Law Off. of Zachary R. Greenhill, P.C. v Liberty Ins. Underwriters, Inc.
2016 NY Slip Op 30078(U)
January 7, 2016
Supreme Court, New York County
Docket Number: 650414/2014
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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LAW OFFICES OF ZACHARY R. GREENHILL, P.C., AND ZACHARY R. GREENHILL,

Plaintiffs, Index No. 650414/2014

- against -

LIBERTY INSURANCE UNDERWRITERS, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

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

Plaintiffs, Law Offices Of Zachary R. Greenhill, P.C. and Zachary R. Greenhill (collectively, "Greenhill"), move for partial summary judgment, pursuant to CPLR 3212(e), dismissing the first and second affirmative defenses asserted by defendants Liberty Insurance Underwriters, Inc. and Liberty Mutual Insurance Company (collectively, "Liberty"). Greenhill also moves for an immediate trial, pursuant to CPLR 3212(c), for a determination directing the defendants to make payment of all legal fees, costs and expenses relative to the defense of the counterclaims in the underlying action captioned *Zachary Greenhill and Judy Lee Greenhill v The Dwight School, et al*, Index No. 603653/2009 (the "Underlying Action").

Liberty moves for an order pursuant to CPLR 3212 dismissing Greenhill's claims in their entirety.

For the reasons set forth below, Greenhill's motion for summary judgment is denied, and Liberty's motion for summary judgment is granted.

Background

The facts set forth herein are taken from the parties' submissions and Rule 19-a Statements, which are undisputed except where noted.

I. The Underlying Action.

Zachary and Judy Greenhill (the "Greenhills") developed a concept in early 2009 to partner U.S.-based educational facilities with Chinese-based schools to build and promote an international degree program (Defendants' Rule 19-a Statement, ¶7). The Greenhills worked with Stephen Spahn, who was the owner and chancellor of the Dwight School in New York City, to form a joint business venture called The Dwight School in China ("Dwight China") (*id.* at ¶¶6, 7).

On May 7, 2009, the parties filed a certificate of formation with the State of Delaware that created Dwight China, LLC (Defendants' Rule 19-a Statement at ¶9). According to the LLC's operating agreement (the "Operating Agreement"), Zachary Greenhill was to become President of Dwight China, LLC (*id.* at ¶12). The Greenhills were to have a 49 percent ownership interest in Dwight China, LLC, split equally between Judy Lee Greenhill and Zachary Greenhill (*id.* at ¶90). Mr. Greenhill identified

himself as President of Dwight China, LLC on various occasions (*id.* at ¶51), and affirms that the Greenhills are founding members of Dwight China (*id.* at ¶50).

In September 2009, Mr. Greenhill reached an agreement with Dwight China (the "Consulting Agreement") to provide the following services: "consulting and advisory services relating to [Dwight China]'s operations, including business development, sales and marketing appropriate to [Dwight China]'s business, legal services, contracting for legal services and government filings, contract negotiation, college and university guidance services and close and overall execution of [Dwight China]'s business plan" (Defendants' Rule 19-a Statement at ¶¶15, 16). Subsequently, Mr. Greenhill provided business and legal services to Dwight China and was paid for these services (*id.* at ¶¶23, 24, 32).

Mr. Greenhill alleges that Spahn made false representations and promises that led Mr. Greenhill to wind down his law practice in order to build his consulting and advisory business (Defendants' Rule 19-a Statement at ¶¶35, 36). On December 10, 2009, the Greenhills filed the Underlying Action against the Dwight School, Dwight China, and Stephen Spahn (the "Underlying Defendants") to enforce their ownership interests in Dwight China and to seek payment of fees arising out of services that Mr. Greenhill performed under the Consulting Agreement. In response,

the Underlying Defendants asserted three counterclaims (the "Counterclaims") against Mr. Greenhill, alleging that he: (1) repudiated the Consulting Agreement; (2) committed legal malpractice by giving bad advice in connection with the execution of the Consulting Agreement, and breached his fiduciary duties; and (3) engaged in fraudulent misrepresentation by creating the impression that he was performing legal work when he in fact was not (*id.* at ¶37). This Court ultimately dismissed the Counterclaims (*id.* at ¶46), and Mr. Greenhill settled the remaining claims with the Underlying Defendants (Plaintiffs' Rule 19-a Statement, ¶7).

II. The Policy.

Liberty agreed to defend Greenhill for "wrongful acts" arising out of Mr. Greenhill's provision of defined legal services under its "New York Lawyers Professional Liability Policy" (the "Policy") (Plaintiffs' Rule 19-a Statement, ¶¶34, 35, 36). The Policy, which was in effect during the litigation of the Underlying Action, defines "wrongful act" as any actual or alleged act, error or omission or personal injury arising out of the rendering or failure to render professional legal services (*id.* at ¶37).

