UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 12-8996 FMO (CWx)**	Date	**July 31, 2014**
Title	**Blum Collins LLP, et al. v. NCG Professional Risks, Ltd., et al.**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiffs:	Attorney Present for Defendants:
None Present	None Present

Proceedings: (In Chambers) Order Re: Pending Motion

Having reviewed and considered all the briefing papers filed with respect to plaintiffs Blum Collins LLP and Craig M. Collins' dba Collins Law Firm (collectively, "plaintiffs") and defendant Certain Underwriters at Lloyd's London ("defendant" or "Underwriters") Joint Brief on Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, or in the Alternative, for Summary Adjudication ("Joint Brief"), the court concludes that oral argument is not necessary and orders as follows. See Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001).

INTRODUCTION

On June 7, 2012, plaintiffs filed a complaint in Los Angeles County Superior Court for: (1) breach of insurance policy; (2) breach of duty of good faith and fair dealing; (3) fraud; (4) declaratory relief. (See Notice of Removal ("NOR"), Exhibit ("Exh.") A ("Complaint"), at ¶¶ 9-36). Defendant[1] removed the action to this court on October 18, 2012. (See, generally, NOR at ¶¶ 1-4).

SUMMARY OF FACTS

Unless otherwise noted, the following facts are undisputed:

I. THE UNDERLYING ACTION (THE BECK ACTION).

In December 2004, Cynthia Beck ("Beck) retained Craig Collins ("Collins"), in his capacity as a partner of the Collins Law Firm, to represent her in a property dispute. (See, e.g., Evidentiary Appendix ("Evid. App.") at Exh. T). On September 20, 2007, Beck and Collins dissolved their

[1] Underwriters contends that it was erroneously sued as Caitlin, Inc. On Behalf of Certain Underwriters at Lloyd's, London, Named Insurance Policy Nos. NAPI06109786, NAPI0710978, NAPI07109786, NAPI07109981, NAPI08109786, and NAPI09109786. (See Joint Brief at 4).

attorney-client relationship and entered into an Agreement ("the September 2007 Agreement") whereby "Collins agree[d] to furnish Beck with time to evaluate her assertions [of malpractice] and her potential damages without filing an action during the time period her appeal rights are in place. . . . [T]he parties agree[d] that the Statute of Limitation in [the underlying suit] [was] suspended pursuant to the terms of this Agreement." (Id., Exh. E at 53).[2]

Judgment was entered against Beck in the property dispute on October 24, 2007. (See Evid. App., Exh. BB at 11-21). The appellate court affirmed the trial court's judgment on January 28, 2009, and a representative for Beck emailed plaintiffs on February 1, 2009, alleging that the judgment against Beck was caused by Collins' malpractice. (See Evid. App, Exh. A at 3 & Exh. M at 95).

On March 26, 2009, plaintiffs gave notice of the Beck claim to the Underwriters of Lloyd's of London ("Underwriters"). (See Evid. App. at Exh. A).

II. THE LLOYD'S POLICY.

On July 23, 2008, Collins, on behalf of and as a partner of Blum Collins LLP, applied for professional liability insurance from the Underwriters. (See Evid. App. at Exh. R ("Application")). Directly above the signature line, the Application asked the applicant to acknowledge certain warranties and limitations of the Policy:

> [t]he Applicant declare[d] and warrant[ed] that, after enquiry, to the best knowledge of all persons to be insured the statements set forth herein and in any attachments made hereto are true and no material facts have been suppressed omitted or misstated. [Defendant] reserve[s] the right to deny or rescind coverage on any Policy that is issued as a result of this Application if, in the statements set forth herein and in any attachments made hereto it is found that material information has been omitted, suppressed or misstated.

(See Evid. App., Exh. R at 146). The Application also asked the following question: "After enquiry, are any persons listed in Supplement 1 aware of any circumstances, allegations, tolling agreements or contentions as to any incident which may result in a claim being made against the Applicant or any of its past or present Owners [or] Partners . . .?" (Id. at 144 ("Question 10.C")). Plaintiffs replied "No." (Id.).

