

American Alternative Ins. Corp. v Zack
2020 NY Slip Op 33878(U)
November 20, 2020
Supreme Court, New York County
Docket Number: 656522/2019
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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AMERICAN ALTERNATIVE INSURANCE CORPORATION,
Plaintiff,

INDEX NO. 656522/2019

MOTION DATE 10/27/2020

MOTION SEQ. NO. 001 002

- v -

LEONARD ZACK, LEONARD ZACK AND ASSOCIATES,
FREDERICK TROPEANO, NICOLE TROPEANO, CLAUDIO
SIMPKINS

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 15, 21, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 49, 50

were read on this motion to/for DISMISS.

Upon the foregoing documents,

Defendants, Frederick Tropeano and Nicole Tropeano (together “Tropeanos”) move for dismissal pursuant to CPLR 3211(a)(7), and defendants, Leonard Zack, and Leonard Zack and Associates (together “Zack”) also move for dismissal pursuant to CPLR 3211(a)(1) and (7); plaintiff American Alternative Insurance Corporation (“AAIC”) opposes both motions. This Court heard oral argument on both motions October 27, 2020.

This litigation involves AAIC seeking to 1) rescind a professional liability policy on the basis of alleged material misrepresentations, omissions, concealment of facts, and incorrect statements made by Zack arising out of allegations of professional malpractice asserted by the Tropeanos or 2) a declaratory judgment that American Alternative has no duty to defend or indemnify Zack under the subject professional liability policy.

Zack submitted an application for Lawyers Professional Liability Insurance to AAIC on November 13, 2017. AAIC issued a claims-made Lawyers Professional Liability Insurance Policy for the period December 10, 2017 to December 10, 2018.

Plaintiff states in paragraph three of their complaint that, “[k]nowledge of the fact that the firm had engaged in legal work that might be expected to lead to a claim was not disclosed to AAIC in the firm’s policy application in response to a question asking whether any firm member or employee had knowledge of such incidents.”

The Tropeanos commenced a legal malpractice action against Zack, and Claudio Simpkins, in Supreme Court, New York County, *Tropeano v. Zack*, with index no. 158241/2018, arising out of a medical malpractice action captioned *Tropeano v. Sandhu*, in Supreme Court, New York County, Index No. 161062/2013, where Zack was the attorney for the Tropeanos.

A summons and complaint for this action, index no. 656522/2019 was filed on or about January 7, 2020. Zack filed a notice of appearance on January 10, 2020. The Tropeanos appeared by a notice of motion filed on January 7, 2020.

The defendants now move for dismissal pursuant to CPLR 3211(a)(1) and (a)(7). On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff’s allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]). When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

In deciding a motion to dismiss under CPLR 3211(a), the pleading at issue must be given a liberal construction, and a court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88[1994]).

Here, plaintiff alleges that the unusual circumstances of the underlying medical malpractice trial itself should have raised sufficient awareness of Zack's possible malpractice that it should have been disclosed on Zack's insurance application. Plaintiff highlights the transcript of the proceedings in the medical malpractice action wherein both in open court (without the presence of the jury) and in an on the record discussion in chambers on April 20, 2017, the presiding Judge was advised that the Tropeanos wished to replace Zack due to their concerns about his abilities, and that a potential new attorney was present in the courtroom to advise them and possibly take over mid-trial. Serious issues also arose from the testimony of plaintiffs' expert Dr. Braga at said trial which eventually lead to a directed verdict, dismissing the case. After trial the file was turned over to new attorneys to pursue an appeal.

The affidavit of Leonard Zack states, "[w]hen I submitted our application for professional liability insurance on November 13, 2017, the firm answered no, as we were not aware of any incidents or legal work that might be expected to lead to a claim or suit against Leonard Zack, Esq. or Leonard Zack & Assoc., and more specifically of any such claim or suit by the Tropeanos. It is correct that on April 20, 2017, the trial court dismissed the defendant from the medical malpractice action at issue. At no point did Mr. Tropeano, his attorney, or anyone else give any indication whatsoever that they believed I had committed malpractice, let alone that they planned to commence an action alleging same, until they eventually served me with papers in September,

2018. Prior to that time, I was not aware that any claim against me was going to be filed; nor did I have any reason to believe that there existed any basis for such a potential action.”

