SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice **PART** 19

Index Number : 102485/2008
INSURANCE CORP., OF NEW YORK
vs
SMITH, MAZURE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

motion and ~~cross-motion~~ are decided in accordance with accompanying memorandum decision.

RECEIVED

JAN 24 2013

[illegible] COURT OFFICE
[illegible] SUPREME COURT - CIVIL

FILED

JAN 24 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/23/13

_____, J.S.C.
SALIANN SCARPULLA

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

THE INSURANCE CORPORATION OF NEW YORK,

Plaintiff,

-against-

SMITH, MAZURE, DIRECTOR, WILKENS, YOUNG & YAGERMAN, P.C.,

Defendant.

----------X

Index No. 102485/08
Submission Date: 9/12/12

DECISION AND ORDER

For Plaintiff:
McKeegan and Shearer, P.C.
192 Lexington Avenue
New York, NY 10016

For Defendant:
Lewis, Brisbois, Bisgaard & Smith, LLP
77 Water Street, Suite 2100
New York, NY 10005

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Support 2
Mem of Law 3
Aff in Opp 4
Reply Aff 5
Reply Mem of Law 6

HON. SALIANN SCARPULLA, J.:

Defendant Smith, Mazure, Director, Wilkens, Young & Yagerman, P.C. ("Smith Mazure") moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint in its entirety.

In this legal malpractice action, plaintiff The Insurance Corporation of New York ("Inscorp") alleges that, while representing Inscorp, Joel Simon, Esq. ("Simon"), a member of Smith Mazure, negligently rendered legal advice regarding insurance coverage

during telephone conversations in late 2004 and early 2005. Inscorp alleges that Simon negligently counseled Michael Weiss ("Weiss"), a claims adjuster employed by Inscorp's third-party administrator, Ward North America ("Ward"), that Inscorp was contractually obligated to provide a defense and indemnification to West Perry, LLC ("West Perry") and G.B. Construction, LLC ("G.B. Construction") in an underlying Labor Law action. *See Soto v. West Perry, LLC, West Perry Garage LLC, West Perry Corp., Armtech Corp., Armtech Demolition Corp., G.B. Constr., LLC, Urban Found./Eng'g, LLC & Gotham Constr. Co.*, (Sup. Ct. N.Y. Co., Index No. 114283/2001) (the "*Soto* action").

Specifically, Inscorp alleges that Simon improperly advised Weiss that West Perry, the construction site owner, was an additional insured under an Inscorp general liability policy issued to G.B. Construction, a subcontractor at the site, and that the Inscorp late disclaimers of coverage issued by Ward were improper and untimely, and therefore, invalid. Inscorp alleges that the disclaimers were enforceable on the grounds that West Perry was not an additional insured under the Inscorp policy, and that neither G.B. Construction nor West Perry had satisfied the policy's notice of claim requirements.

Inscorp also alleges that Simon negligently failed to disclose to Weiss that United National Insurance Group ("UNG") had retained Smith Mazure to secure additional coverage for West Perry under the Inscorp policy, following Inscorp's failure to respond to UNG's October 15, 2004 tender of West Perry's defense and indemnity. Inscorp further

alleges that UNG's retention of Smith Mazure created a conflict of interest, inasmuch as Smith Mazure had represented UNG and its insureds over a period of years.

On February 8, 2005, Inscorp rescinded the disclaimer of West Perry's coverage, and, by separate letter dated February 8, 2005, retained Smith Mazure to represent West Perry in the *Soto* action. By letter dated March 24, 2005, Inscorp retained Smith Mazure to represent G.B. Construction in that action.

Inscorp alleges that, based on Smith Mazure's negligent legal advice, it rescinded its valid disclaimers to West Perry and G.B. Construction, and expended approximately $73,000 in legal fees in defending G.B. Construction and West Perry, and $490,000 in settling the *Soto* action on behalf of both companies.