On July 27, 2008, Underwriters issued a Lloyd's, London Certificate, Lawyers Professional Liability Insurance Certificate No. NAPI08I09786 to Blum Collins LLP. (See Evid. App. at Exh. Q ("Policy")). The effective period of the Policy was July 27, 2008, to July 27, 2009. (See id. at 120). The Policy listed the "Named Assured" as Blum Collins, LLP, (see id.), and defined the Assured

[2] Any pagination is to the Evid. App., not the individual document.

as including, in relevant part: "(b) a partnership, the partnership so designated; [and] (c) any lawyers who are partners in the Named Assured . . . but solely for acts on behalf of the Named Assured[.]" (Id. at 123).

The Policy provided that defendant would:

> pay on behalf of the Assured, Damages and Claims Expenses which the Assured shall become legally obligated to pay because of any Claim or Claims . . . first made against the Assured and reported to the Underwriters during the Period of Insurance or Extended Reporting Period, arising out of any act, error or omission of the Assured in rendering or failing to render professional services for others in the Assured's capacity as a lawyer . . . but solely for acts on behalf of the Named Assured [Blum Collins LLP] . . . and caused by the Assured, except as excluded or limited by the terms, conditions and exclusions of this insurance.

(Policy at 122). The Policy further stated that "Underwriters shall have the right and duty to defend, subject to the Limit of Liability, any Claim against Assured seeking Damages which are payable under the terms of this insurance, even if any of the allegations of the Claim are groundless, false or fraudulent." (Id.).

The Policy defined several grounds of exclusion on which defendant could deny coverage:

> (f) to any Claim arising out of any Assured's activities as a . . . partner, officer, director or employee of any . . . corporation, company or business other than that of the Named Assured;
> (g) to any Claim made by or against or in connection with any business enterprise . . . which is owned by any Assured or which is directly or indirectly controlled, operated or managed by any Assured in a non-fiduciary capacity; . . .
> (l) to any Claim arising out of any acts, errors, or omissions which took place prior to the effective date of this insurance, if any Assured on the effective date knew or could have reasonably foreseen that such acts, errors or omissions might be expected to be the basis of a Claim[.]"

(Policy at 124 (respectively, "Exclusion(f)"; "Exclusion(g)"; and "Exclusion(l)")).

III. THE COVERAGE DISPUTE.

On January 27, 2011, Beck filed a suit against Craig Collins, Blum Collins LLP, and other former attorneys, alleging professional negligence and breach of fiduciary duty. (See Evid. App. at Exh. D ("the Beck Complaint")). On February 18, 2011, plaintiffs forwarded the Beck Complaint,

invoking defendant's duty to defend and seeking indemnification. (See Evid. App. at Exh. G). On May 23, 2011, Beck filed an Amended Complaint, asserting causes of action of professional negligence, breach of fiduciary duty, and breach of contract. (See Evid. App. at Exh. F ("the Beck Amended Complaint")).

On June 15, 2011, defendant sent a denial letter advising plaintiffs that no coverage was available under the Policy. (See Evid. App. at Exh. H). In that correspondence, defendant asserted its right to deny coverage based on Exclusion (I) and cited plaintiffs' answer to Question 10.C, which defendant claimed constituted "material misrepresentations and omissions in the policy application[,]" as an additional justification for its denial.[3] (See id. at 75-77).

On January 18, 2012, plaintiffs responded to defendant's denial of coverage. (See Evid. App., Exh. I at 80). In responding to defendant's invocation of Exclusion (I), plaintiffs claimed that "[n]o Assured knew or could have reasonably foreseen that any prior acts might be expected to be the basis of a Claim. On the effective date, we knew that we had not committed malpractice and thus did not expect a claim." (Id.). Plaintiffs conceded that "[o]f course [they] knew on the effective date that Ms. Beck had lost her case, and had asked for an agreement from Craig M. Collins waiving the statute of limitations . . ., but as of the effective date neither Ms. Beck nor [plaintiffs] could identify any act, error, or omission that might be the basis of any such claim[.]" (Id. at 80-81). Plaintiffs also contended that Blum Collins LLP did not enter into any agreement with Beck. (See id. at 82). Plaintiffs also cited defendant's failure to return plaintiffs' premium as an indication that defendant had opted not to rescind the Policy. (See id. at 81).

