

Goel v National Union Fire Ins. Co. of Pittsburgh, Pa.

2023 NY Slip Op 31232(U)

April 18, 2023

Supreme Court, New York County

Docket Number: Index No. 651296/2023

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BRIJESH GOEL		INDEX NO. <u>651296/2023</u>
Plaintiff,		MOTION DATE <u>04/05/2023</u>
- v -		MOTION SEQ. NO. <u>001</u>
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,		
Defendant.		DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 27, 32, 33, 34, 35, 36, 37, 38, 39, 46, 47, 48, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78
 were read on this motion for PRELIMINARY INJUNCTION.

Plaintiff Brijesh Goel (“Plaintiff” or “Goel”) moves for a preliminary injunction requiring defendant National Union Fire Insurance Company of Pittsburgh, Pa. (“Defendant” or “AIG”) to resume advancing the reasonable and necessary costs of Goel’s defense in a pending federal criminal case. For the following reason, Goel’s motion is **DENIED**.

Under CPLR 6301, a preliminary injunction may be awarded where the movant demonstrates “a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 [2005]). Where, as here, the movant is seeking a mandatory injunction (affirmatively requiring AIG to advance legal expenses), it should be granted only in “extraordinary circumstances” (*St. Paul Fire & Marine Ins v York Claims Serv*, 308 AD2d 347, 349 [1st Dept 2011]).

The Court finds that Goel has not established a reasonable probability of success on the merits of his claim that he is an “Affiliate Insured” entitled to coverage under AIG’s insurance policy with non-party Goldman Sachs (the “D&O Policy” [NYSCEF 38]). Nor has he established a reasonable probability that AIG will be equitably estopped from denying coverage because AIG initially (and preliminarily, with a reservation of rights) provided advancement before ultimately reaching the conclusion that Goel was not an Affiliate Insured. Accordingly, Goel is not entitled to a preliminary injunction directing AIG to resume advancing funds for his defense.

Background

Goel is a former employee of Goldman Sachs & Co. LLC (“GSC”), a wholly owned subsidiary of AIG’s insured, The Goldman Sachs Group, Inc. (“Goldman”). On May 19, 2022, he was subpoenaed by a federal grand jury to provide testimony and documents with respect to alleged insider trading (NYSCEF 35). He retained counsel to represent him in connection with the grand jury investigation and a related FBI investigation. He also engaged separate counsel to assist him with indemnification and insurance issues.

On July 25, 2022, Goel (through counsel) demanded that Goldman indemnify him and advance his legal expenses in connection with the grand jury investigation (NYSCEF 35). He further requested that Goldman provide notice of the investigation under any “potentially applicable” insurance policy that “may provide coverage to current and former employees of Goldman and its subsidiaries, such as Mr. Goel.” Goel agreed to execute an undertaking to “repay all advanced expenses if it shall ultimately be determined that [he is] not entitled to advancement. . .”

That same day, Goel was indicted in the United States District Court for the Southern District of New York and charged with six counts of conspiracy, securities fraud, and obstruction of justice (*United States v. Goel*, [S.D.N.Y. 22-CRIM-396] (NYSCEF 7)). The indictment alleged that he perpetrated an insider trading scheme based on his misappropriation of material nonpublic information concerning potential takeovers to which he had access through his employment at GSC. The SEC simultaneously filed a parallel civil enforcement action against Goel.

On July 28, 2022, Goel's counsel emailed Goldman's Vice President and Senior Counsel that "it is important to understand Goldman's position with respect to indemnification and to understand what insurance may also be available to assist him in this matter" (NYSCEF 21). Goldman responded that Mr. Goel "is not entitled to indemnification or reimbursement of expenses under the Amended and Restated By-Laws of The Goldman Sachs Group, Inc." (NYSCEF 36). Nevertheless, Goldman provided AIG with notice of Goel's demand (NYSCEF 37).

On August 19, 2022, an AIG Senior Complex Claims Director responded with a detailed letter agreeing to advance Goel's defense costs under the D&O Policy subject to a "Reservation of Rights" and requested further information from Goel "to confirm [his] status as an Affiliate Insured" under AIG's policy (NYSCEF 8). The AIG representative stated that "[t]he balance of this letter is written on the assumption that Mr. Goel qualifies as an Affiliate Insured. In the event he is not an Affiliate Insured, coverage would not apply." Based on the assumption of "Affiliate Insured" status, the AIG claims director concluded that Goldman's failure to indemnify Goel or advance his defense expenses triggered coverage under the policy, subject to Goel's cooperation with any subrogation efforts that [AIG] might undertake against Goldman."

In conclusion, AIG “expressly reserve[d] all of their rights under the Policies, any other policy, at law, and/or in equity, including the right to assert additional defenses to any claims for coverage.”

