SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.

Plaintiff,

- v -

GOLENBOCK EISEMAN ASSOR BELL & PESKOE, LLP,

Defendant.

INDEX NO. 653762/2022

MOTION DATE 03/08/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 47, 48

were read on this motion for SUMMARY JUDGMENT.

This is an insurance coverage dispute. Plaintiff Allied World Assurance Company (U.S.) Inc. ("Plaintiff" or "Allied") issued a Lawyers Professional Liability Insurance Policy ("Policy" [NYSCEF 32]) to Defendant Golenbock Eisenman Assor Bell & Peskoe, LLP ("Defendant" or "Golenbock"). Prior to obtaining the Policy, Defendant had entered into a tolling agreement ("Tolling Agreement" [NYSCEF 34]) with its client, non-party Workspace, Incorporated ("Workspace") which referenced potential claims for professional malpractice.

Following the issuance of the Policy, Workspace sued Defendant for legal malpractice (*Workspace, Inc. v Golenbock Eiseman Assor Bell & Peskoe, LLP*, Index No. 157233/2021 (Sup Ct, NY Cnty) (the "Workspace Action")). Golenbock sought coverage from Plaintiff under the Policy for the Workspace Action, which Plaintiff provided under a reservation of rights (NYSCEF 37).

Plaintiff moves for summary judgment on its first and second causes of action for declaratory judgment that there is no coverage under the Policy because (1) the Tolling Agreement constituted a "Claim" which was asserted prior to the term of the claims-made Policy and (2) the Policy's "No Prior Knowledge Condition" is not satisfied. Plaintiff third cause of action seeks a declaration and money judgment for recoupment of costs advanced to Defendant, though at oral argument Plaintiff's counsel confirmed that no funds had yet been advanced. Defendant cross-moves for summary judgment declaring that there is coverage under the Policy.

As stated on the record on September 18, 2023 (NYSCEF 48), Plaintiff's motion for summary judgment on its first and second causes of action is **granted** and it is declared that Defendant is not entitled to coverage for the Workspace Action under the Policy. With respect to the third cause of action, the motion is **denied without prejudice** because no funds were actually disbursed to Defendant. Defendant's cross-motion is **denied** other than with respect to Plaintiff's moot claim for recoupment.

BACKGROUND

The Policy is a "claims-made" insurance policy with an effective period from August 2021 to August 2022. The Policy defines a "Claim" as:

> 1. any written notice or demand for monetary relief or Legal Services;
> 2. any civil proceeding in a court of law;
> 3. any administrative proceeding, other than a Disciplinary Proceeding; or
> **4. a request to toll or waive a statute of limitations**
>
> made to or against any Insured seeking to hold such insured responsible for any Wrongful Act…

(Policy Section III.C) (emphasis added).

The Policy provides that "[a] Claim will be deemed to have been first made when an insured receives written notice of the Claim" (Policy Section III.C). The Policy defines Legal

Services Wrongful Act as "any actual or alleged act, error, or omission committed by an Insured, solely in the performance of or failure to perform Legal Services…" (Policy Section III.Q).

The Policy further provides that "[a]ll Claims based upon or arising out of the same Wrongful Act or Related Act or Omission shall be considered a single Claim and shall be considered first made at the time the earliest Claim arising out of such Related Act or Omission was first made. . ." (Policy Section V.E.5) (emphasis omitted). Finally, the Policy provides:

> It is a condition precedent to coverage under this Policy that any Wrongful Act upon which a Claim is based occurred:
>
> 1. during the Policy Period; or
> 2. on or after the Retroactive Date and prior to the Policy Period, provided that all of the following three conditions are met:
>   (a) the Insured did not notify any prior insurer of such Wrongful Act or Related Act or Omission; and
>   **(b) prior to August 1, 2019 no Insured had any basis (1) to believe that any Insured had breached a professional duty; or (2) to foresee that any fact, circumstance, situation, transaction, event, or Wrongful Act might reasonably be expected to be the basis of a Claim against any Insured; and**
>   (c) there is no policy that provides insurance to the Insured for such liability or claim.

(Policy Section I.2.(b) as Amended by Endorsement No. 4) (emphasis added).

In 2017, Workspace was sued in the action known as *106 Spring Street LLC v. Workspace, Inc.*, Index No. 657050/2017 (Sup. Ct., N.Y. Cnty.) (the "106 Spring Street Action").

In 2018, prior to the Policy's effective period, Workspace and Golenbock entered the Tolling Agreement (Answer ¶21 [NYSCEF 16]). The Tolling Agreement provides, in relevant part, that

> A. Workspace believes that it may hold claims against Golenbock (the "Workspace Claims"), and wishes to preserve the Claims – if any – until the final adjudication of

the matter captioned as 106 Spring Street LLC v. Workspace, Inc., Index No. 657050/2017 (Sup. Ct. N.Y. Cnty) (the "106 Spring Street Action").

