DOCKET NO.: DBD-CV-23-6046736-S SUPERIOR COURT

EVANS & LEWIS, LLC, ET AL. J. D. OF DANBURY

V. AT DANBURY

NATIONAL LIABILITY & FIRE INSURANCE CO. JULY 22, 2024

MEMORANDUM OF DECISION
RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT #108

PROCEDURAL HISTORY & FACTS

The plaintiffs, Evans & Lewis, LLC and Douglas Lewis in his individual capacity, have filed a single-count complaint seeking to enforce a professional liability insurance contract against the defendant, National Liability & Fire Insurance Company. Specifically, the plaintiffs demand that the defendant indemnify the plaintiffs for a professional malpractice suit brought by a former client, Dameisha Moore (the "Moore action"). The defendant filed an answer, four special defenses,[1] and a three-count counterclaim seeking a declaratory judgment that they do not owe indemnification. In its counterclaim, the defendant alleges that the Moore action predated the insurance coverage period, that the plaintiffs knew of the Moore action prior to the policy inception date, and that the plaintiffs made material misrepresentations on the insurance application. (Dkt. No. 102.00.) The plaintiffs filed a reply, an answer, and special defenses to each counterclaim, asserting that the Moore action is not a "claim," "potential claim," or "wrongful act" as defined by the policy; that the defendant has not been "harmed, disadvantaged, or otherwise prejudiced as a

[1] The four special defenses raised by the defendant are that the plaintiffs' claims are barred by 1) their failure to mitigate damages, 2) the underlying claim against the plaintiffs was made before the inception date of the policy, 3) Lewis knew of the underlying claim before the inception date of the policy, and 4) the plaintiffs' material misrepresentation in applying for the policy. Dkt. No. 102.00.

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result of any innocent misrepresentations" in their insurance application and/or that the doctrine of disproportionate forfeiture should afford relief from the rigorous enforcement of contract provisions. (Dkt. Nos. 103.00 and 104.00.)

The defendant filed the present summary judgment motion on February 15, 2024, accompanied by a supporting memorandum, affidavits, and exhibits. (Dkt. Nos. 108.00 and 109.00.) The plaintiffs filed an objection on March 15, 2024, supported by their own memorandum, affidavits and exhibits. (Dkt. Nos. 110.00 and 111.00.) The defendant filed a response on March 27, 2024. (Dkt. No. 113.00.) Oral argument was heard April 29, 2024.

The parties have set forth the following facts.[2] Evans & Lewis, LLC, is a law firm in Bethel, Connecticut consisting of Lewis and attorney Eric Evans. (Compl. ¶ 1.) On January 18, 2022, Evans, on behalf of the law firm, began the application process for a "Lawyers Professional Liability Policy" (the "policy") with the defendant by submitting an "Attorney Protective Premium Indication Form." (Dkt. No. 102.00 ¶ 10.) Paragraph A.1.5 of the Premium Indication Form states, in relevant part, that:

> Subject to all terms and conditions of this Policy, we will pay on your behalf all claim expenses and damages up to the Limits of Liability as set forth in the Declarations of this Policy for a claim to which this Policy applies that is first made against you . . . during the policy period . . . . However, this Insuring Agreement shall apply only if: . . . *As of the continuous insurance start date no Insured knew or reasonably should have known of any same or related wrongful act, legal service, fact, circumstance* or adverse outcome that *might* result in a claim. (Emphasis added.) (Dkt. No. 109.00 Ex. C., Attorney Protective Premium Indication Form, p. 1 ¶ A.1.5.)

The policy defines a "claim" as "a demand received by you for money or services arising from a wrongful act." (Dkt. No. 109 Ex. C., Attorney Protective Premium Indication Form, p. 1 ¶ B.1.)

[2] The court has reviewed all documents submitted in support of the motion and the objection to it as well as the existing pleadings in the file.

A "wrongful act," in turn, is "any actual or alleged negligent act, error, or omission, or any actual or alleged offense resulting in personal injury, in the performance of legal services for others by you." Id. p. 4 ¶ B.25.

Evans submitted the Premium Indication Form checking "no" to the following questions: "In the past five years has the firm or any attorney for whom coverage is sought ever been involved, directly or indirectly, in a claim, potential claim, or suit arising out of the rendering or failing to render legal services?"; and "Is the firm or any attorney for whom coverage is sought aware of any act, error, omission or incident reasonably expected to result in a claim or suit made against them?" (Dkt. No. 111, ¶ 8.)

