SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. **PART** 46

Index Number : 113510/2011
AMERICAN GUARANTEE
vs
MARK E. COHEN, ESQ.
Sequence Number : 002
DEFAULT JUDGMENT

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

The following papers, numbered 1 to 6 **, were read on this motion to/for** summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1-4
Answering Affidavits — Exhibits	**No(s).** 5
Replying Affidavits	**No(s).** 6

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court denies plaintiff's motion for summary judgment, grants the cross-motion for summary judgment by all defendants except Cohen in part, and denies the cross-motion in part, pursuant to the accompanying decision. C.P.L.R. §§ 3001, 3212(b) and (e). Plaintiff withdraws its motion for a default judgment against defendant Cohen.

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

Dated: 12/19/13

Lucy Billings, J.S.C.
LUCY BILLINGS

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 46
----------X

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Index No. 113510/2009

Plaintiff

- against -

DECISION AND ORDER

MARK E. COHEN, ESQ., URIEL MOND, TOBY PAPIR, JOSHUA MALLIN, JOEL ROTHMAN, MARTIN ROTHMAN, BERNARD SAND, JULIUS SAND, KAREN SAND, YEKUTIEL SHALEV, SHEMON SINGER, and JOSEPH WILLIG,

Defendants

----------X

I. BACKGROUND

Plaintiff issued to its insured, defendant Cohen, an attorney practicing in New York, a professional liability insurance policy covering December 1, 2008, to December 1, 2009. Plaintiff has been defending and continues to defend Cohen in an underlying action for legal malpractice since January 2009. Plaintiff commenced this action seeking a declaratory judgment that plaintiff is not obligated to defend or indemnify Cohen in that action and seeking reimbursement of expenses for the defense already provided. The 11 plaintiffs in the underlying action intervened as defendants in this declaratory judgment action.

Intervening defendants sued defendant Cohen in the underlying action claiming legal malpractice based on his failure to undertake due diligence to obtain adequate security for their investments. The investors, who include the intervening defendants and Cohen, pooled funds together to invest in a real

estate venture. The investors sent their funds to Cohen, which he maintained in his interest on lawyer account (IOLA), N.Y. Jud. § 497(1), and from which Cohen issued loans to a real estate investment fund managed by a nonparty. The real estate fund proved to be a Ponzi scheme that deprived defendants of any recovery of their investment, which was unsecured by any collateral.

Intervening defendants maintain that Cohen served as their attorney for the investment and represented that he would obtain collateral for the loans to secure against any potential loss. Defendant Cohen insists that he served only as an escrow agent for the investment pool, was not responsible for securing defendants' investment to guard against a potential loss, and therefore is not liable for any legal malpractice.

II. THE PARTIES' MOTIONS

Plaintiff now moves for summary judgment declaring that plaintiff is not obligated to defend and indemnify Cohen because he (1) violated a condition of coverage by failing to provide notice of a potential claim and (2) materially misrepresented facts in his professional liability insurance renewal application. C.P.L.R. §§ 3001, 3212(b). If granted this relief, plaintiff seeks an award of damages in the amount of plaintiff's expenses for the defense already provided. Plaintiff also seeks summary judgment dismissing intervening defendants' counterclaim. Plaintiff has withdrawn its motion for a default judgment against defendant Cohen.

As a condition to coverage, the policy requires Cohen to notify the insurer immediately if he has reason to expect that a claim may be made against him for professional malpractice. Plaintiff maintains that Cohen was obligated to notify it of potential claims relating to the lost investments in February 2006, when he realized the investments were a total loss. Instead, Cohen advised plaintiff of the claim against him only after he was served with the summons and notice of the underlying action in December 2008.

Plaintiff further maintains that Cohen's failure to disclose the underlying failed investment in his renewal application November 19, 2008, for the 2008-2009 policy year constitutes a material omission in violation of the policy's condition requiring the insured to provide accurate statements in the renewal application. Specifically, plaintiff insists that Cohen's involvement in a failed investment constituted conduct that might result in a claim against Cohen under the policy, triggering his duty to make that disclosure in his renewal application.

