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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

----------X **PART 6**

MARKEL INSURANCE COMPANY, as Assignee of the rights of American Gardens Owners Corp., American Gardens Management, LLC and American Gardens Management Corp, and as Subrogee to the rights of New Empire Group Ltd., and NEW EMPIRE GROUP LTD.,

INDEX NO. 13608/11

MOTION DATE: 01/13/12
SEQUENCE NO. 001

Plaintiffs,

-against-

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ATOMIC RISK MANAGEMENT OF NEW YORK, INC. d/b/a ARM OF NY INSURANCE AGENCY, and REBORE THORPE & PISARELLO, P.C.,

Defendants.

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Notice of Motion, Affs & Exs.....1
Memorandum of Law in Support.....2
Affirmation in Opposition.....3
Memorandum of Law in Opposition.....4
Reply Memorandum of Law.....5

Upon the foregoing papers, the motion by defendant Rebore Thorpe & Pisarello, P.C., for an order dismissing plaintiffs' causes of action against it for legal malpractice and indemnification, pursuant to CPLR §3211(a)(7), is granted.

Defendant Rebore Thorpe & Pisarello, P.C. (hereinafter "Rebore") moves, pre-answer, for dismissal of plaintiffs' complaint against it, for plaintiffs' failure to state legally cognizable causes of action against Rebore.

This is an action by Markel Insurance Company (hereinafter "Markel"), New Empire Group Ltd.'s errors and omissions carrier, and New Empire Group Ltd. (hereinafter "NEG"), to

recover settlement monies paid from NEG's insurance policy with Markel to settle a personal injury action which was brought against American Gardens Owners Corp. The underlying action, which forms the basis for this suit, relates to a personal injury action stemming from an accident which occurred on September 30, 2005. On said date, Alex Murillo, an employee of a contracting company, was climbing a ladder at a premises owned by American Gardens Owners Corp., located at 123-27 Merrick Boulevard in Queens, when the ladder slid out from under him and he fell to the ground. Mr. Murillo claimed to have sustained serious injuries from the fall, and he and his wife filed a lawsuit in Supreme Court, Bronx County, under the caption, *Murillo v. American Gardens Owners Corp.*, under index number 23668/05.

American Gardens Owners Corp., American Gardens Management, LLC, and American Gardens Management Corp. (hereinafter "American Gardens") were insured for said loss by non-party Chartis Insurance Company with an umbrella excess liability policy issued by American Guarantee and Liability Insurance Company (hereinafter "American Guarantee"). The American Guarantee Policy had a "New York Changes" endorsement which amended the Notice of Occurrence provision of the policy to include that notice to any agent of American Guarantee constituted notice to American Guarantee.

NEG, which was insured under an "errors and omissions" policy issued by Markel, was the managing general agent which acted as American Guarantee's agent and as program administrator for the American Guarantee Policy. The Program Administrator Agreement contained an indemnity provision in which American Guarantee was required to indemnify and hold NEG harmless from any and all claims.

During the pendency of the underlying Murillo action, Rebore was counsel to American Gardens and allegedly had notice of the Murillo action on or about November 15, 2005 when notice of same was given to American Gardens. On or about December 13, 2005, it is alleged that notice of the Murillo action was given to Atomic Risk Management of New York, Inc. d/b/a ARM of New York Insurance Agency (hereinafter "ARM"), the retail insurance broker for American Gardens. It is further alleged that ARM forwarded the notice of the claim to American Gardens' primary insurer, Chartis, and to NEG as agent of the excess carrier, American Guarantee. Thereafter, in August of 2008, ARM faxed the Accord form to NEG, which was in turn forwarded to American Guarantee. In September 2008, American Guarantee, the excess carrier, denied coverage, alleging breach of the notice provision of the American Guarantee

Policy and claiming that the August 2008 notice was its first notice of the claim. Prior to the commencement of the trial of the Murillo action, ARM disclosed that it had noticed the Murillo action to NEG as early as December 2005. Despite same, American Guarantee would not participate in any settlement negotiations of the Murillo action.