In a letter dated April 2, 2012, defendant again refused to provide coverage. (See Evid. App., Exh. M). In addition to the grounds cited previously, defendant asserted that Collins "was not acting in his capacity as an insured attorney in connection with the representation of Beck. All of the pleadings were signed by Collins on behalf of The Collins Law Firm, which is not an Insured under the policy." (Id. at 96). Consequently, defendant stated that plaintiffs did "not [meet] the requirements of the [Policy] that limits coverage to claims arising from an act, error or omission committed by an insured attorney while acting on behalf of the firm." (Id. at 97). Defendant, however, did acknowledge that the Beck Complaint stated that "Craig Collins was acting in the course and scope of his employment and position as a partner with Defendant Blum Collins," and asked plaintiffs to submit evidence "that Collins, during his representation of Beck, was acting in his sole capacity on behalf of the [Blum Collins]." (Id.) (emphasis in the original). Plaintiffs did not submit any such evidence. (See, generally, Evid. App.; Joint Brief).

In the months that followed, plaintiffs and defendant continued to disagree whether denial of coverage was warranted. (See, e.g., Evid. App., Exhs. N, O & P). Plaintiffs filed the instant

[3] In its letter, defendant also claimed other exclusions as a basis for denial, (see Evid. App., Exh. H at 76-77), but it has not pursued the additional grounds. (See, generally, Joint Brief at 18-32).

Complaint on June 7, 2012. (See Complaint).

LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for granting a directed verdict. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id.

The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). If the "moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

If the moving party has sustained its burden, the burden then shifts to the nonmovant to identify specific facts, drawn from materials in the file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Celotex, 477 U.S. at 324, 106 S.Ct. at 2553; Anderson, 477 U.S. at 256, 106 S.Ct. at 2514 (A party opposing a properly supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial.").[4] A factual dispute is material only if it affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. See SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552; see also Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 (parties bear the same substantive burden of proof as would apply at a trial on the merits).

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the nonmoving party. See Barlow v. Ground, 943 F.2d 1132, 1134 (9th Cir. 1991), cert. denied, 505 U.S. 1206, 112 S.Ct. 2995 (1992). However, summary judgment cannot be avoided by relying solely on "conclusory allegations [in] an affidavit."

[4] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (more than a "metaphysical doubt" is required to establish a genuine issue of material fact). "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to survive summary judgment; "there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S.Ct. at 2512.

With these standards in mind, the court now turns to the arguments raised by the parties.

DISCUSSION

I. DUTY TO DEFEND.

"'When a suit against an insured alleges a claim that 'potentially' or even 'possibly' could subject the insured to liability for covered damages, an insurer must defend unless and until the insurer can demonstrate by reference to 'undisputed facts' that the claim cannot be covered.'" Reese v. Travelers Ins. Co., 129 F.3d 1056, 1060 (9th Cir. 1997) (quoting Vann v. Travelers Cos., 39 Cal.App.4th 1610, 1614 (1995)). "The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." Montrose Chem. Corp. v. Superior Court, 6 Cal.4th 287, 295 (1993). In the instant case, the Beck Complaint names "Craig M. Collins, individually and dba Collins Law Firm [and] Blum Collins L.L.P." as defendants and arguably establishes a duty to defend Blum Collins. (See Beck Complaint at 38; Beck Amended Complaint at 55). Given "that the underlying action fell within coverage provisions, [defendant] may defeat [plaintiffs'] motion for summary judgment on the duty to defend only by producing undisputed extrinsic evidence conclusively eliminating the potential for coverage under the policy." Anthem Elecs., Inc. v. Pac. Emp'r Ins. Co., 302 F.3d 1049, 1060 (9th Cir. 2002) (citing Md. Cas. Co. v. Nat'l Am. Ins. Co. of Calif., 48 Cal.App.4th 1822, 1832 (1996)). "Evidence that merely place[s] in dispute whether [an insured's] actions would eventually be determined not to constitute an occurrence or to fall within one or more of the exclusions contained in the policies is insufficient to defeat the [plaintiffs'] right to summary judgment." Id. (internal quotations marks and citation omitted).

"In determining whether a duty to defend exists, courts look to all the facts available to the insurer at the time the insured tenders its claim for the defense." Reese, 129 F.3d at 1060 (internal quotations and citation omitted). "If, at the time of tender, the allegations of the complaint together with extrinsic facts available to the insurer demonstrate no potential for coverage, the carrier may properly deny a defense." We Do Graphics, Inc. v. Mercury Cas. Co., 124 Cal.App.4th 131, 136 (2004). Thus, "[t]he insurer's defense duty is obviated where the facts are undisputed and conclusively eliminate the potential the policy provides coverage for the third party's claim." Palp Inc. v. Williamsburg Nat'l Ins. Co., 200 Cal.App.4th 282, 289 (2011).