Two explicit exclusions within the Policy applied in the context of certain outside business activities of either the law firm or its lawyers. Policy Exclusion 3 (the "Capacity

Exclusion") excludes, in relevant part, "any claim arising out of your services and/or capacity as: a. an officer, director, partner, trustee, manager, operator, or employee of an organization other than that of the named insured" (Plaintiffs' Rule 19-a Statement at ¶38). Policy Exclusion 6 (the "Equity Interests Exclusion") states, in relevant part:

> "If a person insured under this policy owns, along with his or her spouse, ten percent (10%) of the issued and outstanding shares, units or other portions of the capital of an organization, and that person simultaneously provides professional legal services with respect to such an organization, this policy will provide no coverage to that person for any claims that result therefrom" (*id.* at ¶39).

At the outset, Liberty did not provide defense or indemnity to Mr. Greenhill for the Counterclaims (Plaintiffs' Rule 19-a Statement at ¶61). Liberty then offered to defend Mr. Greenhill with a reservation of rights, including the right to decline coverage on the basis of the Policy Exclusions and the right to recover legal fees if the Counterclaims were later found not to be covered under the Policy (*id.* at ¶65). Mr. Greenhill did not accept Liberty's offer, defended himself and now seeks indemnity in the form of legal fees, which Liberty refuses to pay, leading to Greenhill's filing of the complaint in the present action.

Discussion

The proponent of a motion for summary judgment pursuant to CPLR §3212 must demonstrate that there are no genuine issues of material fact in dispute, and that it is entitled to judgment as

a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

When interpreting the language of an insurance contract, New York courts should "construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Consolidated Edison Co. Of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). Exclusionary provisions are generally accorded a strict and narrow construction (*Seabord Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). Moreover, an insurer's duty to defend its insured is "exceedingly broad," and insurers will be called upon to provide a defense "whenever the allegations of the complaint suggest... a reasonable possibility of coverage" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]).

A court considers judicial admissions in the insured's responsive pleadings and formal submissions (*Northville Industries Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 634 [1997]), including factual findings of the underlying action (*Bedford Affiliates v Manheimer*, 205 F.3d 1321 [2d Cir 2000]), to confirm or clarify the nature of the underlying claims. A party's affidavit that contradicts that party's prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept

2002]). If the issue claimed to exist is not genuine, but is feigned and there is nothing to be tried, then summary judgment should be granted (*Rubin v Irving Trust Co.*, 305 NY 288, 306 [1953]).

I. Mr. Greenhill's Actions In His Capacity As Officer, Partner, And/or Manager Of Dwight China Triggered The Capacity Exclusion.

At issue is whether there is a triable dispute regarding Mr. Greenhill's status as an officer, partner, and/or manager of Dwight China. In the Underlying Action, Mr. Greenhill plainly admitted in his pleadings and sworn testimony to being President of Dwight China (Affirmation of Kevin Mattessich ["Mattessich aff"], Ex. A, ¶21; Mattessich aff, Ex. E, ¶41). Greenhill's statements to the contrary in the affidavits filed in this action are merely attempts to create a feigned issue of fact. Moreover, Mr. Greenhill himself produced documents in the Underlying Action that he had signed in his capacity as President of Dwight China (Mattessich aff, Ex. E, ¶41).

Mr. Greenhill also admitted in the Underlying Action that he was a partner and manager of Dwight China. Mr. Greenhill repeatedly referred to himself in sworn testimony as a "partner" in the Dwight China venture (*see* Affidavit in Opposition of Zachary R. Greenhill ["Greenhill aff"], Ex. 58, 111:6-9; Ex. 59, 124:14-17; Ex. 60, 246:4-8). Additionally, the Consulting Agreement and the Operating Agreement contained the essential

terms of a "Memorandum of Understanding" between the Greenhills and Dwight China that stipulated to Mr. Greenhill's status as a member of Dwight China's "management team" (Mattessich aff, Ex. E, ¶¶55, 101), and Mr. Greenhill admitted that he and his wife were "senior managers" of Dwight China (Mattessich aff, Ex. G, 228:19-22). Therefore, no genuine issue of material fact exists as to whether Mr. Greenhill was an officer, partner, and/or manager of Dwight China.

Next, this Court must determine whether the Capacity Exclusion properly excludes the Counterclaims. New York courts interpret "arising out of" as "originating from, incident to or having connection with" (*Regal Const. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]). The term "arising out of" requires only that there is some causal relationship between the injury and the risk for which coverage is provided or excluded (*id.*). The test to determine what a claim "arises out of" is a "but for" test (*U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 836 [1995]).

Here, the Counterclaims doe not arise solely out of Mr. Greenhill's actions in his capacity as an independent contractor. The Capacity Exclusion excludes only claims arising out of the named insured's "services and/or capacity as: a. an officer, director, partner, trustee, manager, operator, or employee of an organization other than that of the named insured" (Defendants'

Rule 19-a Statement, ¶38), and would not include independent contractors. It is true that the Consulting Agreement refers to Mr. Greenhill as an independent contractor, not as an officer, partner, and/or manager of Dwight China. However, the plaintiffs have not shown that the alleged wrongdoings in the Counterclaims arose solely from Mr. Greenhill's legal services for Dwight China in an independent contractor capacity. Indeed, Mr. Greenhill has admitted that he did not keep time records or diary records for Dwight China, as is common practice for attorneys providing legal services in an independent capacity, because he was a partner in the Dwight China venture, and Dwight China was not his "client" (Greenhill aff, Ex. 58, 111:6-9).

