| **VPC Projects, LLC v Golenbock Eiseman Assor Bell & Peskoe LLP** |
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| 2020 NY Slip Op 32069(U) |
| June 2, 2020 |
| Supreme Court, New York County |
| Docket Number: 156097/2016 |
| Judge: Margaret A. Chan |
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155947/2019

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

***Justice***

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VPC PROJECTS, LLC,

Plaintiff,

- v -

GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP,

Defendant.

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**INDEX NO.** 156097/2016

**MOTION DATE** 06/07/2019

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159

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

Plaintiff, VPC Projects, LLC ("VPC"), opened a bar named Veronica Peoples Club in July 2010 in Brooklyn, New York. In January 2012, defendant, Golenbock Eiseman Assor Bell & Peskoe LLP, was retained to represent VPC in the underlying nuisance lawsuit against VPC. After the underlying lawsuit was resolved, VPC commenced this legal malpractice action against defendant for defendant's handling of plaintiff's insurance coverage in the Jou Action. Defendant now moves pursuant to CPLR 3212 for summary dismissal of the complaint, which plaintiff opposes.

FACTS

Soon after opening Veronica Peoples Club ("the bar") in 2010, plaintiff was met with multiple noise complaints from its neighbors, Peter and Lena Jou. Consequently, plaintiff received citations and was subject to hearings and fines from the New York City's Department of Environmental Protection (DEP). Peter and Lena Jou ultimately commenced a nuisance action against plaintiff and its landlord on January 2, 2012 (the Jou Action).

Plaintiff's principal is Heather Millstone; Heather's father and benefactor is Robert Millstone, who retained defendant to defend plaintiff in the Jou Action and paid defendant's legal fees. There was no retainer agreement between plaintiff, or Robert Millstone and defendant nor were there any written document defining the scope of representation.

Immediately after the commencement of the Jou Action, Robert Millstone sent defendant copies of the pleadings in the Jou Action. On January 4, 2012, an attorney in defendant's firm, Elizabeth Jaffe, emailed Heather Millstone asking whether plaintiff had insurance coverage. Heather Millstone responded on January 5 and furnished Jaffe with plaintiff's insurance broker's name, Jennifer Shoemaker, and her contact information. On January 6, Jaffe emailed Shoemaker at her office, W.B. Payne Co. (the third-party defendant), and requested that Shoemaker send the Jou Action complaint to plaintiff's insurance carrier in order to serve as plaintiff's notice of claim. Jaffe also requested that Shoemaker keep Jaffe apprised of the status of the insurer's review of the claim; Shoemaker agreed to do so.

In response to the email exchange between Jaffe and Shoemaker, Heather Millstone emailed Jaffe asking whether plaintiff was covered by the insurance carrier, to which Jaffe responded "no, not at all. Probably not, but we will give it a shot just in case" (NYSCEF # 118, Email dated January 6, 2012).

On January 10, 2012, Shoemaker faxed a notice of claim and the complaint in the Jou Action to plaintiff's insurer's representative, RCN. Shoemaker also confirmed to Jaffe that she sent the notice of claim to plaintiff's insurer and that she would advise Jaffe of coverage "as soon as I receive the claim notification with the claim number[,] I will forward over to you for your records" (NYSCEF # 149, Email dated January 10, 2012).

In late March 2012, while the Jou Action was pending, plaintiff closed the bar. The underpinning of Heather Millstone's decision to close the bar is a point of contention in this litigation. Plaintiff alleges it closed the bar because Jaffe informed the Millstones in January 2012 that plaintiff's claim for coverage was denied and that plaintiff risked liability and defense costs in the Jou Action (NYSCEF # 105, Complaint, ¶¶ 5, 6). Plaintiff also claims that Jaffe told Heather Millstone that she risked incarceration if plaintiff received more noise-related complaints and that plaintiff would fare better in its counterclaims if the bar was closed (*id.*). Plaintiff claims that Jaffe's advice caused plaintiff to shut down the bar resulting in the loss of its investment. Jaffe largely denies Heather Millstone's allegations.