B. Golenbock believes that it may hold claims against Workspace for unpaid legal fees (the "Golenbock Claims").
C. The Parties desire to avoid litigation at this time.
D. The Parties desire to enter into this Agreement to toll the statute of limitation on their claims against one another at this time.

The Workspace Action was filed during the Policy's effective period on April 1, 2022 (NYSCEF 3). In the Workspace Action, Workspace alleges that Golenbock committed legal malpractice during the period 2015–2017 in connection with certain transactions concerning 106 Spring Street and 93 Mercer Street – the same properties that are in issue in the 106 Spring Street Action.

Golenbock requested, and Allied provided, a defense in the Workspace Action subject to a reservation of rights given its conclusion that there was no coverage under the Policy (August 15, 2022 Letter [NYSCEF 37]). Allied initiated this case on October 12, 2022 (Complaint [NYSCEF 1]).

Allied now moves for summary judgment that there is no coverage under the Policy for the Workspace Action on two grounds. First, Allied asserts that the "Claims" alleged in the Workspace Action were first made in the Tolling Agreement and therefore predate the Policy. Second, Allied asserts that the "No Prior Knowledge Condition" is not satisfied because Golenbock knew about Workspace's claims before it obtained the Policy.

Allied also seeks recoupment of any costs advanced. During oral argument, counsel for Allied indicated that the Policy's $100,000 deductible had not been met and thus the request for a money judgment was likely moot (Sept. 18, 2023 Tr. 13-14, 43-44 [NYSCEF 48]).

Golenbock cross-moves for summary judgment declaring that the Policy provides coverage for the Workspace Action. Golenbock argues that the Tolling Agreement is not a

"Claim"' within the meaning of the Policy. Golenbock also argues that that Tolling Agreement is not specific enough to constitute prior knowledge of the claims asserted in the Workspace Action so as to violate the No Prior Knowledge Condition.

DISCUSSION

A. Legal Standard

Summary judgment is warranted when the movant makes a *prima facie* showing of entitlement to judgment as a matter of law and the opposing party fails to establish the existence of a triable issue of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [collecting cases]). Summary judgment may be granted in a declaratory judgment action and appropriate declarations are made in the decretal portion of this order (*Booston LLC v 35 W. Realty Co., LLC*, 213 AD3d 553, 554 [1st Dept 2023]).

Whether a contract is ambiguous is a matter of law for the Court's determination on a motion for summary judgment, including where cross-motions are made (*S. Rd. Assoc., LLC v Intern. Bus. Machines Corp.*, 4 NY3d 272, 278 [2005]). Relevant here, "[w]hen the terms and conditions of an insurance policy are clear and unambiguous, the construction of the policy presents a question of law to be determined by the court, and the court may properly grant summary judgment" (*Slattery Skanska Inc. v Am. Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]). Whether coverage is available under a policy may be resolved by summary judgment (*Salvo v Greater New York Mut. Ins. Co.*, 213 AD3d 587 [1st Dept 2023]).

B. Plaintiff is Entitled to a Declaration That There is No Coverage Under the Policy

The evidence in this case is uncontested in all material respects. Neither party disputes the authenticity of the Policy or the Tolling Agreement. The 106 Spring Street Action and

Workspace Action are matters of public record. Both parties ask the Court to make a summary determination based on the current record.

The Court holds that Plaintiff Allied is entitled to summary judgment.

a. The Tolling Agreement is a "Claim" Under the Policy

The Policy expressly includes within the definition of claim "a request to toll or waive a statute of limitations." It is undisputed that Golenbock and Workspace, its former client, entered into the Tolling Agreement prior to the Policy period. Under the terms of the Policy, a tolling agreement need only to seek to hold Golenbock responsible for "any Wrongful Act" to constitute a claim (Policy Section I.2.b). Golenbock's argument that the Tolling Agreement is ambiguous or not specific enough is unavailing. Although the Tolling Agreement does not describe the specific claims Workspace was considering, it references the 106 Spring Street Action concerning specific transactions on which Golenbock advised Workspace. The parties had no relationship other than as attorney and client, and thus the only claim that reasonably could have been contemplated was one for a Legal Services Wrongful Act, as defined in the Policy. The terms of the Policy do not require that the Tolling Agreement spell out the proposed claims in detail.[1]

Under the terms of the Policy, therefore, the "claim" embodied in the Workspace Action was in fact made prior to the Policy's effective period. Accordingly, there is no coverage under the Policy for the Workspace Action and Plaintiff is entitled to summary judgment on its first

