UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TESSA KNOX, PAMELA KASSEN, LAURENTINA CHAPARRO, HILLARY CRANDLE, JOY FUSARO, ALYSSA HICKEY, MARGRET HOLCOMB, MICHELLE ORTIZ, TRIPTI PANDEY, WIJDAN SHOUBAKI, JENA TOBAK, CHRISTINA TORRES, and ARISSIA TOSSETTI,	21cv6321 (DLC)
Plaintiffs,	OPINION AND ORDER
-v-	
IRONSHORE INDEMNITY INC.,	
Defendants.	

APPEARANCES:

For plaintiffs:
William Irvin Dunnegan
Richard Weiss
Dunnegan & Scileppi LLC
437 Madison Avenue
24th Floor
New York, NY 10022

For defendant Ironshore Indemnity Inc.:
Luigi Spadafora
Alexander A. Truitt
Winget Spadafora & Schwartzberg LLP
45 Broadway
32nd Floor
New York, NY 10006

DENISE COTE, District Judge:

In this insurance coverage dispute, the plaintiffs, former employees of John Varvatos Enterprises, Inc. ("Varvatos"), sue Ironshore Indemnity Inc. ("Ironshore"), Varvatos' insurer, to

collect a judgment (the "Judgment") awarded to them and a class of former Varvatos employees in another litigation in this District (the "Underlying Litigation"). Ironshore has moved to dismiss, claiming that the plaintiffs' claims are barred by the res judicata effect of a prior action ("Knox I") and that they in any event fail to state a claim because the express terms of the insurance policy Ironshore issued to Varvatos mean that Varvatos is not covered for the conduct that resulted in the Judgment. The plaintiffs have moved to certify a class of Varvatos employees who they claim are entitled to an award from Ironshore and for summary judgment, contending that Ironshore is, as a matter of law, obligated to pay the Judgment. Because the plain terms of the policy issued by Ironshore make clear that the conduct leading to the Judgment is excluded from coverage under the policy, Ironshore's motion to dismiss is granted.

Background

This action is not the first case in which this group of plaintiffs, or a subset, have sought to collect the Judgment from Ironshore. In 2020, plaintiffs Knox and Kassen brought Knox I, and on January 26, 2021, this Court granted Ironshore's motion to dismiss that case. Knox v. Ironshore Indemnity Inc. (Knox I), No. 20cv4401 (DLC), 2021 WL 256948 (S.D.N.Y. Jan. 26,

2021). The facts set forth in this Opinion are derived from this Court's Opinion granting Ironshore's motion to dismiss Knox I, which is incorporated by reference, as well as the plaintiffs' complaint, documents annexed to the complaint and incorporated by reference, and other documents properly considered in conjunction with the cross-motions to dismiss and for summary judgment.

I. Varvatos' Illegal Conduct and the Underlying Litigation

In brief, this case, Knox I, and the Underlying Litigation all arise out of a discriminatory compensation policy maintained by Varvatos, a clothing retailer. Prior to 2005, Varvatos offered clothing for both men and women, required both male and female sales employees to wear Varvatos clothing to work, and gave both male and female employees an allowance to purchase Varvatos clothing to wear to work. In 2005, Varvatos discontinued its women's line, rescinded its requirement that female sales employees wear Varvatos clothing at work, and ceased providing a clothing allowance to female sales employees. Under this policy, male sales employees, but not female sales employees, were entitled to obtain $12,000 in Varvatos clothes annually. The $12,000 clothing allowance was doled out to male employees in increments of $3,000 per quarter. This state of affairs prevailed until some point after 2012, when Varvatos

began to offer to female sales employees, but not male sales employees, a discount at a related retailer, Allsaints, but continued to withhold a clothing allowance from female sales employees. Under this policy, female sales employees could, every six months, use their personal funds to purchase up to $2,500 in clothing from Allsaints at a 50% discount from the retail price.

