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

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Shedler & Cohen, LLP et al,
Plaintiffs,

Index No. 651404/2018

-against-

DECISION AND ORDER
Mot. Seq. nos 2,3, and 4

AON/Albert G. Ruben Insurance Services, Inc,

Defendant.

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Melissa A. Crane, J.S.C.

The court consolidates motions 2, 3, and 4 for disposition. With respect to the two sealing motions (nos 3 and 4) the court decides them in accordance with the reasoning on the record of May 11, 2020 [pg 12-14]). In sum, the court finds good reason to seal the portion of the exhibits that contain information about the fees that defendant charges and otherwise denies the requests to seal.

Motion no. 2 consists of defendant's motion for summary judgment and plaintiff's cross motion for summary judgment. A brief discussion of the underlying facts is in order

Defendant AON/Albert G. Ruben Insurance Services, Inc (Aon) was Shedler & Cohen, LLP's (S&C) insurance broker. In March 2008, Aon placed a professional errors and omissions insurance policy on S&C's behalf with Executive Risk Indemnity Inc., a member of the Chubb Group of Insurance Companies ("Chubb"). The Chubb Policy required Chubb to defend and indemnify S&C for all claims arising from S&C's "Insured Services." The definition of Insured Services in the Chubb Policy for the policy year 2008-2009 did not include "business management" services. (*Id*.). The Chubb Policy also excluded conduct that involved the commingling of client funds.

In 2015, S&C renewed the Chubb Policy. In S&C's renewal application for the Chubb Policy year 2015-2016, S&C described the nature of its business as including "Professional services," " bookkeeping," "business & personal accounting," and "business management." (see EDOC 91). As in prior years, Aon provided S&C with a Professional Liability Quotation containing the definition of Insured Services (referred to in the Quotation as "Professional Services"). However, this quotation for the eventual Chubb policy only included "data processing services; business and personal tax preparation services; medical claim preparation services; pension / profit sharing supervision services" as covered services (see EDOC 43).

Ms. Cohen signed and returned the Quotation to Aon, approving the terms and conditions and instructing Aon to bind the Chubb Policy. Aon provided S&C with the bound Policy and Ms. Cohen believes that she reviewed the definition of Insured Services in the Policy briefly. No one at Aon ever brought to S&C's attention that the definition of Insured Services in the Quotation and the Policy did not match the description of S&C's business in the renewal application.

In the context of a different litigation against S&C, Aon identified in its e-mails to Chubb what it perceived to be a "gray area" in the scope of covered professional services. By e-mail, dated April 1, 2015, Aon asked Chubb **"**whether we need to revise the definition of professional services to make sure that there aren't any gray areas going forward?" Chubb responded that it was "not going to make any

changes to the professional services" as part of the 2015-16 policy renewal. Aon never informed S&C of these communications with Chubb or otherwise advised them of any "gray areas" or limitations in the scope of coverage for the professional services.

On January 14, 2016, counsel for Jennifer Rush, a S&C client engaged in contentious divorce proceedings from her husband Robert Morton (who also was a S&C client), delivered a notice to S&C that identified certain alleged wrongful conduct in connection with the firm's work for Ms. Rush (the "Rush Claim"). Specifically, Ms. Rush claimed that, in connection with her divorce proceedings, she learned that "under [S&C's] management, Robert's separate property was protected and indeed increased substantially during the parties' marriage while Jenny's separate property was commingled with the community funds and generally managed to her detriment."

After receiving Ms. Rush's communication, S&C tendered a notice of loss to Chubb for defense and indemnification pursuant to the 2015-2016 Chubb Policy. On March 28, 2016, Chubb advised S&C that it would provide a defense for the Rush Claim. Chubb, however, reserved its rights regarding coverage. In support of its reservation of rights, Chubb identified two exclusions that might apply based on the nature of the alleged wrongful conduct. Endorsement No. 2 – Bookkeeper (Section 2), excluded coverage for any claim "based upon, arising from or in consequence of any...commingling of any money, monetary instrument or securities." Endorsement No. 12 – Investment Advisor Exclusion Endorsement, excluded coverage for any claim "based upon, arising from on [sic] in consequence of any...improper use or commingling of any client's funds or monies." (see E 64)

Ms. Rush sued S&C and Mr. Shedler (the "Rush Action") in July 2016 (see EDOC 31). She alleged that S&C improperly transferred funds from her personal accounts to her husband's accounts and improperly used her personal accounts for expenses related to her husband's property. But, this was not all. Ms. Rush also alleged, *inter alia*, that S&C gave her incorrect advice regarding her ownership status in certain marital property in Santa Monica, allocated a greater percentage of financial responsibility to her for the Santa Monica property, all the while concealing the unfair allocation from her, and forging her signature on an engagement agreement with them.

