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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 12

X

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

Plaintiffs,

-against-

Index No.: 006748/12
Motion Sequence...03, 04
Motion Date...02/13/15

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY , ZURICH AMERICAN INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 03).....x
Notice of Cross-Motion (Mot. Seq. 04).....x
Affirmation in Further Support and Opposition..x
Affirmation in Further Support and Opposition..x

Upon the foregoing papers, the Motion (Mot. Seq. 03) by the Plaintiffs, Bernard H. Vogel and Seavey Vogel & Oziel, LLP, seeking an order pursuant to CPLR § 2221 (d) amending the Judgment awarded by this court entered on November 21, 2014 and awarding them pre-judgment interest and the Cross-motion (Mot. Seq. 04) by the Defendants, American Guarantee & Liability Insurance Company and Zurich American Insurance Company, seeking an order pursuant to CPLR § 2221 (d) granting them reargument of this

Court's rulings on their *motion in limine* and upon reargument, amending the judgment: (1) to limit their liability to when coverage under the second amended complaint was denied in the underlying action and (2) refusing to consider documentary evidence that was not produced prior to the hearing on damages, are determined as provided herein.

The Plaintiffs in this case sought to recover of the Defendant insurance companies for their refusal to defend and indemnify them in a legal malpractice action. By order of the Hon. Robert A. Bruno, dated July 20, 2014, the Plaintiffs were granted summary judgment with respect to liability on their First and Second causes of action sounding in breach of contract and declaratory judgment. The Third cause of action sounding in bad faith was dismissed. An inquest on damages was held and Judgment was signed on November 18, 2014 and entered on November 21, 2014.

In fashioning its judgment, this Court refused to award the Plaintiffs pre-judgment interest. This Court also refused to limit the Defendant insurers' liability for failure to defend the Plaintiff in the underlying action to when the Second Amended Complaint was interposed. It also allowed the Plaintiffs to rely on documents that were not produced in discovery in establishing their damages. The parties now ask this court to reconsider those rulings. Upon reconsideration, the Plaintiffs seek an award of pre-judgment interest in accordance with CPLR § 5001. In contrast, the Defendants, American Guarantee & Liability Insurance Company and Zurich American Insurance Company, seek to limit the Plaintiffs' damages to when coverage under the Second Amended Complaint in the underlying action

was denied. They maintain that Justice Bruno specifically found that only then did a reasonable possibility of coverage under the policy arise in the underlying action, thereby giving rise to the Defendants' duty to defend the Plaintiffs in that action.

" 'A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" ' " (*Markovic v. J & A Realty, LLC*, 124 A.D.3d 846 [2d Dept. 2015], quoting *Grimm v. Bailey*, 105 A.D.3d 703, 704 [2d Dept. 2013], quoting CPLR § 2221 [d] [2]; citing *Ahmed v. Pannone*, 116 A.D.3d 802 [2d Dept. 2014]; *Matter of American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 [2d Dept. 2011], lv denied 18 N.Y.3d 803 [2012]).

CPLR § 5001 (a) provides that interest shall be recovered on a sum awarded for breach of performance of a contract. CPLR § 5001 (b) provides that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." "When items of damage, all incidents of a single claim, accrue at different times, a separate interest computation is made for each, measured from its own accrual." Siegel, N, Y. Prac, § 411. "In an action to recover the proceeds of an insurance policy, pre-judgment interest must be awarded on amounts due pursuant to the terms of the insurance policy on the ground that the delay in payment constituted a breach of the terms of the insurance policy" (*Mann v. Gulf Ins. Co.*, 300 A.D.2d 452, 454 [2d Dept. 2000], citing *Royal Indem. Co. v. Providence*

Washington Ins. Co., 966 F.Supp. 149 [ND NY 1997], affd. 172 F3d 38 [2d Cir 1999]; see also *Hedaya Home Fashions, Inc. v. American Motorists Ins. Co.*, 12 A.D.3d 639 [2d Dept. 2009], lv denied 4 N.Y.3d708 [2005]).

Contrary to the Defendants' characterization of the Plaintiffs' argument at the hearing, their contention that they were entitled to pre-judgment interest because the court had found that the Defendants had breached their insurance policy adequately notified this court that the Plaintiffs were seeking pre-judgment interest on the ground that this was a breach of contract claim. An insurance policy is a contract. While the declaratory relief was equitable, it was ancillary here. The recovery for breach of the insurance policy was not equitable in nature and the Plaintiffs are entitled to the pre-judgment interest they seek pursuant to CPLR § 5001 (b). See, *Action S.A. v. Marc Rich & Co., Inc.*, 951 F2d 504 (2d Cir 1991), cert denied 503 US 1006 (1992).

As such, the Plaintiffs' motion for reargument is granted to the extent that they are granted pre-judgment interest as of the date expenses were incurred.

As for the date on which the Defendant insurance companies became responsible for defending the Plaintiffs, contrary to the Plaintiffs' position, the date on which a party becomes entitled to damages factors in a calculation of damages. *Halsey v. Connor*, 287 A.D.2d 597 (2d Dept. 2001). An insurer's duty to defend does not arise until the allegations in the complaint against the insured suggests a reasonable possibility of coverage under their policy. *BP A.C. Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708 (2007). The

Defendants are correct that Justice Bruno found as follows in granting the Plaintiffs summary judgment:

> [T]he allegations asserted against Vogel in the Zweibach 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 alleged negligent supervision of Oziel's actions in relation to the firm's escrow account.
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> The court found that:
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> American Guarantees failed to establish that the allegations against Vogel in the Zwiebach action place the entirety of that complaint completely within the damage exclusion invoked to deny coverage.

The Defendant insurance companies are correct that the only claim advanced in the Zweibach action that fell under the policy did not come into existence until the Plaintiffs in the underlying action served their Second Amended Complaint. *Stellar Mech. Servs. of N. Y., Inc. v. Merchants Ins. of New Hampshire*, 74 A.D.3d 948 (2d Dept. 2010). The Defendant Insurers were notified of the amendment and denied coverage on December 22, 2010. *Allstate Ins. Co. v. Consolidated Mut. Ins. Co.*, 35 A.D.2d 535 (2d Dept. 1970). In fact, the Court in the underlying action specifically stated "[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." The Defendant Insurers liability for the Plaintiffs' expenses began on December 22, 2010.

The Defendant insurance companies have not demonstrated how this court

erred in considering documents that were not produced in discovery in assessing the Plaintiffs' damages. Not only have they failed to demonstrate that the Plaintiffs' failure was willful or contumacious, they still haven't identified any prejudice. *Gonzalez v. New York City Tr. Auth.*, 87 A.D.3d 675 (2d Dept. 2011); *Gendusa v. Yu Lin Chen*, 71 A.D.3d 1085 (2d Dept. 2010). That portion of their motion for reargument is **DENIED**.

In conclusion, the Defendants' motion is **GRANTED** to the extent that the Plaintiffs damages are hereby limited to the expenses incurred by them on or after December 22, 2010. The Plaintiffs' motion is **GRANTED** to the extent that they are awarded pre-judgment interest on their expenses as of the date on which they were incurred.

Submit judgment on notice.

All applications not specifically addressed are herewith denied.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 24, 2015

Hon. Randy Sue Marber, J.S.C.