DECISION AND ORDER

FILED & ENTERED
3/17/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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ROCKLAND EXPOSITION, INC.,

Plaintiff,

MOTION DATE: 2/28/14
INDEX NO.: 53809/11

-against-

MARSHALL & STERLING ENTERPRISES, INC., MARSHALL & STERLING FINANCIAL CONSULTANTS, INC., MARSHALL & STERLING PROGRAMS, INC., MARSHALL & STERLING REALTY, INC., MARSHALL & STERLING SERVICES, INC., MARSHALL & STERLING UPSTATE, INC., MARSHALL & STERLING, INC. and GREG TOWNSEND,

Defendants.

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The following papers numbered 1 to 10 were read on this motion by defendants for summary judgment dismissing all claims, etc.

Papers Numbered

Notice of Motion - Affirmation (Renner) - Affidavit (Townsend) - Exhs. (A-P) 1-4
Answering Affirmation (Llorens) - Exhs. (Collectively)[1] - Affidavit (McCarey) -

[1]This Part's published Rules require separately tabbed motion exhibits.

Exhs. (Collectively) 5-8
Replying Affirmation (Renner) - Exh. 9-10

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendants for summary judgment dismissing all claims is disposed of as follows:

Plaintiff Rockland Exposition, Inc. ("REI"), which is engaged in the business of promoting trade shows aimed toward the automotive industry, had a policy of insurance ("Policy") with Great American Insurance Company ("Great American"), in effect for the period of August 31, 2007 through August 31, 2008, to protect REI's business and it expressly provided coverage for "Personal and Advertising Injury" up to one million dollars per occurrence. This Policy also had provided for defense costs, including attorney's fees.

The instant action arises out of an underlying action entitled *Association of Automobile Service Providers of New Jersey v. Rockland Exposition, Inc.* (the "AASP/NJ action"), which originally had been filed in United States District Court, District of New Jersey. The June 26, 2008, filed complaint in the AASP/NJ action alleges that REI, which had contracted with AASP/NJ wherein REI would run the trade show and AASP/NJ would be the sponsor, had infringed on the copyright, trade dress and/or slogan of AASP/NJ in its advertisement by false designation of origin, dilution, unfair competition, trademark violation, tortious interference and misappropriation of confidential business information. REI thereafter had filed its own lawsuit against AASP/NJ in United Stated District Court, Southern District of New York, arising out of the same operative facts as those involved in the AASP/NJ action. On January 5, 2009, the two cases were consolidated in United States District Court, Southern District of New York. It appears that this consolidated action eventually had been settled by the parties' written Settlement Agreement and

Release, resulting in a Stipulation of Discontinuance, dated March 12, 2013.[2]

In June, 2009, REI additionally had brought an action against Great American in the Southern District of New York for breach of contract and for judgment declaring the parties' rights, duties and obligations under the subject Policy with respect to the AASP/NJ litigation. Plaintiff REI had claimed in that litigation that, in accordance with the Policy's requirements, it had afforded Great American timely notice of the AASP/NJ lawsuit, in addition to its having satisfied all applicable conditions precedent to coverage, but that Great American wrongfully had refused to honor its contractual obligations to REI. In 2010, Great American had prevailed on its motion for summary judgment dismissing that action based upon REI's failure to have complied with a condition precedent to Policy coverage and to have provided Great American with timely notice of the AASP/NJ action and its claim. In its Order, dated September 29, 2010, the Federal Southern District Court of New York made certain findings of fact and law, including that AASP/NJ had informed REI of the litigation and faxed it a copy of the complaint on June 27, 2008, that REI's duty to have provided Great American with notice of its claim pertaining to the AASP/NJ litigation had been triggered when it had been faxed a copy of the complaint, that REI's asserted failure to have realized that there would be coverage under the policy "does not excuse the fifty-two days that REI delayed *before* asking its insurance broker about the possibility of coverage," that REI's duty to provide notice and to forward the lawsuit papers to Great American were not excused by REI's belief that it ultimately would not be found liable to

[2]AASP/NJ allegedly had to make payment to REI.

AASP/NJ and that Great American had not waived its late notice defense.[3]

REI then commenced this action against defendants, collectively defendants "M&S." REI maintains that, since 1974, it had used defendants M&S exclusively as its insurance agent to provide REI with insurance in accordance with REI's needs, as determined by M&S. At all times, REI states that, M&S would make the necessary arrangements with the various insurance companies to obtain the insurance polices, that REI always would pay policy premiums to M&S, that M&S would make any rebate payments under policies to REI, that on the few occasions when REI had to make policy claims M&S had handled all of those insurance company dealings and that on no occasion had REI ever dealt directly with the insurance company regarding any policy claims.

According to REI, it had been served on July 11, 2008, with the summons and complaint in the underlying AASP/NJ action. On August 18, 2008, plaintiff alleges that its president, David McCarey, personally had "informed" defendant Greg Townsend, M&S's vice president. Allegedly at no time had Townsend advised REI that it had to give notice of the claim to the carrier, Great American. In September, 2008, REI again had communicated with M&S regarding the AASP/NJ litigation, at which time M&S first requested that REI furnish M&S with a copy of the summons and complaint. The following day, Townsend had visited REI's offices and picked up the copies of the summons and complaint. Thereafter, M&S had communicated with Great American adjusters.

On October 1, 2008, M&S had submitted REI's claim to Great American. In its letter dated October 29, 2009, Great American had advised REI that no coverage to REI exists

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[3]The District Court's Order had been affirmed by the Second Circuit, on November 2, 2011.

with respect to the AASP/NJ litigation because REI had failed to comply with the Policy's notice conditions, the claims against REI did not fall within the ambit of Policy coverage and because the claims against REI were precluded from coverage by various Policy exclusions, including, as specified, the exclusions for trademark infringement, breach of contract and knowing violation exclusions.

