UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Westport Insurance Corp. v. Goldberger & Dubin, P.C.

255 F. App'x 593 (2d Cir. 2007) · Decided November 29, 2007

SUMMARY

The Second Circuit affirmed summary judgment for Westport Insurance Corporation in a dispute over coverage for a legal malpractice claim. It held that the policy's exclusion applied because the insured attorneys could reasonably have foreseen that their client's attorney negligence might lead to a malpractice suit, notwithstanding the client's statement that she did not intend to sue. The court also declined to consider an equitable estoppel argument raised for the first time on appeal and upheld denial of Rule 60(b) relief.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Per curiam; Calabresi; Hon; Walker; Winter
JURISDICTION	Federal
DECIDED	November 29, 2007
DISPOSITION	affirmed
PROCEDURAL POSTURE	The insured law firm and individual attorneys appealed the district court's grant of summary judgment to Westport Insurance Corporation and the denial of their motion for reconsideration under Rule 60(b).
STANDARD OF REVIEW	Summary judgment is reviewed de novo, construing the record in the light most favorable to the nonmoving party. Denial of a Rule 60(b) motion is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Goldberger & Dubin, P.C., Paul Goldberger, Lawrence A. Dubin, Samuel H. Kelner v. Westport Insurance Corporation

TOPICS

insurance coverage · summary judgment · motion for reconsideration · standard of review · appellate procedure

PRACTICE AREAS

insurance coverage · professional liability insurance · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether the policy's prior-knowledge exclusion barred coverage for the malpractice lawsuit despite the client's statement that she did not intend to sue.
2. Whether the appellants could obtain appellate consideration of an equitable-estoppel argument that they had not presented to the district court.
3. Whether the district court abused its discretion in denying the appellants' Rule 60(b) motion for reconsideration based on arguments not raised in opposition to summary judgment.

HOLDINGS

1. The exclusion barred coverage because, under any reasonable interpretation of the policy, the clear evidence of the attorney's breach of duty meant that a malpractice suit was reasonably foreseeable, even taking the client's assurance into account.
2. The court would not consider the equitable-estoppel argument because the appellants had not initially presented it to the district court.
3. The district court did not abuse its discretion in denying reconsideration based on new arguments that the appellants had failed to raise in response to the summary-judgment motion.

KEY QUOTATIONS

> *"Given the clear evidence of a breach of duty by the lawyer to the client, even taking into account Mrs. Latona's statement that she would not bring a malpractice action, no reasonable juror could find that any insured could not reasonably have foreseen that Mrs. Latona might be expected to change her mind and file a malpractice suit."* (595)

> *"New arguments based on hindsight regarding how a movant would have preferred to have argued its case do not provide grounds for Rule 60(b) relief."* (595)

FACTUAL BACKGROUND

The appellants represented Mrs. Latona and committed conduct that constituted a clear breach of their duty to her. Although Mrs. Latona allegedly told them that she did not want to bring a malpractice action, the policy contained an exclusion for claims that could reasonably have been foreseen when the policy was issued. The Second Circuit concluded that, even considering her statement, no reasonable juror could find that a malpractice suit was not reasonably foreseeable.

PROCEDURAL HISTORY

The district court granted Westport summary judgment on March 8, 2006, holding that the malpractice claim was excluded because the insured could reasonably have foreseen the claim when the policy was issued. The court denied the appellants' motion for reconsideration on September 14, 2006. The Second Circuit reviewed the summary judgment de novo and the Rule 60(b) ruling for abuse of discretion, declined to consider an equitable-estoppel argument not raised below, and affirmed.

