40 Misc.3d 1205(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Onondaga County, New York.

SYRACUSE UNIVERSITY, Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA, Defendant.

No. 2012EF63. | March 7, 2013.

Attorneys and Law Firms

Robin Cohen, Esq. and Kenneth Frenchman, Esq., of Kasowitz, Benson, Torres & Friedman, LLP, for Plaintiff.

Robert Novak, Esq. and Charles W. Stotter, Esq., of Bresler, Amery & Ross, for Defendant.

Opinion

DONALD A. GREENWOOD, J.

***1** The defendant National Union Fire Insurance Company of Pittsburgh, PA made a pre-answer motion to dismiss on the ground that the complaint fails to state a cause of action. *See, CPLR § 3211(a)(7).* The complaint contains two causes of action: one for breach of contract and the second seeking declaratory judgment to define the parties' rights and obligations under the subject insurance policy. In addition, plaintiff seeks all costs, including attorney's fees, to prosecute this lawsuit. Plaintiff subsequently opposed the defendant's motion and cross-moved for partial summary judgment on the declaratory judgment cause of action. The defendant has opposed the cross-motion for partial summary judgment and has sought leave of this Court to convert its motion to dismiss to a motion for summary judgment. Due to the express actions of the parties, the motion to convert is granted and the motion will be treated as one for summary judgment. *See, Carcone, et al. v. D'Angelo Insurance Agency,* 302 A.D.2d 963 (4th Dept.2003); *see also, CPLR § 3211(c).*

The plaintiff alleges that it was the named insured under a not-for-profit individual and organization insurance policy sold to it by the defendant. In November of 2011 the plaintiff became aware of public media reports of allegations that Bernie Fine sexually abused two former participants in plaintiff's basketball program (referred to as “ball boys”) over a period of years while acting in his capacity as the plaintiff's Associate Basketball Coach. Plaintiff gave notice to the defendant of the media report as a circumstance that may give rise to a claim on November 22, 2011. According to the complaint, over the next two months the plaintiff received six subpoenas in connection with state and federal investigations: three grand jury subpoenas duces tecum from the United State's Attorney's Office and three grand jury subpoenas duces tecum from the Onondaga County District Attorney's Office. The third subpoena duces tecum from the District Attorney's Office was addressed to James A. Boeheim Enterprises, Inc., a company which was headed by Boeheim, as the Head Basketball Coach, while Fine, the Associate Coach, operated summer basketball camps. The federal subpoenas required production of, *inter alia*, electronic equipment issued to Fine, a list of all secretaries who previously worked for Fine, a list of Fine's hotel accommodations while traveling with the basketball team in 2001 and 2002 and bus companies known by plaintiff to provide bus service to away games during the 2001 to 2002 season. In addition, the subpoenas sought records and documents relating to any complaints made about Fine, internal documents relating to how the plaintiff responded to such complaints, as well as documents in the plaintiff's possession relating to communications occurring after November 17, 2011, after Fine had been suspended from the plaintiff's employ. Also sought was documentation in the plaintiff's possession after Fine's departure where one or more of the parties to the communication were a member of its Men's Basketball Program, a faculty member, staff member or administrator, and concerned the topics of Joe Paterno, Jerry Sandusky or the scandal related to the Penn State University Football Team and allegations of child molestation by former assistant coach Jerry Sandusky. The subpoenas also sought documents in plaintiff's possession or control relating to complaints about Fine, and another sought telephone logs for any telephone calls made to or received by Fine. The District Attorney's Office subpoenas sought documents and records relating to the Syracuse Men's Basketball road games, meet and greet sessions and video footage of the games. On or around December 13, 2011 a civil complaint was filed against the plaintiff containing allegations relating to its alleged acts or omissions concerning the Fine allegations. *See, Davis and Lang v. Boeheim and Syracuse University,* Index No.: 2011–0113967.

***2** Thereafter, plaintiff sent defendant copies of the subpoenas and the cover letter received in connection with the investigation on December 22, 2011. On February 6, 2012 defendant informed plaintiff that its costs in responding to the

investigation subpoenas were not covered under the policy, and on February 8, 2012 plaintiff sent defendant a letter disputing the coverage position. By letter dated March 26, 2012 defendant reaffirmed its position. On August 22, 2012 plaintiff filed this action.

The construction and effect of an insurance contract is a question of law to be determined by the court where, as here, there is no occasion to resort to extrinsic proof. *See, Oot v. Home Insurance Co. of Indiana,* 244 A.D.2d 62 (4th Dept.1998). Both the defendant, as the proponent of its motion, and the plaintiff, as the proponent of the cross-motion, agree that there are no facts in dispute here and it remains only for the Court to apply the subject policy's terms to the plaintiff's claims to determine whether coverage exists, based upon applicable case law. As such, this Court first considers the language of the policy at issue.