On February 1, 2017, plaintiff Knox initiated the Underlying Litigation against Varvatos in this District, alleging that Varvatos' policy of providing a clothing allowance to male sales employees but not female sales employees violated federal and New York state laws prohibiting pay discrimination. Tessa Knox v. John Varvatos Enterprises, Inc., No. 17cv772 (GWG). After motion practice resulting in the certification of the Underlying Litigation as a collective action under the federal Equal Pay Act, 29 U.S.C. § 206(d), and a class action pursuant to Rule 23, Fed. R. Civ. P., the case proceeded to trial before the Honorable Gabriel Gorenstein.

At trial in 2020, the plaintiffs argued that Varvatos had violated federal and state law prohibiting pay discrimination by offering a clothing allowance to male employees, but not female employees. In defense, Varvatos' counsel argued, inter alia, that Varvatos had not engaged in pay discrimination because,

while it did not offer its female sales employees a clothing allowance, it provided compensation of equivalent value in the form of the Allsaints discount. The plaintiffs' counsel argued that the Allsaints discount is "no more than a coupon," not "equal or even comparable to the clothing allowance," and not "worth anything." The jury found Varvatos liable for violating federal and New York civil rights law and awarded damages on a per-employee basis.

Based on the jury's per-employee award and the applicable rate of pre-judgment interest, the court calculated a judgment of $3,516,051.23 against Varvatos. Judgment was initially entered on March 24, 2020. Varvatos moved for post-trial relief under Fed. R. Civ. P. 50 and 59 on April 21. Judge Gorenstein granted a motion for a new trial on damages, or in the alternative remittitur, on January 12, 2021. The parties agreed to remittitur, and after additional litigation regarding the amount of the judgment and attorneys' fees, the Court entered a final judgment in the total amount of $2,114,086.20 on June 23 (the "Judgment").

II. The Ironshore Insurance Policy

On May 16, 2016, Ironshore issued to Varvatos a "Directors, Officers, and Private Company Liability Insurance Policy Including Employment Practice Claims Coverage." This policy

required Ironshore to indemnify Varvatos for "Loss" that it incurred as a result of civil litigation resulting from Varvatos' "Wrongful Act[s]" during the term of the policy. "Wrongful Act," in turn, is defined, inter alia, as "any . . . Employment Practices Wrongful Act" by Varvatos. "Employment Practices Wrongful Act[s]" include "discrimination," "violation of the Equal Pay Act," and "violation of an Employee's civil rights relating to any of the above."

The policy also includes a Prior Acts Exclusion, which provides that Ironshore

> shall not be liable to make any payment for Loss in connection with any [civil litigation] for any Wrongful Act which occurred prior to April 30, 2012. Loss arising out of the same Wrongful Act or Related Wrongful Acts shall be deemed to arise from the first such Wrongful Act.

The term "Related Wrongful Acts" is defined as

> Wrongful Acts which are the same, related, or continuous, or Wrongful Acts which arise from a common nucleus of facts. Claims can allege Related Wrongful Acts regardless of whether such Claims involve the same or different claimants, Insureds, or legal causes of action.

The insurance policy took effect on April 30, 2016 and expired on April 30, 2017. The Underlying Litigation commenced on February 1, 2017.

III. History of the Plaintiffs' Litigation against Ironshore

On June 9, 2020, Tessa Knox and Pamela Kassen -- who are also plaintiffs in this action -- brought Knox I against Ironshore. In Knox I, like this case, they sought to collect from Ironshore the Judgment pursuant to N.Y. Ins. Law § 3420(b) (the "New York direct action statute"), which allows "any person who . . . has obtained a judgment against [an] insured . . . for damages for injury sustained . . . during the life of the policy or contract" to maintain an action against an insurer "to recover the amount of a judgment against the insured." Knox I was assigned to this Court, and Ironshore moved to dismiss.