REI has commenced the instant litigation against defendants M&S, asserting causes of action for breach of contract and negligence/breach of fiduciary duty,[4] and specifically that M&S had breached its contract with REI and violated its fiduciary duty in failing to give timely notice of REI's Policy claim, which consequently had caused REI to be deprived of the benefit of insurance coverage, and incurring damages of not less than $850,000.00.

Defendants M&S presently are moving for summary judgment dismissing this action. Defendants M&S argue that the Policy contains a standard notice provision requiring REI to notify Great American "as soon as practicable of an 'occurrence' or an offense which may result in a claim," which notice should include to the extent possible how, when and where the occurrence or offense took place, the names and addresses of any injured person and witnesses and the nature and location of any injury of damage arising out of the occurrence or offense. Further, M&S notes that the Policy provides that "If a claim is made or 'suit' is brought against any insured, [the insured] must: (1) Immediately record the specifics of the claim or 'suit' and the date received; and (2) Notify [Great American] as soon and practicable," and the insured "must: (1) Immediately send [Great American] copies of any demands, notices, summonses or legal papers receive in connection with the

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[4]These two theories of liability are jointly stated in REI's second cause of action.

claim or 'suit'."

Defendants M&S submit that, by August 18, 2008, the date REI claims that it had informed M&S of its claim related to the AASP/NJ litigation, 52 days had passed since REI first had received a copy of the summons and complaint and that under the Policy terms it already was too late for REI or M&S to provide timely notice to Great American. Specifically, defendants claim that REI knew or should have known of the likelihood of AASP's bringing the New Jersey action no later than March 27, 2008, at which time REI admitted to its having received a threatening letter from AASP/NJ's counsel advising REI that its "inaccurate misrepresentations" and "misleading and confusing conduct" would result in legal action, and that REI actually had received a faxed copy of the complaint in the AASP/NJ action, on June 27, 2008, but that it inexcusably had waited until August 18, 2008, to advise M&S of its claim, and then further did not provide M&S with a copy of the summons and complaint until September 30, 2008. Since by the August 18, 2008 notification date REI already had breached its contract with Great American, defendants M&S argue that any alleged ensuing breaches by M&S had been academic, and not the proximate cause of REI's damages. Accordingly, it maintains that this complaint properly must be dismissed.

Plaintiff opposes the motion, arguing that New York insurance law holds that "as soon as practicable" policy language is an elastic standard which requires a determination of what was within a reasonable time period in light of the facts and circumstances presenting. REI maintains that its actions herein were reasonable, especially given REI's president and owner's unrefuted averments that, throughout REI's lengthy relationship with M&S, REI never had advised anyone other than M&S of its various other claims under its

insurance policies, that no one at M&S ever had advised him that he had to notify the insurance company directly and that the Policy itself is written in language "that defies a layman's ability to understand it" and he had had a good faith belief of REI's non-liability. REI submits that a triable issue of fact exists as to whether REI's delay had been unreasonable and/or excusable, and whether M&S, by having failed to promptly have advised Great American of REI's claim proximately had caused REI to sustain damages of non-coverage for its underlying defense costs.

Defendants' motion for summary judgment is granted and this action is hereby dismissed. This Court necessarily finds that plaintiff's demonstrated 52-day delay in its notifying defendants that it had been served with a summons and complaint had vitiated coverage herein because notice of the litigation had not been given "as soon as practicable." See American Insurance Co. v. Fairchild Indus., Inc., 56 F.3d 435, 440 (2nd Cir. 2005); Great Canal Realty Corp. v. Seneca Insurance Company, Inc., 5 N.Y.3d 742, 743 (2005); Deso v. London Lancashire Indem. Co. Of America, 3 N.Y.2d 127, 130 (1957); Columbia University Press, Inc. v. Travelers Indem. Co. of America, 89 A.D.3d 667, 668 (2nd Dept. 2011); Tower Ins. of New York v. Amsterdam Apartments, LLC, 82 A.D.3d 465, 466 (1st Dept. 2011); Republic N.Y. Corp. v American Home Assur. Co., 125 A.D.2d 247 (1st Dept. 1986). Accordingly, the failures by defendant M&S, if any, as a matter of law, had not proximately caused REI's damages as a result of the non-coverage. Cf. US Pack Network Corp. v Travelers Prop. Cas., 42 A.D.3d 330 (1st Dept. 2007); Resource Financing, Inc. v. National Cas. Co., 219 A.D.2d 627 (2nd Dept. 1995).

Although plaintiff correctly notes that there exists an exception in the law where the insured has a good faith belief in its non-liability, same is unavailing at bar. Plaintiff

previously unsuccessfully had asserted in its earlier suit against Great American the same excuses now offered, and each excuse had been rejected by the District Court in its well-reasoned, 29-page September 29, 2010, Opinion and Order. Plaintiff, having had a full and fair opportunity to have litigated the same issues within that lawsuit, necessarily is collaterally estopped from asserting those arguments in opposition to M&S's instant motion. See Nachum v. Ezagui, 83 A.D.3d 1017, 1018 (2nd Dept. 2011); Mahler v. Campagna, 60 A.D.3d 1009 (2nd Dept. 2009).[5]

Dated: March 17, 2014
White Plains, New York

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[5]Notably, plaintiff fails to even address this issue of his claims being barred by collateral estoppel.