In the answer, Smith Mazure denies all allegations of wrongdoing. In this motion, Smith Mazure alleges that, at the time that the alleged misconduct occurred, it had not been retained by Inscorp or Ward to render an insurance coverage legal opinion for either West Perry or G.B. Construction, and had clearly advised Weiss that it was acting on behalf of UNG when Simon contacted Weiss in 2004 and 2005. Smith Mazure explains that, in November or December 2004, Simon had received a request from Cheryl Mawby ("Mawby"), a UNG senior claims examiner, to commence a declaratory judgment action to compel Inscorp to provide a defense to UNG's insured, West Perry, in the *Soto* action, and Simon had contacted Inscorp to verbally request coverage on behalf of West Perry.

Smith Mazure now moves for summary judgment in its favor on the ground that Inscorp cannot, as a matter of law, prove the essential elements of a claim of legal malpractice. Specifically, Smith Mazure contends that there is no evidence to support Inscorp's claim that Smith Mazure rendered any coverage advice regarding G.B. Construction; that Inscorp cannot demonstrate any acts or omissions by Smith Mazure that were a proximate cause of its alleged damages inasmuch as the disclaimers were unenforceable and invalid, as a matter of law; that Inscorp cannot establish that it suffered actual and ascertainable damages as a result of Smith Mazure's alleged acts or omissions; and that the undisputed evidence conclusively demonstrates that no relevant attorney-client relationship existed between Inscorp and Smith Mazure, inasmuch as the Inscorp retainer letters issued by Ward were sent to Smith Mazure several weeks after the alleged improper acts occurred, and, at the time that the advice was allegedly given, Smith Mazure was representing UNG, and had never been retained by Inscorp to provide a coverage opinion regarding West Perry or G.B. Construction.

In opposition, Inscorp contends that numerous genuine triable issues of fact exist, including whether an attorney-client relationship existed between Smith Mazure and Inscorp at the time that the alleged negligence occurred. Inscorp also contends that triable issues exist regarding whether Simon advised Weiss to pick up coverage for G.B. Construction, as well as West Perry.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Where genuine triable issues of material fact or triable issues requiring credibility determinations exist, summary judgment is not appropriate. *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974); *see* CPLR 3212. To prevail on a legal malpractice claim,

> a plaintiff must prove that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community. In addition, the plaintiff must establish that the attorney's negligence was a proximate cause of the loss sustained, that the plaintiff incurred actual damages as a direct result of the attorney's actions or inaction, and that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action or would not have sustained any damages.

Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins, 286 A.D.2d 314, 315-316 (2d Dept 2001) (internal citations omitted). A plaintiff's failure to establish any one of these elements is fatal to the claim, and warrants dismissal. *See J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 14 A.D.3d 482, 483 (2d Dept 2005).

> An attorney-client relationship arises . . . when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. Formality is not essential to create a legal services contract. Therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed

Talansky v. Schulman, 2 A.D.3d 355, 358 (1st Dept 2003) (internal quotation marks and citations omitted).

An attorney's simultaneous representation of two adverse parties in a matter, or the failure to disclose such a conflict, may form the basis of a valid claim for legal malpractice. *See Hearst v. Hearst*, 50 A.D.3d 959, 963 (2d Dept 2008). In determining whether such an attorney-client relationship exists, the court may consider the following factors, among others: whether the parties entered into a fee arrangement; whether a written retainer agreement or other contract exists; whether there was an informal relationship in which the attorney performed legal services gratuitously; whether the attorney actually represented the purported client in an aspect of the matter; whether the attorney excluded the purported client from some aspect of the litigation to protect another client's interests; and whether the purported client reasonably believed that the attorney represented him or her. *Catizone v. Wolff*, 71 F. Supp. 2d 365, 368 (S.D.N.Y. 1999) (applying New York law).

Here, the record consists primarily of deposition testimony and affidavits by Weiss and Simon, which establish triable issues of fact regarding whether an attorney-client relationship regarding coverage issues existed between Inscorp and Smith Mazure at the

time Weiss and Simon spoke in 2004 and 2005. *See Terio v. Spodek*, 63 A.D.3d 719, 721 (2d Dept 2009).

