. Defendant moves to compel production of the documents contained in its discovery demand.

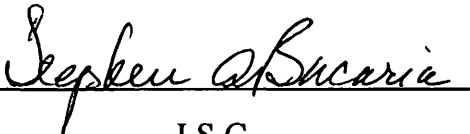
To the extent that plaintiff seeks reimbursement for the cost of its defense in the *Montesa* action, it has put the reasonableness of its legal fees in issue, and the attorney-client privilege has been waived. Accordingly, defendant's motion to compel discovery is **granted** to the extent that plaintiff shall produce all documents exchanged in the federal action, correspondence among counsel, and all legal bills for defense of the *Montesa* action, up to the date of Judge Seibel's order. The documents shall be produced within 15 days of the date of this order.

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Finally, the District seeks production of documents to support its claim that the insurer disclaimed coverage in bad faith. The court concludes as a matter of law that New York Schools' disclaimer of coverage for the District's claim arising from the *Montesa* action was not in bad faith. Accordingly, plaintiff's motion to compel discovery is **denied**.

So ordered.

Dated JAN 30 2014



J.S.C.

ENTERED

FEB 05 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE