SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

Justice

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HYPERION MEDICAL P.C.,

Plaintiff,

- v -

TRINET HR III, INC., ADP TOTALSOURCE, INC., ZURICH AMERICAN INSURANCE COMPANY, STEADFAST INSURANCE COMPANY,

Defendants.

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INDEX NO. 654790/2018

MOTION DATE 05/17/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment is denied, and defendant Steadfast Insurance Company's cross-motion for summary judgment dismissing the claims asserted against it is granted, as follows.

This case arises out of an underlying lawsuit filed against plaintiff Hyperion Medical, P.C. ("Hyperion"), by a former employee, Leonides Duverny ("Duverny"), for various claims arising out of her employment with Hyperion and the termination of her employment by Hyperion in 2016. That lawsuit, filed in 2018, was preceded by a charge of discrimination filed by Duverny with the Equal Employment Opportunity Commission ("EEOC") in 2016. A right to sue letter was ultimately issued and Duverny then filed suit in August 2018.

Hyperion commenced this declaratory judgment action seeking insurance indemnification and defense coverage from defendant Steadfast Insurance Company ("Steadfast") under an employment practices liability insurance policy Steadfast issued to a Professional Employer

Organization ("PEO"), defendant TriNet Group, Inc. ("TriNet"), effective April 1, 2018. The Steadfast insurance policy is a "claims-made" policy that only provides coverage for claims first made during the Steadfast policy period, which was April 1, 2018 to April 1, 2019. Hyperion's instant motion for summary judgment seeks a judgment on its complaint. Steadfast cross-moves for summary judgment dismissing the claims against it in this action.

FACTUAL AND PROCEDURAL BACKGROUND

Hyperion hired Duverny as an employee in 2015 (Amended Complaint [NYSCEF Doc. No. 25] ¶ 10). Duverny's employment was terminated by Hyperion in May 2016 (*id.*, ¶ 12). In June 2016, Duverny filed a charge of discrimination against Hyperion with the EEOC (*id.*, ¶ 13). In June 2018, Duverny was issued a right to sue letter by the EEOC (*id.*, ¶ 14). In August 2018, Duverny filed a lawsuit against Hyperion entitled *Duverny v Hercules Medical P.C.* (No. 18-cv-07652 [SDNY]) (the "Duverny Lawsuit"). A copy of the complaint in the Duverny Lawsuit is NYSCEF Doc. No. 15. In the Duverny Lawsuit, Duverny alleged, *inter alia*, discrimination and violation of the Fair Labor Standards Act ("FLSA") for failing to pay her proper overtime wages.

Hyperion retained defendant ADP Total Source, Inc. ("ADP") as its PEO in July 2015 (Amended Complaint ¶ 1). ADP continued as Hyperion's PEO until May 2018, when Hyperion retained TriNet as its PEO to replace ADP (*id.*). The contract between Hyperion and TriNet was dated May 8, 2018 (NYSCEF Doc. No. 17). Hyperion alleges that ADP and TriNet provided various services, including payroll and employee benefits services, as well as obtaining employment practices and liability insurance (Amended Complaint ¶ 2). Hyperion alleges that pursuant to its Client Services Agreement with ADP, ADP was required to provide Hyperion with employment practices and liability insurance on a claims-made basis (*id.*, ¶ 3). Hyperion

also alleges that pursuant to its Client Services Agreement with TriNet, TriNet was required to provide Hyperion with employment practices liability insurance (*id.*, ¶ 5).

Steadfast issued to TriNet a Zurich American Insurance Company Professional Employer Organization Employment Practices Liability insurance policy bearing policy number EPL 0508351-00 for the policy period of April 1, 2018 to April 1, 2019 (the "Steadfast Policy" [NYSCEF Doc. No. 14]). The Steadfast Policy is a claims-made policy that provides coverage for certain types of claims, as long as those claims are first made during the policy period (*id.*). The Steadfast Policy also provides coverage only for claims that are brought against a client company of TriNet by persons who were employed pursuant to the Client Services Agreement between the client company and TriNet (*id.*). Duverny was hired by Hyperion in 2015 and fired by Hyperion in 2016, and was never employed during the time that Hyperion had a Client Services Agreement with TriNet beginning in 2018 (Amended Complaint ¶¶ 1, 10, 12).

