

Aptuit, LLC v Columbia Cas. Co.

2014 NY Slip Op 31250(U)

May 8, 2014

Sup Ct, New York County

Docket Number: 651289/2012

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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APTUIT, LLC,

Index No. 651289/2012

Plaintiff,

-against-

COLUMBIA CASUALTY COMPANY and CNA,

Defendants.
-----x

Hon. Charles E. Ramos, J.S.C.:

In this insurance coverage action, plaintiff Aptuit, LLC (Aptuit), seeks a declaration that its insurer, defendant Columbia Casualty Company (CCC)¹, is required to defend and indemnify it for claims stemming from criminal acts of a former Aptuit employee, Steven Eaton (Eaton).

In motion sequence 001, CCC moves for summary judgment pursuant to CPLR 3212 dismissing Aptuit's causes of action based on contentions that: (1) Aptuit's insurance claims are excluded under the "Dishonest, Fraudulent, Criminal or Malicious Acts" exclusion (Criminal Acts Exclusion) of the policy; (2) Any damages due to Aptuit's delay in providing, or failure to provide, claimants with the work contracted for is not covered under the Performance Delay Exclusion of the policy; and, (3) Any refunds that Aptuit has to pay claimants do not constitute "damages" under the policy.

¹CCC is the only remaining defendant to this action pursuant to a stipulation of discontinuance against CNA (Dated May 18, 2012).

Background²

Aptuit is a Delaware company with its principal place of business in Greenwich, Connecticut. It is the parent company of subsidiaries that are engaged in the business of pharmaceutical development services, including providing bio-analytical studies to certain customers. One of its subsidiaries is Aptuit Riccarton located in Riccarton, Scotland.

In 2008, CCC, an insurance company authorized to do business in New York, contracted with Aptuit whereby CCC would provide Aptuit with a professional liability insurance policy (the Policy), for a period of one (1) year from September 30, 2008 to September 30, 2009, with a retroactive date of August 1, 1999 (the "Policy Period").

Under the Policy, CCC was obligated to defend Aptuit against professional liability claims arising out of the operation of Aptuit's business and to pay all amounts in excess of the deductible up to the limit of liability for damages resulting from "a covered professional liability claim by reason of a wrongful act by the Insured or by someone for whom the Insured is liable." In addition, the Policy included certain exclusions such as the Criminal Acts Exclusion and Performance Delay Exclusion.

² The facts set forth herein are taken from the parties' submissions and Rule 19-A Statements.

In January 2009, Aptuit conducted an internal audit which resulted in findings of major irregularities for its pre-clinical data generated for studies. Said data³ was delivered by Aptuit to its clients pursuant to contracts. The audit also revealed that Eaton, who was employed as a scientist and who generated pre-clinical data at Aptuit Riccarton, was responsible for the irregularities and falsified records. In February 2009, Aptuit notified the Medicines and Healthcare Products Regulatory Agency (MHRA)⁴ of the falsified records.

Aptuit also notified impacted clients and provided them with reports as required by the MHRA, stating that the studies which had originally been reported as successful, had in fact failed, and/or had not been carried out in compliance with Good Laboratory Practices (GLP) as had been previously certified.⁵

³The data involved changing or providing false analytical data used to determine the concentration of medicine that could be given to clinical trial subjects to assess the safety and efficacy of a new medicine.

⁴The MHRA is a government agency in the United Kingdom and is responsible for regulating medicines and medical devices.

⁵Defined by the MHRA, GLP embodies a set of principles that provides a framework within which studies are planned, performed, monitored, recorded, reported and achieved. These studies are undertaken to generate data by which the hazards and risks to users, consumers and third parties, including the government, can be assessed for pharmaceuticals, agrochemicals, veterinary medicines, industrials chemicals, cosmetics, food, and feed additives and biocides. GLP helps assure regulatory authorities that the data submitted are a true reflection of the results obtained during the study and can therefore be relied upon when making risk/safety assessments.

