

N THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BROWNSTEIN & WASHKO, JOSEPH	:	
G. WASHKO, ESQ. and PAUL	:	CIVIL ACTION
BROWNSTEIN, ESQ.	:	
	:	
v.	:	
	:	
WESTPORT INSURANCE CORP.	:	NO. 01-4026
	:	
O'NEILL, J.		JULY , 2002

MEMORANDUM

Plaintiffs have brought suit seeking a declaratory judgment and damages arising from defendant insurance company's refusal to provide them with coverage for a claim of legal malpractice. Defendant declined coverage on the ground that the underlying claim falls within an exclusion contained in the policy it issued to plaintiffs. Before me now is defendant's motion for summary judgment on all claims contained in plaintiffs' complaint and on its own counterclaim seeking a declaratory judgment.

BACKGROUND

Defendant issued to plaintiffs a professional liability insurance policy which subject to its terms and conditions provided coverage for claims made and reported from May 1, 1999 to May 1, 2000. Under section fourteen entitled "Exclusions" the policy states:

This policy shall not apply to any claim based upon, arising out of, attributable to, or directly or indirectly resulting from:

-
- B. any act, error, omission, circumstance or personal injury occurring prior to the

effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or personal injury might be the basis of a claim.

The record discloses the following facts. In August, 1997, Mary Lou Maxwell retained plaintiffs to represent her in a state criminal proceeding. At trial Maxwell was represented by defendant Washko. On April 1, 1998, she was convicted of aggravated indecent assault and corruption of a minor. On April 8, 1998, Maxwell terminated her relationship with plaintiffs and hired a new attorney, Michael H. Appelbaum. Appelbaum filed a motion for post-verdict relief alleging ineffective assistance of counsel, prosecutorial misconduct and trial court error. Washko received a copy of the motion. At a hearing held before Hon. Anthony J. DeFino on October 22, 1998, Washko appeared under subpoena and testified extensively about his representation of Maxwell.¹ Washko was aware that the purpose of the inquiry was to determine whether he was ineffective in his representation of Maxwell.²

Upon leaving the courtroom Washko contends that Appelbaum “advised him that he was ‘out of the woods’ regarding this case.” According to Washko one or two months after the hearing Appelbaum informed him that Maxwell had been granted a new trial and that the Commonwealth had “nolle prossed” the criminal charges against her. Id. ¶ 9. Washko states that during this conversation Appelbaum told him he was “off the hook.” On November 6, 1998, Judge DeFino issued an opinion granting Maxwell’s motion for extraordinary relief and granting her a new trial based solely on his finding that several aspects of Washko’s representation

¹ Washko’s examination covers approximately 160 pages of transcript.

² During the examination Judge DeFino stated: “Now, the issue is his ineffectiveness.” (Post Trial Mot. Hear. Tr. at 47).

amounted to ineffectiveness of counsel. Washko admits that he was informed that a new trial had been granted by Judge DeFino but states that he was not made aware of the grounds for the judge's decision until after the effective date of the policy. Based on comments made by Judge DeFino's during Washko's testimony and because new counsel for Maxwell had informed him that he was "off the hook" and "out of the woods", Washko assumed that the basis for Judge DeFino's decision was either prosecutorial misconduct or trial court error.

For purposes of this motion I accept as established fact that the grounds for Judge DeFino's decision were not known by Washko prior to the inception of the policy on May 1, 1999.

By letter dated December 21, 1999, Dean I. Orloff notified Washko that he had been retained to represent Maxwell in a legal malpractice suit against Washko to be filed in the Pennsylvania Court of Common Pleas. On December 22, 1999 plaintiffs notified Westport of Maxwell's impending suit. Westport responded by letter dated October 5, 2000, which stated in relevant part:

The materials reviewed clearly indicate that you received a copy in 1998 of a post verdict motion in arrest of judgment and for extraordinary relief founded on your alleged ineffectiveness of counsel with respect to the handling of the claimant's defense. On October 22, 1998 you were questioned fairly extensively with respect to these allegations and this motion before Judge . . . DeFino On November 6, 1998, Judge DeFino issued a written opinion detailing some of his findings and concluding that your handling of the claimant's defense at trial amounted to ineffective assistance of counsel. Judge DeFino granted the claimant's motion for extraordinary relief and awarded her a new trial by order dated November 9, 1998.

Westport refused to provide coverage and/or defense against Maxwell's claim because in its view plaintiffs had knowledge of or should have reasonably foreseen the basis for this claim prior to May 1, 1999, the date coverage began on the policy.