On October 22, 2018, TriNet provided notice to defendant Zurich American Insurance Company ("Zurich") and Steadfast of Hyperion's lawsuit against TriNet (the instant lawsuit) as well as the Duverny Lawsuit (NYSCEF Doc. No. 36). By letter dated October 29, 2018, Steadfast advised Hyperion that no coverage was available under the Steadfast Policy for the Duverny Lawsuit (NYSCEF Doc. No. 41).

Hyperion originally filed this action in this court on September 27, 2018, naming only TriNet and ADP as defendants (NYSCEF Doc. No. 27). Those defendants removed the case to federal court on October 31, 2018 (NYSCEF Doc. No. 2). On November 13, 2018, Hyperion filed an amended complaint in federal court, naming Steadfast and Zurich as Defendants (NYSCEF Doc. No. 28). On December 20, 2018, the federal court ordered the case remanded to this court based on a lack of subject matter jurisdiction (NYSCEF Doc. No. 4.) On

January 10, 2019, Hyperion filed its Amended Complaint in this court (NYSCEF Doc. No. 25). On January 17, 2019, Steadfast and Zurich filed their Answer to the Amended Complaint (NYSCEF Doc. No. 29). Hyperion filed its instant motion for summary judgment against Steadfast on March 29, 2019 (NYSCEF Doc. No. 12).

DISCUSSION

The Summary Judgment Standard:

Summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212[b].) To prevail on a motion for summary judgment, the movant must: (1) make a *prima facie* showing that it is entitled to judgment as a matter of law; and (2) offer evidence demonstrating that there is no genuine issue of material fact (*e.g., JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). If the movant makes its *prima facie* showing, the burden then shifts to the non-moving party to "produce evidence in admissible form to demonstrate the existence of a disputed issue of material fact sufficient to require a trial" (*Michele M. v Board of Educ.*, 3 AD3d 370, 371 [1st Dept 2004]).

A motion for summary judgment will be granted only when a cause of action or defense is established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party (CPLR 3212[b]). The fundamental question with respect to a motion for summary judgment is whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers, and to justify finding, as a matter of law, either that there is no defense to the action or that the action or defense is without merit (*see, Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]).

The Steadfast Policy:

An insurance contract is interpreted under ordinary common law contract principles, and the court must give effect to the intent of the parties as expressed in the clear language of the contract (*Breed v Insurance Co. of North America*, 46 NY2d 351 [1978], *rearg denied* 46 NY2d 940 [1979]). If the terms of an insurance policy are clear and unambiguous, they must be accorded their ordinary meaning (*Seaport Park Condominium v Greater New York Mut. Ins. Co.*, 39 AD3d 51 [1st Dept 2016]).

Further, the policy must be construed in a way that gives fair meaning to all the language employed by the parties, and leaves no provision without force and effect (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY3d 157 [2005]; *Consolidated Edison Co. v Allstate Ins. Co.*, 98 NY2d 208 [2002]).

New York law is clear that it is the insured that bears the initial burden of proving that a claim is within the scope of the coverage afforded by the insurance policy (*e.g., Consolidated Edison Co., supra. Id.*, at 218 ["it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage"]; *Tribeca Broadway Associates, LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004] ["it is well established that the party claiming insurance coverage bears the burden of proving entitlement . . . to coverage"]).

The Insuring Agreements of the Steadfast Policy provide, in relevant part, as follows:

A. Employment Practices Liability Coverage

> The Insurer shall pay on behalf of any Insured, subject to the Limits of Liability set forth in Item 3. of the Declarations, the Loss arising from a Claim first made by or on behalf of an Insured Person during the Policy Period (or Discovery Period, if applicable) against such Insured for any Wrongful Act, other than a Third Party Wrongful Act, and reported to the Insurer in accordance with the terms of this Policy.

B. Third-Party Liability Coverage

The Insurer shall pay on behalf of any Insured, subject to the Limits of Liability set forth in Item 3. of the Declarations, the Loss arising from a Claim first made during the Policy Period (or Discovery Period, if applicable) against such Insured for any Third- Party Wrongful Act, and reported to the Insurer in accordance with the terms of this Policy.

(NYSCEF Doc. No. 35 at 006.)