In late September 2012, while the Jou Action was being litigated, Robert Millstone asked Jaffe about the insurance coverage issue that was relayed to Shoemaker in January 2012. On October 2, 2012, Jaffe contacted Shoemaker, who in turn contacted plaintiff's insurance representative and learned that plaintiff's insurer allegedly did not receive notice of plaintiff's claim. On October 3, Jaffe informed the Millstones the news, stating: "After some digging, I determined that we, in fact, never had received a denial of coverage" (NYSCEF # 131, Email dated October 3, 2012) and that VPC was never provided coverage because VPC's January 2012 claim to the carrier was never received and no determination was made. Jaffe

informed the Millstones that Shoemaker had resent the notice to RCN and emailed Jaffe with the insurer's acknowledgement letter indicating that the insurer will contact the insured directly after a review (*id.*). Plaintiff alleges that at the very least, defendant was negligent in not assessing whether plaintiff was covered in the Jou Action (Complaint, ¶ 5).

On November 16, 2012, VPC's insurer advised Heather Millstone and Shoemaker that the insurer would assume VPC's defense under a reservation of rights. The carrier declined to pay for legal fees in defending the landlord and refused to pay any defense costs for prosecuting plaintiff's counterclaim in the Jou Action. In September 2014, the Jou Action settled, and plaintiff's insurance carrier paid a cost of defense settlement of all claims and counterclaims in the Jou Action for $25,000. In October 2014, the carrier resolved the unreimbursed legal fees owed to defendant in the amount of $25,000.

DISCUSSION

*Summary Judgment Standard*

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

*Legal Malpractice*

Plaintiff's allegations on its legal malpractice claims fall into two distinct categories: (a) defendant's failure to make an insurance coverage determination; and (b) defendant's affirmative statement that plaintiff lacked insurance coverage (Complaint, ¶ 5). The essential question raised by these two claims is whether defendant had a duty to pursue plaintiff's insurance coverage issues.

Defendant, as the movant for summary judgment, has the burden "to establish through expert opinion that [the firm] did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community" (*Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010] [emphasis in original]). Defendant argues that it may not be held liable for failing to act outside the scope of

its retention (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435 [2007]; *see Genesis Merch. Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]).

*Scope of Legal Representation*

Defendant denies being retained to make an insurance coverage determination for the underlying Jou Action. Defendant characterizes Jaffe's request for the insurance policy and forwarding it to plaintiff's insurance broker as ministerial acts – not an undertaking of the insurance coverage issue. Defendant contends that even if an obligation did exist, defendant fulfilled it by tendering the Jou Action complaint to plaintiff's insurance agent.

Defendant's legal expert, John Harris, explained in his affidavit, that defendant did not assume a duty as to plaintiff's insurance coverage issues merely by asking about the policy and then forwarding the complaint to the insurer. Defendant's service here was a courtesy – nothing more – since plaintiff could have contacted her insurance broker herself (NYSCEF # 104, Aff of John Harris, ¶¶ 5-6).

Defendant adds that there is no evidence supporting plaintiff's claim that Jaffe allegedly misinformed the Millstones in January 2012 regarding plaintiff's lack of insurance coverage as to the Jou Action. And there is no evidence demonstrating that part of defendant's scope of representation was to make a coverage determination as there is no written agreement defining the scope of representation and no indication that defendant agreed to undertake to provide coverage advice at any time during the retention (*see Darby & Darby, P.C. v VSI Int'l, Inc.*, 268 AD2d 270, 271 [1st Dept], *affd* 95 NY2d 308 [2000]). Indeed, there was no discussion between Robert Millstone and defendant regarding insurance coverage when Robert Millstone retained defendant to litigate the Jou Action.

