SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN **PART** 49

Justice

0107645/2002

ORANSKY, IVAN

VS

MCIC VERMONT INC.

SEQ 1

SUMMARY JUDGMENT

INDEX NO. 107645/02 ✓

MOTION DATE 12/2/03

MOTION SEQ. NO. 001

MOTION CAL. NO. 17

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 20 2003
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/14/03

Herman Cahn

J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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IVAN ORANSKY, :

Plaintiff, : Index No. 107645/02

- against - :

MCIC VERMONT, INC., GLENN A. BUSCH, individually and as Administrator of the Estate of GARY S. BUSCH, DORIS BUSCH BESLEEY, NORMAN BUSCH, and GREGG M. BUSCH, :

Defendants. :

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HERMAN CAHN, J.

This is an action for a declaratory judgment finding defendant MCIC Vermont, Inc. to be in breach of a policy of insurance which it issued, due to its refusal to provide for plaintiff's defense in another civil action. MCIC moves, and plaintiff cross-moves, for summary judgment, CPLR 3212 (motion seq. no. 1).

BACKGROUND

This action arises out of the much publicized fatal shooting of Gary S. Busch, a 31 year old man, by New York City police officers outside his Brooklyn apartment in 1999.[1]

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[1] The details of the actual shooting, attracting widespread media attention at the time, are alleged in the verified complaint in a related civil action (the "Related Complaint") entitled *Busch v Oransky* (Sup Ct, NY County, Madden, J., index No. 104177/02). They appear to be as follows.

On August 30, 1999, New York City police officers arrived at the Brooklyn basement apartment of Gary Busch, "a 31-year old white observant Jewish man," while he was in the company of "Percy Freeman, an African-American acquaintance." (Related Complaint ¶ 9.) The police forcibly removed Freeman from the premises, ordering Busch to remove himself as well (*id.* ¶ 11). It is alleged that the police, "without cause or justification," blinded Busch with pepper spray and physically assaulted him (*id.* ¶¶ 12, 15). Busch then moved out onto the

In February 2002, an action was commenced by members of the family of Gary Busch, against Ivan Oransky and the New York - Presbyterian Hospital (*Busch v Oransky*, Sup Ct, NY County, Madden, J., index No. 104177/02), alleging that Oransky, then a resident in the Hospital's Department of Psychiatry, unlawfully accessed Gary Busch's confidential psychiatric records and wrongfully disclosed them to *The New York Times* after the shooting. Those records are alleged to have formed the basis for an article entitled "Man Shot by Police Told Hospital Staff of Violent Impulses," published by *The New York Times* on September 3, 1999 – the day after Mr. Busch's funeral. That action, which is currently pending, seeks compensatory and punitive damages against Oransky and the Hospital for emotional, physical, and reputational injuries claimed to have been caused by the disclosure.

MCIC issued a professional and commercial general liability insurance policy to the Hospital.[2] The Policy insures "[a]ny Physician, Dentist, medical or dental resident or intern or professional corporation . . . while acting within the scope of his or her or its duties . . . ."

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driveway, but "holding a religious object, a small hammer with Hebrew inscriptions on it . . . ." (*Id.* ¶ 16.) It is alleged that at that point, the police officers fired twelve bullets into Mr. Busch, who died shortly thereafter from his wounds (*id.* ¶¶ 20, 22-23). The complaint also alleges that "[a]s Gary Busch lay dying, without medical attention, the police officers moved away and began to talk among themselves." (*Id.* ¶ 21.)

Another related civil action was commenced by Busch family members in U.S. District Court against police officers and officials, and city officials (*Busch v City of New York,* US Dist Ct, ED NY, 00-CV-5211).

[2] The parties have each submitted a copy of the Policy, which only covers the period from January 1, 2001 through January 1, 2002. The Busch shooting and subsequent news article occurred in 1999, and the related action *Busch v Oransky* was not commenced until February 2002. None of the parties address the fundamental issue whether the Policy even covers the relevant time period of the claim against Oransky. As will be discussed, however, alternative dispositive grounds exist in connection with the instant motion and cross-motion for summary judgment.

(Policy at 7.) It further provides that "if claim is made or suit is brought against the Insured, the Insured shall immediately forward to [MCIC] every demand, notice, summons or other process received by him or his representative." (*Id.* at 13.) Finally, the Policy undertakes "[t]o pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages because of any claims . . . resulting from one or more of the following offenses committed in the conduct of [the Hospital's] . . . business: * * * (b) The publication or utterance of a libel or slander or other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy[.]" (*Id.* at 3.)

