SCAN

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 4

JAY GOLDMAN, D.M.D.,

Plaintiff,

Motion Sequence Nos. 1-2

Index No. 7459/03

-against-

Motion Date: October 24, 2003

TIG INSURANCE COMPANY, HOWARD J. KIRSCHNER, D.D.S., FRANCES MARY MCNELIS, STEVEN LORIA, GINAROSA GOLDE,

Defendants.

The following papers read on these applications for summary judgment:

Notice of Motion	X
Notice of Cross-motion	X
Opposing Submissions	XX
Reply Papers	XXX
Sur-reply Papers	XX

Upon the foregoing papers it is ordered that plaintiff's motion for an order pursuant to CPLR 3212 granting summary judgment in his favor against the

defendants, and the cross-motion by defendant, TIG Insurance Company ("TIG") for an order pursuant to CPLR 3212 declaring that it has no duty to indemnify the plaintiff in the underlying action (Kirschner v Goldman, et al, Supreme Court, Nassau County, Index #9600/01) and for other relief are determined as provided herein.

In this case, the plaintiff, a TIG insured, seeks a judgment declaring the rights and other legal relations of the parties. The plaintiff's complaint alleges, inter alia, that "on or about February 26, 1999, [TIG] issued and delivered a Dentist Professional Liability policy to [plaintiff], policy #3119828, with a policy period of February 26, 1999 to February 26, 2000." The complaint further alleges that "the Kirschner action currently pending in Supreme Court, New York County [now Nassau County], falls squarely under the definitions set forth in the policy." It is additionally alleged that "pursuant to the terms of the policy, [TIG] is required to indemnify the insured."

The complaint in the underlying action asserts five (5) causes of action. Dr. Kirschner's first cause of action alleges, inter alia, that: "The defendants [i.e., Dr. Goldman, Frances Mary McNelis, Steven Loria, Ginarosa Golde, and Claudia Stern] acted under color of state law, and violated [his] rights under the First and Fourteenth Amendment[s] [and that their] actions were in violation of the Civil

Rights Act of 1871, 42 U.S.C. Section 1983." Dr. Kirschner's second cause of action alleges, inter alia, that: "By reason of defendants' violation of [his] New York State Constitutional rights, [he] is entitled to declaratory and injunctive relief [and compensatory and punitive damages]."

Dr. Kirschner's third cause of action alleges, inter alia, that the defendants "directly and intentionally interfered with [his] business relations as a consultant to various insurance companies and law firms." Dr. Kirschner's fourth cause of action alleges, inter alia, that the acts of the defendants constitute a prima facie tort. Dr. Kirschner's fifth and last cause of action is for malicious prosecution and is against Dr. Goldman, Francis Mary McNelis, Steven Loria, and Ginarosa Golde.

Counsel for the plaintiff states that: "On or about October, 2000, prior to the institution of the State Court action, a similar action was commenced by Howard Kirschner against, among others, Dr. Goldman, in the United States District Court, Southern District of New York, case number 99 CIV 4828, which was a civil rights lawsuit brought pursuant to the First Amendment of the United States Constitution [and] the Constitution of the State of New York, which also contained state law causes of action alleging, among other things, conspiracy to violate Kirschner's right to free speech, and setting forth virtually the same allegations contained in the State Court action." Counsel further states that: "The

federal action was subsequently dismissed."

Counsel for the plaintiff goes on to state that: "TIG does not dispute that it was given timely notice of both the state and federal actions commenced against the plaintiff nor does it dispute that the Dentist Professional Liability [policy] was in force and effect at all relevant times." Counsel additionally states that: "By letter dated October 17, 2000 [Plaintiff's Exhibit E], TIG agreed to provide Dr. Goldman with a defense in the federal action, and also, 'any potential state court action', and reserved its rights 'to decline[,] limit or withdraw coverage for the Kirschner action or any other claim or suit based upon or arising out of the same facts and/or theories'." Counsel also states that: "The letter dated October 17, 2000, disclaimed indemnity coverage, alleging that the Kirschner lawsuit(s) fell beyond the purview of the provisions of the policy relating to definitions of 'dental incidents'[,] 'professional services' and 'injuries'."

Counsel for the plaintiff argues that: "By TIG's own definitions contained in the Dentists Professional Liability Policy [Plaintiff's Exhibit B], coverage extended to claims made against the plaintiff for 'dental incidents', which are specifically defined in the policy as including intentional torts such as 'false arrest', 'malicious prosecution', 'oral or written publication of material that slanders or libels a person', 'humiliation' and other acts." Counsel furthermore

argues that: "These apply directly to the 'dental incidences' alleged in the Kirschner complaint, including but not limited to, Kirschner's claims for compensatory and special damages." Counsel additionally argues that: "Again, by definitions contained in the Policy, coverage extended to claims made against the plaintiff for 'professional services' which he rendered as an expert witness in the peer review conducted of Dr. Kirschner by the OPD [i.e., Office of Professional Discipline of the New York State Education Department]." Counsel concludes that: "It is clear that the Kirschner action currently pending in Supreme Court, New York County [now Nassau County], falls squarely under the definitions set forth in the policy."

The relevant policy provisions are as follows:

"SECTION I - COVERAGE

"A. Insuring Agreement

1. We will pay on behalf of an insured all sums which an insured shall become legally obligated to pay as damages because of injury to which this policy applies.

   This policy applies to injury only if:

   a. The injury was caused by a dental incident . . . .

"B. Exclusions

This policy does not apply to: . . .

j. Injury that is expected or intended from the standpoint of an insured. . . . .