On January 26, 2021, this Court held that the plaintiffs had "failed to state a claim for relief under the New York direct action statute" and dismissed Knox I. 2021 WL 256948, at *3. The Court reached this conclusion for three reasons. First, a precondition to litigation against an insurer under the New York direct action statute is a judgment against the insured, and at the time Knox I was decided, Judge Gorenstein had vacated the judgment in the Underlying Action pending a new trial on damages or an agreement on remittitur. Id. Second, the New York direct action statute does not allow a plaintiff to maintain a direct action during a stay of execution of the judgment at issue, and at the time Knox I was decided, the

execution of any judgment against Varvatos was stayed because Varvatos was in the midst of Chapter 11 bankruptcy proceedings before the United States Bankruptcy Court for the District of Delaware. Id. at 2-3. Finally, the New York direct action statute required the plaintiffs "to serve both the insurer and the insured with a copy of the judgment and notice of entry of the judgment," and the plaintiffs had not pleaded compliance with this provision. Id. at 3. The plaintiffs did not appeal this Court's decision granting Ironshore's motion to dismiss Knox I.

On July 26, 2021, the plaintiffs initiated this action, which was assigned to the Honorable Jed Rakoff.[1] On August 23, the plaintiffs moved for partial summary judgment on the issue of Ironshore's liability under the insurance policy, and on August 30, the plaintiffs moved to certify in this action a class of all members of the class certified in the Underlying Litigation. Ironshore moved to dismiss on September 7. The case was reassigned to this Court on September 13, and on September 24, each party filed its opposition to its adversary's respective motions. All of the motions became fully submitted on October 4.

[1] The plaintiffs allege that they served the Judgment on counsel for Varvatos and Ironshore on June 23. The Varvatos bankruptcy case was dismissed on June 30.

Discussion

The plaintiffs have brought this action pursuant to the New York direct action statute, N.Y. Ins. Law § 3420(b). Ironshore has moved to dismiss.[2] In order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "[t]he complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" Green v. Dep't of Educ. of City of New York, 16

[2] The plaintiffs have also brought claims against Ironshore for insurance by estoppel and for a declaratory judgment -- pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 -- that Ironshore is obligated to satisfy the Judgment.

The insurance by estoppel claim fails. This claim is premised on the plaintiffs' assertion that Ironshore represented, in a March 14, 2017 letter from Ironshore to Varvatos in which it agreed to provide coverage for defense of the Underlying Litigation, that it would cover any losses resulting from the Underlying Litigation. But that letter, which is annexed to the plaintiffs' complaint and is therefore properly considered on a motion to dismiss, expressly reserved "all rights, privileges and defenses . . . under the Policy and at law and/or in equity." "An insurer may . . . by timely notice, reserve its right to claim that the policy does not cover the situation at issue, while defending the action," Am. W. Home Ins. Co. v. Gjonaj Realty & Mgmt. Co., 138 N.Y.S.3d 626, 630 (1st Dep't. 2020), and the broadly worded reservation of rights in the March 14, 2017 letter thus precludes any claim for insurance by estoppel. See Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 176 (2d Cir. 2006) ("When an insurer reserves its right to deny coverage, estoppel and waiver may not be inferred." (citation omitted)).

The plaintiffs' declaratory judgment claim rises and falls with their primary claim under the New York direct action statute because "a plaintiff may not use the Declaratory Judgment Act to create legal rights that do not otherwise exist." Knox I, 2021 WL 256948, at *4 (citation omitted).

F.4th 1070, 1076–77 (2d Cir. 2021) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "In determining if a claim is sufficiently plausible to withstand dismissal," a court "accept[s] all factual allegations as true" and "draw[s] all reasonable inferences in favor of the plaintiffs." Melendez v. City of New York, 16 F.4th 992, 1010 (2d Cir. 2021) (citation omitted).

