067-074
COPY

SHORT FORM ORDER

INDEX No. 12-19807

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 9-24-12
ADJ. DATE 12-5-12
Mot. Seq. # 001 - MG; CASEDISP

A WOMAN'S WAY MEDI-SPA, INC. and SUSAN L. HALBERT,

Plaintiffs,

- against -

THOSE CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,

Defendant.

MARTIN SILVER, ESQ.
Attorney for Plaintiffs
330 Motor Parkway, Suite 201
Hauppauge, New York 11788

LONDON FISCHER LLP
Attorney for Defendant
59 Maiden Lane, 39th Floor
New York, New York 10038

Upon the following papers numbered 1 to 17 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10 - 11; Replying Affidavits and supporting papers 12 - 13; Other Supplemental Affidavit, 14 - 15; memorandum of law, 16 - 17; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Those Certain Underwriters at Lloyds of London for an order pursuant to CPLR 3211 (a) (1) dismissing the complaint as against it is granted.

This is an action by plaintiffs A Woman's Way Medi-Spa, Inc. and Susan Halbert for a judgment declaring that defendant Those Certain Underwriters at Lloyds of London is obligated to defend them in the underlying action pending in this Court entitled *Nicole Opisso v A Woman's Way Medi-Spa, Inc. and Susan Halbert*, assigned index number 31866-11. In the underlying action, Opisso is seeking damages for personal injuries she allegedly sustained as a result of a laser treatment to remove spider veins performed by Susan Halbert at A Woman's Way Medi-Spa. The complaint in the instant action alleges that plaintiffs filed a claim for insurance coverage, but defendant disclaimed coverage, refusing to assume the defense of plaintiffs and refusing to pay any judgment that might be obtained by Opisso.

Defendant now moves for an order pursuant to CPLR 3211 (a) (1) dismissing the complaint as against it, arguing documentary evidence conclusively establishes that coverage is excluded. Specifically, defendant argues that as plaintiffs failed to provide it with a signed consent form by Ms. Opisso, the claim is excluded from coverage pursuant to the terms of the liability insurance policy. In support of its motion, defendant submits, among other things, copies of the pleadings, the Medi-Spa Professional Liability and Commercial General Liability Insurance Policy, a report of claim form, and a letter from defendant's counsel to plaintiffs. Plaintiffs oppose defendant's motion, arguing that the Opisso action seeks to recover for personal injuries alleging based on plaintiffs' alleged negligence and asserts no claims for lack of informed consent or battery. Plaintiffs also argues that the language of the consent form exclusion is too vague to enforce.

The liability insurance policy issued by defendant to A Woman's Way Medi-Spa, Inc. under the section entitled Medi-Spa Professional Liability Coverage Part One states as follows:

II. DEFENSE, SETTLEMENT, AND INVESTIGATION OF CLAIMS

A. The Underwriter shall have the right and duty to defend, subject to the Limit of Liability, exclusions and other terms and conditions in this Policy, any Claim against the Insured seeking **Damages** which are payable under the terms of this Policy, even if any of the allegations of the **Claim** are groundless, false or fraudulent.

B. It is agreed that Underwriters' right and duty to defend shall be limited to payment of **Claims Expenses**.

The insurance policy under the section entitled Medi-Spa Professional Liability Coverage Part Provider Schedule contains a provision stating, in relevant part, as follows:

The coverage under this Insurance applies to **Damages** or **Claims Expenses** incurred solely with respect to any **Claim** arising out of the rendering or failure to render any Professional Service

* * *

The following additional DEFINITIONS apply:

* * *

"Beauty Services" means the act or practice of the below listed services, including but not limited to:

a) Manicures;
b) Facials;
c) Aesthetic Peels;
d) Eyelash/Eyebrow Tinting and/or Extensions;
d) Wax removal;
f) Body Wraps;
g) Massage;
h) Electrology;

i) Tanning;
j) Microdermabrasion;
k) Hairdressing;
l) Topical Makeup Application; and
m) Piercing for earlobe and outer rim of ear cartilage only.

* * *

The following EXCLUSIONS apply
The coverage under this insurance does not apply to Damages or Claims Expenses incurred with respect to any Claim:

3) **Consent Forms:**
arising from any Claim where the Named Insured cannot provide to the Underwriters a signed consen[t] form, however this exclusion will not apply to the application of Beauty Services as defined herein

A CPLR 3211(a)(1) motion to dismiss based on documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (***Goshen v Mutual Life Ins. Co.***, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Suchmacher v Manana Grocery***, 73 AD3d 1017, 900 NYS2d 686 [2d Dept 2010]).