The MHRA conducted an investigation into the falsified records and found that Aptuit was not responsible for data integrity issues, but that Eaton was responsible in that he altered pre-clinical trial data to ensure an experiment was deemed successful when in fact it had failed. Eaton was criminally prosecuted for his actions and in March 2013, was found guilty at Edinburgh Sherrif Court in Scotland for altering pre-clinical data designed to support applications to perform clinical trials. He was sentenced to a 3-month prison term.

Certain clients of Aptuit brought claims against Aptuit with respect to the false data delivered to them. However, no formal actions were ever filed by Aptuit's customers.

In April 2010, Aptuit notified CCC of the claims and sought coverage under the Policy. CCC responded by issuing a reservation of rights letter wherein it agreed to fund Aptuit's defense to the claims subject to a reservation of rights based on the Criminal Acts Exclusion, Performance Delay Exclusion, and definition of "damages" defense.

In April 2012, prior to Mr. Eaton's conviction, Aptuit commenced the instant action against CCC seeking a declaratory judgment compelling CCC to defend and indemnify it for customer claims stemming from the criminal acts of Eaton. Aptuit also pleads a claim for breach of contract, arising out of the failure to provide defense and indemnification under the Policy.

Discussion

CCC moves for summary judgment to dismiss Aptuit's causes of action on the grounds that: (1) Aptuit's insurance claims are excluded under the Criminal Acts Exclusion because Eaton is deemed an insured under the Policy and his criminal acts fall under said exclusion; (2) Aptuit delayed in providing claimants with the work contracted for due to Eaton's acts and is thus is not covered based on the Performance Delay Exclusion of the Policy; and, (3) any refunds that Aptuit has to pay claimants do not constitute "damages" under the Policy.

As a threshold issue, this Court must address which state's law, New York or Connecticut, governs the instant motion. Both parties have agreed that New York is a proper forum for this dispute and consent that New York law governs this case and the instant motion. Further, this Court discerns no overriding interest in applying Connecticut law and no conflicts between the laws of both states as to the issues raised with respect to the instant motion. As such, New York law governs this insurance coverage action.

Where no triable issue of fact is raised, summary judgment determination is appropriate (CPLR 3212).

Where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement (*U.S.*

Fidelity & Guar. Co. v Annunziata, 67 NY2d 229, 232 [1986]).

However, where the meaning of a policy of insurance is in doubt or is subject to more than one reasonable interpretation, all ambiguity must be resolved in favor of the policyholder and against the company which issued the policy (*id.*).

Further, exclusionary provisions are given a strict, narrow construction, and an insurer bears the burden of establishing that the exclusion applies (*Pioneer Tower Owners Assoc. v State Farm Fire & Cas. Co.*, 12 NY3d 302 [2009]; *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). Accordingly, CCC has met its burden of establishing that the Criminal Acts Exclusion applies in this particular case (*id.*).

The Criminal Acts Exclusion in the Policy bars coverage for any professional liability claim arising out of a criminal act by an Insured.

Coverage does not apply to any professional liability "based on or arising out of a dishonest, fraudulent, criminal or malicious act by any Insured". The Company shall provide the Insured with a defense of such claim unless or until the dishonest, fraudulent, criminal or malicious act has been determined by any trial verdict, court ruling, regulatory ruling or legal admission, whether appealed or not. Such defense will not waive any of its rights under this Policy. Criminal proceedings are not covered under this Policy regardless of the allegations made against the Insured." (Aff. Of Joseph Fiorenzo, Exhibit D, the Policy, P9; emphasis added)

Under the Policy, "Insured" is defined as the "Named Insured" [Aptuit], "Directors & Officers", "Stockholders" and

"Employees" of Aptuit. However, with respect to professional liability claims, "Employees" are considered an "Insured" solely with respect to professional services rendered on Aptuit's behalf (*id.*). "Professional services" is defined to be those services performed by Aptuit or by any other insured on behalf of Aptuit for a fee [or other remuneration] and includes pre-clinical research and other professional services for the pharmaceutical/biotechnology industry (*id.* at P16, P31).