"A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Green, 16 F.4th at 1077 (citation omitted). The court may also consider documents that are "the proper subject of judicial notice" in evaluating a motion to dismiss, so long as it does not consider them "for the truth of the matters asserted therein." United States v. Strock, 982 F.3d 51, 63 (2d Cir. 2020) (citation omitted). Documents properly subject to judicial notice include public records. Bellin v. Zucker, 6 F.4th 463, 472 n. 10 (2d Cir. 2021). Accordingly, in evaluating Ironshore's motion to dismiss, the Court takes judicial notice of the existence of certain filings in Knox I, the Underlying Litigation, and Varvatos' bankruptcy proceedings in Delaware.

The parties' respective submissions each present several issues, but the resolution of one issue presented by Ironshore's

motion to dismiss -- whether the plaintiffs have failed to state a claim against Ironshore because Ironshore, pursuant to the Prior Acts Exclusion in the insurance policy it issued to Varvatos, is not obligated to indemnify Varvatos for the Judgment[3] -- is sufficient to dispose of this litigation. For the following reasons, this Opinion concludes that the Prior Acts Exclusion bars the plaintiffs' recovery.

Under New York law,[4] when "an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." Beazley Ins. Co., Inc. v. ACE Am. Ins. Co., 880 F.3d 64, 69 (2d Cir. 2018) (quoting Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., 12 N.Y.3d 302, 307 (2009)). "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced" and "are to be accorded a strict and narrow construction." Id.

[3] Under the New York direct action statute, the plaintiffs "have no greater rights than [Varvatos] to recover under the policy" that Ironshore issued to Varvatos. Knox I, 2021 WL 256948, at *2 (quoting D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 665 (1990)).

[4] While the plaintiffs raise choice of law issues with respect to certain other issues presented by the parties' cross-motions, the parties do not dispute that New York law applies to the issue of whether the Prior Acts Exclusion bars coverage for the Judgment. "Under New York choice-of-law rules, where the parties agree that a certain jurisdiction's law controls, this is sufficient to establish choice of law." Alphonse Hotel Corp. v. Tran, 828 F.3d 146, 152 (2d Cir. 2016) (citation omitted).

Thus, when an insurer moves to dismiss a coverage action on the grounds that a policy exclusion applies, the motion to dismiss must be denied "unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation." Dormitory Auth. v. RLI Ins. Co., 143 N.Y.S.3d 31, 33 (1st Dep't. 2021) (citation omitted).

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007) (citation omitted). In determining an insurance contract's plain meaning, a court must interpret the contract "according to common speech and consistent with the reasonable expectations of the average insured." Cragg v. Allstate Indem. Corp., 17 N.Y.3d 118, 122 (2011). Even if a term is potentially ambiguous, "established state law," "terms and concepts that are firmly rooted in federal law," or "widespread custom or usage" may allow for "determin[ation of] the meaning of a potentially vague term." Hugo Boss Fashions, Inc. v. Federal Ins. Co., 252 F.3d 608, 617-18 (2d Cir. 2001). Any ambiguities are to be

construed against the insurer. Dormitory Auth., 143 N.Y.S.3d at 33.

In this case, Ironshore has argued that the Prior Acts Exclusion unambiguously excludes coverage for the Judgment because Varvatos adopted its discriminatory clothing allowance policy as early as 2005, and the Prior Acts Exclusion precludes coverage for "Wrongful Acts" occurring before April 30, 2012 and "Related Wrongful Acts" that occur after April 30, 2012 but "are the same, related, . . . continuous, . . . [or] arise from a common nucleus of facts" as those occurring before April 30, 2012. Ironshore is correct. Varvatos adopted its discriminatory clothing allowance policy before April 30, 2012 and maintained it after that date. The harms that the plaintiffs suffered arose from the same policy both before and after April 30, 2012. And the underlying nucleus of facts that gave rise to the plaintiffs' causes of action against Varvatos existed both before that date and after that date. Under this broadly worded Prior Acts Exclusion, coverage is therefore excluded.