On June 21, 2001, plaintiffs filed a state court action against Westport seeking a declaratory judgment stating that Westport was obligated to provide plaintiffs with a defense in Maxwell's suit and indemnify them in the event a judgment were entered against them. The complaint also alleged breach of contract, unjust enrichment,³ and bad faith. On August 8, 2001, Westport removed the action to this court. In its answer, defendant filed a counter-claim seeking a declaratory judgment that because of the exclusionary language quoted above the policy afforded no coverage to plaintiffs with respect to Maxwell's malpractice suit.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact," the moving party is entitled to summary judgment. Fed. R. Civ. P. 56(c). An issue is genuine if the fact-finder could reasonably hold in the non-movant's favor with respect to that issue and a fact is material if it influences the outcome under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). It is my obligation to determine whether all the evidence can reasonably support a verdict for the non-moving party. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 856 (E.D. Pa.1993). In making this determination the facts must be reviewed in the light most favorable to the non-moving party. See Anderson, 477 U.S. at 248. Further, the non-moving

³ Plaintiffs memorandum of law in response to Westport's motion for summary judgment states: "Plaintiffs, lastly agree that they are not entitled to relief under the Doctrine of Unjust Enrichment given that discovery has proven there to be a contract of insurance between the parties." (Pls.' Resp. Br. at 7). Accordingly this claim will be dismissed.

party is entitled to all reasonable inferences drawn from those facts. Id. However, the non-moving party must raise “more than a mere scintilla of evidence in its favor” in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). Although the moving party bears the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must establish the existence of each element of its case. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

DISCUSSION

The question for decision is whether or not the malpractice claim brought by Maxwell falls within the policy provision excluding claims that were foreseeable prior to its effective date. Under Pennsylvania law, language contained in a contract must be construed in accordance with its plain and ordinary meaning. See O’Brien Energy Sys., Inc. v. American Employers’ Ins. Co., 629 A.2d 957, 960 (Pa. Super. Ct. 1993). Where an insurance policy’s language is ambiguous, it is construed in favor of the insured. See Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). A policy provision is ambiguous “if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning.” Id. at 220. The Court of Appeals has elaborated on these principles by stating that a court should read policies to avoid ambiguities. See Niagara Fire Ins. Co. v. Pepicelli, Pepicelli, Watts and Youngs, P.C., 821 F.2d 216, 220 (3d Cir. 1987). When an insurer seeks to deny coverage based upon an exclusion in a policy, it is the insurer’s burden to demonstrate that the exclusion applies. See Brown, 834 F. Supp. at 857.

In Coregis Insurance Co. v. Barrata & Fenerty, Ltd., 264 F.3d 302 (3d Cir. 2001), the Court of Appeals applied the mixed subjective/objective standard it had established in Selko v. Home Ins. Co., 139 F.3d 146 (3d Cir. 1998), to determine whether a policy exclusion almost identical to the one before me precluded coverage for a legal malpractice claim.⁴ The policy in Selko provided coverage for any act, error or omission occurring prior to the policy period “provided that prior to the effective date of this policy . . . the insured had no basis to believe that the insured had breached a professional duty.” 139 F.3d at 149 n. 1. In analyzing this provision the Selko Court stated:

First, it must be shown that the insured knew of certain facts. Second, in order to determine whether the knowledge actually possessed by the insured was sufficient to create a ‘basis to believe,’ it must be determined that a reasonable lawyer in possession of such facts would have had a basis to believe that the insured had breached a professional duty.

Selko, 139 F.3d at 152. In Baratta, the Court noted that prior to the effective date of the insurance policy in question the complaint in the underlying action had been dismissed for lack of activity and the attorney had received a letter expressing his clients’ dissatisfaction with his representation. The Court found that in view of these facts the prior knowledge exclusion contained in the policy acted to bar coverage for the ensuing malpractice suit. In reaching its holding, the Baratta Court rejected the claim of the attorney-defendant that he had no reason to foresee a legal malpractice claim because at the time of the effective date of the policy he believed that any malpractice action was time-barred by the Pennsylvania statute of limitations.

⁴ The policy provision at issue in Baratta stated in relevant part: “[the] policy does not apply to . . . any claim arising out of any act, error, omission or personal injury occurring prior to the effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission or personal injury might be expected to be the basis of a claim”

The Baratta Court stated:

When an attorney has a basis to believe he has breached a professional duty, he has a reason to foresee that his conduct might be the basis of a professional liability claim against him. He cannot assume that the claim will not be brought because he *subjectively* believes it is time barred or lacks merit.

264 F.3d at 307 (emphasis in original).

In Coregis Insurance Co. v. Wheeler, 24 F. Supp. 2d 475, 478 (E.D. Pa. 1998), relying on Selko, the court held that a similar provision acted to exclude coverage for a legal malpractice claim.⁵ In Wheeler the attorney-defendant had failed to include allegations in a complaint to support one of his client's claims and it was subsequently dismissed. The attorney contended that he could not have foreseen the subsequent filing of a legal malpractice claim since at the time the insurance policy became effective he believed the matter had been resolved by an agreement to reduce the fee charged for the services claimed by his client to be inadequate. The Wheeler Court rejected this contention, noting the Selko Court's approval of the rationale employed by the court in Mount Airy Insurance Co. v. Thomas, 954 F. Supp. 1073, 1080 (W.D. Pa. 1997), which held that disputes over "whether the defendant believed, on the basis of his relationship with his client or his impression of that client's reaction to the situation, that the client would make a claim is not relevant to our analysis." Wheeler, 24 F. Supp. 2d at 479.⁶ The

⁵ The exclusion in Wheeler applied to claims arising "out of an act, error, omission or personal injury occurring prior to the effective date of th[e] policy" where the insured "at the effective date knew or could have reasonably foreseen that such act, error, omission or personal injury might be expected to form the basis of a claim."