DISPOSITION

affirmed

CASES CITED

- Hoyt v. Andreucci, 433 F.3d 320, 327 (2d Cir. 2006)
- Mount Airy Insurance Co. v. Thomas, 954 F. Supp. 1073, 1080 (W.D. Pa. 1997), summarily aff'd, 149 F.3d 1165 (3d Cir. 1998)
- Westport Insurance Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P., 267 F. Supp. 2d 601, 608 (E.D. Tex. 2003)
- SEC v. Monarch Funding Corp., 192 F.3d 295, 308-09 (2d Cir. 1999)
- Transaero, Inc. v. La Fuerza Aérea Boliviana, 24 F.3d 457, 459 (2d Cir. 1994)
- Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1986)

OPINION

PER CURIAM.

SUMMARY ORDER Appellants Goldberger & Dubin, P.C., Paul Goldberger, Lawrence A. Dubin, and Samuel H. Kelner appeal the district court’s March 8, 2006 award of summary judgment to Westport Insurance Corporation, and its September 14, 2006 order denying Appellants’ motion for reconsideration of that judgment. Judge Jones found that Westport was not obliged to cover a malpractice lawsuit brought against the Appellants, holding that, when the policy was issued, Goldberger “could have reasonably foreseen” that the negligent actions of Kelner “might be expected to be the basis of a claim or suit,” and that hence the suit was excluded by the terms of the policy.

For the purposes of our de novo review of the district court’s award of summary judgment, we construe the record in the light most favorable to the non-moving party. Hoyt v. Andreucci, 433 F.3d 320, 327 (2d Cir.2006).

We therefore assume that Mrs. Latona, Appellants’ client, told Appellants that she did not want to bring an action for malpractice notwithstanding their negligence. Courts construing similar exclusion clauses under the laws of different states have adopted varying approaches to the relevance of such statements by clients.

Here, the district court found persuasive a decision construing Pennsylvania law, Mount Airy Insurance Co. v. Thomas, 954 F.Supp. 1073 (W.D.Pa.1997), summarily aff’d, 149 F.3d 1165 (3d Cir.1998). On the Mount Airy view, a client’s assurances are irrelevant to the question of whether the exclusion applies. Mt. Airy, 954 F.Supp. at 1080 (“Any dispute over whether the defendant believed, on the basis of his relationship with his client or his impression of that client’s reaction to the situation, that the client would make a claim is not relevant to our analysis.”).

Other courts have deployed a less purely “objective” inquiry, holding that a client’s assurances may, in appropriate circumstances, be taken into account when deciding what an attorney in the insured’s position could reasonably have foreseen. See, e.g., Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P, 267 F.Supp.2d 601, 608 (E.D.Tex.2003) (“[T]he exclusion must be read so as to ask the following question: What would any reasonable attorney expect, given the facts of which the insured was actually aware? ”).

No court in New York, whose law provides the rule of decision in this case, has addressed the question. It is not necessary, however, to predict the path the New York courts would take, because Westport is entitled to summary judgment either way.

Under any reasonable interpretation of the policy, even a low probability of suit would trigger Exclusion B. Given the clear evidence of a breach of duty by the lawyer to the client, even taking into account Mrs. Latona’s statement that she would not bring a malpractice action, no *595reasonable juror could find that any insured could not reasonably have foreseen that Mrs. Latona might be expected to change her mind and file a malpractice suit.

Appellants also raise an equitable estoppel argument, which was not initially presented to the court below. For that reason, we will not consider it. SEC v. Monarch Funding Corp., 192 F.3d 295, 308-09 (2d Cir.1999).

We note, in passing, that the estoppel argument seems likely to be without merit. After judgment was entered, Appellants moved unsuccessfully for reconsideration in light of several arguments they had failed to raise in response to the summary judgment motion.

The district court’s decision to deny a Rule 60(b) motion is reviewed for abuse of discretion, Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 459 (2d Cir.1994), and we find none here. New arguments based on hindsight regarding how a movant would have preferred to have argued its case do not provide grounds for Rule 60(b) relief. Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir.1986).

We have considered all of the Appellants’ arguments, and have found them to be without merit. Accordingly, the district court’s judgment is AFFIRMED.