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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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B & R CONSOLIDATED, LLC,

Plaintiff(s),

-against-

ZURICH AMERICAN INSURANCE COMPANY, d/b/a ZURICH NORTH AMERICA, d/b/a ZURICH, and AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant(s).

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Index No. 19211-2010

Motion Seq. No.: 002 & 003
Motion Submitted: 5/15/12

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Motion by defendants, Zurich American Insurance Company d/b/a Zurich North America d/b/a Zurich and American Guarantee and Liability Insurance Company, for an Order, pursuant to CPLR 3212, granting them summary judgment dismissal of the plaintiff's complaint is denied. Motion by plaintiff, B&R Consolidated, LLC, for an Order, pursuant to CPLR 3212, granting it summary judgment on it's claims is granted.

Plaintiff, B&R Consolidated, LLC ("B&R"), as claimant, brings this action to recover on

a judgment obtained against an insured of defendants, Zurich American Insurance Company d/b/a Zurich North America d/b/a Zurich and American Guarantee and Liability Insurance Company.

As best as can be determined from the papers submitted herein, the defendants, Zurich American Insurance Company d/b/a Zurich North America d/b/a Zurich and American Guarantee and Liability Insurance Company, issued a liability insurance policy to Frederic A. Powell. Defendant American Guarantee and Liability Insurance Company participated in implementing this policy; however, there is no evidence that the policy was issued "only by" American Guarantee. Indeed, the documentary evidence confirms that Powell's policy was issued by Zurich on Zurich letterhead and that Zurich North American administered Powell's policy on "behalf" of American Guarantee. Accordingly, insofar as defendants' seek summary judgment dismissal of the plaintiff's complaint against defendant Zurich on the grounds that the subject policy was issued by American Guarantee, not by Zurich, said application is denied.
As such, both named defendants, Zurich American Insurance Company d/b/a Zurich North America d/b/a Zurich and American Guarantee and Liability Insurance Company, will be collectively referred to herein as "Insurer."

On or about January 23, 2008, the defendants issued to non-party Frederic A. Powell (the "Insured") a claims-made Lawyers Professional Liability Insurance Policy, no. LPL 5960394-1, for the policy period from February 21, 2008 to February 21, 2009. The Insured is an attorney who represented the plaintiff in a real estate transaction. In the underlying action entitled B&R Consolidated, LLC v. Frederic A. Powell, Esq. And Robin Powell, filed in this Court under Index No. 08-020049 on November 6, 2008, B&R alleged that Powell acted as it's attorney and

escrow agent on a real estate loan closing transaction, then failed to keep it informed of the status of the loan, ultimately causing it to suffer damages. The summons and complaint were served on the Insured on November 12, 2008. Powell in turn first reported the action to the defendants on January 2, 2009, i.e., 51 days later.

By letter dated January 20, 2009, the Insurer reserved its rights on various grounds and assigned counsel to defend the Insured in the underlying action. The next day, on January 21, 2009, the claimant, B&R served an amended complaint in the underlying action which alleged a variety of causes of action including negligence, legal malpractice, breach of fiduciary duty, constructive trust and accounting. The gravamen of the complaint was that the Insured, Powell, misappropriated $450,000.00 belonging to the claimant B&R.

Subsequently, by letter dated June 1, 2009, the Insurer withdrew its defense of the underlying action and disclaimed coverage on the grounds that the Insured gave it late notice of the claim, to wit, the lawsuit brought by the claimant, B&R. The Insurer also continued to reserve its rights to deny coverage for the other reasons set forth in its letter of January 20, 2009.