On March 17, 2022, in response to a request from the plaintiffs for financing of the policy premium, the defendant provided to the plaintiffs a supplemental warranty letter to be completed by them. (Dkt. No. 109.00 Ex. B., Attorney Protective Warranty Letter.) In completing and signing the warranty letter, Evans checked "no" to the following question: "In the past five years has the firm or any attorney for whom coverage is sought ever been involved, directly or indirectly, in a claim, potential claim, suit, disciplinary matter or grievance arising out of the rendering or failing to render legal services?" Id. Evans' answer to the warranty letter question was, as the plaintiffs conceded at oral argument, untrue.[3] (Dkt. No. 111.00, pp. 4–5, 18–19.) In fact, on October 25, 2021, Moore had filed a grievance complaint against Lewis with the Statewide Grievance Committee, #21-0466, claiming that Lewis was negligent in his representation of Moore's foreclosure/bankruptcy matter. (Dkt. No. 111.00, ¶ 4 of memorandum of law in opposition; ¶ 6 of affidavit of Douglas J. Lewis.) In response to the grievance complaint, Lewis submitted a signed

[3] In footnote 3 of their memorandum of law in objection to the motion for summary judgment, the plaintiffs characterized the representation as a "partial" misrepresentation. The court finds this to be a distinction without a difference.

statement on November 29, 2021, recounting that: "Mrs. Moore called me after the law date had run and title vested in the Bank, claiming not to be aware of the same. *She threatened to take steps to grieve me, and sue me, with respect to her case*. She claimed that I was the cause of her losing her home. . . . I informed her, during this conversation, that she still had the option of filing a Chapter 7 Bankruptcy . . . . She declined to take that option, and insisted that I prepare a motion to reopen the foreclosure judgment." (Emphasis added.) (Dkt. No. 109.00 Ex. E, Lewis Response to Grievance Complaint, p. 8 ¶¶ 37–40.) The grievance complaint was dismissed by the Statewide Grievance Committee on December 19, 2022. (Dkt. No. 111.00 ¶ 6; Grievance Panel Dismissal.[4]) None of this was made known to the defendant. (Dkt. No. 109.00, p. 11 and Dkt. No. 111.00, pp. 4–5, 18–19.)

Based on the responses provided, the defendant approved the plaintiffs' application and coverage was issued for the period April 28, 2022 to April 28, 2023 under policy number LP061478. (Dkt. No. 109.00, p. 9.) On September 7, 2022, during the period the policy was in effect, Moore served a professional malpractice civil suit against the plaintiffs for which the plaintiffs requested indemnification pursuant to the policy.[5] Thereafter, the defendant denied coverage. On July 7, 2023, the plaintiffs commenced this action alleging that the defendant breached the policy by not providing coverage and/or indemnification for the Moore claim.

Other facts will be recited as necessary.

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[4] The Grievance Panel Dismissal is an unlabeled attachment to the plaintiffs' memorandum of law in opposition to the motion for summary judgment, Dkt. No. 111.00.

[5] As of the date of this decision, the underlying Moore litigation is ongoing. See *Moore* v. *Evans & Lewis LLC*, Superior Court, judicial district of Danbury, Docket No. CV-22-6044055-S.

STANDARD OF LAW

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law . . . ." (Internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446 (2010). The nonmovant also "is given the benefit of all favorable inferences that can be drawn." (Internal citations omitted.) *Catz* v. *Rubenstein*, 201 Conn. 39, 49, 513 A.2d 98 (1986).

Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court. . . ." (Internal quotation marks omitted.) *Byrne* v. *Burke*, 112 Conn. App. 262, 267–68, 962 A.2d 825, cert. denied, 290 Conn. 923, 966 A.2d 235 (2009).

"Summary judgment in favor of the defendant is properly granted if the defendant in its motion raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." (Internal quotation marks omitted.) *Serrano* v. *Burns*, 248 Conn. 419, 424, 727 A.2d 1276 (1999). "[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues

that should be tried." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018). "Only one of [a defendant's] defenses needs to be valid in order to overcome [a] motion for summary judgment. [S]ince a single valid defense may defeat recovery, [a movant's] motion for summary judgment should be denied when any defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 417, 679 A.2d 421 (1996).

"Practice Book (2014) § 17-44 was amended in 2013 to provide that summary judgment is available for defenses, which rendered prior decisional law to the contrary moot. W. Horton et al., 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2017–2018 Ed.) § 17-44, authors' comments, p. 829." *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 791 n.12, 185 A.3d 643 (2018).