⁶ The Wheeler Court also noted that in the absence of actually obtaining a release from liability, discussing a malpractice suit even in the context of securing an agreement not to bring a future claim would put a reasonable attorney on notice that his alleged conduct "might be expected to be the basis of a claim or suit." 24 F. Supp. 2d at 480.

relevant inquiry requires the presence of “facts which are known to the attorney and, when view[ed] by a reasonable person, *could* give rise to a claim of malpractice” Id. (emphasis added).

Applying the standard established in Selko, I must first determine what facts were known to Washko as of May 1, 1999, the effective date of the policy. As summarized above, these facts included: (1) following her conviction Maxwell had terminated her relationship with plaintiffs and retained new counsel to pursue post-conviction remedies; (2) one basis on which Maxwell sought to overturn her conviction was ineffective assistance of counsel; (3) Washko was subpoenaed to appear at a hearing where he gave extensive testimony concerning his representation of Maxwell; and (4) Maxwell’s post-conviction motion for extraordinary relief was granted and a new trial was ordered. Turning to the second step of the Selko analysis, I hold that a reasonable lawyer in possession of these facts would have had reason to believe that they might form the basis of a future claim of legal malpractice.

Defendant contends that given the facts in Washko’s possession as of the effective date of the policy “there can be no doubt that a reasonable attorney in possession of such knowledge could have reasonably foreseen that a claim might be brought.” (Def.’s Rep. Br. at 5). Plaintiffs respond by stating that “[t]here is one fact which is undisputed and precludes this Court’s entering of summary judgment” (Pls.’ Resp. at 1). According to plaintiffs that “one fact” is that as of the effective date of the policy Washko “believed that Judge Defino had not found him to be ineffective in the representation of Ms. Maxwell.” Id. Further, plaintiffs state that

[g]iven that Appelbaum had informed Washko after his testimony on October 22, 1998 that he was ‘out of the woods’ and Washko never learned from any source that Judge DeFino had ruled him to be ineffective until even after he notified defendant Westport of Ms. Maxwell’s claim, it was certainly reasonable for Plaintiff to believe that Judge

DeFino had not found him to be ineffective.

(Pls.' Resp. at 3). However, Washko's subjective understanding of the likelihood of a future malpractice suit in light of Appelbaum's comments is not relevant to this inquiry. See Barrata, 264 F.3d at 307. What I must determine is whether a reasonable attorney in possession of the facts known to Washko prior to the effective date of the policy would have reason to believe that they could provide a basis for a legal malpractice claim.

Plaintiffs argue that a grant of summary judgment in favor of defendant would "announce a bright line rule of law stating that any time a convicted criminal defendant makes a claim of ineffective assistance of counsel against his trial attorney, the trial attorney has a basis to believe that he has breached a professional duty." (Pls.' Sur-Rep. Br. at 1). I do not adopt such a rule. As of the policy's effective date Washko was not only aware that Maxwell had sought to overturn her conviction partly on the basis of ineffectiveness of counsel, but was also aware that Maxwell had hired another attorney to represent her following her conviction, was aware that he had been questioned extensively regarding his representation of Maxwell at a post-conviction hearing and was aware that Judge DeFino had granted Maxwell a new trial. This motion was granted in November, 1998, nearly six months prior to the effective date of the policy. Washko's erroneous impression that Judge DeFino must have granted a new trial on the basis of either trial court error or prosecutorial misconduct was due to the fact that he had "never learned from any source that Judge DeFino had ruled him to be ineffective" and his subjective understanding of the likelihood that his own conduct could have formed the basis of the court's decision. Viewing the facts in the light most favorable to plaintiffs, were I to hold in their favor it would mean that an attorney who was aware that his client had made, among other grounds for post-conviction relief,

an allegation of ineffective assistance of counsel and then learned that such relief had been granted is under no obligation to report this circumstance as a possible future claim of malpractice so long as the attorney does not know the basis of the trial court's decision. I decline to do so.⁷

An appropriate Order follows.

⁷ In light of my ruling defendant is entitled to summary judgment on the remaining counts of plaintiffs' complaint, which sought: damages for breach of contract (Count I); a declaratory judgment construing the policy in their favor (Count II); and damages for bad faith (Count IV).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BROWNSTEIN & WASHKO, JOSEPH	:	
G. WASHKO, ESQ. and PAUL	:	CIVIL ACTION
BROWNSTEIN, ESQ.	:	
	:	
v.	:	
	:	
WESTPORT INSURANCE CORP.	:	NO. 01-4026

ORDER

AND NOW, this day of July, 2002, in consideration of defendant's motion for summary judgment, plaintiff's response thereto, and the reasons set forth in the accompanying memorandum, the motion is GRANTED. Judgment is entered in favor of defendant and against plaintiffs with respect to all counts of plaintiffs' complaint.

THOMAS N. O'NEILL, JR., J.