AAIC states in paragraph sixteen of their affirmation in opposition, “the Zack defendants’ motion to dismiss must be denied in its entirety because applying the required legal standards, the Zack defendants should have apprised AAIC of the Tropeanos’ potential claim in the application and, having failed to do so, breached the policy condition concerning application representations and precluded coverage as a result of the prior knowledge exclusion (see NYSCEF Doc. No. 24, Par. 16). As such, accepting the factual allegations of the pleadings as true, plaintiff has adequately stated a cause of action.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(1), it must come forward with documentary evidence that “utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (see *533 Park Ave. Realty, LLC v. Park Ave. Bldg. & Roofing Supplies, LLC*, 156 A.D.3d 744, 746 [2d Dept 2017]). Here it is clear that no documentary evidence has been submitted which utterly refutes plaintiff’s allegations.

The Tropeano defendants seek dismissal pursuant to CPLR 3211(a)(1), a defense is founded upon documentary evidence; CPLR 3211(a)(2), subject matter jurisdiction; and CPLR 3211(a)(7), failure to state a cause of action.

AAIC’s complaint seeks rescission of the policy, “[f]acts regarding the Tropeanos’ expressed concerns about Zack’s representation and the circumstances of the dismissal of the Underlying Action were material facts. Had AAIC been made aware of these material facts AAIC would have either refused to issue the Policy or would not have issued the coverage on the terms set forth in the Policy” (see NYSCEF Doc. No. 1 Par. 40). “As a consequence of the material misrepresentations made in the Firm’s underwriting submissions to AAIC for the Policy, AAIC is

entitled to a declaration that the Policy is rescinded and *void ab initio*, and that AAIC has no coverage obligations thereunder (see NYSCEF Doc. No. 1 Par. 44).

The Tropeanos' highlight plaintiff's complaint in paragraph thirty-three, "[t]he Firm notified AAIC of the malpractice action on or about October 8, 2018." Hence, defendant Tropeanos' state, "the insurance carrier was promptly notified of the legal malpractice claim upon the legal malpractice defendants becoming aware that there was a claim."

Tropeanos' affirmation in support, paragraph fifteen, states, "[b]ased on plaintiff's own representations, this notice was timely pursuant to policy of insurance. 'If a CLAIM is received by any INSURED, the INSURED must give prompt written notice to the Company or to any authorized agent of the Company in New York within sixty (60) days.' The record evidence establishes that notice was made within 3-5 days of the Legal Malpractice Defendants' receipt of the claim."

As a matter of law, "[t]he Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy" (see CPLR 3001).

The Tropeanos also seek dismissal pursuant to subject matter jurisdiction, CPLR 3211(a)(2).

An action for a declaratory judgment is brought to forever settle the rights of all interested parties, and consequently all persons who may be affected thereby must be joined as parties. The compulsory joinder of parties in a declaratory judgment action avoids a multiplicity of action and protects non parties whose rights should not be jeopardized if they have a material interest in the subject matter. Persons who ought to be parties if complete relief is to be accorded between the persons who are already parties to an action, or who might be inequitably affected by a judgment in the action, must be made plaintiffs or defendants, and when a person who should be joined as a plaintiff refuses to do so such person may be

made a defendant (see 43 N.Y. Jur. 2d Declaratory Judgments § 173).

There exists no basis for dismissal based upon a lack of subject matter jurisdiction as the Tropeanos are interested parties in this action. Further, for the reasons described in the discussion of CPLR 3211(a)(1) and (7), *supra*, the Tropeanos are not entitled to dismissal pursuant to those sections.

ORDERED that the motion of defendant FREDERICK TROPEANO and NICOLE TROPEANO to dismiss the complaint herein is DENIED; and it is further

ORDERED that the motion of defendant LEONARD ZACK, LEONARD ZACK AND ASSOCIATES to dismiss the complaint herein is DENIED.

11/20/2020

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE