SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Index Number : 601166/2009

FOUR CORNERS COMMUNICATIONS

vs

GRAPHIC ARTS MUTUAL INSURANCE

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) are decided in accordance with the annexed decision/order of even date.

FILED
NOV 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/10/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

FOUR CORNERS COMMUNICATIONS, INC.,

Plaintiffs,

-against-

GRAPHIC ARTS MUTUAL INSURANCE COMPANY,

Defendant.

----------x

DECISION/ORDER
Index No.: 601166/09
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltf's n/mot (SJ), DK affid, exhs	1
Def's x-mot (SJ) EAP affirm, exhs	2
Def's EAP reply affirm, exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff moves for summary judgment on its breach of contract claim. CPLR § 3212. The defendant opposes the motion and cross moves for summary judgment in its favor, dismissing the complaint and declaring that the defendant does not have a duty to defend or indemnify plaintiff with respect to underlying litigation. Issue has been joined, but Note of Issue has not yet been filed. Therefore, the motion can been considered by the court. Brill v. City of New York, 2 N.Y.3d 648 (2004).

In August 2006, Drew Kerr, President and principal of plaintiff, a public relations company, purchased the internet domain name "ronntorossianpr.com." In order to criticize Ronn Torossian, the principal of 5W Public Relations, LLC ("5W"), another

public relations company, Mr. Kerr posted a photograph of a "Summer's Eve Douche" package on a website that was reached via use of the domain name www.ronntorssianpr.com. Mr. Kerr explains that by doing so, he was calling Mr. Torossian a "douche" or a "douchebag," and thereby expressing his opinion of Torossian's own behavior "in using internet domain names containing the names of his competitors in the public relations industry to divert traffic from Internet users interested in those competitors to Torossian's own 5W public relations website."

On December 4, 2008, Torossian and 5W filed two complaints against plaintiff and Mr. Kerr, one in the New York Supreme Court in New York County, [Torossian *et al.* v. Kerr *et al.*, Index No. 116167/08 (the "State Action")] and the other in the U.S. District Court for the Southern District of New York, [Torossian *et al.* v. Kerr *et al.*, No. 08 Civ. 10519 (NRB)(FM) (the "Federal Action")]. The State Action alleged six causes of action: [1] common law trademark infringement; [2] common law unfair competition; [3] violation of the New York Anti-Dilution Statute; [4] violation of the New York Right of Privacy Law §§ 50, 51; [5] common law defamation; and [6] common law tortious interference. The Federal Action contains claims for: [1] trademark infringement; [2] trademark dilution; [3] cybersquatting; [4] cyberpiracy; and [5] unfair competition and false designation of origin.

The defendant issued to plaintiff a Businessowners Liability Policy, No. BOP1963192, for the period March 1, 2006 to July 31, 2007, providing limits of liability of $1,000,000 per occurrence. The Policy provides in relevant part:

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury," "property damage," "personal injury," or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any occurrence" and settle any claim or "suit" that may result...

b. This insurance applies:

(1) To "bodily injury" and "property damage" only if:

(a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and

(b) The "bodily injury" or "property damage" occurs during the policy period.

(2) To:

(a) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(b) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

But only if the offense was committed in the "coverage territory" during the policy period.

...

B. Exclusions

1. Applicable to Business Liability Coverage - This insurance does not apply to:

...

p. "Personal injury" or "advertising injury":

> (1) arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

Upon service of the complaints in the Federal and State Actions, plaintiff promptly gave notice of the claims to the defendant. The claims asserted against Mr. Kerr personally were covered under his Great Northern Insurance Company (Chubb) homeowners' insurance policy. In a letter dated January 7, 2009, the defendant issued a Disclaimer of Coverage of the claims made against plaintiff. The basis for the defendant's disclaimer was that the Policy specifically excludes coverage for claims arising from trademark infringement. Plaintiff challenged the Disclaimer, and through its counsel, responded by letter dated January 22, 2009, arguing that there were no breach of contract or copyright infringement claims in either the State or Federal Actions, and that the policy otherwise affords coverage to the claims asserted therein.

The defendant, through its attorney, Eric A. Portuguese, Esq.,cited three exclusions in the policy as grounds for disclaiming coverage: [1] the trademark infringement exclusion barred coverage for the claims based upon the unauthorized use of Mr. Torossian's name in plaintiff's domain name; [2] the defamation claim asserted in the State Action arose outside of the policy term; and [3] that the claims arising from the "intentional creation of the website and the posting of the allegedly defamatory material on the website falls entirely within the policy exclusion of knowingly false statements."

On March 19, 2009, both the Federal and State Actions were settled without any payment by the defendants therein or admission of any liability. Plaintiff thereafter

commenced this action for breach of the Policy, and seeking reimbursement of its attorneys fees, costs and disbursements less payments made under Mr. Kerr's homeowner's insurance policy.

Discussion

On the respective motion and cross-motion for summary judgment, each proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept. 2003).