Plaintiff argues that defendant voluntarily undertook a duty to provide legal advice about insurance coverage by "browsing" the policy and discussing the policy with the Millstones on two occasions in January 2012. Plaintiff insists that in a January 2012 phone conference, Jaffe affirmatively informed the Millstones that plaintiff lacked insurance coverage in the Jou Action (NYSCEF # 146 – H. Millstone Aff, ¶¶ 14-16).

In support of its argument, plaintiff, through Bennett Wasserman, its legal expert" attempts to delineate the appropriate "standard of professional care and skill" that defendant must meet under the circumstances (*Orchard Motorcycle Distributors, Inc. v Morrison Cohen Singer & Weinstein*, LLP, 49 AD3d 292, 292 [1st Dept 2008]; *Merlin Biomed Asset Mgmt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [1st Dept 2005]). Wasserman's review spoke to Jaffe's

inactions and failure to understand the coverage relationship between W.B. Payne and the carrier that led to defendant's mishandling of the insurance coverage issue.

What Wasserman's points address are the ministerial nature of Jaffe's involvement of plaintiff's insurance policy. Wasserman does not show how Jaffe's ministerial act rose to a legal obligation to follow up on plaintiff's insurance claim (NYSCEF # 148, ¶¶ 18-21). Wasserman does not delineate that defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. Finally, Wasserman's opinion was conclusory and generally bolsters Heather Millstones' allegations in her affidavit but was otherwise unsupported by evidence. And plaintiff offers no legal support for its contention that defendant voluntarily assumed the duty to provide legal advice regarding insurance coverage (*see Genesis Merch. Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 480 [1st Dept 2018]).

Heather Millstone's belief that defendant would review and make a coverage determination does not suggest even a tacit agreement on defendant's part to undertake the insurance coverage issue (NYSCEF # 146 – H. Millstone Aff, ¶¶ 14-16). Heather Millstone's belief is also undermined by the actions taken in January 2012: neither the tendering of the Jou Action pleadings to plaintiff's insurance broker on January 6 nor Jaffe's email response on the same day to Heather Millstone's coverage inquiry – "no, not at all. Probably not, but we will give it a shot just in case" (NYSCEF # 118, Email dated January 6, 2012) constitutes an affirmative undertaking of the insurance coverage issue.

On January 6, Heather Millstone was apprised that plaintiff's insurance broker was just contacted about the Jou Action. And although Jaffe said "no, not at all" and "[p]robably not," Jaffe also said in the same email to "give it a shot just in case" signaling there is no response or determination about coverage. Contrary to Wasserman's opinion, the absence of action by defendant on the insurance coverage issue, after relaying the claim to the insurance broker, shows that defendant did not undertake the insurance coverage as part of its scope of representation. Indeed, the insurance carrier ultimately contacted Heather Millstone directly, and not defendant, when it made a coverage determination.

As such, defendant has made its prima facie showing that its scope of representation in the Jou Action did not include rendering an insurance coverage determination, including a follow-up on plaintiff's insurance claim. Plaintiff has not raised an issue of fact to defeat defendant's prima facie case.

In so determining that plaintiff's insurance coverage issue was not within defendant's scope of representation, defendant is not liable for failing to act outside

the scope of its retention (*AmBase Corp.,* 8 NY3d at 435). Hence, defendant's remaining contentions are academic and will not be addressed.

Plaintiff's claim that defendant's alleged erroneous advice was the proximate cause of its damages is likewise academic. Nonetheless, plaintiff fails to show that it would not have incurred any damages but for defendant's alleged negligence (*see Rudolf v Shayne, Dachs, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotations and citations omitted]). The Millstones' respective emails in February and March 2012 show that the prominent reason plaintiff lost its investment or "throwing in the towel" was because the bar was not profitable to warrant dealing with the incessant noise complaints and fines (NYSCEF ## 127, 129, 139).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment pursuant to CPLR 3212 is granted; the complaint is dismissed as to defendant Golenbock Eiseman Assor Bell & Peskoe LLP; it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry upon plaintiff within fourteen (14) days of entry.

This constitutes the Decision and Order of the court.


6/2/2020
DATE

MARGARET A. CHAN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |