[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

SUCKLE SCHLESINGER PLLC

Plaintiff, Index No.651926/2014

-against- **DECISION/ORDER**

IRONSHORE INDEMNITY, INC. AND
YORK PRO INC,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	

Plaintiff law firm Suckle Schlesinger PLLC has brought the present action against its insurer Ironshore Indemnity, Inc. ("Ironshore") and the insurer's claim manager York Pro, Inc. ("York Pro") to recover the sum it paid to fund a settlement it entered into with its former client. It has brought the present motion for summary judgment on some of its claims, including its claim for breach of contract. As will be explained more fully below, its motion for summary judgment on its breach of contract claim is granted.

The facts are as follows. Plaintiff was insured pursuant to a Lawyers Professional Liability Policy with Ironshore. Plaintiff represented its client in a claim for property damage in a Supreme Court action, which action was settled for $600,000. This amount was placed in plaintiff's escrow account and was not released to plaintiff's client. Plaintiff's client then commenced an action for

legal malpractice against plaintiff. Plaintiff sent notice of the legal malpractice action commenced against it to Ironshore. On July 11, 2013, York Pro, acting as defendant Ironshore's claim agent, sent plaintiff a letter, which stated as follows:

> As such, we will provide coverage for this claim, subject to the following reservation of rights.
>
> Section 1.B provides that the Insurer shall have the right and duty to defend any claim. As a result, Ironshore has facilitated the Insured's retention of Robert Modica, Esq. of Gordon & Rees to provide a defense for the insured.
>
> We also direct your attention to Section VII.A of the Policy which provides that the Insured shall not admit liability, offer to settle or agree to any settlement in connection with any Claim without the express prior written consent of the Insurer. As a result, we would ask that you limit discussions regarding this case to only those between you and Mr. Modica and his associates/partners.

After plaintiff received this letter, it alleges and defendants do not dispute, that it did not have any discussions with any persons other than the attorneys designated by the defendant insurance company about the case and the settlement of the case until after the settlement agreement was signed.

In or about August of 2013, Mark Beckman, Esq. of Gordon & Rees, the law firm retained by the insurance company, began settlement negotiations in an attempt to resolve the legal malpractice action. In November 2013, Mr. Beckman informed plaintiff that a settlement agreement had been reached in the legal malpractice action for the sum of $230,000.00. On November 21, 2013, Mr. Beckman sent an email to plaintiff in which he attached pdfs of the signed settlement agreement and indicated that he would be sending the originals for signature. On November 2, 2013, Gordon & Rees sent a written letter to plaintiff, which stated that two sets of the settlement agreement were enclosed for signature by plaintiff, which should then be returned to Gordon &

Rees. Plaintiff then signed the enclosed agreement, returned it to Gordon & Rees along with a check made payable to Ironshore in the amount of $5,000 as and for the policy deductible and a cover letter requesting that the insurance company Ironshore issue a check for $230,000 pursuant to the terms of the settlement agreement. In response to this letter, Gordon & Rees advised plaintiff that their contact person at York Pro was Collette Siesholtz and provided plaintiff with her email. Plaintiff then sent an email to York Pro, dated November 26, 2013, to the attention of Collette Siesholtz, requesting that she issue the settlement check pursuant to the terms of the settlement agreement. On November 27, 2013, Collette Siesholtz of York Pro sent an email to the plaintiff in which she stated that "I have requested the check and have noted the time constraint for payment." The plaintiff then sent another email to Ms. Siesholtz asking for confirmation that the check was being processed. Ms. Siesholtz responded with another email, dated December 3, stating that "The claim was previously submitted last week with a request to expedite. I will follow up to see if the funding is being processed." On December 4, the day before the settlement payment of $230,000 was due pursuant to the terms of the settlement agreement, Ms. Siesholtz of York Pro sent an email to plaintiff stating that Ironshore would not be making payment for the settlement as the $230,000 settlement is to be paid out of plaintiff's escrow account. In order to avoid default under the settlement agreement, plaintiff paid the settlement of the lawsuit out of its own funds. Plaintiff then made a demand for reimbursement of the settlement amount. In response to this demand, plaintiff received a seven page letter from the law firm of London Fischer LLP in which Ironshore attempts to disclaim coverage for the first time on the ground, inter alia, that Ironshore had never consented to the settlement as required by the insurance policy.

In addition to settlement of the underlying legal malpractice action, the settlement agreement

also deals with the termination of the attorney client relationship between plaintiff and its former client. Pursuant to the agreement, the plaintiff agreed in the first numbered paragraph entitled payment "to issue payment to plaintiffs in the amount of two hundred and thirty thousand dollars ($230,000)." In the third numbered paragraph of the settlement agreement, entitled termination of Attorney Client Relationship, the following is stated :

> The Firm hereby warrants and represents that it received $600,000 as payment in settlement of the Underlying Lawsuit. The parties agree that upon payment of the amount as agreed to in Paragraph 1 above to Plaintiffs, defendants shall release the proceeds from the Underlying lawsuit Settlement payment to themselves....

Plaintiff has now brought a motion seeking summary judgment on its claim that the defendants breached the insurance policy by refusing to fund the settlement between plaintiff and its former client in the underlying medical malpractice action. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, the court finds that plaintiff has established its prima facie right to summary judgment on its claim for breach of the insurance policy based on defendants' refusal to fund the settlement agreement. It is undisputed that the plaintiff and Ironshore entered into a policy whereby Ironshore agreed to provide professional liability insurance to plaintiff. Plaintiff has also established that it performed its obligations under the policy by notifying Ironshore about the

malpractice claim against it in a timely fashion. Moreover, defendants have admitted that they received notice of the claim and sent plaintiff a letter dated July 2013 in which they explicitly stated that they would provide coverage for the claim and in which they acknowledged that the policy covers an insured for all sums the insured shall become legally obligated to pay as damages as a result of the claim made against the insured. The only conditions contained in the letter stating that they would provide coverage was reference to the provision in the policy excluding coverage for punitive and other specific types of damages and their reference to the provision in the policy that the plaintiff should not settle the claim without the consent of the insurer.

Plaintiff has established that the settlement of the claim was made with the consent of the insurer and the insurer has failed to raise a disputed issue of fact with respect to its consent of the settlement. In the letter from defendants acknowledging that they would provide coverage for the claim, they clearly provided that they were retaining Robert Modica Esq. of Gordon & Rees to provide a defense for plaintiff. They also provided as follows:

> We also direct your attention to Section VII.A of the Policy which provides that the Insured shall not admit liability, offer to settle or agree to any settlement in connection with any Claim without the express prior written consent of the Insurer. As a result, we would ask that you limit discussions regarding this case to only those between you and Mr. Modica and his associates/partners.

Based on the foregoing unambiguous language in the letter sent by defendants to plaintiff, defendants specifically instructed plaintiff that any discussions about offers to settle and agreements to settle the case should "only" occur with Mr. Modica of Gordon & Rees and his associates and partners. It is undisputed that plaintiff complied with the very specific instructions contained in this letter by only discussing the settlement of the case with Gordon & Rees and agreeing to sign the settlement agreement which had been negotiated by Gordon & Rees, the law firm which had been

retained by defendants. Defendants also confirmed their consent to the settlement agreement by defendant York Pro sending two separate emails to plaintiff in which its representative acknowledged that she had requested the check to fund the settlement and that the request was being processed. It was not until the day before the settlement payment was due that defendants first took the position that they were not required to fund the settlement and their position was not based on a lack of consent but on their claim that the settlement should be funded from the funds which were being held in escrow. Under these circumstances, defendants have failed to raise any disputed issue of fact about their consent to the settlement of the underlying medical malpractice action.

There is also no basis for defendant's argument that there are issues of fact as to whether the parties agreed that the settlement amount was to be funded from the plaintiff's escrow account. Initially, this position is barred by the unambiguous terms of the settlement agreement, drafted by the law firm retained by defendants, which provided that the settlement proceeds from the underlying lawsuit would not be released from the escrow account until after the settlement amount of $230,000.00 had already been paid. Moreover, defendants cannot establish that there are issues of fact as to whether they agreed to issue a check to fund the settlement when their representative sent two emails to plaintiff confirming that defendants would be sending a check to fund the settlement.

Moreover, defendants' argument that there are issues of fact as to whether they disclaimed coverage after they became aware of the terms of the settlement agreement is without basis as a matter of law based on this court's finding that defendants had specifically instructed plaintiff to only discuss the terms of any settlement with Gordon & Rees and it was Gordon & Rees who sent the completed settlement agreement to plaintiff for execution. Under these circumstances, any

subsequent disclaimer by defendants was invalid as it had already consented to the settlement.

Additionally, to the extent defendants contend that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, defendants have failed to identify any outstanding discovery that would change the essential fact that they explicitly agreed to provide coverage for the underlying claim with the only reservation of right being that they had to consent to settlement and that they did consent to the settlement of the lawsuit and agreed to issue a check funding the settlement.

Based on the foregoing, the court need not reach the other arguments raised by plaintiff; plaintiff is granted summary judgment on its claim for breach of contract and the clerk is directed to enter summary judgment in favor of plaintiff and against defendants for the amount of $230,000, plus costs and disbursements, plus interest from December 5, 2013. The foregoing constitutes the decision and order of the court.

Dated: 2/24/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.