Further, in interpreting the provisions of a contract such as that involved in this case, it "must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction . . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Lawson* v. *Whitey's Frame Shop*, 241 Conn. 678, 686, 697 A.2d 1137 (1997).

ANALYSIS

At the outset, the court finds that the provisions of the contract referenced by the parties at oral argument and in their respective memoranda of law are clear and unambiguous and should be given effect according to their terms.

The plaintiffs assert that the warranty letter, and Evans' misrepresentation therein, do not constitute part of the policy's application process, as the warranty letter was introduced after the submission of the Premium Indication Form. Paragraph 12 of the Premium Indication Form states that:

> By acceptance of this Policy you agree that . . . [a]ll of the information, Applications, supplements, addendums, and statements provided to us by the Named Insured are true, accurate, and complete and shall be deemed to constitute material representations made by each and all of the Insureds . . . [t]his Policy is issued *in reliance upon* the Named Insured's information, Applications, supplements, addendums, and statements . . . [t]his Policy and all its endorsements, together with the completed and signed Application and *any and all information, Applications, supplements, addendums and statements provided by you to us are deemed to be incorporated into this Policy and embody all of the agreements existing between you and us and shall constitute the entire contract* between you and us; and . . . [w]e reserve all rights permitted by law, including but not limited to the right to rescind this Policy or any coverage provided herein, for any misrepresentation of any material fact by you or your agent, whether in the Application or otherwise. We also reserve the right, in our sole discretion, to decline coverage for any claim or disciplinary proceeding arising from, in connection with, or related to, any such misrepresented material fact. (Emphasis added.) (Dkt. No. 109.00 Ex. C., Attorney Protective Premium Indication Form, p. 3 ¶ 12.)

Furthermore, the warranty letter itself provides:

> [The defendant] is relying upon the "Attorney Protective Premium Indication Form, previously submitted applications and supplements, *and this letter* to review and price the Applicant's legal professional liability coverage. . . . [T]he Applicant understands that it *is affirming that the representations being made herein* and in the submitted Attorney Protective Premium Indication Request *are true and correct* to the best of the Applicant's knowledge and belief. The Applicant also agrees that *any misrepresentations or false statements made may be the basis for the termination or revocation of coverage*. (Emphasis added.) (Dkt. No. 109.00 Ex. B., Attorney Protective Warranty Letter.)

By this language, the defendant considers any statements made to it by an applicant to evaluate whether to provide insurance coverage are deemed part of the agreement. Although the warranty letter was delivered separately from the original application, it nonetheless constituted part of the application process.

The primary question, then, is whether the prior-knowledge exclusion in paragraph A.1.5 of the policy includes Moore's allegations in the grievance complaint. "Connecticut analyzes prior knowledge exclusions to claims-made insurance policies under a two-part, subjective-objective test to determine whether the exclusion bars coverage for a particular claim, asking first, whether the insured had actual knowledge of a suit, act, error or omission, a subjective inquiry; and second, whether a reasonable professional in the insured's position might expect a claim or a suit to result, an objective inquiry." (Internal quotation marks omitted.) *Wallingford Group, LLC* v. *Arch Ins. Co.*, Docket No. 3:18-CV-00946 (AVC), 2020 WL 4464629 (D. Conn. May 11, 2020); see *Eisenhandler* v. *Twin City Fire Ins. Co.*, Superior Court, judicial district of New Haven, Docket No. CV-09-5031716-S, 2011 WL 5458180 (October 21, 2011, *Woods, J.*).[6]

"When applying the subjective-objective test, the court must first ask the subjective question of whether the insured had knowledge of the relevant facts." (Internal quotation marks omitted.) *Philadelphia Indemnity Ins. Co.* v. *Atlanta Risk Management, Inc.*, Superior Court, Docket No. CV-06-4018752, 2009 WL 2783073, *8 (July 30, 2009, *Holden, J.*); see *Metropolitan Distribution Commission* v. *QBE Americas, Inc.*, 416 F. Supp. 3d (D. Conn. 2019).