A. Misstatements or Omissions.

The parties agree that the Policy contains a clause whereby defendant could rescind or deny coverage as a result of a material misstatement or omission. (See Joint Brief at 30 & 32). The parties part ways, however, as to whether plaintiffs' failure to give defendant notice of a potential lawsuit was such a material omission as to warrant defendant's refusal to defend or whether such refusal constituted a breach of contract. (See id.).

Plaintiffs, purporting to quote the relevant portion of Question 10.C, contend that "[t]he policy application asked ' . . . are any persons listed in Supplement 1 aware of any . . . tolling agreements . . . as to any incident which may result in a claim being made against the Applicant . . .'" (Joint Brief at 30) (citation omitted). Based on this reading, plaintiffs argue that they were not provided with Supplement 1 and thus "it would have been impossible for Plaintiffs to know how to have answered [the] question." (Id.). Additionally, plaintiffs contend that Blum Collins LLP, "the Named Assured," was not a party to the September 2007 Agreement and thus there was no agreement related to any potential claim for "the Assured" to disclose. (See id.). In any case, plaintiffs go on, defendant's inquiry asked only for "incident[s] which may result in a claim[,]" and since no claim had materialized, they were not aware of any incident which may have resulted in a claim. (See id. at 30-31).

Plaintiffs' selective quotation of Question 10.C. and their arguments relating to their omissions are utterly meritless. The full text of the question asks: "After enquiry, are any persons listed in Supplement 1 aware of any circumstances, allegations, tolling agreements or contentions as to any incident which may result in a claim being made against the Applicant or any of its past or present Owners, Partners, Shareholders, Corporate Officers, Associates, Employed Lawyers, Contract Lawyers, or Employees or its predecessors in business?" (Application at 144) (emphasis added). Plaintiffs provide no authority or evidence to support their argument that the absence of Supplement 1 excuses any misstatement or omission in their response to Question 10.C. (See, generally, Supplemental Brief in Support of Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Supp. Brief") at 4-5; Joint Brief at 30-31). Using the ordinary rules of contract interpretation, see Yalter v. Endocare, Inc., 412 Fed.App'x 24, 25 (9th Cir. 2011) (internal citations omitted), the court "consider[s] the contract as a whole and interpret[s] the language in context[.]" Employers Reinsurance Co. v. Superior Court, 161 Cal. App. 4th 906, 919 (2008). "If policy language is ambiguous," as plaintiffs contend here, "an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. Thus, the court must determine whether the coverage under the policy that would result from such a construction is consistent with the insured's objectively reasonable expectations." Id. at 919-20 (internal citations omitted).

Here, the absence of Supplement 1 did not alter plaintiffs' understanding or responsibility to answer Question 10.C accurately. In addition to Question 10.C, at least one other question referenced Supplement 1. (See Application at 144 (question 9.F)). Despite the absence of Supplement 1, plaintiffs answered both questions that referenced it. (See id.). Had the absence

of Supplement 1 truly affected plaintiffs' understanding of the questions, plaintiffs, a law firm with several experienced attorneys, would not have answered the questions.[5] Further, as defendant points out, (see Joint Brief at 33), the term "after enquiry" is a defined term. (See Application at 144). It is "deemed to mean to the knowledge of any Owner, Partner, Shareholder, Associate, Employed Lawyer, of Counsel or Employee." (Id.). Thus, irrespective of whether plaintiffs knew who was listed on Supplement 1, plaintiffs' owners and partners were obligated to respond to Question 10.C. Plaintiffs provide no authority or any evidence to support their contention that the absence of Supplement 1 somehow relieved them of their obligation to respond to Question 10.C; nor do they argue that the absence of Supplement 1 actually impaired their understanding of and answer to Question 10.C. (See, generally, Joint Brief at 30-31; Plaintiffs' Supp. Brief at 4-5).

Plaintiffs' next argument, that Blum Collins, LLP, the Named Assured, did not owe defendant a duty to disclose since Blum Collins, LLP, did not represent Beck or enter into any agreement that could result in a claim, (see Joint Brief at 30), also fails. Question 10.C asks for information pertaining to any incident that might arise "against the Applicant [Blum Collins LLP] or any of its past or present Owners [or] Partners[.]" (Application at 144) (emphasis added). Question 10.C clearly contemplates the possibility that claims might be brought against owners or partners of the applicant law firm arising from different associations or employment. (See id.).