Markel contends that "out of real concern that the verdict would exceed coverage under both the primary and excess policies issued to American Gardens, expose NEG to exposure beyond even the limits of its policy with [Markel], as well as a bad faith claim on the part of [Markel]...[Markel] prudently contributed $2,000,000 toward the $3,000,000 settlement of the Murillo action." The primary insurer, Chartis, paid out the remaining $1,000,000 toward the settlement. Markel alleges that it contributed to the settlement of the claims, even though they were not brought against its insured, NEG, because American Guarantee denied American Gardens' claim for alleged late notice.

In consideration of the $2,000,000 payment by Markel, an assignment was executed between American Gardens and Markel, in which any claims or causes of action which American Gardens had against American Guarantee, Rebore, and ARM were assigned to Markel.

Markel asserted two causes of action against Rebore, one sounding in legal malpractice, and one for indemnification. Rebore moves to dismiss both causes of action for failure to state a cause of action. With respect to the legal malpractice cause of action, Rebore contends that plaintiffs cannot state a cognizable cause of action for legal malpractice as the required element of damages is missing, as its client, American Gardens, did not sustain any ascertainable damages from the alleged negligence of Rebore. In addition, Rebore contends that neither NEG, nor Markel as its subrogee, is entitled to seek indemnification from Rebore because there is no privity between Rebore and NEG. Rebore also contends that the principle of equitable distribution is inapplicable herein, as the Rebore were the attorneys for American Gardens, not NEG, and there is no relationship "so close as to approach privity" between NEG and Rebore.

While plaintiffs contend that a cause of action for legal malpractice is assignable under New York laws and that the assignee stands in the shoes of the assignor and can assert all of the claims now available to the assignee, defendant Rebore, does not contest same. Rebore contends, however, that a cause of action in negligence cannot be maintained against Rebore, as its client, American Gardens, sustained no ascertainable damages. In addition, plaintiffs contend that Markel, as the equitable subrogee of its insured, NEG, is entitled to seek indemnity from

Rebore due to Rebore's "independent and successive" negligence in failing to timely notify American Gardens' excess insurer, American Guarantee, but Rebore contends that the plaintiffs have not, and cannot, allege that there was any duty running from Rebore to NEG or Markel. Rebore contends that there is no privity between Rebore and NEG and thus no cause of action for indemnification lies herein. Rebore were the attorneys for American Gardens, not NEG, and NEG acted as American Guarantee's agent and was insured, itself, by Markel. As such, Rebore contends that plaintiffs may not maintain a cause of action against it for indemnification.

Plaintiffs complaint fails to state a cause of action against Rebore for legal malpractice. Even accepting all of the alleged facts in the complaint as true, Markel has failed to plead a cause of action against Rebore for legal malpractice. The settlement of the underlying Murillo action on behalf of American Gardens was fully funded, without American Gardens paying personally, and there are no allegations within the complaint that American Gardens sustained any expense or any ascertainable damages as a result of Rebore's representation. The complaint fails to allege actual damages on the part of American Gardens and therefore fails to state a legally cognizable cause of action for legal malpractice.

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages. (*Dempster v. Liotti,* 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011); *Leder v. Spiegel*, 9 N.Y.3d 836 (2007), *cert denied sub nom. Spiegel v. Rowland*, 552 US 1257 (2008); *See, Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 (2007)). A plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence. (*Dempster v. Liotti,* 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011); *Parola, Gross & Marino, P.C. v. Susskind,* 43 A.D.3d 1020, 843 N.Y.S.2d 104 (2d Dept. 2007); *Giambrone v. Bank of New York*, 253 A.D.2d 786, 677 N.Y.S.2d 608 (2d Dept. 1998)). Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice. (*Dempster v. Liotti,* 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011); *Giambrone v. Bank of New York*, 253 A.D.2d 786, 677 N.Y.S.2d 608 (2d Dept. 1998); *Siciliano v. Forchelli & Forchelli*, 17 A.D.2d 343, 793 N.Y.S.2d 102 (2d Dept. 2005)).

