SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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INDEX NO. 155341/2021

MOTION DATE 07/13/2022, 11/08/2022

MOTION SEQ. NO. 001 002

WESCO INSURANCE COMPANY and TECHNOLOGY INSURANCE COMPANY, INC., as successor in interest to Tower Insurance Company of New York

Plaintiffs,

- v -

NUNEZ DENTAL SERVICES, P.C., MARITZA NUNEZ, and CAMILA DAVALOS,

Defendants.

DECISION + ORDER ON MOTION

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CAMILA DAVALOS, as assignee of NUNEZ DENTAL SERVICES, P.C.,

Counterclaim Plaintiff,

-against-

TOWER INSURANCE COMPANY, MERRIMACK MUTUAL FIRE INSURANCE COMPANY, and WESCO INSURANCE COMPANY,

Counterclaim Defendants.

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MERRIMACK MUTUAL FIRE INSURANCE COMPANY

Third-Party Plaintiff,

Third-Party
Index No. 595031/2022

-against-

NUNEZ DENTAL SERVICES, P.C., MARITZA NUNEZ, and CAMILA DAVALOS

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, and 96

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, and 98

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, motion sequence numbers 001 and 002 are consolidated for disposition in accordance with the following memorandum decision.

Background

In this declaratory judgment action, plaintiffs Wesco Insurance Company ("Wesco") and Technology Insurance Company, Inc. ("TIC") seek a declaration that they had no duty to defend or indemnify their insureds, defendants Nunez Dental Services, P.C. and Maritza Nunez, Dental's executive (collectively, "Nunez"), in an underlying action captioned *Camila Davalos v Nunez Dental Services, P.C., et al.,* index number 19-cv-3077, in the United States District Court for the Eastern District of New York. The underlying action concerned Nunez and Dental's alleged misappropriation of defendant Camila Davalos' ("Davalos") image to advertise Nunez's services, and was ultimately settled by a final consent judgment in favor of Davalos in the amount of $900,000. Nunez assigned its claims for failure to defend and indemnify to Davalos as part of the judgment (final consent judgment, NYSCEF Doc. No. 23, ¶ 8).

Currently before the court are two motions for summary judgment. Plaintiffs move (Mot. Seq. No. 001) for summary judgment on their complaint, and defendant Davalos cross moves for summary judgment on her counterclaims seeking a declaratory judgment that plaintiffs and counterclaim defendant/third-party plaintiff Merrimack Mutual Fire Insurance Company ("Merrimack") were required to defendant and indemnify Nunez in the underlying lawsuit. Separately, Merrimack moves (Mot. Seq. No. 002) for summary judgment on its third-party complaint against Davalos and Nunez seeking a declaration that it had no duty to defend or indemnify Nunez, and dismissing Davalos' claims against it. The court heard argument on the

motions on November 17, 2022 and December 15, 2022, respectively. After argument on Merrimack's motion, the court issued an oral decision granting the motion, declaring in favor of Merrimack, and dismissing Davalos' claims against it, which oral decision is herein reduced to writing.

Turning to plaintiffs' motion, the parties do not dispute that Wesco and Tower Insurance Company ("Tower"), TIC's predecessor in interest,[1] issued insurance policies to Nunez at various points during the time in which Nunez was alleged to have misappropriated Davalos' likeness for advertising purposes. The policies are identical, and provide for coverage arising from "personal and advertising injury" cause by a number of offenses, including, as relevant herein, "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" (*e.g.* Wesco Policy 2019-2020, NYSCEF Doc. No. 40, Commercial General Liability Coverage Form, Section V, ¶ 14[e]). This coverage is subject to a number of exclusions, including for "material whose first publication took place before the beginning of the policy period" (*id.*, Section I, Coverage B, ¶ 2[c]), injury "arising out of a criminal act committed by or at the direction of the insured" (*id.*, ¶ 2[d]), and injury "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" (*id.*, 2[i]).

