UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Plaintiff,

- against -

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

MEMORANDUM DECISION AND ORDER

1:18-CV-05892 (AMG) (SMG)

ANN M. DONNELLY, District Judge:

On October 4, 2018,[1] Brooklyn Center for Psychotherapy brought this action against Philadelphia Indemnity Insurance Company, alleging breach of duty of defense and bad faith insurance practices associated with an underlying disability discrimination lawsuit.[2] The defendant-insurer moved to dismiss, claiming that the insurance policy does not cover the action. For the following reasons, the defendant-insurer's motion to dismiss is granted.

BACKGROUND[3]

The plaintiff, Brooklyn Center for Psychotherapy, purchased a commercial general liability policy[4] from the defendant insurance company. (ECF No 1-2 ¶ 9.) The insurance policy

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[1] The case was removed to federal court on October 22, 2018. (ECF No. 1.)

[2] The plaintiff's complaint also alleges breach of contract to provide insurance indemnification. (ECF No. 1 ¶ 28.) However, the plaintiff dropped this cause of action because the jury found the Center was not liable for discrimination. (ECF No. 14 at 7 n.1.)

[3] All facts are taken from the complaint and its attachments. (ECF No. 1.) For purposes of this motion, I accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227 (2d Cir. 2012).

[4] At the motion to dismiss stage, the Court may consider documents integral to or incorporated by reference in the complaint. *See* FED. R. CIV. P. 10(c); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Since the insurance policy is integral to and incorporated by reference into the complaint, the Court considers it here. *See, e.g.*, *Chernosky v. Amica Mut. Ins. Co.*, No. 3:17-CV-01047 (VLB), 2018 WL 529956, at *1 (D. Conn. Jan. 24, 2018) (considering insurance policy on motion to dismiss).

provides coverage in two situations: for "bodily injury and property damage" caused by an "occurrence" taking place in the "coverage territory," ("Coverage A"), and for "personal and advertising injury" caused by "an offense arising out of [the] business" in the "coverage territory," ("Coverage B"). (ECF No. 1-2 at 28, 29.)

On May 5, 2015, Fanni Goldman, who is deaf, sued Brooklyn Center for Psychotherapy in this court, claiming that she sought treatment for her son, and that the Center discriminated against her by refusing to provide her a sign language interpreter, in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and parallel state statute and city code provision, N.Y. Human Rights Law § 290, *et seq.*, and N.Y.C. Administrative Code § 8-101, *et seq.* (ECF No. 1-3 ¶¶ 7, 11, 30, 42, 52-53, 63, 73-75.)

The parties dispute whether the insurance policy covered the lawsuit. Approximately two weeks after Ms. Goldman filed her complaint, the defendant-insurer declined to defend the matter, disclaiming coverage for claims "arising out of disability discrimination." (ECF No. 1-2 at 33.) On August 7, 2018, Brooklyn Center for Psychotherapy responded that the insurer's disclaimer of coverage was erroneous and a breach of its obligations under the insurance policy. (*Id.* at 36.) The defendant-insurer reaffirmed its position on September 10, 2018. (*Id.* at 43.)

Ms. Goldman's case went to trial in January of 2019. (ECF No. 14 at 11.) A jury found for Brooklyn Center for Psychotherapy, concluding that Ms. Goldman failed to prove unlawful discrimination. (ECF No. 14 at 11.) The plaintiff seeks coverage for legal fees, costs, and disbursements incurred in its defense of the case.[5] (*Id.* at 7.)

[5] The Honorable Pamela K. Chen denied the plaintiff's motion for costs and legal fees, concluding that the plaintiff brought the action in "good faith[,]" and the litigation was "close, difficult, and protracted . . . ." *Goldman v. Brooklyn Ctr. Of Psychotherapy, Inc.*, No. 15-CV-2572 (PKC) (LB) (E.D.N.Y. Feb. 13, 2019).

DISCUSSION

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Pleadings must be construed in the light most favorable to the plaintiff. *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). At the motion to dismiss stage, the court "is generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference." *Williams v. Time Warner, Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (quoting *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002)).