In response, the plaintiffs argue that the definition of "Related Wrongful Acts" is unclear, making the exclusion ambiguous. Not so: the policy defines the term as acts that are the "same," "related," "continuous," or "aris[ing] from a common

nucleus of facts." While this language is broad, these terms are widely used in a variety of legal contexts, and courts are regularly called upon to interpret and apply similar language. See, e.g., Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 140 S. Ct. 1589, 1595 (2020) (setting forth a test for the applicability of res judicata that requires courts to determine whether lawsuits "arise from the same transaction" or "involve a common nucleus of operative facts"); United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (federal courts have supplemental jurisdiction over state claims when state and federal claims have "a common nucleus of operative fact"). Beyond ipse dixit, the plaintiffs do not provide any reason to conclude that this ubiquitous legal language, assuredly familiar to the commercial actors who are the parties to the insurance policy at issue in this case, is ambiguous.[5]

The plaintiffs also suggest that the Prior Acts Exclusion does not bar coverage for the Judgment because the nature of Varvatos' wrongful acts changed when Varvatos began to offer female sales employees the Allsaints discount in lieu of a clothing allowance. While it may be so that the implementation

[5] Other courts in this District have found similarly worded exclusion provisions to be unambiguous. See, e.g., Nomura Holding America, Inc. v. Federal Ins. Co., 45 F.Supp.3d 354, 365 (S.D.N.Y. 2014).

of Varvatos' discriminatory clothing allowance policy changed somewhat over the period that it maintained a discriminatory policy, the policy's definition of "Related Wrongful Acts" does not bar coverage for the insured's wrongful acts only when they are entirely consistent or repeated identically over a given period. Rather, the express language of the provision defines "Related Wrongful Acts" not only as those that are the "same" or "continuous," but also those that are "related" or arise from a "common nucleus of facts." It is indisputable that Varvatos' earlier policy of denying a clothing allowance to its female employees is "related" to or arises from a "common nucleus of facts" as its subsequent policy of denying a clothing allowance to its female employees while offering them a discount for personal purchases at another store.

The plaintiffs also argue that the Prior Acts Exclusion is ambiguous because the plaintiffs incurred a loss not all at once, but instead incurred losses quarterly each time male employees were given an allowance that they were not, and many of those losses occurred after April 30, 2012. This argument misses the mark. The relevant question is not when the plaintiffs occurred loss, but rather when Varvatos incurred loss, because Varvatos is the insured. Varvatos incurred a loss after the Judgment was entered. And for the reasons set forth

above, Varvatos' loss as a result of the Judgment imposed in 2021 is unambiguously "related" to and arises from a "common nucleus of facts" as the discriminatory policy it implemented in 2005.

Moreover, while the plaintiffs now argue that it is ambiguous whether Varvatos' wrongful act of denying the clothing allowance to its female employees while offering the Allsaints discount is related to its earlier wrongful act of denying the clothing allowance without offering an alternative discount because, inter alia, of uncertainty regarding the value of the Allsaints discount, this current litigation position represents a change in position from the position that the plaintiffs took at trial in the Underlying Action. At that trial, Varvatos invoked as a defense the value of the Allsaints discount, and the plaintiffs argued to the jury that the Allsaints discount was worthless. Given that the plaintiffs prevailed at trial in part because they convinced the jury that the Allsaints discount lacked value, they are now judicially estopped from claiming that the Allsaints discount had value as a means of circumventing the Prior Acts Exclusion. Judicial estoppel prohibits the plaintiffs from, having "assum[ed] a certain position in a legal proceeding, and succeed[ed] in maintaining that position," assuming "a contrary position" because their

"interests have changed." Ashmore v. CGI Group, Inc., 923 F.3d 260, 272 (2d Cir. 2019) (quoting New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001)).

Conclusion

Because the Prior Acts Exclusion means that the conduct underlying the Judgment is not covered by the insurance policy that Ironshore issued to Varvatos, Ironshore's motion to dismiss is granted. The plaintiffs' motions for partial summary judgment and for class certification are denied as moot. The Clerk of Court shall enter judgment for Ironshore and close this case.

Dated: New York, New York
December 10, 2021

DENISE COTE
United States District Judge