The Policy is clear and unambiguous. There is no question that the Criminal Acts Exclusion applies to preclude coverage in this case with respect to claims arising out of Eaton's criminal acts. It is undisputed that Eaton committed the wrongful conduct out of which the underlying claims arise while he was an employee at Aptuit, and while he was performing pre-clinical research on Aptuit's behalf for its customer's studies. It is also undisputed that he received a criminal conviction for said conduct (*E.g. Orange Motor Co., Inc. v Hanover Ins. Co.*, 172 AD2d 902 [3rd Dept 1991] [Insurer had no duty to defend or indemnify automobile dealer for underlying federal action alleging odometer fraud, under policy providing coverage for negligent failure to comply with Motor Vehicle Information and Cost Saving Act, but excluding coverage for "any intentional, dishonest, fraudulent or criminal acts done by any insured...or of, any insured...or employee of any insured"]).

Aptuit argues that the Criminal Acts Exclusion is not implicated in this case. According to Aptuit, Eaton is not deemed an "Insured" because by committing the criminal actions Eaton was acting outside the scope of employment, and thus was not rendering professional services on behalf of Aptuit and does not fall under the definition of an insured employee.

This Court disagrees with Aptuit's contention. First, in its review of the Policy, this Court fails to find in the definitions of "Insured" and "Professional Services," or within any other provision in the Policy, language specifying or inferring that criminal conduct does not constitute professional services or/and is outside the scope of employment.

Second, the case law that Aptuit relies on is misplaced and irrelevant. In *Rosenblatt v Washington County Co-op Ins. Co.*, 191 AD2d 883, 886 (3rd Dept 1993), the court's holding that an insurer is not liable for alleged criminal conduct of an agent where there is a lack of evidence of such conduct does not apply to the instant matter since there is sufficient evidence here in the form of undisputed facts as to Eaton's criminal conduct and conviction. Further, *Rosenblatt* and other cases cited by Aptuit including *Anderson v Metropolitan Life Ins. Co.*, 128 Misc 144, [Sup. Ct 1926], and *Fire Trust & Deposit Co. v Middlesex Mut. Fire Insurance Co.*, 18 NYS2d 936,943 (4th Dept 1940), relate to the issue of whether a principal is liable for the criminal acts

of an agent. The cited cases do not address the issue in this case as to whether an exclusion applies to deny coverage under a professional liability insurance policy.

Finally, if Aptuit's contention is true then any criminal conduct committed by an "insured" would never be deemed a "professional service." Such an interpretation would forego the need for the Criminal Acts Exclusion since hypothetically all criminal conduct could be deemed out of the realm of "professional services" and scope of employment. This is an unreasonable interpretation and likely not to be the intention of the parties at the time of contracting (see *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]).

Aptuit further argues that there is a genuine issue of material fact as to the intent of the parties when negotiating and entering into the contract in that, specifically, the parties did not intend the scope of the Criminal Acts Exclusion to exclude coverage for the criminal acts of Eaton without the actual knowledge of the criminal acts by Aptuit.

Aptuit, in support of its argument, points to subsequent-year policies which allegedly limits the Criminal Acts Exclusion to preclude coverage to a named insured only when a director or officer of the Named Insured has knowledge of criminal act. Aptuit also points to a memorandum (the "Memo") describing the addition of Policy language in subsequent-year policies, which

specifically stated with respect to the Criminal Acts Exclusion: "Included Intentionally Wrongful Act to reinforce the intent of this exclusion."

Although language relating to any knowledge of criminal acts of lower employees by a named insured is non-existent in the Policy, the Court need not infer ambiguity from such silence. It is clear that the Policy is unambiguous as to the provisions at issue. Moreover, subsequent policy provisions do not carry weight as to clarifying the intent or meaning of the Policy at issue. Further, with respect to the Memo, the Court finds that the cited language does not have any bearing on the definition of "Insured," "Employee" or "Professional Services" as to raise a genuine issue of material fact.

