

**Darwin Natl. Assur. Co. v Capacity Coverage Co. of
N.J.**

2015 NY Slip Op 31518(U)

August 12, 2015

Supreme Court, New York County

Docket Number: 153611/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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DARWIN NATIONAL ASSURANCE COMPANY
n/k/a ALLIED WORLD SPECIALTY INSURANCE
COMPANY,

Plaintiff,

-against-

Index No. 153611/2015

DECISION/ORDER

CAPACITY COVERAGE COMPANY OF NEW
JERSEY, ARM-CPACITY OF NEW YORK, LLC,
VIKTOR GECAJ and GJONAJ REALTY &
MANAGEMENT CORPORATION,

Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking a judgment declaring that it has no duty to defend or indemnify defendants in an underlying personal injury action. Defendants Capacity Coverage Company of New Jersey (“Capacity”) and ARM-Capacity of New York, LLC (“ARM”) (collectively referred to herein as “moving defendants”) now move for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff’s complaint as asserted against them in its entirety. For the reasons set forth below, moving defendants’ motion is denied.

The relevant facts are as follows. This is a declaratory judgment action wherein plaintiff, a professional liability insurance carrier, seeks a declaration that it has no duty to

defend or indemnify defendants in connection with a lawsuit filed against ARM in the Supreme court of the State of New York, Bronx County, entitled *Gjonaj Realty & Management Corp. and 28-47 Webb Avenue Associates, LLC v. ARM-Capacity of New York, LLC* (the “Gjonaj Action”).

In 2011, defendant Viktor Gecaj (“Gecaj”) sued his employer, Gjonaj Realty & Management Corporation (“Gjonaj”) for personal injury in an action entitled *Gecaj v. Gjonaj, et al.* (the “Gecaj Action”). Gjonaj defaulted in the action and a default judgment was entered against it in the amount of \$975,000.

Subsequently, Gjonaj commenced the Gjonaj Action, alleging that ARM, its insurance broker, agreed to forward any and all documents related to the Gecaj Action to American Western, Gjonaj’s insurance carrier. Gjonaj further alleged that ARM failed to forward documents to American Western and, as a result, the aforesaid default judgment was entered against Gjonaj.

Sometime prior to the commencement of the Gjonaj Action, plaintiff issued an Insurance Agents and Broker Professional Liability Policy to defendant Capacity for the policy period July 26, 2014 to July 26, 2015 (the “Darwin Policy”). Pursuant to Endorsement 21 of the Darwin Policy, ARM, Capacity’s affiliate, is also a Named Insured of the Darwin Policy. After the commencement of the Gjonaj Action, ARM sought insurance coverage under the Darwin Policy for defense and any indemnity obligation in the Gjonaj Action. Plaintiff provided ARM with defense in the Gjonaj Action while also expressly reserving its right to recoup any defense expenses in the event it is entitled to deny insurance coverage.

On or about April 13, 2015, plaintiff commenced this action seeking a declaration that ARM is not entitled to coverage for the Gjonaj Action under the Darwin Policy. Specifically,

plaintiff contends in its first cause of action that insurance coverage is barred by the Darwin Policy's "Prior and Pending Litigation Exclusion" and in its second cause of action that coverage is barred by the Darwin Policy's "Prior Knowledge Exclusion." Thus, in its third cause of action, plaintiff seeks to recoup all defense expenses it paid on behalf of ARM in the Gjonaj Action. Moving defendants now move to dismiss all these causes of action on the ground that they fail to state a cause of action upon which relief may be granted.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the present case, as an initial matter, moving defendants' motion to dismiss plaintiff's first cause of action seeking a declaration that there is no duty to defend or indemnify moving defendants under the Darwin Policy in connection with the Gjonaj Action pursuant to the Prior and Pending Litigation Exclusion on the ground that it fails to state a cause of action is denied. The complaint alleges that the Darwin Policy's Prior and Pending Litigation Exclusion states as follows:

- A. This policy shall not apply to any Claim, Loss, or Defense Expenses based, arising out of, directly or indirectly resulting for, in consequence of or in any way involving:

4. any fact, circumstance, situation, transaction, event or Wrongful Act: . . .
 - a. underlying or alleged in any prior and/or pending litigation, or administrative or regulatory proceeding or investigation, of which any Executive Officer had received written notice before July 26, 2013.

The complaint further alleges that ARM received notice of the Gecaj Action, and the allegations that form the basis of the Gjonaj Action, prior to July 26, 2013. These allegations, contrary to moving defendants' contention, are sufficient to state a claim for a judgment declaring that plaintiff has no duty to defend or indemnify ARM in the underlying Gjonaj Action based on the Darwin Policy's Prior or Pending Litigation Exclusion.

To the extent moving defendants contend that the first cause of action must be dismissed as the Gecaj and Gjonaj Actions lack the factual nexus required in order to trigger the Policy's Prior or Pending Litigation Exclusion, such contention is unavailing on the present motion to dismiss as such argument pertains to the merits of plaintiff's claim and is only appropriate on a summary judgment motion. Indeed, on a motion to dismiss, the plaintiff need only allege that such nexus exists.

Additionally, moving defendants' motion to dismiss plaintiff's second cause of action seeking a declaration that there is no duty to defend or indemnify moving defendants under the Darwin Policy in connection with the Gjonaj Action pursuant to the Prior Knowledge Exclusion on the ground that it fails to state a cause of action is also denied. The complaint alleges that the Darwin Policy's Prior Knowledge Exclusion provides that there is no coverage where an "Executive Officer," as defined by the policy, had knowledge, prior to July 26, 2013, of any fact circumstance, situation, transaction, event or wrongful act, or had reasonable expectation of such that could give rise to a claim. The Complaint further alleges that ARM received notice of the