Plaintiffs also contend that their answer to Question 10.C was not a misstatement or omission because at the time they did not believe there existed any agreements or contentions "which may result in a claim." (See Joint Brief at 30-31). According to plaintiffs, "as of the effective date neither Ms. Beck nor [plaintiffs] could identify any act, error, or omission that might be the basis of any such claim[.]" (Id. at 25; Evid. App., Exh. I at 81). Plaintiffs' contentions are unpersuasive.

The September 2007 Agreement stated, in relevant part, that "Collins agree[d] to furnish Beck with time to evaluate her assertions [of malpractice] and her potential damages . . . [and] the parties agree[d] that the Statute of Limitation in [the underlying suit] [was] suspended pursuant to the terms of [that] Agreement." (Evid. App., Exh. E at 53). Plaintiffs' contention that they "did not know of Ms. Beck's spurious accusations until much later when she served Plaintiffs with a copy of her complaint in 2011[,]" (Joint Brief at 31), ignores the plain language of the September 2007 Agreement. Clearly, Beck's "assertions [of malpractice] and her potential damages," (Evid. App., Exh. E at 53), "may result in a claim." (Application at 144). "[W]hen a policy clearly excludes any potential for coverage, any expectation to the contrary on the part of the insured would have been subjective and unreasonable . . . [and] cannot be used to create an ambiguity or a material factual

[5] Indeed, plaintiffs did that with respect to two questions on the Application. For example, plaintiffs replied "N/A" instead of marking one of the "Yes" or "No" boxes on questions 5.C & 5.H. (See Application at 141). Plaintiffs' choice not to respond to those questions suggests that plaintiffs were deliberate in their answers, replying only when they understood the question to be applicable to them.

issue." Cal. Traditions, Inc. v. Claremont Liab. Ins. Co., 197 Cal.App.4th 410, 420-21 (2011) (internal citations and quotation marks omitted); see VierraMoore, Inc v. Continental Cas. Co., 940 F.Supp.2d 1270, 1281 (E.D. Cal. 2013). Here, the September 2007 Agreement unequivocally gave plaintiffs notice that there were contentions that "may result in a claim" against one of the "Owners [or] Partners" of Blum Collins, LLP. Any expectation or understanding to the contrary stretches the bounds of credulity.[6]

B. Materiality of Misstatements or Omissions.

Having found that plaintiffs' answer to Question 10.C was a misstatement or omission, the court must analyze whether plaintiffs' omission was material and warranted defendant's denial of coverage. See Cal. Ins. Code § 331 ("Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."); id. § 359 ("If a representation is false in a material point . . . the injured party is entitled to rescind the contract from the time the representation becomes false."); Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 654 (9th Cir. 1984) ("[M]aterial misrepresentations or concealments in an application for insurance are grounds for rescission of the policy."). Once a misstatement or concealment is found, materiality is determined by a subjective test: what effect a truthful answer would have had on the insurer. See Matilla v. Farmers New World Life Ins., 960 F.Supp.223, 226 (N.D. Cal. 1997), aff'd 133 F.3d 927 (9th Cir. 1997); Cal. Ins. Code § 334 ("Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."). "The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co., 156 Cal.App.4th 1259, 1268 (2007), review denied, 2008 Cal. LEXIS 2348 (2008). However, if an insurer "neglect[s] to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated[,]" Cal. Ins. Code at § 336, the insurer may waive his right to this information.

Here, the Application specifically asked for information pertaining to potential claims against either the Named Assured, Blum Collins LLP, or any of its partners or owners. (See Application at 144). The existence of the question is itself enough to establish materiality, see LA Sounds USA, Inc., 156 Cal.App.4th at 1268, and counter any argument or factual dispute as to whether defendant waived its right to receive such information. See TIG Ins. Co. of Michigan v. Homestore, Inc., 137 Cal.App.4th 749, 762 (2006) (finding that "the undisputed facts demonstrate[d] the misrepresentations in the Form 10-Q[,]" submission of which was required in

[6] Plaintiffs argue that the September 2007 Agreement was not a tolling agreement but instead a waiver of Collins' ability to assert the statute of limitations defense for a limited period of time. (See Joint Brief at 30; Evid. App., Exh. I at 81). Regardless of whether it is characterized as a tolling agreement or a waiver, the September 2007 Agreement put plaintiffs on notice that there were potential claims arising out of Collins' representation of Beck.

the application, "were material"); Shapiro v. Am. Home Assur. Co., 584 F.Supp. 1245, 1249 (D. Mass. 1984) (false statement in application that signer of application did not know of any act by company officials that might give rise to a claim deemed material as a matter of law).