However, Aptuit further argues that the deposition testimony by Jamie Thompson ("Thompson"), CCC's claims adjuster, establishes a genuine issue of material fact. Mr. Thompson testified per an email correspondence with his supervisor Mr. Thomas Morrelli, that certain customer claims could have resulted from factual errors rather than exclusively the result of the fraudulent conduct of Eaton. Mr. Thompson testified that factual error would result in coverage. (See Aff. Of Joseph Fiorenzo, Esq., Exhibit C, Jamie Thompson EBT, T 123:18-124:11, 138:5-138:12). Mr. Thompson also testified that as per an MHRA letter, there are employees other than Mr. Eaton implicated in this case

which could have resulted in customer claims. The named employees include a Mr. Cooper and a Mr. Menzies. These individuals were not prosecuted and it is unclear whether those employees committed conduct that constituted factual error or fraudulent conduct. (See *Id.* at T 144-145)

Thus, there is a genuine issue of fact as to which claims arise out of Eaton's criminal conduct versus those claims which may arise out of other employees and circumstances, as discussed in the previous paragraphs. The request for further discovery on these issues by Aptuit in the form of a deposition of Mr. Morrelli is granted.

CCC sets forth a second defense, that coverage is denied under the Performance Delay Exclusion in the Policy since Aptuit failed to deliver claimants with unflawed studies. According to the Performance Delay Exclusion a strict and narrow construction, CCC has not met its burden of establishing that the exclusion applies in this particular case (*Pioneer Tower Owners Assoc.* at 302).

The Policy bars coverage for any professional liability claim "based on or arising out of delay in delivery of or failure to complete your product or your work." Pursuant to the Policy, "your work" is defined to mean "work, operations or services performed by you or on your behalf" and includes "warranties or representations made at any time with respect to the fitness, quality, durability, performance, use, handling, operation,

safety or maintenance of your work..." (Aff. Of Joseph Fiorenzo, Exhibit D, the Policy, P8,17-18).

This Court disagrees with CCC. First, the Performance Delay Exclusion is ambiguous on its face as to whether it would bar coverage for Aptuit's flawed studies which were delivered to claimants. Second, CCC's claims adjuster, Mr. Thompson, testified that the services provided by Aptuit to its customers were delivered and in his opinion the Performance Delay Exclusion did not apply to the claims at issue (*id.*, Exhibit C, Thompson EBT, T 87:3, 87:15-87:19, 89:3-89:19, 93:18-94:15). Mr. Thompson testified that his supervisor, Mr. Morrelli, suggested that the Performance Delay Exclusion should apply to the claims at issue which resulted in CCC taking its final position in denying coverage based on the Performance Delay Exclusion (*id.* at T 87:20-88:17, 94:22-95:9). Third, CCC fails to provide authority that supports its position.

Thus, there is a genuine issue of fact as to whether the Performance Delay Exclusion would exclude coverage in the instant matter since there is evidence to both support and deny coverage based on the deposition of Mr. Thompson. Aptuit's request to conduct a deposition of Mr. Morelli as to the issue of the applicability of the Performance Delay Exclusion is granted.

Finally, CCC argues that any refunds that Aptuit has to pay claimants based on Aptuit's failure to provide GLP-compliant

studies do not constitute "damages" under the Policy.

The Policy provides that CCC "will pay all amounts...that the Insured (Aptuit) becomes legally obligated to pay as damages as a result of a covered professional liability claim by reason of a wrongful act by the Insured or by someone for whom the Insured is liable" (*id.* at P1). "Damages mean judgments, awards and settlements, provided any settlement is made with the Company's (CCC) prior written consent" (*id.* at P12).

The Policy is clear and unambiguous as to what constitutes damages. Thus this Court disagrees with CCC's position. Assuming that the claims are based on "wrongful acts" as defined under the Policy, any refunds that Aptuit has to pay claimants based on Aptuit's failure to provide adequate studies would fall under the definition of "settlements."

The Court has carefully considered CCC's remaining arguments and finds them unavailing. In light of the disputed issues of fact, it is premature to declare the rights of the respective parties to this action. The parties are directed to contact chambers for a conference.

Accordingly, it is

ORDERED that defendant's motion for summary judgment (001) is denied, and it is further

ORDERED that the parties conduct a deposition of Thomas Morrelli.

Dated: May 8, 2014

ENTER:



J.S.C.