In response, Goel’s counsel identified for AIG the “Associate/Vice President” positions held by Mr. Goel at GSC from 2013 through 2021 (NYSCEF 9). AIG thereafter signed a Confidentiality Agreement providing that “Goel is an Insured Person under the Policies” (NYSCEF 11). The Confidentiality Agreement includes a no-waiver provision. From August 2022 through February 2023, AIG advanced funds for Goel’s defense and communicated with Goel’s counsel about his case (NYSCEF 10, 12-15).

On March 1, 2023, AIG revisited its preliminary conclusion that Goel was an Affiliate Insured. In a detailed letter from an AIG Vice President, AIG concluded that based on its review of Goldman’s by-laws and related documents “we do not see any basis under which Goldman is required to indemnify Goel,” and therefore “it does not appear that Mr. Goel qualifies as an Insured under the 21/22 Primary Policy” (NYSCEF 16). In particular, AIG methodically walked through the relevant policy language, and the Goldman documents referenced therein, and stated that it was unaware of any evidence that Goel was appointed to his employment at GSC in a manner that would conditionally entitle him to indemnification so as to qualify as an Affiliate Insured. AIG also stated that it was “not aware of any resolution of the Board of Directors after October 31, 2014 that would qualify Goel for conditional indemnification from Goldman.” AIG requested that Goel provide information within five days to show that he was an “Affiliate Insured.”

On March 6, 2023, Goel objected to AIG’s request and declined to provide any additional information (NYSCEF 17). AIG disclaimed coverage on March 9, 2023 (NYSCEF 18). On

March 13, 2023, Plaintiff commenced this action and filed a motion for a preliminary injunction arguing that he was an Affiliate Insured and that Defendant was equitably estopped from discontinuing advancement shortly before his trial (NYSCEF 3). Goel's criminal trial is scheduled to begin in June 2023.

A preliminary injunction hearing was held on April 5, 2023 (NYSCEF 78). The Court ordered supplemental production of Goldman-related documents referenced in the D&O Policy and supplemental briefing.

Analysis

For purposes of this motion for preliminary injunctive relief, the Court finds that AIG's March 1, 2023 letter persuasively describes why Goel is not entitled to coverage as an Affiliate Insured, which is the only basis upon which he seeks coverage. Section 2(a) of the applicable AIG D&O Policy provides that:

(a) "Affiliate Insured(s)" means any person, other than a Director or Officer, who as an appointed director, manager, officer, employee, agent, trustee, member, stockholder, partner, incorporator or liquidator of any Subsidiary is conditionally entitled to advancement or indemnification from the Named Corporation pursuant to: (a) the second section of the Approval of Amended and Restated By-laws and Related Matters, adopted by the Board of Directors of the Named Corporation on October 31, 2014, which is entitled "Extension of Indemnification under the Amended and Restated By-Laws", and the Determination of Authorized Persons of the Goldman Sachs Group, Inc. executed by the General Counsel of the Named Corporation on October 31, 2014, or any future Determination executed by the General Counsel of the Named Corporation; or (b) any future resolution of the Board of Directors of the Named Corporation; provided, however, that such person is an Affiliate Insured only to the extent and for such time as such person is entitled to advancement or indemnification from the Named Corporation.

This section provides two ways to establish Affiliate Insured status. First, under Section 2(a)(a), a person must establish that they qualify for conditional entitlement to advancement or indemnification from Goldman under *both* the (1) Extension of Indemnification under the Amended and Restated By-Laws ("Extension of Indemnification") *and* (2) a Determination of

Authorized Persons by Goldman's General Counsel ("Determination of Authorized Persons").

Second, a person can qualify as an Affiliate Insured pursuant to a "future resolution of the Board of Directors" of Goldman. Moreover, the provision makes clear that a person is an Affiliate Insured "only to the extent and for such time as such person is entitled [as distinct from "conditionally entitled"] to advancement or indemnification from" Goldman.

As AIG's March 1 letter pointed out, Goldman's Determination of Authorized Persons limits the scope of Goldman subsidiary employees who may be conditionally entitled to advancement or indemnification. Specifically, to qualify Goel would have to have been appointed by a resolution of the subsidiary's board of directors, by an election of the subsidiary's stockholders, by a written consent of the subsidiary's sole or managing member, by a written consent of the subsidiary's general partner, by an analogous formal written action by the subsidiary's governing body, or "by other written action by the controlling owner or governing body of the Subsidiary that states that such action will result in such person obtaining the benefits of the indemnification and payment of expenses provisions under the Resolutions and Section 6.4 of the By-laws" (NYSCEF 16, 71). There is no evidence that Goel was appointed to his positions at GSC through any of those means. Nor is there any evidence that he was covered by any "future resolution of the Board of Directors" of Goldman or any subsequent Determination of Authorized Persons. In fact, Goldman has represented, in a response to a subpoena in this action, that it possesses no records that support Goel's contention that he is an "Affiliate Insured" as defined in the D&O Policy (NYSCEF 72).