The policy provides that the defendant "shall pay on behalf of the organization loss arising from a claim first made against the organization during the policy period" for "any actual or alleged wrongful act of the organization." A loss includes defense costs associated with defending a claim in excess of a $250,000 retention. The claim is defined in the policy as:

> (1)A written demand for monetary, non-monetary or injunctive relief; or
>
> (2)A civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which is commenced by: (i) service of a complaint or similar pleading; or (ii) return of an indictment, information or similar document (in the case of criminal proceeding); or (iii) receipt or filing of a notice of charges ...

Policy § 2(b) as amended by endorsements 17, 22, 23, 38. [1]

The policy defines a wrongful act as "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the organization." *Policy § 2(u)(2).*

The terms of the policy and the definition of "claim" here are clear and unambiguous and thus must be enforced as written. *See, Woods, v. General Accident Insurance,* 292 A.D.2d 802 (4th Dept.2002). An insurance policy must be read in light of common speech and the reasonable expectations of a business person. *See, Belt Painting Corp. v. TIG Insurance Co.,* 100 N.Y.2d 377 (2003). In addition, even if the subject policy's terms are ambiguous, this Court is required to resolve any ambiguity in favor of the plaintiff, as the policy holder, and against the defendant, the company that issued the policy. *See, Woods, supra.*

The grand jury's investigations and the subpoenas constitute a "written demand ... for non-monetary relief" and the investigations are "criminal proceedings for monetary or non-monetary relief which [are] commenced by: ... (ii) return of an indictment, information or similar document (in the case of a criminal proceeding)." The language of each subpoena states "YOU ARE HEREBY COMMANDED" to appear with and/or produce the enumerated documents. Pursuant to both New York and federal law failure to comply with a grand jury subpoena is punishable by fine or imprisonment as contempt of court. *See, CPLR § 2308; see also, Judiciary Law § 751; see also, Fed. R.Crim. Proc. § 17(g.); see also, 18 USC § 401; see also, 28 USC § 1826.* Likewise, this Court has considered the definition of "non-monetary relief" under the plain meaning of the term. "Relief" is defined in Black's Law Dictionary as the "redress or benefit, esp. equitable in nature (such as injunction or specific performance) that a party asks of a court-also termed remedy." *Black's Law Dictionary, 9th Ed.2009.* The term "remedy" is defined broadly as the "means of enforcing a right or preventing or redressing a wrong." *Id.* A subpoena is a grand jury's means of preventing or redressing a wrong by enforcing the public's right to "every man's evidence." *Branzburg v. Hayes,* 408 U.S. 665 (1972). The relief sought by a subpoena is the production of documents or testimony. *See, Minuteman, supra.* It has also been held that government issued subpoenas and other document requests are demands for non-monetary relief under the plain policy language. *See, Agilis Benefit Services, LLC v. Travelers Cas. and Sur. Co.,* NO. 5:08–CV–213, 2010 U.S. Dist. Lexis, 144499, 30–31 (E.D.Tx.2/24/10). In that case, the insurance policy at issue, like the subject policy here, defined a "claim" in part as "a written demand for monetary or non-monetary relief" and did not contain a definition of the term "relief." *See, id.* The court found that the term "relief" was broad enough to include a demand for "something due" and held that the documents plaintiffs were commanded to produce pursuant to a grand jury subpoena were written demands for non-monetary relief. *See, id.*

***3** This Court's determination that the subject subpoenas issued to the plaintiff constitute a "claim" under the subject insurance policy is supported by a recent finding of the United States Court of Appeals, Second Circuit, where the court interpreted New York law. *See, MBIA, Inc. v. Federal Insurance Co.,* 652 F3d 152 (2d Cir.2011). There, the court found that governmental investigative subpoenas

can constitute a claim under a substantially similar definition. *See, id.* In that case the insurance policy defined the term "claim" as a "formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, a formal or informal investigative order or similar document." *See, id.* The court held that the subpoenas issued by the New York State Attorney General's Office constituted a claim under this definition and rejected the insurer's view of the nature of a subpoena as a mere discovery device and held as follows:

> We reject the insurers' crabbed view of the nature of a subpoena as a "mere discovery device" that is not even "similar" to an investigative order. The New York case law makes it crystalline that a subpoena as the primary investigative implement in the NYAG's tool shed. We also reject the insurers' argument that because the definition does not include a proceeding commenced by service of a subpoena, a subpoena is not included. This reading puts form over substance; the fact that the definition does not say "service of a subpoena" is not dispositive.