In apparent reliance on the foregoing provisions, Oransky furnished MCIC copies of the summons and verified complaint in *Busch v Oransky*, and sought to have MCIC assume his defense in that action. MCIC declined coverage by letter dated March 26, 2002 (Gold Aff. Ex. B), because Oransky's access and public disclosure of Busch's confidential psychiatric records was unauthorized and outside the scope of any of his duties as a medical resident in the Hospital's Department of Psychiatry (*id.*). The letter states that Oransky was "never involved in the care and treatment of Mr. Busch at any time, and at no time, did [he] ever enter into, have, or maintain, a patient-physician relationship with Mr. Busch." (*Id.* at 2-3.) None of Oransky's submissions in the instant motion practice refutes those statements.[3]

The letter further notes that in two letters from Oransky to faculty review members of the Hospital, dated September 7, 1999 and October 6, 1999, he admitted that he deliberately accessed and read Busch's confidential psychiatric records (Gold Aff. Ex. B at 2-3).

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[3] As treated below, Oransky submits no factual affidavit based on personal knowledge.

Indeed, Oransky even characterized himself as "guilty" of breach of confidentiality of Busch's psychiatric record maintained at the Hospital (*id.* at 3). Again, none of Oransky's submissions in the instant motion refutes those statements. In fact, Oransky's reply to the Hospital's Amended Verified Answer and Cross-Claim in *Busch v Oransky* admits that he deliberately accessed Mr. Busch's confidential file and furnished it to the media (Jacobs Aff. Ex. A [Verified Reply to Cross-Claim] ¶¶ 4-5).

The verified complaint in *Busch v Oransky* includes as an exhibit a copy of a letter from Philip J. Wilner, M.D., Associate Professor of Clinical Psychiatry at the Hospital, to Sidney Hirschfeld, Director of the New York State Mental Hygiene Legal Service, dated September 8, 2000. The letter states that after the article appeared in *The New York Times* on September 3, 1999, the Hospital launched an investigation resulting in a finding that a second year post-graduate physician at the Hospital, who had no professional connection with the former patient, wrongfully accessed Mr. Busch's records (Related Complaint Ex. A at 1-2). The letter further states that the physician "acknowledged knowing the Times reporter personally, whom he described as a college acquaintance he knew from when they both worked on the school newspaper" and that he "acknowledged being called by the reporter, who told him that he was writing an article about the patient in issue[.]" (*Id.* at 2). While the letter states that the individual denied answering the reporter's specific questions, and denied providing a copy of the records to the reporter (*id.*), the *New York Times* article reported that "[t]he confidential records from the hospital . . . were obtained by The New York Times through a staff member of the hospital." (Related Complaint ¶ 34.) As with virtually all of the substantive factual allegations, Oransky submits nothing to refute that report.

MCIC moves for summary judgment declaring the propriety of its denial to provide Oransky with a defense in *Busch v Oransky*. Oransky cross-moves for summary judgment declaring MCIC to be in breach of a contractual duty under the Policy to defend him in that action. Although the Busch family members are captioned as defendants, no claims have been asserted against them.

DISCUSSION

Summary judgment should be granted where the movant can show entitlement to judgment as a matter of law, and the absence of any genuine issue of material fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"[A]n insurer's duty to defend . . . arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy." (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002]; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). "The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer . . . ." (*Town of Massena, supra,* at 443-44; *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984].) Plaintiff Ivan Oransky has not met these criteria for coverage.

The acts alleged in the complaint in *Busch v Oransky* are plainly outside the scope of Oransky's duties and are, thus, not covered by the Policy. Oransky has been sued for unlawful access and disclosure of Gary Busch's confidential psychiatric records maintained by the New York - Presbyterian Hospital. The Policy issued by MCIC to the Hospital and its physicians only

insures them for acts performed "while acting within the scope of [their] . . . duties" at the Hospital (Policy at 7). The Policy similarly provides for payment of damages assessed against Oransky if, and only if, they result from "offenses committed in the conduct of [the Hospital's] . . . business[.]" (*Id.* at 3.) Plaintiff cannot credibly maintain that his wrongful access and alleged disclosure of patient records, as alleged in the Related Complaint, and as substantially admitted in his Verified Reply to Cross-Claim in that action, somehow constitute a part of his duties or functions as a medical resident of the Hospital. The Policy clearly excludes such conduct from its duty to defend.