It is well settled that an insurer's obligation to defend is determined by a review of the allegations of the complaint against the insured without regard to the merits of the claims, and that an insurer's duty to furnish a defense is broader than its obligation to indemnify (see Continental Cas. Co. v. Rapid-Am. Corp., 80 NY2d 640 (1993);

Seaboard Sur. Co. v. Gillette Co., 64 NY2d 304 [1984]). An insurer must defend when the four corners fo the complaint suggest, or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage. Continental Cas. Co. v. Rapid-Am. Corp., *supra.*

An insurer may, however, be relieved of its duty to defend if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured under the terms of the policy, or by proving that the allegations fall within a policy exclusion (Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co, 91 NY2d 169 [1997]; see also Sarin v. CNA Financial Corp., 873 NYS2d 237 [NY Sup 2008]).

There is no dispute that the defendant was required to defend the State Action inasmuch as claims for defamation and violation of the right of privacy were alleged therein. The defendant, however, argues that these claims fall within the policy exclusion because they are premised upon a statement that had been made with "knowledge of its falsity." The court rejects this argument because purchasing a domain name and creating a website upon which the picture of a product was posted in this case was not a statement of fact which would otherwise be capable of being proven false. The cases relied upon by the defendant does not apply. Those cases involve counterfeiting (Atlantic Mut. Ins. Co. v. Terk Technologies Corp., 309 A.D.2d 22 [1st Dept 2003] [the intentional production and marketing of counterfeit products fall within the "knowledge of falsity" exclusion in the policy]; and A.J. Sheepskin and Leather Co., Inc. v Colonia Ins. Co., 273 A.D.2d 107 [1st Dept 2000]).

Moreover, to the extent that a statement that Mr. Torossian is a "douche" or "douchebag" can be inferred from the plaintiff's actions, this is also not a statement of fact, but rather, is one of opinion (see generally Gross v. New York Times Co., 82 NY2d 146 [1993]). An opinion, which is a person's thought, belief or inference, is not capable of being proven false. Black's Law Dictionary (8th Ed 2004). The defendant's arguments about whether the law of defamation should be applied, or not, is irrelevant. Based upon the clear language of the policy, the material published by the plaintiff, i.e. the website with the posted picture, must have been posted by plaintiff with knowledge of its falsity in order for the claimed exception to apply. Since the opinion that plaintiff was trying to convey is not capable of being proven false, the claims arising from the plaintiff's actions were not excluded under the "knowledge of falsity" exception.

Inasmuch as some of the claims in the State Action were covered under the Policy, the defendant had an obligation to defend plaintiff in the State Action. Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 NY2d 435 (2002). Therefore, the defendant is liable to plaintiff for plaintiff's expenses in defending an action against him based upon claims falling both within and without policy coverage. Plaintiff also argues that since the Federal Action was related to the State Action, the defendant was also obligated to defend plaintiff in the Federal Action as well. This argument is unavailing. There is no precedent to expand of the general legal concept that coverage of one claim extends to coverage for the entire action in which the claim is made, to completely separate actions in entirely different courts. Moreover, mere speculation that the two actions may have one day been consolidated into a single action does not compel a

different result. To establish a duty to defend, the inquiry must focus on the actual claims contained in the pleadings. To the extent that the claims contained in the pleadings in the Federal Action were not covered under the Policy, the defendant cannot be found to have a duty to defend the Federal Action.

The issue of what damages plaintiff is entitled to recover from the defendant, however, remains to be determined. Plaintiff has submitted invoices from its attorney in the State and Federal Actions itemizing the attorneys fees, costs and disbursements incurred in defending both of those actions. Plaintiff has not delineated the costs and fees associated with its defense in each of the actions, nor has plaintiff provided the affidavit of someone with personal knowledge attesting to the reasonableness of those fees and costs. The court therefore refers the issue of plaintiff's damages to a Special Referee to hear and report back to the court the amount of reasonable attorneys fees, costs and disbursements incurred in connection with plaintiff's defense of the State Action, only.

Accordingly, the defendant's motion is denied, and plaintiff's motion is granted only to the extent that the defendant is found to have breached the policy in failing to defend plaintiff in the State Action. The issue of what damages plaintiff is entitled to recover is hereby refereed to a Special Referee who will hear and report back to the court the issue as identified herein.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the defendant's motion for summary judgment is denied; and it

is further

ORDERED that the plaintiff's motion for summary judgment is granted only to the extent that the defendant is found to have breached the policy in failing to defend plaintiff in the State Action. The issue of what damages plaintiff is entitled to recover is hereby refereed to a Special Referee to hear and report back to the court the amount of reasonable attorneys fees, costs and disbursements incurred in connection with plaintiff's defense of the State Action, only; and it is further

ORDERED that the plaintiff is directed to serve a copy of this decision/order on the Office of the Special Referee within 60 days so that this reference may be assigned. Failure to do so within the time provided shall be deemed an abandonment of this claim and the complaint will be dismissed for unreasonably failing to prosecute.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
November 10, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.