By Short Form Order dated May 10, 2010, this Court (Palmieri, J.) granted the claimant, B&R's motion for summary judgment on it's claim of breach of fiduciary duty against the Insured. This Court began its decision by stating that, although the complaint sounded in negligence, legal malpractice, constructive trust, accounting and several species of breach of fiduciary duty, "this case is built on a rather simple key allegation: the misappropriation of loan repayments by Powell." The Court granted the claimant B&R summary judgment on a claim of breach of fiduciary duty, but denied summary judgment on the claims for negligence and legal malpractice, holding:

> However, it is clearly the alleged misappropriation of funds that caused the damages alleged and the Court finds that of all these theories the one that best fits the circumstances is simple breach of fiduciary duty.

In sum, the Court found the Insured liable to the claimant for misappropriation of the claimant's funds.

On June 14, 2010, this Court (Lally, J.) granted judgment in favor of the claimant B&R and against the insured Powell in the sum of $585,056.18, with costs, disbursements and interest. Judgment was entered on July 23, 2010 in the amount of $592,031.74.

The Insurer denied Powell's demand for indemnification. As such, B&R commenced this direct action against the Insurer seeking to recover the amount of the judgment. In its complaint, B&R asserts that it has obtained a judgment against Powell for damages incurred during the term of the policy, that the judgment remains unsatisfied, and that the Insurer is liable to B&R for the amount of the Judgment.

On October 26, 2010, the Insurer, noting that the claimant B&R has no greater rights under the Policy than the Insured, moved to dismiss the complaint in this action, pursuant to CPLR 3211(a)(1) and (7). According to the Insurer, Powell was denied coverage because he failed to give immediate notice of the underlying claim and because judgment in the underlying action was based upon the "misappropriation" of B&R's funds. Thus, the Insurer argued that it did not have any obligation to indemnify Powell for the judgment in the underlying action, B&R having no greater rights under the policy than Powell. In opposition thereto, B&R argued that the gravamen of their amended complaint was not that Powell misappropriated $450,000.00 but that he failed to exercise due care as an attorney, resulting in the loss of B&R's funds.

This Court (DeStefano, J.) denied the defendants' motion holding: the Insurer failed to conclusively establish that B&R was not prejudiced by it's late disclaimer and that it cannot be said as a matter of law that Powell's conduct fell outside the scope of risk covered by the policy including "intentional, criminal, fraudulent, malicious or dishonest act or omission."

Upon the instant motion, the Insurer now seeks summary judgment dismissal of B&R's complaint based on two of these three policy grounds: late notice and a final adjudication of excluded conduct. Specifically, it advances the following: First, despite finding that the Insured had given the Insurer late notice of the claim, this Court (DeStefano, J.), in determining the prior motion to dismiss, held that the Insurer had failed to conclusively establish that B&R was not prejudiced by its late disclaimer. That is, even if the Insurer's disclaimer was unduly delayed, it cannot be estopped from denying coverage, regardless of whether the Insured suffered prejudice, because it issued a reservation of rights letter to the Insured.

Second, the policy excludes coverage for judgments arising out of "any intentional, criminal, fraudulent, malicious or dishonest act" of the Insured. Here, the judgment in the underlying action was based solely on the Insured's misappropriation of funds belonging to the claimant. Contrary to the prior holding of the Court in denying defendants' motion to dismiss the complaint, the judgment stemming from the decision and order of the Court in the underlying action (Palmieri, J.) was indeed a final adjudication that the insured had misapprorpirated the claimant's funds.

Plaintiff B&R opposes the motion and in turn seeks summary judgment as against the defendants insurance company. Plaintiff asserts four bases for it's entitlement to summary judgment. First, Judge DeStefano adopted the conclusion in Judge Palmieri's Order dated May

10, 2010 that the insured, Powell, was providing legal services and found, as a matter of law, that Judge Palmieri's Decision and Order was not an adjudication of "intentional, criminal, fraudulent, malicious, or dishonest" conduct. These determinations are law of the case and as such B&R cannot be denied indemnification based on defendants' asserted exclusions.

Second, neither the legal services nor fraud and dishonesty exclusions are applicable in this action.

Third, defendants' disclaimer on the basis of late notice is ineffective because the disclaimer was unreasonably late and resulted in prejudice to the insured.