In the instant action, plaintiffs allege only that Markel may have been damaged, not that

Rebore's client (and Markel's assignor) sustained ascertainable damages due to Rebore's alleged malpractice. In the instant action, there was not an uncovered judgment against American Gardens, nor did American Gardens litigate the disclaimer of coverage by American Guarantee. There are no allegations that American Gardens sustained damages in the underlying action due to the negligence of Rebore. As such, Markel's payment on behalf of NEG, in an action in which NEG was not a party (the Murillo action), could at best result in speculative damages, which are insufficient to state a cause of action for legal malpractice against Rebore.

Further, Markel's voluntary payment on behalf of NEG in an action in which it was not a named party, bars its recovery herein. Where an insurer who is not acting under a mistake of material fact or law assumes the defense and indemnification of an insured when there is no obligation to do so, the insurer becomes a volunteer with no right to recover the monies it paid on behalf of the insured. (*Merchants Mutual Ins. Co. v. Travelers Ins. Co.*, 24 A.D.3d 1179, 806 N.Y.S.2d 813 (4th Dept. 2005)).

Additionally, plaintiffs have failed to state a cause of action for indemnification. Plaintiffs have failed to allege that there is any duty running from Rebore to NEG or Markel. The disclaimer by American Guarantee did not expose American Gardens to any actual uncovered damages as the settlement of the Murillo action was not funded personally by American Gardens. Markel admits that it made payment toward the settlement because of its concern that its insured, NEG, would be exposed to a claim by American Gardens for its failure to properly process American Gardens' notice of claim. Rebore contends that plaintiffs' cause of action for indemnification fails because it is an attempt to be indemnified for its own wrongdoing.

Indemnification involves a shifting of the entire loss from one who is, or has been, compelled to pay for a loss, without regard to that party's own fault, to one who more properly bears responsibility for that loss because that party was the actual wrongdoer. (*Raguet v. Braun*, 90 N.Y.2d 177, 681 N.E.2d 404 (1997); *Westchester Cty. v. Welton Becket Assoc.*, 102 A.D.2d 34, 478 N.Y.S.2d 305 (2d Dept. 1984), *aff'd* 66 N.Y.S.2d 642, 485 N.E.2d 1029 (1985)). The key element of a common law cause of action for indemnification is "not a duty running from the indemnitor to the injured party, but rather is a 'separate duty owed the indemnitee by the indemnitor.'" (*Raguet v. Braun*, 90 N.Y.2d 177, 681 N.E.2d 404 (1997)). A duty to indemnify must exist. (*Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 484 N.E.2d 1354 (1985)).

The complaint herein fails to allege that there was a duty owed by Rebore to NEG or Markel. NEG was the managing general agent which acted as American Guarantee's agent and program administrator for the American Guarantee Policy which provided excess coverage to American Gardens. Pursuant to the Program Administrator Agreement, plaintiffs allege that American Guarantee was required to indemnify and hold NEG harmless. Plaintiffs allege that Markel, as NEG's insurer, paid $2,000,000 toward the $3,000,000 settlement of the Murillo action. Plaintiff has failed, however, to allege the existence of a duty between themselves and Rebore which can serve as a basis for NEG or Markel to seek indemnification from Rebore.

In addition, plaintiffs' complaint fails to state a cause of action based upon equitable subrogation, as there is no privity between NEG and Rebore and no basis for NEG to recover from Rebore. Subrogation allows an insurer who pays the losses of its insured to be placed in its insured's position, so as to recover from the third party legally responsible for the loss. (*Kumar v. American Transit Ins. Co.*, 49 A.D.3d 1353, 854 N.Y.S.2d 274 (4th Dept. 2008), *citing, Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 650 N.E.2d 841 (1995)). Rebore were the attorneys for American Gardens. NEG acted as American Guarantee's agent and was itself insured by an Insurance Agents & Brokers Errors and Omissions Insurance Policy issued by Markel. As such, there is no privity between NEG and Rebore, and plaintiffs cannot maintain a cause of action for indemnification based upon equitable subrogation against Rebore.

Accordingly, plaintiffs' third and fourth causes of action for legal malpractice and indemnification against defendant Rebore are hereby dismissed.

Dated: March 6, 2012

Anthony L. Parga, J.S.C.

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