The Duverny Lawsuit is Not a Claim "First Made" During the Policy Period:

Both of the above-quoted provisions of the Steadfast Policy require that the "Claim" for which coverage is sought must be "first made . . . during the Policy Period" (*id.* [emphasis added]). The Steadfast Policy defines the term "Claim" to include:

(2) judicial, administrative or regulatory proceeding, whether civil or criminal, for monetary, non-monetary or injunctive relief commenced against an Insured, including any appeal therefrom, which is commenced by:
(i) service of a complaint, notice of charges or similar pleading;
(ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or
(iii) receipt or filing of a notice of charges;

It is further understood that criminal proceedings for monetary, nonmonetary or injunctive relief commenced against a PEO Client Company is not covered under this coverage section[.]

* * *

(4) notification of an investigation of an Insured by the Equal Employment Opportunity Commission ("EEOC") or similar governmental agency, commenced by the filing of a notice of charges, formal investigative order or similar document[.]

(*Id.*, at 006-07.)

Duverny filed its EEOC charge in June 2016 based on facts and circumstances that are alleged in the Duverny Lawsuit, filed subsequent to said charge (Amended Complaint ¶ 13; NYSCEF Doc. No. 26 ¶ 5). That EEOC charge was most definitely a "Claim" as defined in the Steadfast Policy, quoted above. Duverny then received a right to sue letter in June 2018 (NYSCEF Doc. No. 26 ¶ 6) and filed the Duverny Lawsuit in August 2018 (NYSCEF Doc. No.

26). Duverny herself alleges in the Duverny Lawsuit that she "filed a charge of discrimination upon which this Complaint is based with the Equal Employment Opportunities Commission ('EEOC')" (NYSCEF Doc. No. 26 ¶ 5), and Hyperion admits that there was an EEOC charge filed (NYSCEF Doc. No. 20 at 7 n 1).

As quoted above from the Steadfast Policy, coverage was only available if the "Claim" (such as Duverny's EEOC charge) was "first made" during the policy period (April 1, 2018 to April 1, 2019). "A Claim shall be deemed first made when any Insured receives notice of the Claim" (NYSCEF Doc. No. 35 [the Steadfast Policy] at 007). Moreover: "More than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been first made in accordance with the previous sentence" (*id.*). In addition: "'Interrelated Wrongful Acts' means any and all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, occurrence, cause or series of related facts or circumstances, situations, events, transactions, occurrences or causes. Claims which allege Wrongful Acts can be interrelated regardless of whether such Wrongful Acts involve the same or different claimants or legal causes of action" (*id.*, at 009).

The EEOC charge and the Duverny Lawsuit clearly involve the same Wrongful Acts, as Duverny herself alleges in the Duverny Lawsuit that she "filed a charge of discrimination upon which this Complaint is based with the Equal Employment Opportunities Commission ('EEOC')" (NYSCEF Doc. No. 26 ¶ 5). In fact, the EEOC charge was a procedural prerequisite to the filing the Duverny Lawsuit. Thus, at a bare minimum, the EEOC charge and the Duverny Lawsuit involve Interrelated Wrongful Acts. Since the EEOC charge and the Duverny Lawsuitare necessarily are based on the same Wrongful Acts and/or Interrelated Wrongful Acts, they are deemed to be a single Claim pursuant to the clear language of the Steadfast Policy.

Based on the clear language of the Steadfast Policy, that single Claim was deemed "first made" when Duverny filed her charge of discrimination with the EEOC – in 2016 – two years **before** the Policy Period of the Steadfast Policy. For this reason, the Claim (consisting collectively of the EEOC charge and the Duverny Lawsuit) was not "first made" during the 2018-2019 Policy Period of the Steadfast Policy, and, therefore, no coverage claim can exist under the Steadfast Policy.

The Duverny Lawsuit is Not a Claim Made by or on Behalf of an "Insured Person":