Intervening defendants cross-move for summary judgment dismissing plaintiff's complaint and for summary judgment on their counterclaim. C.P.L.R. § 3212(b). The counterclaim alleges that plaintiff failed to disclaim coverage timely and thus waived any disclaimer or denial of coverage based on Cohen's late notice of a claim against him. Intervening defendants also seek a declaratory judgment declaring the parties' rights and

obligations in defendants' favor, as is permitted in a declaratory judgment action. C.P.L.R. § 3001; 200 Genesee St. Corp. v. City of Utica, 6 N.Y.3d 761, 762 (2006); Savik, Murray & Aurora Constr. Mgt. Co., LLC v. ITT Hartford Ins. Group, 86 A.D.3d 490, 494 (1st Dep't 2011). Specifically, intervening defendants seek a declaratory judgment that plaintiff may not disclaim or deny coverage on the basis of a material misrepresentation because Cohen had no reason to report the underlying claims against him when he renewed his policy.

III. APPLICABLE STANDARDS

Plaintiff and intervening defendants, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if the moving parties satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If the moving parties fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. JMD Holding Corp. v. Congress

Fin. Corp, 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d 507, 508 (1st Dep't 2012); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352, 352 (1st Dep't 2006). See Roman v. Hudson Tel. Assoc., 15 A.D.3d 227, 228 (1st Dep't 2005). If upon the moving parties prima facie showing, however, the opposition fails to establish material factual issues, the court must grant summary judgment. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Morales v. D & A Food Serv., 10 N.Y.3d at 913; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d at 508. In evaluating the evidence for purposes of the moving parties' motions, the court construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

IV. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT.

A. Cohen's Reasonable Belief of Nonliability for Legal Malpractice

Plaintiff relies on Cohen's use of his IOLA for the investment to establish that he was acting as an attorney for intervening defendants, triggering his duty to notify plaintiff of the potential legal malpractice claims against him when he learned the investment failed in February 2006. Plaintiff presents no evidence of a retainer agreement establishing an attorney-client relationship between Cohen and intervening defendants.

Cohen in his deposition testimony, on the other hand, denies any attorney-client relationship with intervening defendants and maintains that his role was limited to a co-investor and escrow agent and that he never even undertook any responsibility to collateralize the investments. Aff. of Thomas E. Gallagher Ex. C, at 27, 65, 144-45. He further testified that, had he had any basis believe a malpractice claim against him potentially would arise from his involvement with the investment, he would have disclosed the potential claim to plaintiff when he renewed his policy. Id. at 166. Cohen's deposition testimony, even had plaintiff presented contrary evidence, raises a material factual issue that his belief in the absence of a potential claim by his co-investors for legal malpractice, as distinct from any other negligence or other culpable conduct, causing the lost investment, was reasonable under the circumstances. Great Canal Realty Corp. v. Seneca Ins. Co., Ins., 5 N.Y.3d 742, 743-44 (2005); Savik, Murray & Aurora Const. Mgt. Co., LLC v. ITT Hartford Ins. Group, 86 A.D.3d 490, 492 (1st Dep't 2011). See Wilson v. Quaranta, 18 A.D.3d 324, 325 (1st Dep't 2005).

The underlying claims against Cohen are predicated on his alleged failure to secure adequate collateral for the investments. Any misconduct in using his IOLA as the escrow account caused no harm to intervening defendants and therefore may not reasonably be expected to form a basis for a legal malpractice claim against Cohen. In fact intervening defendants do not claim any culpable conduct by Cohen in using his IOLA as

the escrow account.