On August 18, 2017, Chubb issued a supplemental reservation of rights letter by email (EDOC 66): The letter states in part as follows:

> The Policy's insuring Clause (amended by the New York State Amendatory Endorsement no. 10), covers "Wrongful Acts" committed by the Insureds "solely in the performance or failure to perform insured Services," which is defined to include only "data processing services business and personal tax preparation services; medical claim preparation services; pension/profit sharing supervision services." The insureds' memorandum in support of its August 11, 2017 motion for summary judgment summarizes the allegations made in the Action against the Insureds as follows: "[T]he thrust of the [Action is that Shedler falsely represented he would look out for Rusks interests and failed to provide her proper advice regarding her pre and post marital separate and community property interests, improperly deposited Rush's income into joint accounts. . .and used Rush's money toward mortgage and maintenance expenses ' on two properties that Rusk's ex-husband claimed, in the divorce proceeding, were his own." However, those alleged misrepresentation, advice and actions of the Insureds do not constitute data processing, business and personal tax preparation, medical claim preparation or pension/profit sharing supervision services that would satisfy the definition of "Insured Services." To the extent that the allegations against the insureds regarding, for example, tax-related services provided by the insureds, are supplemented or clarified to

> allege Rush actually incurred some damages as a result of the insureds' alleged tax preparation services that could potentially constitute "Insured Services," it appears that those services would have given rise to a very minor portion, if any, of Rush's alleged damages. Therefore, any settlement based, in part, on such services would still be mostly, if not wholly, uncovered as not arising from "Insured Services."

S&C settled the Rush Action for $1 million. S&C agreed to accept $500,000 from Chubb in exchange for not pursuing a coverage action. (*Id.*) S&C did not tell Aon that it was settling its claim for coverage with Chubb. (*Id.*)

Discussion

I. Defendant's Motion for Summary Judgement

"Insurance agents and brokers have a common law duty to obtain the coverage requested by the client within a reasonable time after the request is made or if unable to procure the requested coverage, to promptly notify the client." (*Cosmos Queens, ltd., v Matthias Saechang IM Agency, et al.*, 74 AD3d 682, 683 [1st Dep't 2010]). Moreover, "an insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction. Thus, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract" (*Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 866 [1st Dep't 2009]).

Defendant's main argument is that, even if it failed to obtain the coverage plaintiff requested, there is no proximate cause. Defendant reasons the Chubb policy always contained an exclusion for commingling and is of the view that all of Ms. Rush's claims allege commingling. Aon also claims that Chubb's only basis for denying coverage was the commingling exclusion.

Aon is incorrect on both points. First as described above, the underlying plaintiff did not allege merely commingling. She also alleged that she received incorrect business advice and that the allocation of payment for the Santa Monica property unfairly favored her (now ex) husband when S&C had a fiduciary duty to both of them. Second, as the August 18, 2017 email from Chubb makes clear, it also denied coverage because the "advice and actions of the Insureds do not constitute data processing, business and personal tax preparation, medical claim preparation or pension/profit sharing supervision services that would satisfy the definition of "Insured Services.""

The renewal application S&C submitted asked for coverage for: Professional services; "bookkeeping"; "business and personal accounting" and "business management." Aon failed to obtain coverage for, *inter alia*, "business management." Had the Chubb policy covered "business management" arguably Chubb would have had to cover the entire Rush action. Thus, to the extent Aon's motion for summary relies on the argument that there was no proximate cause between its actions (or lack thereof) and S&C's damages, the court rejects the argument.

Moreover, the court cannot conclude as a matter of law that S&C failed to mitigate damages when it settled the Rush action. Having no coverage due to Aon's failure to obtain it, S&C was understandably reluctant to risk a substantial judgment against it and settled to control its own destiny.

Nor does S&C's written authorization to place the Chubb policy preclude S&C's claims against Aon. First, Aon is not contesting the nature of the relationship between the parties on this motion, but reserves its rights to do so at trial. (See Def. Reply Brief pg 11 fn 10 EDOC 120). Thus, for the purposes of this motion, the court assumes there is a special relationship between the parties. "In exceptional

circumstances, a cause of action for negligent misrepresentation exists where there is a special relationship between the customer and the insurance broker and the customer reasonably relies upon the broker's representations" *Houston Casualty Co., v Cavan Corp. of NY.*, 161 AD3d 427, 428 [1st Dep't 2018][20-year relationship]). As S&C's long time insurance broker, there may have been a duty to point out to S&C the failure to obtain the requested coverage. Accordingly, the court denies defendant's motion for summary judgment in its entirety.

II. Plaintiff's Cross-Motion for Summary Judgment

The court also denies plaintiffs' cross motion. Plaintiffs appear to argue that the commingling exclusion in the Chubb policy does not preclude coverage for Ms. Rush's claims and therefore somehow Aon is liable. This is a non sequitur. This may have been a reason to take issue with Chubb's denial of coverage. However, Plaintiffs have settled their claims with Chubb. There is no claim here against Aon.

Accordingly, it is

Ordered that the court denies defendant's motion for summary judgment, and it is further

Ordered that the court denies plaintiffs' cross motion for summary judgment.

ENTER:

Melissa A. Crane, J.S.C.

Dated: New York, New York
7/15/2020