Plaintiff selectively cites Policy language covering an insured's "publication or utterance in violation of an individual's right of privacy," but ignores critical qualifying language limiting that very coverage to acts "committed in the conduct of a Named Insured's . . . business[.]" (Policy at 3.)[4] In other words, if plaintiff were part of the team treating Gary Busch and then accessed the patient's files, or if he had some other valid reason to access those files, and in connection therewith violated the patient's right to privacy, he would be entitled to coverage. Here, however, plaintiff's conduct, as alleged, appears to have been so unjustified and outside the scope of his employment, that he is not entitled to coverage.

Further, plaintiff misapplies the applicable standard. Plaintiff's counsel asserts that the sole focus of a court's determination of coverage, i.e., an insurer's duty to defend, is the "Four Corners of the Complaint" (Gold Aff. ¶ 12). Working from that premise, plaintiff's counsel posits that the Related Complaint does not specifically allege that plaintiff was not a treating physician of Gary Busch and, thus, was not functioning within the general purview of his

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[4] The New York - Presbyterian Hospital is a "Named Insured" (Policy at 1).

residency duties when he accessed and disclosed that former patient's information (*id.*). Rather, he asserts, the Related Complaint annexes extrinsic material, in the form of Dr. Wilner's letter, in order to make that point (Related Complaint Ex. A). Therefore, he argues, a prima facie duty to defend Oransky against claims of wrongful access and disclosure exists. This argument is without merit.

To be sure, an insurer's duty to defend is assessed through examination of "the allegations in a complaint" against the insured (*Town of Massena, supra,* at 443; *Fitzpatrick, supra,* at 65; *Seaboard Sur. Co., supra,* at 310). The Court of Appeals has, indeed, couched this standard in terms of "the four corners of the complaint" (*Continental Casualty Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]); a term borrowed by plaintiff's counsel. However, it is a fundamental rule that "[a] copy of any writing which is attached to a pleading is a part thereof for all purposes." (CPLR 3014.) The Related Complaint specifically refers to, and annexes, Dr. Wilner's letter in the course of alleging that "confidential medical information relating to Gary Busch had been disclosed and disseminated without authorization . . . ." (Related Complaint ¶ 42.) That letter, authenticated or not, contains various relevant allegations, including one stating that "[i]t was determined that this practitioner was not involved in the patient's care, and therefore would not qualify as a physician with [a] 'need to know' the contents of the record." (Related Complaint Ex. A at 2.)[5] That averment is part and parcel of the Related Complaint (CPLR 3014), and is necessarily considered in assessing whether MCIC bears a duty to defend Oransky against claims of wrongful access and disclosure.

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[5] The exhibited letter further avers that Oransky was terminated from the Hospital's residency program on November 4, 1999 as a result of his admitted wrongful access to the information and subsequent contact with *The New York Times* (Related Complaint Ex. A at 3).

In addition, the complaint in the related case does not describe Oransky's function in the Hospital as related to Busch. It simply does not state that Oransky had any valid reason to access, much less to disclose, the decedent's medical records. It does not allege that Oransky was acting in the scope of his duties, or was not so acting. Plaintiff cannot extend coverage to himself based merely on the Related Complaint's silence as to the issue.

It is further noted that plaintiff himself has failed to submit his own affidavit on these motions. While MCIC submits a factual affidavit of its Vice President for Claims, Alan Landberg, plaintiff only submits affirmations from his attorney, who lacks personal knowledge of the scope of plaintiff's duties as a psychiatric resident at the Hospital, and rightly abstains from making any representations in that regard (*see, Sutton v East River Sav. Bank*, 55 NY2d 550 [1982]; *Steinberg v Metro Entertainment Corp.*, 145 AD2d 333 [1st Dept 1988] [an attorney's affirmation without personal knowledge of the facts is insufficient to oppose a motion for summary judgment]).

Plaintiff's counsel asserts that because the Related Complaint contains second and third causes of action entitled "malpractice" and "negligence" (Related Complaint at 11), MCIC must provide a defense under the Policy.[6] This is also incorrect. The seminal allegations of wrongful access and disclosure by Oransky form the factual predicate for all the causes of action. Those allegations, which are outside the scope of coverage, govern the analysis of any duty by MCIC to defend Oransky under the Policy, irrespective of the alternative rubrics assigned to those facts in the Related Complaint (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153 [1992]).

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[6] The first cause of action is cast as "breach of fiduciary duty of confidentiality" (Related Complaint at 10).

Accordingly, it is

ORDERED that the motion by defendant MCIC Vermont, Inc. for summary judgment is granted, and the complaint is dismissed as against all defendants; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

Dated: May 14, 2003

ENTER:

J. S. C.