Fourth, pursuant to Insurance Law §3420(a), an injured party has an independent right to notify the insurer of its claim. B&R exercised reasonable diligence in ensuring that the defendants were notified of the claim as soon as possible.

In addressing the merits of the instant motions for summary judgment, this Court begins with noting that the central issue herein is whether Judge DeStefano's prior Decision and Order constitutes law of the case and as such the issues already litigated in this action should be given preclusive effect.

Generally, as a threshold matter, the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion (*191 Chrystie LLC v. Ledoux*, 82 AD3d 681 [1st Dept. 2011]; *Riddick v. City of New York*, 4 AD3d 242, 245 [1st Dept. 2004]). Thus, since defendants' first motion was to dismiss under CPLR 3211, and this Court (DeStefano, J.) declined to convert that pre-answer motion to a summary judgment motion, the law of the case doctrine would ordinarily be inapplicable to the motions at hand made pursuant to

CPLR 3212. However that is not the case here.

Pursuant to the doctrine of law of the case, once a point is decided within a case, that point is binding upon all parties and upon all courts of coordinate jurisdiction (*Gee Tai Chong Realty v. GA Ins. Co.*, 283 AD2d 295, 296 [1st Dept. 2001], *citing* Siegel, NY Prac. § 488 [2012]). Thus the doctrine known as the "law of the case" is in essence a doctrine of intra-action res judicata (Siegel, NY Prac. §276 [2012]). While a judgment resulting from the grant of a CPLR 3211 motion is not res judicata of the entire merits of the case, it is "res judicata" of whatever it determined. The general rule is that the earlier determination must be on the "merits," and the parties must be afforded a full and fair opportunity to litigate the propriety of a determination, in order to invoke the preclusion doctrines (*Id.* at §446; *see e.g., Rudd v. Cornell*, 171 NY 114 [1902]).

In this case, Judge DeStefano, based on documentary evidence including the underlying insurance policy and Judge Palmieri's Decision and Order fully and clearly analyzed that Powell's actions constituted the provision of legal services; and, that the fraud and dishonest exclusions of the insurance policy are inapplicable to the facts at hand – that is, Judge DeStefano has already determined that there was no final adjudication of excluded conduct. Specifically, Judge DeStefano rejected defendants' claim that Judge Palmieri's decision was a final adjudication of fraud or dishonesty. Indeed, he wrote, as follows:

> In the absence of a "final adjudication" that Powell's acts were "intentional, criminal, fraudulent, malicious or dishonest," therefore, the branch of the Insurer's motion to dismiss on this ground must be denied.

Judge DeStefano's determinations were based upon the documentary evidence (and lack of sufficiency of the pleadings). Based upon the decision of Judge Palmieri and the underlying

policy, Judge DeStefano found, as a matter of law, that this documentary evidence was not an adjudication of fraud or dishonesty. Indeed a finding that Judge Palmieri's Order was a final adjudication of fraud or dishonesty would have resulted in plaintiff's case being dismissed (*Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Accordingly, a contrary ruling on the same documentary evidence herein would clearly run afoul of the doctrine of law of the case. The defenses have already been rejected by this Court and will not be explored again on this motion. There is no basis on which to re-evaluate the decision of Judge DeStefano.

Furthermore, even if this Court were to re-examine the merits of the Insurer's claim that B&R's late notice of the claim to it and the Insured's conduct is excluded from the policy precludes the claimant's suit herein, this Court would nonetheless deny the defendants' motion for summary judgment.