Here, the plaintiffs were made aware of Moore's allegations against Lewis as early as the filing of the grievance complaint on October 25, 2021. In paragraph 4 of their memorandum, the

[6] Although the parties disagreed about the proper standard in their briefs, the plaintiffs acknowledged at oral argument that the subjective-objective test is appropriate.

plaintiffs themselves acknowledge that Moore had "alleged *failure*, on the part of Attorney Lewis, generally, *to act competently and to communicate properly*, with respect to a foreclosure/bankruptcy matter in which Attorney Lewis represented Mrs. Moore." (Emphasis added.) (Dkt. No. 111.00 ¶ 4.) Further, in Lewis' written response to the grievance complaint, he describes the underlying facts of his representation of Moore and that she had "threatened to take steps to grieve me, and sue me, with respect to her case. She claimed that I was the cause of her losing her home . . . ." (Dkt. No. 109.00 Ex. E, Lewis Response to Grievance Complaint, p. 8 ¶¶ 37–40.) Therefore, the plaintiffs had the requisite subjective knowledge of the facts before the policy start date.

Next, the objective inquiry asks, based on the subjective knowledge of facts to the insured, "whether, based on the known facts, a reasonable person in the insured's position might expect such facts to be the basis of a claim." *Eisenhandler* v. *Twin City Fire Ins. Co.*, supra, Superior Court, Docket No. CV-09-5031716-S (October 21, 2011, *Woods, J.*); see *HSB Group, Inc.* v. *SVB Underwriting, Ltd.*, 664 F. Supp. 2d 158 (D. Conn. 2009). In *Eisenhandler*, an attorney was sued for his failure to commence a personal injury claim within the statutory deadline despite oral assurances from the client that she would not bring such a malpractice claim. Judge Woods found that, despite the client's assurances she would not sue the attorney, the objective prong was satisfied because "all that is required is that, based on the subjective knowledge of the actual attorney at issue, a reasonable attorney would understand that his actions 'might' be the basis of a claim." (Internal citation omitted.) *Eisenhandler* v. *Twin City Fire Ins. Co.*, supra. Judge Woods explained that: "As used in the exclusion, the word 'might' is an expression of 'possibility' . . . . Eisenhandler's subjective knowledge of Carroll-Wiltshire's verbal assurance does not alter the calculus of whether a reasonable attorney would understand that the error in question *might*

possibly be the basis of a malpractice claim." (Emphasis in original; internal quotation marks omitted.) Id. In the instant case, Moore had specifically alleged Lewis was negligent in his representation of her and Lewis's response to the grievance complaint expressly acknowledged that she had threatened to sue him. (Dkt. No. 109.00 Exs. D–E, Grievance Complaint and Lewis Response to Grievance Complaint.) Such accusations of professional negligence, including a formal complaint with the Statewide Grievance Committee, would alert a reasonable attorney to the *possibility* that Moore *might* bring a professional malpractice claim.

At oral argument, the plaintiffs contended in part that the Committee's dismissal of Moore's grievance complaint proved that there was no merit to the complaint thereby essentially vitiating any potential or actual misrepresentation on their part in the application process. (See also, Dkt. No. 111.00 ¶ 8 of the affidavit of Douglas J. Lewis, and the December 19, 2022 Grievance Panel Dismissal, #21-0466.) However, it is not the merits of the grievance complaint that is an issue with respect to coverage under the policy. It is the fact that the complaint existed at all at the time the application was submitted that is critical to the determination of the defendant's obligation to cover the claim.

Notably, the defendant has provided the affidavit of Brandon Sakry in support of its position. Mr. Sakry is the underwriting manager for the defendant and has specifically averred that had the information of the grievance been known to the defendant at the time of the application, then it would have either issued an exclusion to the policy for such a claim or substantially increased the premium quoted. No evidence contrary to that representation has been submitted by the plaintiffs. Hence, there is prejudice to the defendant from the misrepresentation.

CONCLUSION

In the contract between the parties, the defendant reserved all rights permitted by law, including, but not limited to, the right to rescind any coverage provided by the policy due to any misrepresentation of any material fact by the plaintiffs. The plaintiffs were aware of Moore's allegations of a "wrongful act" by Lewis, as early as the filing of the grievance complaint on October 25, 2021, well before the policy's start date of April 28, 2022. The plaintiffs have conceded that their representation as to whether they had ever been involved, directly or indirectly, in a claim, potential claim, suit, disciplinary matter or grievance arising out of the rendering or failing to render legal services prior to the inception of the policy was untrue. Thus, there is no dispute that there was a material misrepresentation of a material fact which allowed the defendant to rescind the policy, or any coverage provided.

From a review of the evidence presented to the court with respect to the motion and the objection to it, the defendant has established that there is no genuine issue of material fact as to the basis of its denial of the plaintiffs' claim for coverage under the policy. The motion for summary judgment is granted as to the plaintiffs' breach of contract claim and the defendant's counterclaim for a declaration that it does not owe defense or indemnification to the plaintiffs.

Shaban, J.