Id.

The court also agreed with the District Court's "sensible intuition that a business person would view a subpoena as a formal or informal investigative order based on the common understanding of these words." *Id, citing MBIA, Inc.*, 2009 WL6635307. This recent federal decision interpreting New York law applies in this matter and therefore this Court finds that a grand jury's investigations are criminal proceedings for monetary or non-monetary relief and that common sense dictates that a criminal investigation is an integral part of a criminal proceeding. *See, Nick v. Abrams,* 717 FSupp 1053 (SDNY 1989). In addition, when a District Attorney issues and serves a subpoena in good faith, a proceeding is instituted in the grand jury, just as in an analogous situation a civil action is commenced by the service of a summons. *See, Hershfeld v. NY,* 253 A.D.2d 53 (1st Dept.1999).

The plaintiff is not required to prove that it was a named target of an investigation, as defendant contends. The duty to defend arises when there are any facts or allegations bringing the claim even potentially within the protection that was purchased. *See, Regal Construction Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA,* 15 NY3d 34 (2010). In addition, a defense may be denied only if there is no possible or factual legal basis upon which the defendant may eventually held to be obligated to indemnify the plaintiff under any provision of the subject policy. *See, Spoor–Lasher Co. v. Aetna Cas. and Sur. Co.,* 39 N.Y.2d 875 (1976).

***4** While most of the questions in the subpoenas deal with Fine, any liability of the plaintiff was necessarily dependent on the predicate liability of Fine inasmuch as Fine was an employee of plaintiff, a relationship that implicates issues regarding responsibility, including potential, vicarious, supervisory or derivative liability for Fine's actions. The allegations against Fine were raised by participants in the plaintiff's basketball program regarding actions occurring, at least in part, on or around plaintiff's property and committed by plaintiff's employee. Therefore, even the questions dealing with Fine's conduct are relevant to the plaintiff's potential liability. While Fine may have been a target and the plaintiff may not have been specifically identified as one, the defendant's reliance upon the U.S. Attorney's Manual (USAM) is unavailing. The manual contains general policies and procedures relevant to the work of the office and specifically states that the manual "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *USAM, § 1–1.00.* It has been noted that the USAM sections are "replete with qualifiers, modifiers, provisos, exceptions and limitations intermixed with buzz words ... this vagueness reduces the paper to mere precatory exhortation to be good and to be fair ..." *U.S. v. Shulman,* 466 F.Supp. 293 (SDNY 1979). Therefore, the fact that plaintiff may not have been a target at the time the subpoenas were issued is not controlling upon the U.S. Attorney's Office in its determination on whether to bring charges against the plaintiff based on information derived from the subpoenas.

Moreover, the defendant's argument that the subpoenas contain no facts or allegations of a wrongful act ignores the requirement that facts or allegations may "potentially" be within the protections purchased in the insurance policy and that there be no possible factual or legal basis upon which the defendant would be required to indemnify the plaintiff. *See, Regal Construction, supra.; see also, Spoor–Lasher Co., supra.* Some of the subpoenas sought documents and records in the plaintiff's possession relating to communications that occurred after Fine's departure from plaintiff's employ. Most

notably question 18 of the U.S. Attorney's subpoena sought information about events and transactions that occurred between a faculty or staff member, administrator or member of the basketball program to, *inter alia*, the police and prosecutors, as well as internal documentation occurring after Fine's departure regarding the scandal related to the Penn State University football team and allegations of child molestation by former assistant coach Jerry Sandusky. Given the broad nature of the demands contained in the federal subpoenas, particularly in question 18, as well as other questions seeking information concerning acts which occurred after Fine's suspension and subsequent departure, the federal prosecutor was demanding information from plaintiff beyond Fine's potential wrongful acts and extended to those of the organization as a whole. The only reasonable interpretation of the need for the prosecutor to demand answers and documentation for question 18 was for the prosecutor to determine whether the plaintiff was engaged in an institutional coverup of Fine's alleged misdeeds, similar to that of Penn State, and was thus engaged in a breach of duty. While it is true that plaintiff did not receive a "target letter", the USAM indicates that an organization will not receive a "target letter" automatically if one of its employees is deemed a target. *See, USAM, § 9–11.151.* It strains credulity to say that if the U.S. Attorney had found evidence of criminal conduct by the plaintiff as a result of answers to question 18 or any other questions that the plaintiff would not have become a target of the investigation and may have been charged criminally. But whether a formal target or not, it is clear that the subpoenas sought "facts ... of a wrongful act"