Rather, within the four corners of the Counterclaims, Mr. Greenhill's actions in his capacity as an officer, partner, and/or manager of Dwight China caused Dwight China's alleged injuries. The Counterclaims arose from the dispute surrounding Mr. Greenhill's interests as a partner in the Dwight China venture. The Greenhills' claims that they divested from Dwight China before the time the Counterclaims accrued is baseless. The Greenhills have stated that they "remained committed" to Dwight China while the facts at issue in the Counterclaims transpired (Mattessich aff, Ex. E, ¶123), and that they were "ready, willing and able" to "fulfill their obligations under the operating and consulting agreements" (*id.* at ¶133). The totality of the record

makes clear that the injuries contemplated in the Counterclaims would not have occurred but for Mr. Greenhill's actions in his capacity as an officer, partner, and/or manager of Dwight China. It follows that the Counterclaims arose from Mr. Greenhill's actions in his capacity as officer, partner, and/or manager.

Therefore, the Policy properly excludes the Counterclaims from coverage under the Capacity Exclusion.

II. The Greenhills' Equity Interest In Dwight China Triggered The Equity Interests Exclusion.

Greenhill argues that there is a genuine issue of material fact regarding the Greenhills' equity interest in Dwight China. The First Department stated, in an opinion affirming this Court's denial of Greenhill's first motion for summary judgment as premature, that discovery was necessary "on the issue of Mr. Greenhill's ownership interests and whether such interests come within the Equity Interests Exclusion" (*Law Offs. of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc.*, 128 AD3d 556, 560 [1st Dept 2015]).

The parties do not dispute that Mr. and Mrs. Greenhill would have each owned 24.5 percent of Dwight China under the Operating Agreement, for a total equity interest of 49 percent, had the Operating Agreement been enforced (Defendants' Rule 19-a Statement, ¶90). However, Greenhill claims that the First Department and this Court have both declared that the Operating

Agreement was never enforced (*Greenhill*, 128 AD3d at 557 ["the operating agreement was never executed by any of the parties to the agreement"]; Greenhill aff, Ex. 51, 21:22-24). Greenhill asserts, contrary to his admissions in the Underlying Action, that he and his wife did not own more than 10 percent of the issued and outstanding shares of Dwight China at the time of the claim (Plaintiffs' Rule 19-a Statement, ¶22).

Greenhill is attempting to feign an issue of fact regarding the Greenhills' equity interest in Dwight China by contradicting prior admissions in the Underlying Action. These prior admissions, proffered through affidavit testimony, constitute findings of fact. Mr. Greenhill's own admissions in the Underlying Action, and not his most recent affidavits, are undisputed facts for purposes of this §3212 motion (*see Harty*, 294 AD2d at 298; *Rubin*, 305 NY at 306). The Greenhills affirmed that Dwight China and the Greenhills entered into the Operating Agreement (Mattessich aff, Ex. A, ¶18). Because the Greenhills entered into the Operating Agreement, which specifies Mr. and Mrs. Greenhill as owning 24.5 percent each of the units of Dwight China (Mattessich aff, Ex. M, Schedule 1), the Greenhills have admitted to owning a 49 percent equity interest in Dwight China. This understanding of the Greenhills' equity interest in Dwight China is corroborated by Mr. Greenhill's admission that he had a

financial interest in Dwight China (Mattessich aff, Ex. G, 245:20-21).

In the absence of a triable issue with respect to the Greenhills' 49 percent equity interest in Dwight China, the Equity Interests Exclusion incontrovertibly excludes the Counterclaims from coverage under the Policy. The Equity Interests Exclusion states:

> "If a person insured under this policy owns, along with his or her spouse, ten percent (10%) of the issued and outstanding shares, units or other portions of the capital of an organization, and that person simultaneously provides professional legal services with respect to such an organization, this policy will provide no coverage to that person for any claims that result therefrom" (Defendants' Rule 19-a Statement, ¶39).

The Greenhills owned well above the ten percent equity interest in Dwight China required by the exclusion. The Counterclaims arose out of Mr. Greenhill's provision of legal services to Dwight China, simultaneous to his 49 percent ownership interest. It follows that the Greenhills' equity interest triggered the Equity Interests Exclusion.

Both the Capacity and the Equity Interests Exclusions properly exclude the Counterclaims. Therefore, Greenhill's claims against Liberty for failing to defend and/or indemnify Mr. Greenhill against the Counterclaims must be dismissed in their entirety.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs Law Offices Of Zachary R. Greenhill, P.C. and Zachary R. Greenhill for summary judgment is denied; and

ORDERED that the motion of defendants Liberty Insurance Underwriters, Inc. and Liberty Mutual Insurance Company for summary judgment dismissing the complaint is granted.

Settle order and judgment.

DATED: January 7, 2016

ENTER:

J.S.C.

HON. CHARLES E. RAMOS