Freedom Specialty Ins. Co. v Platinum Mgt. (NY), LLC
2018 NY Slip Op 32233(U)
September 10, 2018
Supreme Court, New York County
Docket Number: 652505/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

FREEDOM SPECIALTY INSURANCE COMPANY, ATLANTIC SPECIALTY INSURANCE COMPANY, AND BERKLEY INSURANCE COMPANY,

Plaintiffs,

-against-

PLATINUM MANAGEMENT (NY), LLC, PLATINUM CREDIT MANAGEMENT, LP, MARK NORDLICHT, DAVID LEVY, DANIEL SMALL, URI LANDESMAN, JOSEPH MANN, and JOSEPH SANFILIPPO,

Defendants.

- X

DECISION AND ORDER
Index No.: 652505/2017

Motion Sequence No.: 005

O. PETER SHERWOOD, J.:

This insurance coverage case arises out of an SEC proceeding, and criminal prosecutions in the Southern and Eastern Districts of New York, that allege defendants' involvement in a Ponzi-like scheme (the "Underlying Prosecution"). In motion sequence 005, plaintiff Berkley Insurance Company ("Berkley") moves for summary judgment on its sole cause of action – seeking a declaratory judgment that it has no duty to defend or indemnify – and against defendants' counterclaims. Berkley also seeks to vacate this court's December 21, 2017 order directing plaintiffs to advance defendants' legal expenses in the Underlying Prosecution (*see* NYSCEF Doc. No. 163). Berkley asserts that coverage for the Underlying Prosecution is subject to a policy exclusion clause for claims that involve in "any way" litigation or investigation that was "prior or pending" as of November 20, 2015 (*see* NYSCEF Doc. No. 183 ["Heineman aff"], exhibit L ["Berkley Policy"] at EX 304300 [01-09] [the "PPLI Exclusion"]). Because Berkley has failed to meet its burden of establishing, as a matter of law, that the PPLI Exclusion applies to the Underlying Prosecution, the motion shall be denied and the advancement order will remain in force.

I. BACKGROUND

Berkley is one of several plaintiff insurers in this action, and is the issuer of Excess Policy No. 18013260, to defendant Platinum Management (NY) LLC ("Platinum"), effective for the

period November 20, 2015 to November 20, 2016 (the "Berkley Policy") (*see* NYSCEF Doc. No. 213 ["SUMF"] ¶ 45; Berkley Policy). The Berkley Policy provides coverage in accordance with the primary policy issued by U.S. Specialty Insurance Company for Directors and Officers Liability coverage (SUMF ¶¶ 35, 40). The Berkley Policy PPLI Exclusion provides as follows:

> "The **Insurer** shall not be liable to make any payment for Loss in connection with a Claim made against any Insured based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
>
> (1) any prior or pending litigation, administrative or arbitration proceeding, or investigation as of November 20, 2015, or
>
> (2) any fact, circumstance, situation, transaction or event underlying or alleged in such litigation, administrative or arbitration proceeding or investigation,
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> regardless of the legal theory upon which such Claim is predicated."

Neither party disputes that the operative "prior or pending litigation . . . or investigation" in this instance is the investigation and subsequent prosecution of Platinum's founder, Murray Huberfeld, for allegedly bribing the president of the Correction Officers Benevolent Association ("COBA"), Norman Seabrook, in order to secure investment by COBA into Platinum Partners Value Arbitrage Fund (respectively, the "Huberfeld Investigation" and "Huberfeld Prosecution") (*see e.g.* Heineman aff, exhibit A [indictment in Huberfeld Prosecution]).

II. DISCUSSION

A. Standard of Law, Exclusion Provisions[1]

Insurance policies are "in essence, creatures of contract, and accordingly, are subject to principles of contract interpretation," namely, that they are to be "construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense" (*In re Estates of Covert*, 97 NY2d 68, 76 [2001]). In New York, if an insured's claims "fall within the polic[y's] exclusions, . . . insurance companies are relieved of their obligations to defend and indemnify" (*Zandri Constr. Co. v Stanley H. Calkins, Inc.*, 54 NY2d 922 [1981]). However, the "duty to defend is liberally construed and is broader than the duty to indemnify, in order to ensure [an]

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[1] The standards for a motion for summary judgment are well established. For a summary *see Amaranth LLC v J.P. Morgan Chase & Co.,* 32 Misc 3d 1235 (a), Sup Ct, New York County 2011, aff'd 100 AD 3d 573 (1st Dept).

adequate . . . defense of [the] insured, without regard to the insured's ultimate likelihood of prevailing on the merits of a claim" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264 [2011], quoting *General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]).