***5** concerning plaintiff's conduct, defined as "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the organization", subsequent to Fine's departure. Therefore, the information sought meets the standard of a potential claim implicating the policy's coverage and it cannot be said that there is no possible or factual legal basis upon which the defendant may eventually be obligated to indemnify the plaintiff. *See, Regal Construction Corp., supra: see also, Spoor–Lasher Co., supra.*

Inasmuch as the definition of "claim" and "wrongful act" have been met for purposes of coverage, plaintiff is entitled to partial summary judgment on its second cause of action seeking a declaratory judgment. Having so found, this Court also determines that the defendant had a duty to advance defense costs for any claim that potentially may have been covered under the policy. An insurer's duty to defend is extremely broad. *See, Regal Construction Corp, supra.* The same allegations that trigger a duty to defend likewise trigger an obligation to pay defense costs; both an insurer's duty to defend and to pay defense costs under liability insurance policies may be construed broadly in favor of the policy holder. *See, Federal Insurance Co. v. Kozslowski,* 18 AD3d 33 (1st Dept.2005). The ultimate validity of the underlying complaint's allegations is irrelevant; the existence of the duty depends upon whether sufficient facts are stated so as to invoke coverage pursuant to the policy. *See, id; see also, Zurich American Insurance Co. v. Atlantic Mutual Insurance Co.,* 139 A.D.2d 379 (1st Dept.1998). The policy provides that the defendant is required to "advance defense costs of such claim prior to disposition." Policy, § 2(k), 8. As such, the plaintiff is entitled to partial summary judgment on its cause of action seeking a declaratory judgment.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion for summary judgment dismissal of the complaint is denied, and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment is granted, and it is therefore

ORDERED, ADJUDGED and DECLARED, that defendant National Union is obligated to pay on behalf of the plaintiff Syracuse University's loss arising from the subpoenas in excess of the retention up to the applicable limits of the policy and to advance the plaintiff's defense costs in responding to the subpoenas.

Papers Considered:

1.Defendant's Notice of Motion for dismissal, dated October 12, 2012;

2.Affirmation of Robert Novack, Esq. in support of defendant's motion to dismiss, dated October 12, 2012, and attached exhibits;

3.Defendant's Memorandum of Law in support of motion to dismiss, dated October 12, 2012;

4.Plaintiff's Notice of Cross–Motion for partial summary judgment, dated November 9, 2012;

5.Plaintiff's Memorandum of Law in opposition to defendant's motion and in support of plaintiff's cross-motion, dated November 9, 2012;

***6** 6.Affirmation of Kenneth H. Frenchman, Esq. in support of plaintiff's cross-motion, dated November 9, 2012, and attached exhibits;

7.Defendant's Response to Plaintiff's Statement of Material Facts, dated November 28, 2012;

8.Defendant's Supplemental Statement of Material Facts, dated November 28, 2012;

9.Affirmation of Robert Novack, Esq. in opposition to plaintiff's cross-motion and in further support of defendant's motion, dated November 28, 2012, and attached exhibits;

10.Defendant's Memorandum of Law in opposition to plaintiff's cross-motion and in further support of defendant's motion, dated November 28, 2012; and

11.Plaintiff's Reply Memorandum of Law in support of cross-motion, dated December 12, 2012.

Parallel Citations

40 Misc.3d 1205(A), 975 N.Y.S.2d 370 (Table), 2013 WL 3357812 (N.Y.Sup.), 2013 N.Y. Slip Op. 51041(U)

Footnotes

1 The parties have disputed the applicable definition based upon the subsequent issuance of endorsements, and this Court finds that this is the operative language under the facts here. Where, as here, there is no basis for favoring one endorsement over another endorsement, any ambiguity raised by the conflicting endorsement is construed in favor the plaintiff, the insured. *See, Aetna Cas. and Sur. Co. v. Reisman,* 193 A.D.2d 659 (2d Dept.1993); *see also, Minuteman International, Inc. v. Great Am. Ins. Co.,* 2004 U.S. Dist. Lexis 4660 (N.D.Ill.2004). In this case there is no such basis inasmuch as the policies' conflicting endorsements each have the same effective date and state that "[a]ll other terms, conditions and exclusions remain unchanged." Although the defendant contends that endorsement 22 explicitly superceded a part of endorsement 17, the endorsements do not explicitly indicate that they change earlier numbered endorsements. The policy does not, as the defendant argues, provide one endorsement which supercedes the other and rather the policy contains two policy provisions, both adopted at the same time, which are in conflict. The ambiguity thus created by the conflict must be resolved in favor of coverage if such a reading is reasonable. *See, Woods v. General Accident Insurance,* 292 A.D.2d 802 (4th Dept.2002).