SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

Beth Neuhaus,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 161793/2013

Nachamie Spizz Cohen Serchuk, P.C. f/k/a
Todtman, Nachamie Spizz & Johns P.C.
Defendant.

Melissa A. Crane, J.S.C.

By this motion, defendants Nachamie Spizz Cohen and Serchuk, f/k/a Todtman, Nachamie, Spizz & Johns P.C. (the defendant law firm) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The underlying facts for the most part are not in dispute.

Defendant law firm carried professional liability insurance with the Chubb Group of Insurance Companies ("Chubb") under policy no. 6802-3096 effective from March 18, 2005 through March 18, 2006 (Complaint, ¶ 5-7). Plaintiff Beth Neuhaus, an attorney, was a contract partner at the defendant law firm from February 28, 1995 through July 29, 2005 (Complaint, ¶¶ 3 and 4). After plaintiff left defendant's employ, she became a defendant in an action entitled *Art Capital Group, LLC, et. al. v. Neuhaus*, Index No. 600245/08 (the Underlying Action) in connection with some of the legal services she rendered while at the defendant law firm.

The Chubb policy had a $100,000 deductible whereby the insured would be liable for the first $100,000 of any claim, including attorney's fees (the "Retention Amount"). The Chubb policy defined "Insured Person" as "any natural person or entity. . .(1) who was, now is or shall become a partner. . . (2) counsel or (3) whose labor or service is engaged by and directed by the Firm to perform Professional Services." It is undisputed that, with respect to the *Art Capital* case, plaintiff was an "Insured Person."

Responsibility for the Retention Amount was that of the Insured Person. However, "in the event that any Insured Person is *unable or unwilling* to bear the retention amount, it shall be the obligation of the firm to bear such retention amount uninsured and at its own risk." (Policy Section IX, emphasis added)

Defendant law firm had the right under the Chubb policy to assume the defense of any claim provided it notified Chubb that it elected to assume the defense within 30 days. Without notice of election, Chubb retained the right and duty to defend the claim. At that point, defendant law firm had the option to consent to the Chubb's choice of defense counsel, but could not unreasonably withhold that consent. If the defendant law firm's withholding of consent was reasonable, then it could select defense counsel from Chubb's list of approved defense firms:

> If the Firm does not notify the Company in writing within thirty (30) days after the Inception Date set forth in ITEM 3(A) of the Declarations that it elects to assume the right and duty to defend all Claims cover by this policy, then the Company [Chubb] shall retain such right and duty and:
> (i) The Firm shall have the option to consent to the Company's choice of defense counsel, which consent shall not be unreasonably withheld, and to participate and assist in the direction of the defense of any Claim. If the Firm reasonably withholds its consent to the Company's choice of defense counsel in connection with the Company's right and duty to defend any Claim covered by this Policy, then the Firm shall have the right to select defense counsel with respect to any such Claim, and will be given the Company's list of approved defense firms.

(Exhibit 1 to Complaint, at p. D 00025-26).

After defendant law firm provided notice of the underlying lawsuit, Chubb retained Barry Jacobs, Esq. of the law firm Abrams, Gorelick, Friedman & Jacobson (Abrams Gorelick) to defend Neuhaus in the Underlying Action. Defendant consented to this arrangement. The Plaintiff, however, discharged the Abrams Gorelick firm and decided to retain the firm of Miller & Wrubel, P.C. to represent her instead. The first retainer agreement, dated June 14, 2008, between plaintiff and Miller & Wrubel, place responsibility for legal fees upon plaintiff as a last resort: To the extent not paid by Chubb or Todtman Nachamie [the defendant law firm], you are responsible for the full

amount of our invoices" (Affirmation of Alex Spizz, dated December 19, 2017, Ex F). This agreement also included an arbitration provision for fee disputes (id.) Plaintiff and Miller & Wrubel executed a new retainer agreement two days later, on June 16, 2008. This agreement placed responsibility for fees squarely on plaintiff: "You are responsible for the full amount of our invoices. We will submit monthly invoices to you at the above address and we expect you to pay these invoices promptly and in full" (id. Ex. G).

Thereafter, the plaintiff, Miller & Wrubel, and Chubb all agreed that Miller & Wrubel would take over plaintiff's defense instead of Abrams Gorelick. In an August 10, 2008 email from Joel Miller, the senior partner of Miller & Wrubel, to Tom Penna, a representative of Chubb, Joel Miller stated that "our agreement to be retained is contingent on Todtman Nachamie [i.e. the defendant law firm] agreeing to pay our fees up to the retained amount" (id. Ex. D).

Defendant law firm claims this arrangement was without its knowledge or consent. Indeed, the evidence supports defendant's position. Defendant law firm was not copied on the August 10, 2008 email or involved in the discussions to substitute Miller & Wrubel for Abrams Gorelick. Defendant claims it never consented to Miller & Wrubel's retention in place of Abrams Gorelick or agreed to pay Miller & Wrubel's fees.