I. Breach of Contract to Provide a Defense

An insurer's duty to defend is broad, *Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122, 124-25 (2d Cir. 2005) (summary order) (citations omitted), and depends on a comparison of the allegations in the complaint to the terms of the insurance policy, *Darwin Nat. Assur. Co. v. Westport Ins. Corp.*, No. 13-CV-02076 (PKC), 2015 WL 1475887, at *11 (E.D.N.Y. Mar. 31, 2015) (citations omitted). An insurer must defend the action if the complaint, liberally construed, "contains any allegations that arguably or potentially bring the action within the protection purchased." *JD2 Env., Inc. v. Endurance Am. Ins. Comp.*, No. 14-CV-8888 (JPO), 2017 WL 751157, at *3 (S.D.N.Y. Feb. 27, 2017) (citing *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989)). The insurer can avoid a defense obligation only when the factual allegations provide no basis for coverage under the

policy. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 163 (1992) (citations omitted). This is a "heavy burden[:]" the claims and allegations must fall "'solely and entirely' within specific unambiguous exclusions from the policy's coverage." *Avondale Indus., Inc.*, 887 F.2d at 1204-05 (citation omitted).

The court is not required to "accept [a party's] legal characterization of the causes of action . . . ." *Sidney Frank Import. Co., Inc. v. Farmington Cas. Co.*, No. 97-CV-9324 (LAP), 1999 WL 173263, at *3 (S.D.N.Y. Mar. 26, 1999) (citations omitted). Instead, "a court should be guided by the facts alleged in the complaint . . . ." *Id.* at *3 (citing *Allstate Ins. Co.*, 79 N.Y.2d at 162). Interpretation of insurance policies, similar to other contracts, is a matter of law. *Dama v. Prudential Ins. Co. of Am.*, No. 18-CV-03104 (ERK) (SMG), 2018 WL 6706314 (E.D.N.Y. Dec. 20, 2018).

A. Bodily and Property Coverage

Coverage A of the policy provides coverage for injury or damage caused by an "occurrence,"[6] (ECF No. 1-2 at 28), which the policy defines as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* at 30.) Similarly, the policy excludes coverage for injury or damage "expected or intended from the standpoint of the insured." (*Id.* at 29.)

Intentional discriminatory acts are not accidental and thus not covered by the policy. *Rosenberg Diamond Dev. Corp.*, 144 F. App'x at *1 (citing *Mary & Alice Ford Nursing Home v. Fireman's Ins. Co. of Newark,* 446 N.Y.S.2d 599, 601 (N.Y. App. Div. 1982) (no duty to indemnify, and thus no duty to defend, an intentional discrimination claim under a coverage

[6] The *Goldman* complaint alleged that Ms. Goldman suffered "humiliation, fear, anxiety, and emotional distress," (ECF No. 1-3 ¶ 30), which the parties agree is a bodily injury – defined as "bodily injury, sickness or disease (ECF No. 1-2 at 29) – in the coverage territory.

provision comparable to Coverage A), *aff'd*, 57 N.Y.2d 656 (1982)). Conversely, unintentional discrimination – for example, a facially neutral policy with a discriminatory disparate impact – is covered by the policy. *See Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 326 F.Supp.2d 472, 476 (S.D.N.Y. 2004), *aff'd*, 144 F. App'x 122 (2d Cir. 2005) (explaining that requiring insurance companies to defend disparate impact claims does not offend public policy).

The defendant-insurer argues that the *Goldman* complaint alleged intentional discriminatory conduct, and therefore is not covered by the policy. (ECF No. 13 at 4.) Brooklyn Center for Psychotherapy responds that the *Goldman* complaint alleged both intentional and unintentional conduct, thus triggering a duty to defend. (ECF No. 14 at 15-16.)

The Americans with Disabilities Act and the Rehabilitation Act "prohibit discrimination against qualified disabled individuals by requiring that they receive reasonable accommodations that permit them to have access to and take a meaningful part in public services and public accommodations." *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 85 (2d Cir. 2004) (citations and quotation marks omitted); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (explaining that the two statutes' standards are similar and often considered together); *see also Hernandez v. Int'l Shoppes, LLC*, 100 F.Supp.3d 232, 256 (E.D.N.Y. 2015) (explaining that while the NYHRL and NYCHRL are generally more favorable to plaintiffs than the ADA, the analysis is the same). A violation may be found on a theory of disparate treatment, disparate impact, or failure to make a reasonable accommodation. *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (citation omitted). A showing of intentional discrimination is not required in disparate impact or failure to accommodate cases. *Simon v. City of New York*, No. 12-CV-1596 (CBA), 2012 WL 4863368, at *6 (E.D.N.Y. Oct. 11, 2012) (citing *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012)).