Exclusionary clauses "are accorded a strict and narrow construction, and any ambiguity is construed in favor of the insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). Thus, "it is the insurer's burden to prove that the construction it advances is not only reasonable, but also that it is the only fair one" (*Pepper v Allstate Ins. Co.*, 20 AD3d 633, 635 [3d Dept 2005] [internal quotation marks and citation omitted]). In order to avoid its obligation to defend, an insurer must "establish[] 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" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]).

B. Analysis

The parties agree that a determination of whether the PPLI Exclusion applies requires a "side-by-side review," comparing facts that occurred before November 20, 2015 with facts alleged in the Underlying Prosecution "[i]n order to ascertain whether a sufficient factual nexus exists" (*see e.g.* NYSCEF Doc. No. 206 ["sup"] at 19-20; NYSCEF Doc. No. 208 ["opp"] at 12-14; *see also Nomura Holding Am., Inc. v Fed. Ins. Co.*, 45 F Supp 3d 354, 370 [SD NY 2014], *affd but criticized,* 629 Fed Appx 38 [2d Cir 2015]). Within this framework, the primary contested issue (raised first in the opposition papers) is whether the court should compare the allegations of the Underlying Prosecution to *allegations* made before the policy period commenced, or to *facts* that allegedly occurred before the policy period commenced (*see* opp at 11-15; NYSCEF Doc. No. 216 ["reply"] at 14-15). The second issue, also raised by the opposition, is whether the PPLI Exclusion may apply even if defendants were not part of the Huberfeld Investigation (*see* opp at 21-23; reply at 16). The third is regarding how strong of a factual nexus there need be for the PPLI Exception to apply, and whether that standard is met here (*see* sup at 19-28; opp at 15-21; reply at 4-13). Berkley's primary argument for a common nexus is that the bribery that was the subject of the Huberfeld Investigation and Prosecution also helped defendants continue their Ponzi-like Scheme by providing funds to satisfy redemption requests. Berkley also argues, and defendants do not dispute, that it can meet its burden without proving the truth of the allegations in the underlying actions (sup at 28-29).

These three issues could serve as a useful framework for resolving the motion. However, both the motion, and the opposition to the motion, are premised on an incorrect assumption – that the "side-by-side review" applies to this case. That analysis, which was developed in the SD NY and has yet to be applied in New York, has been applied where *only* allegations made in a prior pending litigation bear on the exclusion provision – either by the terms of the provision itself, or through the insurer's reliance on that provision (*see Nomura*, 45 F Supp 3d at 359, 370).[2] In those same instances, New York courts have simply applied the principles of law described above (*see Exec. Risk Indem., Inc. v Starwood Hotels & Resorts Worldwide, Inc.*, 98 AD3d 878, 881 [1st Dept 2012]; *Fed. Ins. Co. v 1030 Fifth Ave. Corp.*, 262 AD2d 142, 142–43 [1st Dept 1999]). The potential utility of that analysis might be compelling in instances where only the allegations in the two respective actions are at issue. However, to allow an insurer to establish facts regarding an investigation through (as Berkley seeks to do here) subsequent allegations *based* on that investigation (*see* sup at 22-27), would circumvent the insurer's burden on summary judgment. To the extent Berkley seeks denial based on a nexus with a "fact, circumstance, situation, transaction or event underlying . . . [a prior] *investigation*," Berkley must at minimum show, as a matter of law, that (a) there existed an investigation prior to November 20, 2015, (b) that there was a common "fact, circumstance, situation, transaction or event" between that investigation and the Underlying Prosecution, and (c) that this common "fact, circumstance, situation, transaction or event" was one that was "underlying" the prior investigation, under a strict and narrow interpretation of that term.[3]

Only two of Berkley's exhibits are of any evidentiary value on any of the three forgoing issues: the May 2015 Subpoenas addressed to Huberfeld and Platinum Partners seeking records relating to transactions between Platinum Partners and COBA (Heineman aff, exhibit G), and the

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[2] *See also Darwin Nat. Assur. Co. v Westport Ins. Corp.*, 13-CV-02076 PKC, 2015 WL 1475887, at *3 [ED NY Mar. 31, 2015] [addressing prior claim]; *Zahler v Twin City Fire Ins. Co.*, 38 Employee Benefits Cas 1428 [SD NY Mar. 31, 2006] [excluding wrongful acts that were noticed under prior policies, which included prior litigation]; *Seneca Ins. Co. v Kemper Ins. Co.*, 2004-1 Trade Cases P 74427 [SD NY 2004], *affd,* 133 Fed Appx 770 [2d Cir 2005] [exclusion provision applied to previously existing "Claim"]; *Zunenshine v Exec. Risk Indem., Inc.*, 97 CIV. 5525 (MBM), 1998 WL 483475, at *1 [SDNY Aug. 17, 1998], *affd,* 182 F3d 902 [2d Cir 1999] [exclusion provision applied only to "prior andor pending litigation or administrative or regulatory proceeding"]).