Plaintiff has demonstrated neither an attorney-client relationship, nor any factors vitiating Cohen's reasonable belief of nonliability for legal malpractice, such that it was unreasonable not to have been aware of such a potential claim from his involvement in the investment before he received the summons in the underlying action. See Property & Cas. Ins. Co. of Hartford v. Levitsky, 110 A.D.3d 503 (1st Dep't 2013); Wilson v. Quaranta, 18 A.D.3d at 325. Since plaintiff thus fails to establish, as a matter of law, that Cohen unreasonably delayed in notifying plaintiff of the claims against him, plaintiff is not entitled to summary judgment awarding declaratory relief on this ground.

B. Plaintiff's Failure to Demonstrate Materiality

To establish materiality of a misrepresentation as a matter of law, plaintiff must present evidence, such as an affidavit from one of plaintiff's underwriters and corroborating documentary evidence of its underwriting policies, that plaintiff would not have issued the renewed policy if Cohen had disclosed the omitted information in his application. N.Y. Ins. Law 3105(b)(1); Arch Specialty Ins. Co. v. Kam Cheung Constr., Inc., 104 A.D.3d 599, 599 (1st Dep't 2013); Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co, 61 A.D.3d 412, 414 (1st Dep't 2009); Kroski v. Long Is. Sav. Bank FSB, 261 A.D.2d 136, 136 (1st Dep't 1999). The conclusory affidavit by plaintiff's Assistant Vice President of its Programs Business Unit, that she would have declined a

renewed policy to Cohen had he disclosed the circumstances of the failed investment made through his IOLA, falls short of the showing necessary to establish that Cohen made a material misrepresentation as a matter of law. Aff. of Sharon Burns ¶¶ 3-4.

First, the affidavit fails to establish that the affiant Sharon Burns is an underwriter for plaintiff or any basis for her personal knowledge of plaintiff's underwriting policies or practices. Id. ¶ 1. See Rodriguez v. Board of Educ. of City of N. Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Beloff v. Gerges, 80 A.D.3d 460, 460-61 (1st Dep't 2011); Figueroa v. Luna, 281 A.D.2d 204, 205 (1st Dep't 2001). Although Burns claims to rely on underwriting guidelines to support her conclusion, Burns Aff. ¶ 5, plaintiff's underlying guidelines' definition of "claims" does not include claims arising from the insured's investments unrelated to his professional capacity as an attorney. Id. Ex. A, at 11. Although "claims" do include "pending disciplinary matters" and "disciplinary matters where a decision . . . was rendered," none of plaintiff's conduct at issue in the underlying action falls into either category. Id.

Plaintiff provides no evidence of an underwriting policy or practice of denying coverage to similarly situated insureds based on potential liability for failed investments made through an IOLA. Sirius American Ins. Co. v. Burlington Ins. Co., 81 A.D.3d 562, 563 (1st Dep't 2011); Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co, 61 A.D.3d at 414; Bleecker St. Health & Beauty Aids,

Inc. v. Granite State Ins. Co., 38 A.D.3d 231, 232 (1st Dep't 2007). Even if Burns possesses personal knowledge of such an underwriting policy or practice by plaintiff, absent any corroboration by plaintiff's underwriting guidelines or comparable documentary evidence, her insistence that she would have declined to renew Cohen's professional liability policy is but a conclusory subjective predilection. Without the necessary substantiation by an objective standard, such speculation does not establish the materiality of the claimed misrepresentation by Cohen and entitle plaintiff to disclaim or deny coverage as a matter of law. See Arch Specialty Ins. Co. v. Kam Cheung Constr., Inc., 104 A.D.3d at 599; Sirius American Ins. Co. v. Burlington Ins. Co., 81 A.D.3d at 563; Bleecker St. Health & Beauty Aids, Inc. v. Granite State Ins. Co., 38 A.D.3d at 232.