While the *Goldman* complaint pleaded a failure to accommodate claim,[7] there is nothing unintentional about the conduct asserted in the complaint. In New York, "if the act is intentional, so is the harm, and the courts will not inquire into the perpetrator's subjective intent to cause the injury." *Accessories Biz, Inc. v. Linda and Jay Keane, Inc.*, 533 F. Supp. 2d 381, 387 (S.D.N.Y. 2008) (citing *Allstate Ins. Co. v. Mugavero*, 581 N.Y.S.2d 142, 589 (1992)). When a defendant commits an affirmative act, the action is not an accident even if the results were unintended. *See Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *6 (N.Y. Sup., May 16, 2003) (collecting cases) ("[O]nce the intentional act has been alleged, then harm is inherent and coverage does not apply.").

According to the complaint,[8] Brooklyn Center for Psychotherapy refused to provide Ms. Goldman with a sign language interpreter on multiple occasions, (ECF No. 1-2 ¶ 14), and an employee dismissively told her to seek treatment for her son elsewhere. (*Id.* ¶¶ 15, 16, 20.) The complaint also alleged that the Center denied services to deaf people and had a policy or practice of refusing to offer on-site sign language interpreting services. (*Id.* ¶¶ 21, 22, 27, 28.) Each claimed action – the explicit refusal to give Ms. Goldman accommodation and the policy against offering interpretation services – was expected or intended by the insured.[9]

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[7] The Court takes judicial notice of Judge Chen's characterization of Ms. Goldman's claim as a reasonable accommodation case. *Goldman v. Brooklyn Ctr. Of Psychotherapy, Inc.*, No. 15-CV-2572 (PKC) (LB), 2018 WL 1385888, at *4 (E.D.N.Y. Mar. 19, 2018) ("Plaintiff's discrimination claim is based on a reasonable accommodation theory."); *see also Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F.Supp.3d 126, 151 n.2 (S.D.N.Y. 2019) ("The Court may take judicial notice of the entries . . . in a court's public docket") (citation omitted).

[8] The question is not whether the complaint was meritorious – the jury found that it was not (ECF No. 14 at 1) – but whether the insurance policy covered the suit.

[9] The fact that the complaint alleges that the Center's acts were both intentional and "deliberately indifferent" does not trigger the duty to defend. (ECF No. 16.) Deliberate indifference is "akin to recklessness" and "requires that a defendant knew of the risk and deliberately assumed or disregarded it." *Corr. Officers' Benevolent Ass'n, Inc. v. City of New York*, No. 17-CV-2899 (LTS), 2018 WL 2435178, *3 (S.D.N.Y. May 30, 2018) (citations omitted).

A disability discrimination claim based on a reasonable accommodation theory could trigger an insurer's duty to defend. Discrimination against people with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985). A defendant could fail to accommodate a plaintiff through negligence or carelessness. *See Tse v. New York Univ.*, No. 10-CV-7207(DAB), 2016 WL 10907062, at *21 (S.D.N.Y. Aug. 29, 2016) (citing *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (an employer's duty to accommodate is triggered when the employee's disability is obvious even if the employee does not request specific accommodation)); *see also Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F.Supp.2d 588, 642 (S.D.N.Y. 2013) (citing *Communities Actively Living Indep. & Free v. City of Los Angeles*, No. 09-CV-0287 (CBM), 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011) (finding the city failed to consider the unique needs of individuals with disabilities in its emergency preparedness program)).

The underlying complaint does not allege that Brooklyn Center for Psychotherapy was negligent or that it merely overlooked Ms. Goldman's disability.[10] Instead, the complaint alleged that when the Center learned of Ms. Goldman's disability, it turned her away, explicitly rejected her requests for accommodation, and told her to search for services elsewhere.

Nor did the *Goldman* complaint assert a disparate impact claim – a "facially neutral policy that has a discriminatory effect." *Smith v. NYCHA*, 410 Fed. App'x 404, 406 (2d Cir.

[10] The plaintiff argues that the *Goldman* complaint sounds both in intentional conduct and negligent conduct, because of the allegations that the Center "knew or should have known" to develop policies serving individuals with disabilities. (ECF No. 1-3 ¶¶ 24, 25.) As explained above, the Court need not "accept [the plaintiff's] legal characterization of the causes of action alleged in the complaint. *Hubel*, 2003 WL 21435624, at *6; *see also Doe v. Alsaud*, 12 F.Supp.3d 674, 683 (S.D.N.Y. 2014) (characterizing a "knew or known" allegation as a "bare legal conclusion[]." Instead, "the Court must look to the facts alleged to determine the nature of the claim." *Hubel*, 2003 WL 21435624, at *6 (collecting cases).