[3] To the extent Berkley argues that the language "alleged in such . . . investigation" applies, that phrase cannot be fairly interpreted to cover also, as Berkley would need to argue, facts *adduced in* an earlier investigation, as *alleged in* a later action. At best, the PPLI Exclusion is ambiguous as to whether allegations made after November 20, 2015 can be imputed to a "prior or pending . . . investigation," and since "any ambiguity is construed in favor of the insured" (*Cragg*, 17 NY3d at 122), even if Berkley could accomplish the herculean task of convincing the court that such an ambiguity exists, Berkley's motion would still fail.

sworn statement of FBI Special Agent Blaire Toleman, dated June 7, 2016 (*id.* exhibit M). The latter concerns the bribery scheme involving Seabrook, Huberfeld and others (id. ¶ 15) as well as an urgent need at Platinum Partners for new funds to meet pending redemption requests and makes a reference to the subpoenas (id. ¶¶ 22 and 23). As noted above, the May 2015 Subpoenas merely request documentation regarding "[t]ransactions between any entities controlled by [Huberfeld] or entities for whom you have done work with [COBA] or any of its Executive Board members or union funds" and, from Platinum Partners "[i]nvestments handled for, or monies received from or transferred for, [COBA], any Union funds, Norman Seabrook, or Michael Maiello, including any such transactions involving Centurion Credit Management or any related entities" (*id.*, exhibit G). Although the investigation references a need for new funds to meet redemption requests at Platinum Partners, there are no indications that as of November 20, 2015 the investigation of Huberfeld and Seabrook in any way included a fact, circumstance, situation, transaction or event of a Ponzi-like scheme within Platinum Partners. Even if one were to accept that Berkley had met the commonality test under the strict standard that applies here, it has not shown that such common "fact circumstance, situation, transaction or event" was one that was underlying the Government's bribery investigation of Huberfeld and Seabrook. Because the evidence fails to establish a prima facie case that the PPLI Exclusion applies, let alone show that this exclusion applies as a matter of law, the motion for summary judgment must be denied and upon a search of the record, summary judgment shall be granted in favor of defendants dismissing the complaint[4] (see CPLR 3212 [b]).

It is hereby

ORDERED that the motion for summary judgment of plaintiff Berkley Insurance Company is DENIED; and it is further

ORDERED that the request to vacate this court's order of December 21, 2017 is likewise DENIED; and it is further

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[4] Although the Huberfeld Prosecution cannot support Berkley's claim because it post-dates November 20, 2015, Berkley's reference to the Government's take on Hubefeld's motive for his alleged participation in a bribery scheme shows that it related to his desire to protect his own money tied up in Platinum by attracting institutional investors who were more likely to leave their funds invested for longer periods than individual investors. In order to achieve the purpose of moving away from wealthy individual clients and toward institutional clients, Huberfeld (who had no official position at Platinum but continued to be associated with it), was not above paying a little more on the side if it meant getting an institutional client's business (see Berkley Reply at 7-8, NYSCEF Doc. No. 216).

In contrast, the charges against the defendants involve misrepresentations relating to various aspects of Platinum's business, overvaluation of assets, and ponzi-like transactions (*see* Grand Jury Charges, ¶ 42, NYSCEF Doc. No. 185). The motive referenced by the prosecutor in the Huberfeld case does not indicate any connection with alleged misrepresentations to investors or any ponzi-like scheme.

ORDERED that pursuant to CPLR 3212 (b) the complaint is hereby DISMISSED and the Clerk of the Court is directed to enter judgment dismissing the complaint of plaintiff Berkley Insurance Company as against defendants Platinum Management (NY) LLC; Mark Nordicht - - - together with costs and disbursements to be taxed against plaintiff Berkley Insurance Company upon submission of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: September 10, 2018

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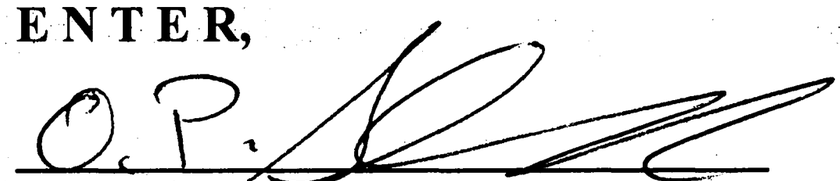

O. PETER SHERWOOD J.S.C.