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

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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NAPOLI SHKOLNIK, PLLC,

Plaintiff,

- v -

GREENWICH INSURANCE COMPANY, HUDSON EXCESS INSURANCE COMPANY, IRONSHORE SPECIALTY INSURANCE COMPANY

Defendant.

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**INDEX NO.** 657246/2019

**MOTION DATE** 09/15/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

The motion by defendants Greenwich Insurance Company and Hudson Excess Insurance Company (collectively, "Movants") to dismiss the complaint and cross claims against it by defendant Ironshore is granted. The cross-motion by plaintiff for leave to amend is denied.

**Background**

This declaratory judgment action arises out of a professional liability insurance policy and an underlying action in federal court in Maryland. Plaintiff, a law firm, was named as a defendant in an October 2017 lawsuit in Maryland brought by another law firm ("Keyes") that alleged that payments were not made in accordance with a fee sharing referral agreement for asbestos clients. Plaintiff claims that on September 12, 2019, it told Movants about the Keyes lawsuit; it claims it had professional liability policies with both Movants.

Greenwich declined coverage on the ground that the Keyes litigation concerned a breach of contract (the fee sharing agreement) rather than the commission of professional services covered by its insurance policy. Defendant Hudson disclaimed for similar reasons. Plaintiff claims that its related firm (Napoli Shkolnik & Associates, "NSA") never received a denial letter. Plaintiff points out that a jury returned a verdict against plaintiff and NSA in the Keyes litigation for over $1.5 million. Plaintiff commenced this action seeking a declaration that all defendants were obligated to defend and indemnify plaintiff for the Keyes litigation.

Movants seek dismissal of plaintiff's claims on the grounds that plaintiff did not report the Keyes lawsuit to Greenwich as soon as possible and because the Keyes litigation involved a business dispute rather than a professional liability issue. They note that the Keyes litigation commenced on October 9, 2017 and alleged that Keyes was supposed to received portions of contingency fees related to asbestos claim pursuant to association agreements. Movants assert that plaintiff did not report this action to Greenwich and Hudson until September 12, 2019, nearly two years after the Keyes litigation began. Movants insist they properly disclaimed coverage because the matter was not reported during the requisite policy period.

In opposition and in support of its cross-motion to amend, plaintiff argues that the documentary evidence relied upon by Movants are self-serving denial letters that they issued. It argues that the insurance policies do not contain "breach of contract exclusions" and there is no limiting language in the policies that would render the coverage inapplicable to the Keyes litigation. Plaintiff emphasizes that there is no evidence that Movants were prejudiced by plaintiff's late notice about the Keyes litigation; it claims it was vigorously defended by counsel throughout. It argues that because Movants also disclaimed on coverage grounds, Movants cannot also claim that they were prejudiced by any delay. Plaintiff insists that if the Court were

to embrace the interpretation of the insurance policies offered by Movants, it would provide only illusory coverage. Plaintiff moves to amend to add declaratory relief claims and to add NSA as an additional plaintiff. Plaintiff explains that NSA is a separate entity that handles asbestos claims while plaintiff does mainly personal injury and other matters.

**Discussion**

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

"An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321, 2017 NY Slip Op 04384 [2017] [internal quotations and citations omitted]).

The 2017-18 insurance policy states that it provides coverage to "any ASSURED or any other person or entity in the conduct of any business conducted by or on behalf of the FIRM in its professional capacity as attorneys, counselors at law, consultants, lobbyists or notaries" (NYSCEF Doc. No. 8 at 7 [2017-18 Greenwich Policy]). The 2018-2019 Greenwich policy defines professional services to include "services rendered or that should have been rendered for others as a lawyer, arbitrator, mediator or a notary public" (NYSCEF Doc. No. 9 at 16). It also mentions other covered situations "where the act or omission in dispute is in the rendering of services ordinarily performed as a lawyer, and then only for those services" (*id.*).

The policies make clear that the insurance provided coverage for acts or omissions arising out of plaintiff's work as a law firm. The claims at issue in the Keyes litigation involved Keyes' claim that it was a referral agent for clients with asbestos claims and it did not receive the corresponding contingency fees for which it was entitled. That omission—the failure to provide Keyes with its fees—has nothing to do with providing legal services. It is a straightforward breach of contract claim. Plaintiff was not representing Keyes in any capacity or providing legal advice to Keyes. Rather, plaintiff breached a business agreement.

Certainly, that agreement relates to its work as a law firm but it does not involve professional services as defined under the 18-19 policy or to any provision of the 17-18 policy. Not every business transaction a law firm engages in necessarily involves its role as attorneys. For instance, a law firm that fails to pay its rent or fails to pay for its electric bill breaches a contract, but that has nothing to do with rendering professional services to its clients. Similarly, the Keyes litigation only involved a law firm's failure to comply with certain obligations in a business agreement. That it related to underlying asbestos litigation is of no moment.

Plaintiff's claim that the policy did not specifically exclude breach of contract actions does not compel a different outcome. An insurance policy need not include every possible exclusion and the policies at issue here are both clear and unambiguous. They provided malpractice insurance to plaintiff for services rendered as attorneys. Neither can be reasonably interpreted to apply to a situation where a fee-sharing contract was breached.

Even if the Court were to deny the branch of the motion to dismiss based on the inapplicability of the policies, the Court finds that plaintiff's notice was not timely. There is no dispute that the Keyes litigation began in 2017 and was heavily litigated for nearly two years before plaintiff finally told Movants about the case. Plaintiff's assertion that it had counsel and vigorously litigated the case (thereby rendering any claims of prejudice moot) is beside the point. Plaintiff told Movants about the Keyes litigation only three months before a jury verdict was rendered. That clearly violates the requirement that plaintiff inform Movants as soon as practicable under the 2017-18 policy (when the claim arose). Similarly, the Court finds that any claim made pursuant to the 2018-2019 policy is inapplicable because the lawsuit began in 2017, outside the claims period for the 18-19 policy.

Because the Court finds that plaintiff is not entitled to coverage, its cross-motion for leave to amend is denied. The allegations in the second amended complaint in the Keyes litigation (that named NSA for the first time) do not suggest that any coverage should be afforded to NSA. The analysis is the same as above—Keyes sought recovery against NSA based on a breach of a fee sharing agreement, a breach of contract dispute that does not implicate a professional services insurance policy.

**Summary**

Despite the lengthy papers submitted in connection with this motion, the instant dispute is a straightforward contractual interpretation question. This Court finds that the professional liability policies issued by Movants do not apply to a breach of contract claim. Plaintiff's breach of contract did not arise from conduct requiring a law degree; it simply failed to honor its contractual obligations to Keyes and failed to pay money owed. Plaintiff's attempts to characterize the subject insurance policies as ambiguous or open to interpretation are misplaced. The policies entered into did not provide insurance to plaintiff for every act or omission simply because it is a law firm. Instead, its intended purpose was to provide coverage for attorney malpractice claims - acts or omissions as attorneys. And, even if the contract could be interpreted as ambiguous on this point, plaintiff waited for nearly two years to tell Movants about it. There is no way that was timely notice under the policies.

Accordingly, it is hereby

ORDERED that the motion by defendants Greenwich Insurance Company and Hudson Excess Insurance Company to dismiss the complaint and any cross-claims against it is granted and the Clerk is directed to enter judgment when practicable along with costs and disbursements after presentation of proper papers therefor; and it is further

ORDERED that the cross-motion by plaintiff for leave to amend is denied.

Remote Conference as to remaining parties: January 14, 2021.

9/18/2020
DATE

ARLENE P. BLUTH, J.S.C.

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