It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, an insurer will be called upon to provide a defense whenever the underlying complaint suggests a reasonable possibility of coverage (***Cont'l Cas. Co. v Rapid-American Corp.***, 80 NY2d 640, 593 NYS2d 966 [1993]). The duty remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless, or not covered (***Fitzpatrick v America Honda Motor Co.***, 78 NY2d 61, 571 NYS2d 672 [1991]). Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has ran its course (***Automobile Ins. Co. of Hartford v Cook***, 7 NY3d 131, 878 NYS2d 176 [2006]). Nevertheless, when the insurer seeks to disclaim coverage on the basis of exclusions, the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast the pleadings solely and entirely within the policy exclusions, and that the allegations *in toto*, are subject to no other interpretation (*see* ***Allstate Ins Co., v Mugavero***, 79 NY2d 153, 581 NYS2d 142 [1992]; ***City of New York v. Insurance Corp. of New York***, 305 A.D.2d 443, 758 N.Y.S.2d 817 [2d Dept 2003]).

Furthermore, it is generally the insured's burden to establish coverage and the insurer's burden to prove the applicability of an exclusion (*see* ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 746 NYS2d 622 [2002]; ***Rhodes v Liberty Mutual Ins. Co.***, 67 AD3d 881, 892 NYS2d 403 [2009]; ***Barkan v New York Schools Ins. Reciprocal***, 65 AD3d 1061, 886 NYS2d 414 [2009]). To establish an exclusion, the insurer must demonstrate that the exclusion relied upon 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, 652, 593 NYS2d 966 [1993]; *see*

Seabord Sur. Co. v Gillette Co., 64 NY2d 304, 486 NYS2d 873 [1984]; ***Guishard v General Security Ins. Co.***, 32 AD3d 528, 820 NYS2d 645 [2006]). Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense (*see* ***Matter of Covert***, 97 NY2d 68, 735 NYS2d 879 [2001]; ***Johnson v Travelers Ins. Co.***, 269 NY 401, 408, 199 N.E. 637 [1936]). The plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists (*see* ***Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.***, 75 AD3d 533, 904 NYS2d 770 [2d Dept 2010]; ***Bassuk Bros. v Utica First Ins. Co.***, 1 AD3d 470, 768 NYS2d 479 [2d Dept 2003]; ***Garson Mgt. Co. v Travelers Indem. Co. Of Ill.***, 300 AD2d 538, 752 NYS2d 696 [2d Dept 2002]).

Here, it is undisputed that plaintiff failed to provide to defendant a signed consent form of Ms. Opisso regarding the laser treatment performed at A Woman's Way Medi-Spa. There is no ambiguity in the relevant terms of the subject insurance policy, which states that coverage under the insurance does not apply to damages incurred arising from any claim where the named insured cannot provide to the insurer a signed consent form, unless it involves a beauty service listed subsequent to the consent form exclusion clause (*see generally* ***Morales v Allcity Ins. Co.***, 275 AD2d 736, 713 NYS2d 227 [2d Dept 2000]). Plaintiffs contend that the language of the exclusion which includes a non-existent word "consen" is too vague to enforce. However, a typographical error does not render the clause vague and/or ambiguous (*see* ***Behrens v City of New York***, 279 AD2d 407, 720 NYS2d 64 [1st Dept 2001]). Moreover, in the report of claim form completed by plaintiff, it states that the client left in a hurry taking the consent form. The assertion that the term "consent form" is ambiguous here would defeat the use of plain English language in this insurance policy and clause (*see* ***Goldman & Sons v Hanover Ins. Co.***, 80 NY2d 986, 592 NYS2d 645 [1992]; ***Commissioners of State Ins. Fund v Insurance Co. of North America***, 80 NY2d 992, 592 NYS2d 648 [1992]). Furthermore, plaintiffs' argument that the consent form exclusion is inconsistent with the other terms of the insurance policy is without merit. Accordingly, defendant's motion to dismiss plaintiffs' complaint is granted.

Dated: 3/27/13

J.S.C.

X FINAL DISPOSITION **____ NON-FINAL DISPOSITION**