The complaint in the underlying action alleges violations of the Lanham Act for false advertising and false or misleading use of a person's image for purposes of advertising (28 USC §§ 1125[a][1][A] and [B]), violation of the rights of privacy and publicity pursuant to Civil Rights Law §§ 50-51, violation of General Business Law § 349, and unfair competition (underlying complaint, NYSCEF Doc. No. 22, ¶ 4). More specifically, Davalos alleged that Nunez had "misappropriated, and intentionally altered" her image "in order to make it appear

[1] TIC assumed liability for Tower's obligations pursuant to a cut-through endorsement in the Tower policy (Fulwood aff., NYSCEF Doc. No. 33, ¶ 4).

that she was a patient of [Nunez], that she sponsored or promoted [Nunez], or that she was otherwise affiliated with [Nunez]" (*id.*, ¶ 19). Nunez tendered the defense of the underlying action to Wesco, and on September 3, 2020 Wesco disclaimed coverage citing, inter alia, the four coverage exclusions set forth above (Wesco disclaimer letter, NYSCEF Doc. No. 41). A similar letter disclaiming coverage on behalf of Tower followed on September 18, 2020 (Tower disclaimer letter, NYSCEF Doc. No. 42).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 NY2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]).

The duty to defend under an insurance policy is exceedingly broad and extends beyond the limits of the duty to indemnify, covering any situation where the allegations of the complaint "suggest a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotations and citation marks omitted]). "Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course" (*id.*). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*id.* [internal quotations and citation marks omitted]). The duty remains

"even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered" (*id.* [internal quotations and citation marks omitted]).

"When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]). More specifically,

> "[t]o be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision"

(*Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997].)

Here, plaintiffs rely on three exclusions to deny coverage: prior publication, criminal acts, and intellectual property infringement.[2] Beginning with prior publication, while the courts of this state have not had occasion to address this particular exclusion, the District Courts, as well as several of the Circuit Courts outside of this state, have coalesced around a dividing line that "bars coverage of an insured's continuous or repeated publication of substantially the same offending material previously published at a point of time before a policy incepts, while not barring coverage of offensive publications made during the policy period which differ in substance from those published before commencement of coverage" (*Tudor Ins. Co. v First Advantage Litig. Consulting, LLC*, 11 CIV. 3567 KBF, 2012 WL 3834721, at *12 [SDNY Aug. 21, 2012], *affd sub nom. on other grounds, First Advantage Litig. Consulting, LLC v American Intern. Specialty Lines Ins. Co.*, 525 Fed Appx 60 [2d Cir 2013]; *Transportation Ins. Co. v*

[2] Plaintiffs also cite to an intentional act exclusion in their first cause of action, but appear to have abandoned reliance on that exclusion in their motion.

Pennsylvania Manufacturers' Ass'n Ins. Co., 346 Fed Appx 862, 867 [3d Cir 2009], *citing Taco Bell Corp. v Continental Cas. Co.*, 388 F3d 1069, 1074 [7th Cir 2004] ["Unless later publications contained 'new matter'—i.e. substantively different content—that the underlying complaint 'allege[d] [were] fresh wrongs,' the 'prior publication' exclusion applies"] [brackets in original]). This court finds such a standard persuasive.

Nunez admitted in its response to interrogatories that it first began using Davalos' image in 2009 (interrogatory response, NYSCEF Doc. No. 32 at 4). The oldest insurance policy at issue herein, Tower's, was in effect from October 2013 through October 2014 (Tower Policy, NYSCEF Doc. No. 34), and accordingly the prior publication exclusion applies. The allegations of the complaint do not assert that each publication of Davalos' image by Nunez constituted a fresh wrong. Rather, Davalos asserts a repetition of a single act in various media (underlying complaint, NYSCEF Doc. No. 22, ¶ 38). Thus, unlike a case where the insured commits multiple different acts impacting various ideas, images, or intellectual property rights, the underlying complaint alleges only "one basic, though sweeping allegation" (*Lexington Ins. Co. v MGA Entertainment, Inc.*, 961 F Supp 2d 536, 556 [SDNY 2013] [internal quotation marks omitted]; *see also Transportation Ins. Co.*, 346 Fed Appx at 867 ["The complaint does not suggest that G & B's publications were, at one point, permissible, and later became injurious. Rather, it alleges that, dating back to August 1999, the publications were *consistently* injurious"] [emphasis in original]). Whether an insurer has a duty to defend is based on the four corners of the underlying complaint (*A.J. Sheepskin and Leather Co., Inc. v Colonia Ins. Co.*, 273 AD2d 107, 107 [1st Dept 2000]), and "an insured cannot avoid application of the exclusion by reading into the underlying complaint a degree of specificity or nuance which it never contained" (*Lexington Ins. Co.*, 961 F Supp 2d at 557).