By letter dated December 1, 2004, Smith Mazure thanked UNG for retaining it in connection with the *Soto* action, demonstrating that Smith Mazure had been retained by UNG. However, Weiss testified at his deposition that he recalled verbally retaining Simon to provide an answer regarding coverage for West Perry in the *Soto* action. In his claims handling notes prepared contemporaneously with his conversations with Simon, Weiss noted that Simon had contacted him as "a courtesy" regarding Inscorp's late notice disclaimer, that UNG had wanted to retain Smith Mazure to obtain coverage for West Perry in the *Soto* action, but that Simon would not accept the assignment because he does defense work for Inscorp. Weiss also noted that Simon "advised" him to send a disclaimer directly to UNG, and that he followed Simon's advice.

On February 8, 2005, Weiss noted that he had conferred with "our defense counsel Joel Simon" regarding the disclaimer, and that Simon had "reviewed the file and the disclaimer will not hold up. Therefore[,] it is in our best interests to defend West Perry[,] the named additional insured[,] under G[.]B[.] Construction[']s policy as per contractual agreement. Joel is doing further research and will be getting back to me." This evidence may be held to demonstrate that Weiss retained Smith Mazure to render a coverage opinion, and received such an opinion, albeit verbally, and creates an issue of fact as to whether Simon either affirmatively led Weiss to believe that he was acting as his attorney

or knowingly allowed him to proceed under that misconception. *See Moran v. Hurst*, 32 A.D.3d 909, 911 (2d Dept 2006).

On the other hand, Simon attests that he very clearly advised Weiss that he was calling on behalf of UNG regarding Inscorp's disclaimer coverage of West Perry in the *Soto* action, and that he never discussed with Weiss the merits of West Perry's standing as an additional insured under the Inscorp policy issued to G.B. Construction, but only discussed Inscorp's failure timely and adequately to disclaim coverage to West Perry. Simon also attests that in none of his conversations with Weiss did he address Inscorp's coverage position with respect to G.B. Construction.

Another relevant factor that may be considered is whether the attorney had represented the client prior to and during the matter at issue. *McLenithan v. McLenithan*, 273 A.D.2d 757, 759 (3d Dept 2000). Smith Mazure admittedly had a prior business relationship with Inscorp, and performed legal work for Inscorp during the relevant period, representing Inscorp or its insureds on more than five cases in 2004 and 2005.

Contrary to Smith Mazure's contention, the lack of a written retainer agreement for a coverage opinion does not conclusively demonstrate that no attorney-client relationship existed, particularly where, as here, such a relationship previously existed between the parties. *See Terio,* 63 A.D.3d at 721; *Moran,* 32 A.D.3d at 911. Weiss testified that Inscorp and Ward would not disclaim coverage without a legal opinion, and that Ward's

coverage counsel often rendered opinions without retainer agreements and would, on occasion, provide verbal and gratuitous coverage opinions.

Similarly, Smith Mazure's failure to bill Inscorp for a coverage opinion is not dispositive, given that Smith Mazure also failed to bill UNG for Simon's conversation with Weiss on December 30, 2004, although Smith Mazure contends that it was representing UNG on that date. It is well settled that an attorney owes his continuous clients a fiduciary duty, even in matters for which the attorney is not specifically retained, and that the breach of this duty can also constitute attorney malpractice. *See Cavaliere v. Plaza Apts., Inc.*, 84 A.D.3d 712, 713-714 (2d Dept 2011). The parties here have raised triable issues regarding whether Smith Mazure simultaneously represented Inscorp and UNG, expressly disclosed its representation of UNG, and if so, whether Smith Mazure obtained Inscorp's consent to the simultaneous representation. *Tabner v. Drake*, 9 A.D.3d 606, 610 (3d Dept 2004).

Contrary to Smith Mazure's contention that Inscorp did not retain Smith Mazure to represent West Perry until after the alleged legal advice was given, Weiss' statement that he would consider extending coverage and accepting the tender, if UNG waived its right to recover the attorneys' fees already expended, is not dispositive. It is not clear from the record whether Weiss believed that he was negotiating with counsel for an adversary, or instructing Inscorp's counsel regarding negotiations with the adversary.