In addition to the Duverny Lawsuit not being a claim first made during the policy period of the Steadfast Policy, no coverage could exist for the Duverny Lawsuit in any event because Insuring Agreement I.A of the Steadfast Policy limits coverage to a "Claim first made by or on behalf of an Insured Person" (NYSCEF Doc. No. 35 [the Steadfast Policy] at 006). Thus, coverage could only exist for the Duverny Lawsuit if Duverny, the person bringing the claim, was an "Insured Person." The Steadfast Policy defines "Insured "Person" to include a "Worksite Employee," which is, in turn, defined as: "any individual working . . . at the PEO Client Company's worksite pursuant to a Client Service Agreement or applicable state statute, but only while that person is acting in their capacity as such" (*id.*, at 012). The term "Client Service Agreement," in turn, is defined as "a written contract or agreement between the Named Insured PEO [i.e., TriNet] and a PEO Client Company [i.e., Hyperion] . . . for payroll, benefits and other human resources functions" (*id.*). Based on these unambiguous provisions, the Steadfast Policy was designed to only provide coverage for a claim made by someone who was working for Hyperion during the time that Hyperion and TriNet had a Client Service Agreement in place. Here, Hyperion alleges that Duverny was employed by it from 2015 to 2016, and

that Hyperion first entered into a contract with TriNet in May 2018 (Amended Complaint ¶¶ 1, 10-12). Based on Hyperion's own allegations, it is clear that Duverny was not employed pursuant to the contract between Hyperion and TriNet, and that Duverny's employment terminated two years before Hyperion ever retained TriNet. For this reason, Duverny was not a Worksite Employee and, thus, not an Insured Person as those terms are defined in the Steadfast Policy. The Duverny Lawsuit, therefore, cannot be considered a claim "by or on behalf of an Insured Person."

The Duverny Lawsuit is Not a Claim for a "Third-Party Wrongful Act":

Similarly, the Duverny Lawsuit cannot be considered a claim for a "Third-Party Wrongful Act" under Insuring Agreement I.B of the Steadfast Policy. The Steadfast Policy defines "Third-Party Wrongful Act," in part, as discrimination or sexual harassment against a Third-Party (NYSCEF Doc. No. 35 [the Steadfast Policy] at 012). The term Third-Party, in turn, is defined to include a "customer, vendor, service provider or other business invitee" (*id.*). It does not include employees. The Duverny Lawsuit cannot constitute a claim for a Third-Party Wrongful Act because it is clear from the complaint that the Duverny Lawsuit asserts claims arising out of Duverny's employment with Hyperion. The Duverny Lawsuit asserts thirteen causes of action, all of which are for claims involving Duverny's employment with the defendants therein, which include Hyperion and Richstone: (1) The first cause of action is for unpaid overtime in violation of FLSA. Duverny alleges that she was an employee and her employers failed to compensate her in accordance with the FLSA's overtime provisions; (2) the second cause of action is for unpaid overtime in violation of the New York Labor Law and the New York Code of Rules and Regulations. Duverny alleges that she worked in excess of forty hours in a workweek and her employers failed to compensate her in accordance with those

provisions; (3) the third cause of action is for failure to pay timely wages after termination in violation of the Labor Law. Duverny alleges that, as a terminated employee, her employers were required to compensate her not later than the regular pay period during which her termination occurred, and that they failed to do so; (4) the fourth cause of action is for failure to furnish proper wage statements in violation of the Labor Law. Duverny alleges that, as an employee, she was entitled to a wage statement that contained accurate and specifically enumerated criteria, and that her employers failed to furnish her with such a wage statement on each payday; (5) the fifth cause of action is for failure to furnish proper wage notices in violation of the Labor Law. Duverny alleges that her employers were required to furnish her, as an employee, with a wage notice at the time of hire, containing accurate, specifically enumerated, criteria, and that they failed to furnish such a wage notice; (6) the sixth cause of action is for gender-based discrimination in Violation of Title VII. Duverny alleges that her employers engaged in an unlawful employment practice in that they discriminated against her by creating a hostile work environment based on her gender, and subjected her to *quid pro quo* sexual harassment by terminating her employment after she rejected the alleged sexual advances of Hyperion's general manager, Geoffrey Richstone; (7) the seventh cause of action is for national-origin-based discrimination in violation of Title VII. Duverny alleges that her employers engaged in an unlawful employment practice in that they discriminated against her by creating a hostile work environment based on her national origin; (8) the eighth cause of action is for disability-based discrimination in violation of the ADA. Duverny alleges that the ADA forbids an employer from requiring a medical examination and making inquiries of an employee as to whether such employee has a disability or as to the nature or severity of the disability, and that her employers violated this prohibition by requiring her to undergo a medical examination; (9) the ninth cause