"SECTION II - DEFINITIONS

The definitions below apply wherever the words and phrases appear in this policy. . . .

'Dental Incident'

a. Any act, error or omission in the rendering of or failure to render professional services by an insured, . . .

'Injury' means:

a. Bodily injury, sickness, disease or death;

b. Physical injury to tangible personal property, excluding all resulting loss of use of that property;

c. False arrest, detention or imprisonment;

d. Malicious prosecution;

e. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy;

f. Oral or written publication of material that slanders or libels a person, or violates a person's right to privacy;

g. Humiliation; or

h. Undue familiarity. . . .

'Professional Services' means services performed in the practice of dentistry as authorized by statute or licensing law in the jurisdiction where you practice, including but not limited to:

a. Services performed as an officer or member of any committee of the American Dental Association or any constituent or component society thereof;

b. Services performed as an officer or a member of a committee of any professional dental society or association officially recognized by the American Dental Association or any constituent or component society thereof;

c. Services performed as an officer or a member of a legally constituted Peer Review Organization;

d. Services performed as a member of any form of accreditation, standards review or other professional board or committee; or

e. The writing of books, papers and articles relating to the technical aspects of the practice of dentistry, if such material is published or distributed by a recognized technical or professional publisher, academic or professional journal, or professional or technical society or association."

Counsel for TIG argues that "all of the causes of action brought by Dr. Kirschner in the Underlying Action require that plaintiff acted with intent to harm, [and that] Exclusion j. bars any duty to indemnify plaintiff with respect to each cause of action." The Court agrees.

"As a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance." (Town of Massena v Healthcare Underwriters Mutual Insurance Company, 98 NY2d 435, 445) The public policy of this State precludes an insured "from seeking indemnity from his [or her] insurer for either

compensatory or punitive damages flowing from [the] intentional causation of injury." (Public Service Mutual Insurance Company v Goldfarb, 53 NY2d 392, 400) The Court of Appeals additionally stated that: "An agreement between two private parties, no matter how explicit, cannot change the public policy of this State." (Id.)

While the Court agrees that there are inherent inconsistencies in the policy provisions between the definition of covered "dental incidents", which include intentional torts such as "false arrest", "malicious prosecution", and "libel and slander", and Exclusion j., controlling authority resolves such inconsistencies in favor of the exclusion. (see, Shapiro v Glens Falls Insurance Company, 39 NY2d 204, 205-207; see, e.g., Transamerica Insurance Group v Rubens, 1999 U.S. Dist. LEXIS 13239 [S.D. N.Y.]; Hodgson v United Services Automobile Association, 262 AD2d 359, 360; Tomain v Allstate Insurance Company, 238 AD2d 774, 775-776 [3d Dept.]; Bingham v Atlantic Mutual Insurance Company, 215 AD2d 315, 316-317[lst Dept.]) Counsel for the plaintiff argues that: "There has been recent indication by the Court of Appeals that Shapiro is no longer good law – citing Belt Painting Corp. v TIG Insurance Company, 100 NY2d 377. The Court does not agree. The exclusion at issue in Belt Painting Corp. was a pollution exclusion, not an exclusion for intentional acts.

Counsel for the plaintiff furthermore argues that: "Summary judgment and indemnity should be granted to the plaintiff, Dr. Goldman, on a bad faith ground alone since TIG has acted since the outset of litigation solely in its own interest and in a manner which has severely prejudiced its insured and exposed him to liability for millions of dollars." Counsel points to a CPLR Article 78 proceeding brought by TIG in the plaintiff's name and as subrogee of the plaintiff against the State of New York to compel the State of New York to defend and indemnify the plaintiff in the underlying action. (Exhibit B to Affirmation of Jeffrey A Jannuzzo, dated September 9, 2003). Counsel argues that: "There is no possible explanation as to how the Article 78 proceeding could have conceivably benefitted anyone other than TIG [and that while] Dr. Goldman acknowledges signing the Petition, he was not advised by his attorneys (retained by TIG) of the consequences of an adverse decision."

Counsel's second "bad faith" argument is based upon a settlement offer made by Dr. Kirchner's attorneys, which Dr. Goldman's attorneys, who were retained by TIG, failed to communicate to Dr. Goldman. In this regard, Dr. Goldman states that: "As to the $75,000.00 settlement demand which was only recently explained to [him] by [his] attorney, Ellen Buchholz, Esq., [he] was never advised by [his] attorneys at Podlofsky Orange Kitt &Kolen[ov]sky that any such

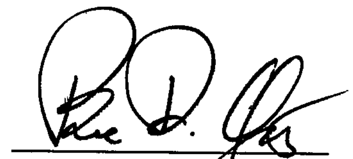
offer was made, [and that had] the offer been conveyed to [him] at the beginning of this litigation, [he] would have paid out of [his] own funds to settle the case."

Irrespective of the merits of counsel's "bad faith" arguments, this is not an action for breach of the insurance policy or legal malpractice seeking money damages on a theory of "bad faith". Rather, this is an action to declare the parties' rights under the subject insurance policy. "Bad faith" is not relevant to the meaning of the policy provisions. Dr. Goldman, if so advised, may assert his "bad faith" claims in another forum. (see, e.g., Smith v General Accident Insurance Company, 91 NY2d 648)

Based on the foregoing, the Court declares that each of the causes of action asserted against Dr. Goldman in the underlying action fall within the parameters of Exclusion j. of the subject policy, and that, consequently, TIG is not obligated to defend or indemnify Dr. Goldman in the underlying action.

Settle judgment on notice in conformity herewith.

DATED: January 6, 2004



J.S.C.

ENTERED

JAN 1 2 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE