For Opinion See 831 N.Y.S.2d 507

Supreme Court, Appellate Division, Second Department, New York.
ENERGY BRANDS, INC., Plaintiff-Appellant,
v.
UTICA MUTUAL INSURANCE COMPANY, Hermitage Insurance Company, Defendants, andJaspan Schlesinger Hoffman, LLP, Defendant-Respondent.
No. 2006-06812.
July 20, 2006.

Brief for Plaintiff-Appellant

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***1** Statement Pursuant to CPLR 5531

1. The index number of the case in the Court below is 26793/02.
2. The full names of the original parties are set forth above.
3. The action was commenced in the Supreme Court, Queens County.
4. The action was commenced by the service and filing of a summons and complaint on or about October 15, 2002. Issue was joined by the service and filing of verified answers on and after October 24, 2002.
5. The action initially sought, *inter alia*, a judgment declaring Plaintiffs rights under two commercial insurance policies, and damages resulting from breach of contract and legal malpractice.
6. Plaintiff appeals from an Order of the Honorable Thomas V. Polizzi, dated December 21, 2005, which disposed of plaintiffs application to (1) vacate a prior order and (2) deny a prior motion by defendant Jaspan Schlesinger Hoffman, LLP for summary judgment.
7. The appeal is being perfected upon a fully reproduced record.

QUESTIONS PRESENTED

1. Did the Court abuse its discretion in reversing its earlier ruling in an order, denying a motion to vacate with leave to refile, that the appellant had shown a reasonable excuse for its default on a motion for summary judgment?

This issue was not addressed by the Court.

2. Did the Court abuse its discretion in failing to consider and rule upon the only question it had given appellant leave to argue on its renewed motion to vacate, namely that it could demonstrate the existence of a meritorious defense to the motion for summary judgment that had been entered by default?

This issue was not addressed by the Court.

3. Did the Court err when it based its denial of vacatur alternatively on the ground of a clerical notation indicating that the matter had been settled which was an error of the clerk and was not raised by either party?

This issue was not addressed by the Court.

NATURE OF THE PROCEEDING

This case comes to the Appellate Division on the denial of a motion made by leave of the Supreme Court, Queens County, renewing an earlier motion for vacatur. (R.3) The Supreme Court ruled, upon the first motion for vacatur, that the movant had demonstrated excusable law office error, but not, on the papers before it, a bona fide defense to the underlying summary judgment of appellant's attorney malpractice claims granted by default. (R.8-10) The Supreme Court therefore denied that motion but granted leave to refile. (R.8)

The appellant timely refiled, submitting extensive briefing and an expert's affidavit demonstrating at least a triable issue on the question of attorney malpractice. The Supreme Court nonetheless denied the motion, but on grounds urged by no one: That, despite its earlier ruling of excusable error, appellant's counsel's error was *not* excusable; and that a clerk's notation on the electronic docket indicated that the case had (despite the round of briefing by both parties) actually been settled. (R.3) The Supreme Court completely ignored the extensive submissions by the movant. It is respectfully submitted that the Supreme Court erred in revisiting a settled issue regarding which no party had, upon the renewed motion, raised, and in relying on an obviously erroneous clerk's notation in a case that clearly had not settled, in order to avoid ruling on a novel and significant commercial law matter.

FACTS

Energy Brands, Inc. (“Energy Brands”) makes high-end consumer beverages. (R.118) Its former attorneys, defendants Jaspan Schlesinger Hoffman LLP (“Jaspan”) and its then-partner, Panagiota Betty Tufariello (“Tufariello”), represented Energy Brands in a wide array of legal matters, including all of its trademark and other intellectual property issues. (R.47)

There is no dispute here but that there was an established attorney-client relationship between the defendant law firm and Energy Brands, though there is one as to the scope of that relationship. The deposition testimony of Ms. Tufariello, a partner of Jaspan at all times relevant to these claims, indicates that she graduated from law school in 1994 and thereafter took the New York Bar Exam. (R.431-432) She has an undergraduate degree in ***4** chemistry and is admitted to practice before the Patent and Trademark Office as a patent attorney. (R.432) Ms. Tufariello took courses in copyright and patent law in law school and went on to practice in the fields of trademarks, copyright and patents. (R.434) As set out in her testimony, during her practice, she was generally involved in her clients' insurance coverage for copyright and trademark infringement liability. (R.442) She understood the importance to her clients of having insurance coverage for such potential liability and the need for the client to comply with the terms of the policies in order to assure coverage when the client needed it.