Coverage is also barred under the criminal acts exclusion, which bars claims where the underlying injury "aris[es] out of a criminal act committed by or at the direction of the insured" (*e.g.* Wesco Policy 2019-2020, NYSCEF Doc. No. 40, Commercial General Liability Coverage Form, Section I, Coverage B, ¶ 2[d]). This exclusion applies regardless of whether the insured is actually convicted of, or even charged with, a crime (*Kehoe v Nationwide Mut. Fire Co.*, 299 AD2d 318, 319 [2d Dept 2002]). Moreover, the Court of Appeals has interpreted the phrase "arising out of" broadly in the context of the criminal acts exclusion, holding that where criminal conduct is the operative act necessary to establish liability, the underlying plaintiff's theory of recovery does not control whether the exclusion applies (*Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 352 [1996] ["while the theory pleaded may be the insured's negligent failure to maintain safe premises, the operative act giving rise to any recovery is the assault"]). Here, the operative act was Nunez's misappropriation and unauthorized use of Davalos' image. Civil Rights Law § 50 provides that "[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor."

In opposition, Davalos argues that Nunez harbored the belief that it *had* obtained Davalos' consent to use her image, and (the argument goes), *per* that belief, Nunez did not commit or direct a criminal act. However, those allegations are not contained within Davalos' underlying complaint, and thus are not relevant to whether plaintiffs rightfully disclaimed coverage (*A.J. Sheepskin and Leather Co., Inc.*, 273 AD2d at 107). Further, the allegations of the underlying complaint are a sufficient basis to deny coverage even in the absence of a finding that the alleged conduct took place (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159 [1992] ["we must assume-- for the purpose of determining coverage--that what is alleged actually

happened"]). Finally, Davalos' claim that plaintiffs' interpretation essentially extinguishes all coverage for privacy violations reads Civil Rights Law § 50 too broadly. The statute expressly applies only to the unauthorized commercial use of a living person's "name, portrait, or picture," and would not serve as a predicate for any other alleged violation of Davalos' right to privacy.

Based on the foregoing, plaintiffs properly disclaimed coverage, entitling them to the relief sought in the motion and requiring denial of Davalos' cross motion for summary judgment on her counterclaims. Moreover, because such relief essentially precludes any possibility of Davalos recovering on her counterclaims, the court grants plaintiffs summary judgment dismissing the counterclaims pursuant to CPLR 3212(b).[3]

Accordingly, it is

ORDERED that the motion of plaintiffs for summary judgment (Mot. Seq. No. 001) on their second and third causes of action seeking a declaration that it was not obliged to provide a defense to, and provide coverage for, defendants Nunez Dental Services. P.C. and Maritza Nunez in the action titled *Camila Davalos v Nunez Dental Services, P.C., et al.,* index number 19-cv-3077, previously pending in the United States District Court for the Eastern District of New York, is granted; and it is further

ADJUDGED and DECLARED that plaintiffs herein were not obliged to provide a defense to, and provide coverage for, defendants Nunez Dental Services. P.C. and Maritza Nunez in the said action previously pending in the Eastern District of New York; and it is further

ORDERED that defendant Camila Davalos' cross motion for summary judgment on her counterclaims is denied, and upon a review of the record pursuant to CPLR 3212(b) and based

[3] Because coverage of the underlying action was properly excluded under both the prior publication and criminal acts exclusions, and because either exclusion stands as an independent ground for the relief set forth above, the court declines to consider whether coverage is also barred by the intellectual property infringement exclusion.

upon the foregoing analysis counterclaim defendants Wesco Insurance Company and Tower Insurance Company are entitled to summary judgment dismissing the counterclaims, and the Clerk of the Court is directed to enter judgment in favor of said counterclaim defendants; and it is further

ORDERED that so much of third-party plaintiff Merrimack Mutual Fire Insurance Company's motion for summary judgment (Mot. Seq. No. 002) seeking a declaration that it was not obliged to provide a defense to, and provide coverage for, defendants Nunez Dental Services P.C. and Maritza Nunez in the action titled *Camila Davalos v Nunez Dental Services, P.C., et al.*, index number 19-cv-3077, previously pending in the United States District Court for the Eastern District of New York, is granted; and it is further

ADJUDGED and DECLARED that plaintiffs herein were not obliged to provide a defense to, and provide coverage for, defendants Nunez Dental Services. P.C. and Maritza Nunez in the said action previously pending in the Eastern District of New York; and it is further

ORDERED that so much of Merrimack's motion for summary judgment dismissing Davalos' counterclaims against it is granted, and the Clerk of the Court is directed to enter judgment in favor of Merrimack dismissing the counterclaims against it.

This constitutes the decision and order of the court.

Louis L. Nock

2/6/2023
DATE

LOUIS L. NOCK, J.S.C.

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