Further, defendant provided evidence that a truthful answer to Question 10.C would have altered whether defendant would have insured plaintiffs and what type of policy defendant would have offered had they chosen to insure plaintiffs. (See Declaration of [Caitlin Syndicate, Ltd. underwriting agent] Daniel Curran ("Curran Decl.") at ¶¶ 8 & 9) (attached as Evid. App., Tab 3). Indeed, the "facts misrepresented . . . were those that an insurer issuing a [ ] policy is most likely to consider in making the underwriting decision." Shapiro, 584 F.Supp. at 1249; see Cummings v. Fire Ins. Exch., 202 Cal.App.3d 1407, 1417 (1988) ("Materiality . . . can be decided as a matter of law if reasonable minds could not disagree on the materiality of the misrepresentations"); (see also Curran Decl. at ¶ 9) (underwriter "Caitlin does not provide cover for what are, in effect, known losses. Cover is intended only in respect of fortuitous loss. The [September 2007 Agreement] clearly contemplates the Beck Action and it is therefore not a fortuity.").

While plaintiffs do not dispute that defendant would not have issued the Policy had Question 10.C been answered differently, (see, generally, Joint Brief at 30-31; Plaintiffs' Supp. Brief 5), they argue, without providing any support in the law, that defendant waived its right to rescind the Policy. (See Plaintiffs' Supp. Brief at 5) ("Lloyd's laments that it would not have issued the subject policy . . . . Too late."). However, "[e]stablished law clearly affords the insurer the right to avoid coverage by way of cross-claims and affirmative defenses when the insured files an action on the contract before the insurer can file its action for rescission." Resure, Inc. v. Superior Court, 42 Cal.App.4th 156, 163 (1996); id. at 164 ("When notice of rescission has not otherwise been given . . ., the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.") (citing Cal. Civ. Code § 1691) (internal quotations omitted); see Carolina Cas. Ins. Co. v. RDD, Inc., 685 F.Supp.2d 1052, 1057 (N.D. Cal. 2010) (the insurer "did not receive any information that [the insured's] responses to questions . . . were false or may have been false before it issued a policy to [the insured]. Therefore, [the insurer] ha[d] not waived its right to rescind the policy.").

In short, the court finds that "[t]he materiality of the undisclosed potential suit[] is obvious," Jaunich v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 647 F.Supp.209, 214 (N.D. Cal. 1986), and constituted sufficient grounds for denial of coverage.

II. EXCLUSIONS.

Because it is sufficient to find that plaintiffs' response to Question 10.C was a material misstatement or omission supporting defendant's denial of coverage, see supra § I., the court will not engage in a protracted analysis of the pertinent exclusions defendant argues in the alternative. (See Joint Brief at 22-29).

Where a coverage policy contains an exclusionary clause, the insurer must provide

"conclusive evidence that the exclusions apply, and the Court strictly construes the exclusionary clauses in favor of [the insured.]" VierraMoore, Inc., 940 F.Supp.2d at 1278; see MacKinnon v. Truck Ins. Exch., 31 Cal.4th 635, 648 (2003) ("exclusionary clauses are interpreted narrowly against the insurer.") (citation and internal quotations marks omitted). Generally, an exclusionary clause must (1) be conspicuous and (2) contain plain and clear language. See VierraMoore, Inc., 940 F.Supp.2d at1280 (internal citations omitted). If such clear and unambiguous language exists, the "plain language of the limitations must be respected[,]" Interinsurance Exch. of Auto. Club. of S. Cal. v. Velji, 44 Cal.App.3d 310, 314 (1975), and an "insurer is entitled to summary adjudication that no potential for indemnity," and thus no duty to defend, "exists . . . as a matter of law." Cnty. of San Diego v. Ace Prop. & Cas. Ins. Co.. 37 Cal.4th 406, 414 (2005); see Impac Mortgage Holdings Inc. v. Houston Cas. Co., 2013 WL 4045362, *5 (C.D. Cal. 2013) (where a policy "clearly and conspicuously disclaim[ed] the duty to defend, the duty to defend standard [does] not apply.").