Goel's contrary reading of the AIG D&O Policy language is unpersuasive. Essentially, he argues that all senior employees of Goldman subsidiaries are "conditionally" entitled to advancement or indemnification because the Goldman board or directors and/or general counsel

could deem them to be so entitled. With that as his starting point, Goel then argues that Goldman’s decision *not* to indemnify him is what triggers coverage under Sections 2(a) and 4(d)(i) of the D&O Policy, under which AIG would be required to indemnify Goel and seek recovery from Goldman. As the Court noted during the preliminary injunction hearing, under Goel’s reading the AIG policy would provide “presumptive insurance coverage for an extraordinarily large number of people” within the Goldman organization (Tr. 24:12-20).

More importantly, Goel’s reading conflicts with the plain text of the Policy. The reference to “conditional” entitlement in Section 2(a) is expressly tied to two specifically identified Goldman corporate documents (the Extension of Indemnification and Determination of Authorized Persons along with any subsequent amendments thereto). Those documents, in turn, carefully describe the prerequisites for entitlement to conditional indemnification and advancement. In that context, Goel’s reading of “conditional entitlement” as an amorphous principle that applies to all senior employees that hypothetically *could* be added to the list of indemnifiable persons strains credulity. And in any event, the final sentence of the definition of Affiliate Insured strips away the concept of “conditional” entitlement (which in the indemnification context is more typically a reference to the fact that an indemnified employee may have to pay back any advancements if they are found to have engaged in improper conduct) by making clear that Affiliate Insured status is limited to those who are actually entitled to indemnification, not those who might have been named in board resolutions or the like but were not.

Goel’s alternative argument that AIG should be equitably estopped from denying coverage is unavailing. “The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a

prejudicial change in his position” (*BWA Corp. v Alltrans Exp. U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985] quoting *Airco Alloys Div., Airco Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81 [4th Dept 1980]). Delay alone is insufficient to establish equitable estoppel (*Hay Group, Inc. v Nadel*, 170 AD2d 398, 399 [1st Dept 1991] [citations omitted]).

Notably, this is not a dispute between an insurer and an insured about the scope of coverage. It is a dispute about whether Goel is an insured at all. Although it is obviously not ideal that AIG changed positions with respect to coverage within a few months of Goel’s trial, the facts do not warrant *creating* a coverage relationship where it strongly appears that none exists (*Wausau Ins. Companies v Feldman*, 213 AD2d 179, 180 [1st Dept 1995] [citations omitted] [“[e]stoppel may not be used to create coverage where no insurance policy existed, regardless of whether or not the insurance company was timely in issuing its disclaimer”). Moreover, AIG’s initial August 2022 determination of coverage was expressly preliminary and based on the *assumption* that Goel was an Affiliate Insured, subject to confirmation of the facts supporting coverage and with a clear reservation of rights (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [1st Dept 2006]). Goel was thus on notice that AIG’s initial coverage determination was subject to change if the circumstances so warranted.¹

In sum, Goel has not established a likelihood of success on the merits, which is a linchpin for the issuance of a preliminary injunction.

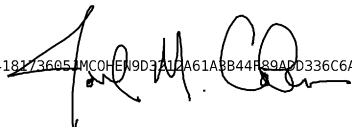
¹ This is not to minimize the potential adverse impact of AIG’s March 2023 coverage decision on Goel, depending on whether he and his counsel can reach an agreement for continued representation through trial (at least). The bottom line, however, is that the circumstances do not warrant the extraordinary remedy of mandating via preliminary injunction that AIG provide insurance coverage that the record indicates it is not obligated to provide. Goel can, of course, address to the federal district court in which his criminal case is pending whether the late change to his insured status should have any impact on the trial schedule.

* * * *

Accordingly, it is

ORDERED that Plaintiff's motion for a preliminary injunction is **DENIED**; it is further **ORDERED** that a telephonic Preliminary Conference will take place on **May 9, 2023 at 11:00 a.m.** and the parties shall circulate dial-in information to SFC-Part3@nycourts.gov in advance.²

This constitutes the decision and order of the Court.

<p><u>4/18/2023</u> DATE</p>	 <small>20230418173605 JMC0HEH9D3712A61A8B44F89AD0336C6A24C195</small> <hr/> JOEL M. COHEN, J.S.C.																												
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² The parties may submit an agreed-upon preliminary conference order in advance of the scheduled date (*see* <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf> [Part 3 PC order template])