Defendants correctly points out that the claimant has no greater rights under the policy than the insured and if it, the Insurer, has no indemnity obligation to the Insured, Powell, then it cannot be found to have any obligation to the plaintiff claimant herein B&R (*Lang v. Hanover Insurance Co.*, 3 NY3d 350 [2004]). That being said, however, pursuant to Insurance Law §3420(a), an injured party has an *independent* right to notify the insurer. Specifically, Insurance Law §3420(a)(4), states in pertinent part as follows:

> § 3420. Liability insurance; standard provisions; right of injured person
>
> (a) No policy or contract insuring against liability for injury to person, except as provided in subsection (g) of this section, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate

to judgment creditors:
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(4) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, an injured person or any other claimant if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible thereafter.

This provision does not require an injured party to give direct notice to the insurer. Instead, all that is required is that it was "not reasonably possible to give [the required] notice within the prescribed time" and that "notice was given as soon as was reasonably possible thereafter." The record herein, including sworn affidavits, supports the finding that Powell initially withheld the identity of his insurer from B&R. In addition, by the time or shortly after Powell's insurance carrier information was disclosed to B&R, notice was given (1) directly to the insurer by Powell or (2) indirectly through defendants' hired counsel. Further, when Powell provided notice to the defendants, it clearly indicated that B&R was the claimant and the injured party. Thus, direct notice by B&R was rendered moot by the fact that the defendants-insurer's received notice already. The notice given to defendants-insurer satisfied the requirement that notice be given "as soon as reasonably possible."

In arguing this point, defendants contend that the injured party, the claimant B&R, never gave notice to them of it's claim against the insured. They submit that B&R must be charged vicariously with the insured's delay and that they are not entitled to the benefit of having given direct notice of the claim to the Insurer simply because they never did so. This argument is unavailing given that the defendants do not dispute on this record that they were given notice and further that they were given notice within a reasonable time period after B&R discovered their

information.

The Second Department stated it best in *Rochester v. Quincy Mut. Fire Ins. Co.*, 10 AD3d 417 [2nd Dept. 2004]:

> *When "the insured is the first to notify the carrier* ... any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer" ***Where, as here, the insurer does not dispute receiving notice from its insured, "the only issue with respect to the injured party [is] whether the efforts of the injured party to facilitate the providing of proper notice were sufficient in light of the opportunities to do so afforded it under the circumstances." ***
> [Citations Omitted; Emphasis Added]

Therefore, since the defendants insurer received notice, and they raise no issue with the diligence of B&R in ascertaining their identity, plaintiff cannot be vicariously charged with any delay of the insured. Thus, the late notice exclusion does not prevent the plaintiff from recovering in this indemnification action.

Equally unavailing is defendants' claim that the application of the fraud and dishonesty exclusion from the policy precludes the plaintiff from proceeding in this indemnification action. It is clear from the papers submitted herein that to trigger the exclusion, there must be a final adjudication of sufficient fraud or dishonesty by the Insured. Exclusions from coverage are construed narrowly, and "[t]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640 [1993]). Any ambiguity is to be construed against the Insurer. In this case, Judge Palmieri clearly held that Powell did not commit any fraudulent or dishonest conduct sufficient to trigger the exclusion under the Policy. As such, there is no basis

on which to deny B&R's claim herein.

Based on the foregoing, this Court herewith denies the defendants' motion, pursuant to CPLR 3212, for an Order granting them summary judgment dismissal of the plaintiff's complaint. The motion by plaintiff, B&R Consolidated, LLC, for an Order, pursuant to CPLR 3212, granting it summary judgment on it's claims is granted.

The parties' remaining contentions have been considered and do not warrant discussion.

All applications not specifically addressed are herewith denied.

Accordingly, upon the service and filing of a Note of Issue, together with a copy of this Order, it is the Order of this Court that the issue of damages is referred to the Calender Control Part (CCP) for an inquest.

Subject to the approval of the Justice there presiding, and provided that the herein above directed service and filing of a Note of Issue has been so served and filed with the Calender Clerk at least ten days prior thereto, this matter shall appear on the calendar of CCP for 9:30 a.m. on September 12, 2012.

A copy of this Order shall be served on the calendar clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the decision and order of this Court.

Dated: July 17, 2012
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.