Next, and assuming without deciding that an attorney-client relationship existed and that Smith Mazure did render legal advice to Inscorp, the parties dispute whether that advice was a proximate cause of Inscorp's alleged damages. "The failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent." *Theresa Striano Revocable Trust v. Blancato*, 71 A.D.3d 1122, 1124 (2d Dept 2010) (internal quotation marks and citation omitted); *Reibman v. Senie*, 302 A.D.2d 290, 291 (1st Dept 2003) (same). Here, the record demonstrates that triable issues exist regarding whether Weiss rescinded the November 5, 2004 disclaimer sent to G.B. Construction in reliance on advice provided by Simon. Weiss' claims handling notes, discussed above, indicate that Simon advised Weiss regarding the enforceability of disclaimers of the *Soto* action claim, without particularizing whether they discussed these issues with respect to G.B. Construction or West Perry, or both.

Inscorp's November 5, 2004 late notice of claim disclaimer appears enforceable against G.B. Construction, as Smith Mazure recognized. In his December 30, 2004 opinion letter to UNG, Simon stated that the disclaimer letter appeared appropriate. A notice of disclaimer must promptly advise a claimant with a high degree of specificity of the ground on which the disclaimer is predicated. *See General Acc. Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864 (1979). "Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully." *Id.* Here, in the November 5, 2004 disclaimer letter addressed to G.B. Construction, Ward, on behalf

of Inscorp, advised that, inasmuch as G.B. Construction received notice of the *Soto* action in August 2001, yet failed to notify Inscorp until 2004, it had failed to notify Inscorp as soon as practicable, and therefore, coverage was denied. An insured's failure to give an insurer timely notice provides a complete defense to coverage. *See Paramount Ins. Co. v. Rosedale Gardens*, 293 A.D.2d 235, 239 (1st Dept 2002).

While G.B. Construction was not named in the original *Soto* action complaint, the allegations in that complaint were sufficient to put that company on notice that a claim may be alleged against it. G.B. Construction was required by the express terms of the policy to "see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Similar language has been interpreted to require the insured to notify the carrier "when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement." *Paramount Ins. Co.*, 293 A.D.2d at 239-240. Moreover, the November 5, 2004 disclaimer was issued within 30 days of G.B. Construction's tender of its defense to Inscorp by UNG letter dated October 6, 2004, and, is therefore, timely.

Accordingly, Simon's alleged advice to Weiss to provide coverage for G.B. Construction, rendered in the face of a valid disclaimer, may form the basis of a legal malpractice claim.

Although the parties argue whether the Inscorp letters of disclaimer are effective as against West Perry, that issue is not relevant to this determination. The Inscorp policy

does not list West Perry as an additional insured. Although the West Perry-G.B. Construction subcontract requires G.B. Construction to obtain a policy covering West Perry, Inscorp is not legally required to provide coverage for West Perry, nor is it required to disclaim coverage. "A disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy." *Markevics v. Liberty Mut. Ins. Co.*, 97 N.Y.2d 646, 648 (2001).

Lastly, the parties dispute whether Inscorp sustained actual and ascertainable damages as a result of it rescission of its letters of disclaimer. "[A]ctual damages are an essential element of a negligence action." *IGEN, Inc. v. White*, 250 A.D.2d 463, 465 (1st Dept 1998). Speculative or conclusory damages claims are insufficient to form a basis for a claim of legal malpractice. *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 A.D.2d 63, 67 (1st Dept 2002). Inscorp alleges that it was caused to incur $563,173.13 in defending and settling the underlying *Soto* action on behalf of G.B. Construction and West Perry directly as a result of Simon's allegedly negligent coverage advice to Weiss. These damages are sufficiently actual and ascertainable to sustain a cause of action for legal malpractice.

Accordingly, Smith Mazure's motion for summary judgment is denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by Smith, Mazure, Director, Wilkens, Young & Yagerman, P.C. , is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 23, 2013

ENTER:

Saliann Scarpulla, J.S.C.