2011) (summary order); *see also Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) (failure to accommodate actions require an "individualized inquiry" to accommodate the plaintiff). In *Rosenberg*, a duty to defend claim related to an underlying Fair Housing Act lawsuit, and the complaint alleged that prospective tenants were steered towards certain properties based on their race. *Rosenberg*, 326 F.Supp.2d at 473. The court held that the insurer had no duty to defend because the underlying complaint alleged only intentional discrimination; the prospective tenants were treated differently not because of a facially neutral policy, but "simply on the basis of their race." *Id.* at 475. Similarly, the *Goldman* complaint did not allege that facially neutral circumstances had a disproportionate impact on one group. Rather, it alleged that Brooklyn Center for Psychotherapy "refuse[d] to serve deaf people[,]" had a policy of "discourag[ing] the use of onsite interpreters[,]" and deliberately rejected Ms. Goldman's individual requests for accommodation.[11] (ECF No. 1-3 ¶¶ 20, 21, 27.)

The *Goldman* complaint alleged only intentional acts resulting in discrimination. Thus, the defendant-insurer has no duty to defend under Coverage A.

B. Personal and Advertising Injury Coverage

Coverage B provides coverage for "personal and advertising injury" caused by "an offense arising out of [the] business" in the "coverage territory." (ECF No. 1-2 at 29.) By amendment, the policy includes coverage for "[d]iscrimination based on race, color, religion, sex, age or national origin . . . for which the insured is liable solely due to either disparate impact or vicarious liability." (*Id.* at 31.) The policy excludes coverage for injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and

[11] The *Goldman* complaint does not allege that Brooklyn Center for Psychotherapy is vicariously liable for one-on-one discrimination by an employee. Rather, it alleges that the corporate entity had a policy of refusing to serve deaf individuals. (*Id.* ¶ 21.)

would inflict" injury, (*Id.* at 29), and "[d]iscrimination . . . done intentionally by[,] or at the direction of, or with the knowledge or consent of," the insured entity. (*Id.* at 31.)

The *Goldman* complaint asserts that Brooklyn Center for Psychotherapy acted intentionally, and discriminated against Ms. Goldman on the basis of her disability. The plaintiff's argument that the policy covers disability discrimination cases because disability discrimination is not listed explicitly in an exclusion is not persuasive. (ECF No. 14 at 21.) The policy unambiguously excludes coverage for intentional discrimination[12] or discrimination about which the insured knows. The *Goldman* complaint falls within this exclusion.

II. Bad Faith Insurance Practices

The plaintiff's claim for bad faith insurance practices is not recognized by New York law. *Maniello v. State Farm Fire and Casualty Co.*, No. 16-CV-1598, 2017 WL 496069, at *4 (E.D.N.Y. 2017) (citing *Sikarevich Family L.P. v. Nationwide Mut. Ins. Co.*, 30 F. Supp. 3d 166, 171 (E.D.N.Y. 2014)). "Even if [its] bad faith claim is interpreted as a cognizable claim for a breach of the covenant of good faith and fair dealing implicit in contracts, it does not constitute a distinct claim where it is premised on the same facts as a claim for breach of contract." *Id.* at *4 (citing *Harris v. Provident Life & Acc. Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002)). As noted, the insurer did not breach the insurance policy; thus, the plaintiff's bad faith insurance practices claim is dismissed.

[12] While discrimination is not defined specifically in the policy, employment-related discrimination is defined as "the actual or alleged treatment of a person or group of persons based upon[,]" among other identities, "physical disability," "mental disability," or "on any basis which is prohibited by federal, state, or local law." (ECF No. 12-3 at 172.)

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CONCLUSION

The defendant-insurer's motion to dismiss the plaintiff's breach of duty of defense and bad faith insurance practices claims is granted. The Clerk is respectfully directed to enter judgment in favor of the defendant-insurer, dismissing this case with prejudice.

SO ORDERED.

Dated: Brooklyn, New York
July 2, 2019

/s/ Ann M. Donnelly
ANN M. DONNELLY
United States District Judge