V. INTERVENING DEFENDANTS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT.

To obtain summary judgment declaring that plaintiff is obligated to defend and indemnify Cohen in intervening defendants' underlying legal malpractice action, intervening defendants may not rely solely on plaintiff's failure to establish, as a matter of law, the unreasonableness of Cohen's belief in his nonliability for legal malpractice. Coastal Sheet Metal Corp. v. Martin Assoc., Inc., 63 A.D.3d 617, 618 (1st Dep't 2009); Bryan v. 250 Church Assoc., LLC, 60 A.D.3d 578, 578 (1st Dep't 2009) Greenidge v. HRH Constr. Corp., 279 A.D.2d 400, 401-402 (1st Dep't 2001). Regarding intervening defendants' first ground for summary judgment, as discussed below, Cohen's

reasonable belief in nonliability would not establish that plaintiff waived its late notice defense to coverage in any event. Regarding intervening defendants' second ground for summary judgment, even if intervening defendants establish Cohen's reasonable belief in nonliability, plaintiff still may raise a factual issue as to the credibility of that belief that may not be determined via summary judgment. See Aff. of Daniel Hirschel ¶ 42; Tower Ins. Co. of N.Y. Lin Hsin Long Co., 50 A.D.3d 305, 307 (1st Dep't 2008); SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D.2d 583, 584 (1st Dep't 1998).

A. Intervening Defendants' Failure to Demonstrate Plaintiff's Waiver of Its Late Notice Defense to Coverage

To demonstrate that plaintiff waived its late notice defense to coverage, intervening defendants rely on the following undisputed sequence of events. On December 4, 2008, plaintiff received notice from Cohen of intervening defendants' legal malpractice claim against him. Not until plaintiff commenced this action in December 2011, did plaintiff first notify Cohen that it disclaimed or denied an obligation to provide coverage to Cohen for intervening defendants' malpractice claim. Even in extensive correspondence from plaintiff to Cohen dated July 16, 2009, reserving its rights to raise coverage defenses, plaintiff failed to identify Cohen's late notice as a potential coverage defense.

To establish that plaintiff, by not raising its late notice defense sooner, waived the defense as a matter of law, however,

intervening defendants must demonstrate further that plaintiff's delay in notifying Cohen of its late notice defense was unreasonable. Since the underlying action is not for death or bodily injury, the statutory requirement for "written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage" is inapplicable. N.Y. Ins. Law § 3420(d)(2). See Penn Millers Ins. Co. v. C.W. Cold Storage, Inc., 103 A.D.3d 1132, 1134 (1st Dep't 2013). Plaintiff insurer nonetheless may be equitably estopped from disclaiming coverage, if plaintiff's insured, Cohen, relied on the coverage to his detriment and was prejudiced by the insurer's delay in disclaiming coverage. 206-208 Main St. Assoc., Inc. v. Arch Ins. Co., 106 A.D.3d 403, 406 (1st Dep't 2013); Liberty Ins. Underwriters, Inc. v. Arch Ins. Co., 61 A.D.3d 482, 482 (1st Dep't 2009); Penn Millers Ins. Co. v. C.W. Cold Stor., Inc., 103 A.D.3d at 1134.

Intervening defendants claim that plaintiff is estopped from disclaiming coverage due to plaintiff's control of Cohen's defense in the underlying action since its commencement. For equitable estoppel to apply so as to bar plaintiff's disclaimer, however, defendants must demonstrate that Cohen actually suffered prejudice from plaintiff's control of his defense or plaintiff's other actions. Yoda, LLC v. National Union Fire Ins. Co. of Pittsburgh, Pa., 88 A.D.3d 506, 508-509 (1st Dep't 2011). See Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d 32, 39 (1st Dep't 2006). If plaintiff's control of Cohen's defense has progressed to the point that the course of

the litigation and strategy of the defense may not be altered as Cohen may seek, then his prejudice may be established. 206-208 Main St. Assoc., Inc. v. Arch Ins. Co., 106 A.D.3d at 406-407; Yoda, LLC v. National Union Fire Ins. Co. of Pittsburgh, Pa., 88 A.D.3d at 508. See Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d at 39-40.