of action is for gender-based discrimination in violation of the New York Human Rights Law. Duverny alleges that her employers discriminated against her on the basis of her gender by creating a hostile work environment and by subjecting her to *quid pro quo* sexual harassment by terminating her employment after plaintiff rejected the alleged sexual advances of Hyperion's general manager, Geoffrey Richstone; (10) the tenth cause of action is for national-origin-based discrimination. Duverny alleges that her employers violated the Human Rights Law by discriminating against her on the basis of her national origin through creating a hostile work environment; (11) the eleventh cause of action is for gender discrimination in violation of the Human Rights Law, alleging that her employers discriminated against her on the basis of her gender by subjecting her to disparate working conditions, and denying her the opportunity to work in an employment setting that was free from unlawful discrimination and harassment; (12) the twelfth cause of action is for national-origin-based discrimination in violation of the Human Rights Law. Duverny alleges that her employers discriminated against her on the basis of her national origin by subjecting her to disparate working conditions, and denying her the opportunity to work in an employment setting that was free from unlawful discrimination and harassment; and (13) the thirteenth cause of action for religious discrimination in violation of the Human Rights Law. Duverny alleges that her employers discriminated against her on the basis of her religion by subjecting her to disparate working conditions, and denying her the opportunity to work in an employment setting that was free from unlawful discrimination and harassment.

Consequently, each and every one of the causes of action alleged by Duverny in the Duverny Lawsuit is based on conduct by Hyperion and its general manager, Geoffrey Richstone, as her employers, toward Duverny as their employee. None of those causes of action are based

on any conduct for a Third-Party Wrongful Act as defined in the Steadfast Policy, and the Duverny Lawsuit is, thus, not a claim for a Third-Party Wrongful Act, and no coverage could, therefore, exist under Insuring Agreement I.B.3.

Steadfast Timely Disclaimed Coverage:

> Insurance Law § 3420 provides as follows:
>
> (2) If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Defendants argue that section 3420(d)(2) is not applicable here because the Duverny Lawsuit is not, from a literal point of view, a claim for bodily injury arising out of an "accident" – the term deliberately used by the Legislature in that section. Regardless, though; and even assuming that that section applies here, Steadfast's denial of coverage was definitely timely. As demonstrated by the evidence submitted by Steadfast, it is clear that Steadfast's denial of coverage was made "as soon as is reasonably possible" as is required by section 3420. The Duverny Lawsuit was filed on August 22, 2018. Needless to say, before Steadfast could deny coverage for the Duverny Lawsuit, it would have had to be notified of its existence. Hyperion says nothing about the timing of any such notification; but Steadfast does. The documentary evidence submitted by Steadfast shows that it was only first given notice of the existence of the Duverny Lawsuiton October 22, 2018 (*see*, NYSCEF Doc. No. 36). On that date, TriNet provided notice to Steadfast by email transmission of this lawsuit (filed against TriNet as Steadfast's co-defendant) and of the Duverny Lawsuit (*id.*). By email dated October 24, 2018, TriNet advised Steadfast that it would need a full coverage assessment letter directed to Hyperion regarding the Duverny Lawsuit (NYSCEF Doc. No. 39). As acknowledged by Hyperion, Steadfast notified Hyperion of

Steadfast's denial of coverage for the Duverny Lawsuit by letter dated October 29, 2018 (NYSCEF Doc. No. 16). Steadfast's denial of coverage was, thus, made a mere seven days after it was first notified of the existence of the Duverny Lawsuit. A denial of coverage within just seven days after notification of a claim is considered to be "as soon as reasonably possible," as required by Insurance Law § 3420 (*see, e.g, 2540 Assocs. Inc. v Assicurazioni Generali, S.P.A.*, 271 AD2d 282 [1st Dept 2000]; *Roules v State Farm Ins. Cos.*, 59 AD3d 514 [2d Dept 2009]).

Conclusion:

Based on the foregoing conclusions of law, plaintiff's motion for summary judgment is denied, and defendant Steadfast Insurance Company's cross-motion for summary judgment is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the cross-motion by defendant Steadfast Insurance Company for summary judgment dismissing the claims asserted against it is granted and, accordingly, those claims are dismissed; and it is further

ORDERED that a conference will be held on September 26, 2019, at 2:15 p.m., in this court (Part 38, Supreme Court, New York County), 111 Centre Street, Courtroom 1166, New York, New York 10013.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

Date: New York, New York
September 6, 2019

LOUIS L. NOCK, J.S.C.