[1] The Court notes that the provision defining a Tolling Agreement to be a "claim" is not inherently for the benefit of the insurer in avoiding coverage. If a similar policy had been in place at the time of the Tolling Agreement, Defendant presumably would have been permitted to trigger its claims-made coverage at that time, rather than having to wait until a lawsuit is actually brought.

cause of action for a declaratory judgment (*Am. Country Ins. Co. v Umude*, 176 AD3d 542, 542 [1st Dept 2019]).

b. The No Prior Knowledge Condition Is Not Satisfied

When analyzing "prior knowledge" provisions in professional liability insurance cases, New York courts apply a two-step subjective/objective knowledge test (*Liberty Ins. Underwriters, Inc. v Corpina Piergrossi Overzat & Klar LLP*, 78 AD3d 602, 604–605 [1st Dept 2010]). The Court must first determine whether the insured, Golenbock, had subjective knowledge of relevant facts or circumstances indicating a potential claim prior to the Policy's effective date (*id.* at 605 *citing Executive Risk Indem. Inc. v Pepper Hamilton LLP*, 13 NY3d 313 [2010]). Second, the Court must determine whether a reasonable attorney "might expect such facts to be the basis of a claim" (*id.*).

Golenbock's subjective knowledge of circumstances relevant to a potential claim cannot reasonably be disputed. Golenbock's conclusory assertion that it did not have actual knowledge of the pertinent facts because the Tolling Agreement does not expressly set those facts out is unavailing. The Tolling Agreement expressly provides that "Workspace believes that it may hold claim against Golenbock" and that those claims are preserved pending the 106 Spring Street Action. Golenbock clearly knew, or should have known, that Workspace sought to preserve claims concerning Golenbock's legal work on the transactions relevant to the 106 Spring Street Action when it entered the Tolling Agreement. The parties had no other commercial relationship.

With respect to the objective prong, Golenbock asserts that it would be unreasonable for an attorney to believe a claim might arise against them because the signing of the Tolling Agreement was driven by *Golenbock's* claims for unpaid legal fees. Again, Golenbock's

argument is flawed given the plain language of the Tolling Agreement which provides that "Workspace believes it may have claims against Golenbock." A reasonable attorney would infer that Workspace had a legal malpractice claim in mind, sufficient to trigger an obligation to disclose that fact to a subsequent insurer. Accordingly, the Court finds that under the No Prior Knowledge Condition in the Policy Allied is entitled to summary judgment on its second cause of action for declaration that there is no coverage under the Policy.

c. Allied's Recoupment Claim Appears Moot

Under New York law, an insurer who provides a defense subject to a reservation of rights may recoup defense costs if it is later determined that coverage was not required (*Certain Underwriters at Lloyd's London Subscribing to Policy No., PGIARK01449-05 v Advance Tr. Co., Inc.*, 188 AD3d 523, 524 [1st Dept 2020]). Whether recoupment is available is a fact-specific inquiry (*Peleus Ins. Co. v RCD Restorations Inc.*, 77 Misc 3d 1225(A) [Sup Ct New York County 2023] [collecting cases]).

Allied is only entitled to recoupment if it actually expended funds on the defense of the Workspace Action. Absent any allegations or proof of payment, Allied's claim for recoupment appears to be moot given the Court's ruling that Allied need not provide coverage going forward. The claim therefore is dismissed without prejudice. If the facts have changed since oral argument, Allied may make a motion to renew with respect to its claim for recoupment.

* * * *

Accordingly,

ORDERED that Plaintiff's motion to summary judgment is **GRANTED IN PART** as to Counts One and Two in the Complaint (NYSCEF 1) and **DENIED WITHOUT PREJUDICE** as to Count 3; it is further

ORDERED that Defendant's cross-motion for summary judgment is **DENIED** other than with respect to Plaintiff's claim for recoupment, which is dismissed without prejudice**;** it is further

ORDERED, ADJUDGED AND DECLARED that there is no coverage for Defendant under the terms of the Lawyers Professional Liability Insurance Policy ending in 9505 issued by Plaintiff in connection with the action known as *Workspace, Inc. v. Golenbock Eiseman Assor Bell & Peskoe LLP*, Index No. 157233/2021 and Plaintiff need not provide a defense to Defendant in the Workspace Action because the Claim, as defined in the Policy, predates the Policy; it is further

ORDERED, ADJUDGED AND DECLARED that there is no coverage for Defendant under the Policy in connection with the Workspace Action because the Policy's Prior Knowledge Condition is not satisfied; it is further

ORDERED that Plaintiff's claim for recoupment is dismissed without prejudice.

The Clerk is directed to enter judgment for Plaintiff accordingly, with costs as taxed by Clerk, upon submission by Plaintiff of a form of judgment and bill of costs.

This constitutes the decision and order of the Court.

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10/27/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**