Here, the Policy reserved the right to deny coverage:

> (f) to any Claim arising out of any Assured's activities as a . . . partner, officer, director or employee of any . . . corporation, company or business other than that of the Named Assured;
>
> (g) to any Claim made by or against or in connection with any business enterprise . . . which is owned by any Assured or which is directly or indirectly controlled, operated or managed by any Assured in a non-fiduciary capacity; . . .
>
> (I) to any Claim arising out of any acts, errors, or omissions which took place prior to the effective date of this insurance, if any Assured on the effective date knew or could have reasonably foreseen that such acts, errors or omissions might be expected to be the basis of a Claim[.]"

(Policy at 124). Each of these exclusions warrants denial of coverage.

A. Exclusion (f) & (g).

The filings associated with the underlying action are all signed by Collins as a member of the Collins Law Firm. (See, e.g., Evid. App., Exhs. S, T, U, V, W & X). Only the Beck Complaint and Amended Complaint implicated Blum Collins LLP as a participant in any capacity. (See Evid. App. at Exhs. D & F). Further, plaintiffs – even in the face of taking contradictory positions – themselves assert the distinction between Blum Collins LLP and the Collins Law Firm. (See Joint Brief at 30). On the one hand, plaintiffs assert that they did not make a material misstatement in their insurance application because the September 2007 Agreement was not between the Blum Collins LLP and Beck, but rather, between the Collins Law Firm and Beck. (See id. at 30-31). On the other hand, Blum Collins LLP argues that defendant had a duty to defend it in Beck's lawsuit because, at the time, Collins was a partner at Blum Collins. (See id. at 21-22). Under the circumstances, the court is persuaded that Exclusions (f) and (g) apply and further justify

defendant's denial of coverage.

B. Exclusion (I).

For the reasons stated above, see supra § I.B., the claims asserted in the Beck Complaint "aris[e] out of acts . . . which took place prior to the effective date of [the Policy]," and Collins, as a partner of Blum Collins LLP "knew or could have reasonably foreseen that such acts . . . might be expected to be the basis of a Claim." (Policy at 124). As such, Exclusion (I) applies to plaintiffs' claims and affirms defendant's denial of coverage.[7]

CONCLUSION

"[T]he facts are undisputed and conclusively eliminate the potential the policy provides coverage for the third party's claim." Palp Inc., 200 Cal.App.4th at 289. As such, defendant did not breach its duty to defend plaintiffs against the claims set forth in the Beck Action, and is thus not liable for breach of the implied covenant of good faith and fair dealing or fraud claims premised on the breach of the insurance contract at issue. See Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1034 (9th Cir. 2008) ("California law is clear, that without a breach of the insurance contract, there can be no breach of the implied covenant of good faith and fair dealing."). Defendant is entitled to summary judgment as to all of the claims in plaintiffs' Complaint.

Based on the foregoing, IT IS ORDERED THAT:

1. The parties' Cross-Motions for Summary Judgment **(Document No. 28)** are **granted** and **denied** as follows. Plaintiffs' Motion for Summary Judgment is **denied**. Defendant's Motion for Summary Judgment is **granted**.

2. Judgment shall be entered accordingly.

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[7] In a final attempt to avert an unfavorable outcome, plaintiffs cite generally to the "Innocent Assured" provision of the Policy. (See Joint Brief at 31). Plaintiffs, however, make no argument or cite any authority as to which of the two subclauses within the "Innocent Assured" clause might apply to them. (See, generally, id.). Nevertheless, the Innocent Assured clause is inapplicable to plaintiffs' claims. The first subclause of the provision allows for coverage that would otherwise be lost "because of any exclusion relating to criminal, dishonest, fraudulent or malicious acts, errors or omissions by any Assured[.]" (Application at 127). Plaintiffs do not argue that Collins committed any criminal, dishonest or fraudulent acts. (See, generally, Joint Brief; Plaintiffs' Supp. Brief). The second subclause grants coverage that would otherwise be denied by failing to give notice of claims or circumstances that may lead to a claim pursuant to Clause XI. (See Application at 127). Defendant's denial of coverage is not premised on Clause XI, (see Joint Brief at 36), and thus the second subclause of the Innocence Assured provision is also inapplicable.

CIVIL MINUTES - GENERAL

Case No.	**CV 12-8996 FMO (CWx)**	Date	**July 31, 2014**
Title	**Blum Collins LLP, et al. v. NCG Professional Risks, Ltd., et al.**		

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