Intervening defendants do not show that the underlying action is so close to trial or otherwise has reached a point where the course of the litigation has been fully charted. Nor do they show prejudice by any other reason, such as plaintiff's use against Cohen of confidential information acquired in its defense of the underlying action. 206-208 Main St. Assoc., Inc. v. Arch Ins. Co., 106 A.D.3d at 408; Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d at 39-40. See Penn Millers Ins. Co. v. C.W. Cold Stor., Inc., 103 A.D.3d at 1134-35. Since intervening defendants thus fail to meet their burden by demonstrating prejudice to Cohen, they are not entitled to summary judgment on plaintiff's waiver of its late notice defense to coverage. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Penn Millers Ins. Co. v. C.W. Cold Stor., Inc., 103 A.D.3d at 1135; Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d at 40-41.

B. Absence of a Material Misrepresentation

Based on Cohen's deposition testimony, intervening defendants do make a prima facie showing of a reasonable basis for Cohen to believe that he was not subject to any legal

malpractice claim by intervening defendants arising from his involvement in their investment. Tower Ins. Co. of N.Y. v. Babylon Fish & Clam, Inc., 83 A.D.3d 547, 548 (1st Dep't 2011); Tower Ins. Co. Of N.Y. v. Lin Hsin Long Co., 50 A.D.3d 305, 307 (1st Dep't 2008); Paramount Ins. Co. v. Rosedale Gardens, 239 A.D.2d 235, 239-40 (1st Dep't 2002). The record discloses no retainer agreement to provide legal representation to intervening defendants. No evidence whatsoever contradicts Cohen's testimony that he was acting as an investor and not in any legal capacity that reasonably would generate a potential legal malpractice claim, so as to require disclosure of the investments in his renewal application.

Nor do plaintiff's conclusory affidavit and the underwriting guidelines plaintiff presents demonstrate that, even if Cohen's belief was not reasonably founded, and he had informed plaintiff of intervening defendants' potential claim, plaintiff would not have renewed his policy. Abreu v. NYLL Mgt. Ltd., 107 A.D.3d 512, 513 (1st Dep't 2013); Sirius American Ins. Co. v. Burlington Ins. Co., 81 A.D.3d at 563. Since plaintiff's own underwriting guidelines do not contemplate a denial of coverage based on an attorney's involvement with other persons pooling their funds in a joint investment and using an IOLA to hold the funds, the failure to disclose such facts does not amount to a material misrepresentation. Arch Specialty Ins. Co. v. Kam Cheung Constr., Inc., 104 A.D.3d at 599; Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co, 61 A.D.3d at 414; Kroski v. Long Is. Sav.

Bank FSB, 261 A.D.2d at 136.

Plaintiff's scant evidence of its underwriting policies and practices fails to rebut intervening defendants' prima facie showing of no material misrepresentation. Levinson v. Mollah, 105 A.D.3d 644, 644 (1st Dep't 2013); Kodsi v. Gee, 100 A.D.3d 437, 437 (1st Dep't 2012). Absent rebuttal evidence raising a factual issue of materiality, intervening defendants are entitled to summary judgment on the nonmateriality of Cohen's omission in his policy renewal application. C.P.L.R. § 3212(b) and (e); Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d at 508. See Arch Specialty Ins. Co. v. Kam Cheung Constr., Inc., 104 A.D.3d at 599; Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co, 61 A.D.3d at 414.

VI. DISPOSITION

For the above reasons, the court denies plaintiff's motion for summary judgment in its entirety. C.P.L.R. §§ 3001, 3212(b). The court grants intervening defendants' cross-motion for summary judgment, insofar as the cross-motion seeks a declaratory judgment that defendant Cohen had no duty to report any potential claim arising from his investment with intervening defendants when he renewed his insurance policy from plaintiff. C.P.L.R. §§ 3001, 3212(b) and (e). The court otherwise denies the cross-motion.

DATED: December 19, 2013

LUCY BILLINGS, J.S.C.