Plaintiff, however, contends that Defendant was aware of the substitution of counsel. Indeed, according to plaintiff, defendant law firm did not withhold its consent to Miller & Wrubel's representation of plaintiff. Moreover, according to plaintiff, it would have been unreasonable to withhold consent, given Miller & Wrubel's level of experience in the field. It is undisputed that Miller & Wrubel's remaining fees of $80,400.20 fall within the Retention Amount.

By December 2008, plaintiff and Miller & Wrubel executed a new retainer agreement that superseded the June 2008 retainer agreements. The December 2008 retainer agreement with plaintiff provided that Miller & Wrubel would look to the defendant law firm for payment of that portion of its fees falling in the Retention Amount:

> "We understand that Todtman, Nachamie, Spizz & Johns, P.C. ("TN") has a retention obligation under the Chubb policy of $100,000 ("Retention"). All bills with respect to the Retention will be sent to Chubb for payment by TN, as you

> have advised us that you are unable and unwilling to pay the Retention and pursuant to the applicable Chubb policy terms, TN is therefore responsible."

(id. Ex H). When the defendant law firm did not pay, Miller & Wrubel commenced an action against it seeking payment of the $80,400.20. After a bench trial, the court granted Miller & Wrubel a judgment on the grounds that it was a third party beneficiary under the Chubb policy and therefore entitled to payment up to the balance of Retention Amount. The Appellate Division, First Department, however, vacated and reversed holding that Miller & Wrubel was not a third party beneficiary under the Chubb policy and had no rights against the defendant (*Miller & Wrubel v Todtman, Nachamie, Spizz & Johns, P.C.*, 106 AD3d 446 [2013]). Following the Appellate Division's reversal, plaintiff Neuhaus instituted this action seeking to collect from defendant the exact amount ($80,400.20) that Miller & Wrubel had previously sought.

ANALYSIS

The court grants defendant's motion and dismisses the complaint, because plaintiff cannot claim damages, at least not yet. Miller & Wrubel has not sued plaintiff and there is no indication that it plans to take any action against her. Indeed, the documents indicate they will not. The December 2008 retainer agreement demonstrates that Miller & Wrubel would look to Chubb and the defendant law firm for payment, not plaintiff. This was because, as Miller & Wrubel acknowledged, plaintiff had indicated that she was "unwilling or unable" to pay her own legal bills and therefore Chubb and the defendant law firm were responsible according to the terms of the Chubb policy (id. Ex H).

Plaintiff claims that her damages are imminent because Miller & Wrubel has only held off from suing her pending the outcome of this lawsuit. In support, she attaches a "Tolling Agreement" allegedly between herself and Miller & Wrubel that purports to extend the statute of limitations (see Affidavit of Beth Neuhaus, sworn to January 27, 2017, Ex. 1). However, this "Tolling Agreement "is unsigned. Moreover, plaintiff does not proffer anything from Miller & Wrubel, such as an affidavit, creating an issue of fact that Miller & Wrubel would ever look to plaintiff for payment. This motion, that has taken place after extensive discovery, is pursuant to CPLR 3212. It was therefore incumbent on plaintiff to go beyond the allegations in the complaint and demonstrate

evidence to create an issue of fact. This she has not done. However, even if she had, this case is not ripe. Notably, plaintiff has not sought declaratory relief, only money damages. As it is undisputed that Miller & Wrubel has not yet sued plaintiff, her claims are not ripe for adjudication.

The issue of ripeness is particularly important given the specific circumstances in this case. There is no evidence in the record, aside from plaintiff's uncorroborated assumptions, that defendant law firm ever agreed to pay Miller & Wrubel or that it even knew about their substitution until after the fact. Although plaintiff claims that it would have been unreasonable for defendant to withhold its consent, and perhaps it would have been, plaintiff has done nothing to indicate that she has or would ever incur damages. All evidence is to the contrary. Miller & Wrubel sent their bills to Chubb after plaintiff, Chubb, and Miller & Wrubel, but NOT defendant, had agreed that "All bills with respect to the Retention will be sent to Chubb for payment by [the defendant law firm]." Moreover, a reconciliation spreadsheet from Miller & Wrubel reflects that the amount of the obligation that the plaintiff was responsible for under the December 15, 2008 retention agreement (Spizz Aff. Ex L). On this sheet, none of the invoices that comprise the $80,400.20 is plaintiff's obligation. While the agreement between Miller & Wrubel, Chubb and plaintiff may have relied on the assumption that Miller & Wrubel had rights under the Chubb policy, by not extending defendant law firm a place at the table, the risk Miller & Wrubel undertook was that they would not be able to recover. Now that risk has materialized. It still does not mean that Miller & Wrubel will come after plaintiff for their fees. Plaintiff has no claim for damages until that event occurs. Again, the court notes that plaintiff made no request for declaratory relief.

Therefore, it is unclear when, if ever, plaintiff would become responsible for the Retention Amount that is the subject of her lawsuit. Thus, this case is not yet ripe and may never ripen.

Accordingly, it is

ORDERED THAT the court grants defendant's motion for summary judgment dismissing the complaint without prejudice.

The Clerk is directed to enter judgment accordingly.

Dated: December 29, 2017
New York, New York

ENTER:

Melissa A. Crane, J.S.C.