Ms. Tufariello admits that in cases where her clients have faced claims of trademark infringement, she has advised them to notify their insurance broker and that sometimes she even took on that role herself on the client's behalf. (R.445) She knew how to take appropriate, affirmative action to pro-

tect her clients' insurance rights. “Most of the time,” she testified, “I contacted the broker or the carrier directly.” (R.445) She testified that she had attended continuing legal education seminars where insurance for intellectual property matters was discussed and that at the time of her EBT, she subscribed ***5** to three CLE audio-tape services, one of which included materials on insurance issues and intellectual property. (R.445) On April 1, 2001, she became a partner in the defendant law firm. Based on her training and experience, Ms. Tufariello could be described as a specialist in intellectual property law. (R.436)

Ms. Tufariello readily acknowledges that appellant was her client (R.437) and further acknowledges direct involvement, at least on a quarterly basis, in reviewing the client's IP portfolio and making specific recommendations on insurance coverage. (R.433-485) On March 4, 2002, Global Brands, Inc. (“Global Brands”) commenced an action for trademark infringement and unfair competition against Energy Brands, Inc. (“Energy Brands”) over Energy Brands' use of the mark “GLACEAU WATER .” (R.49) Ms. Tufariello received actual notice of this potential claim in early November, 2001 when her client faxed to her a copy of a “cease and desist” letter from White & Case, the attorneys for Global. (R.456) That was the first notice Ms. Tuffarielo had that Global asserted an “advertising injury” claim against her client. Instead of giving the carrier immediate notice, she conducted her own research as to the merits of the claim, ***6** and came to the conclusion that the claim had none. (R.458) Ms. Tuffarielo responded to the White & Case letter by demanding more information from them. (R.465)

On or about February 14, 2002 she received a second letter from White & Case relating to Global Brands' claim against Energy Brands. (R.477-478) It was not until March 1, 2002 -- some five months after the initial claim letter -- that Ms. Tufariello first called and wrote to Joyce Panetta of the Libardi Service Agency, Utica Mutual's agent, to give notice of the Global claim. (R.492-493)

In fact, when Ms. Tufariello received the copy of the summons and complaint in that action, she did not forward them to Libardi, the insurance agent with whom she had communicated only a few days earlier. Nor did she forward the summons and complaint to the insurance carriers. (R.505)

As a result of defendant's acts of malpractice, both Hermitage and Utica Mutual Insurance Companies were given a factual basis on which to deny coverage and a defense to Energy Brands, Inc. in the underlying advertising injury claim. (R.50) As a result, the client, Energy Brands, Inc. was deprived of the benefits under one or both of ***7** its commercial liability insurance policies to have the insurer pay for its defense and indemnification costs in the underlying litigation. Even if the carriers chose to reserve their rights as to coverage, the duty to defend the insured, Energy Brands, Inc., was nevertheless absolute and could only have been protected for the benefit of the client by giving timely notice of the claim, which Ms. Tufariello failed to do. Because the carriers asserted that they had received late notice of the claim, they refused to assume the defense from the Debevoise firm, which required the client to pay for its own defense counsel. (R.50) Of course, if Ms. Tufariello had given timely notice, the carriers would have designated and paid for defense counsel to represent Energy Brands, Inc.

As of the date of appellant's Verified Bill of Particulars, (October 28, 2003) the cost to the appellant for legal fees to Debevoise was $267,683.60, legal costs of $19,745.79 and $8,365.00 in expert witness fees, for a total of $295,794.39. (R.51) Had the carriers provided the required defense, even under a reservation of rights, appellant would typically have been spared these expenses. If the Court finds that there was indeed coverage but for the late notice, ***8** then the carrier would also be required to indemnify the insured/appellant for the $75,000 settlement of the underlying Global Brands action. (R.51)

On October 15, 2002, Energy Brands commenced an action for a judgment declaring its rights under

the Utica and Hermitage policies and for damages resulting from the insurers' breach of contract and from Tufariello's legal malpractice as a result of her failure to provide timely notice to the insurers. (R.116-130) On December 31, 2004, Jaspan filed a motion for summary judgment. (R.16) On January 10, 2005, Hermitage filed a motion for summary judgment. (R.17) Due to what the court below later ruled was excusable law office failure, Energy Brands responded only to Hermitage's summary judgment motion and on January 31, 2005, the Supreme Court granted Jaspan's summary judgment motion, thus dismissing Energy Brands' claims against Jaspan. (R.12)

On March 28, 2005, Energy Brands made an emergency motion, via order to show cause, to vacate the January 31, 2005, order. (R.16-19) The court issued a decision on May 26, 2005 (the "May 26 Order"). (R.8-10) The May 26 Order held that Energy Brands ***9** provided a credible excuse for its default -- reasonable law office failure -- but Energy Brands failed to establish that it had a meritorious claim for legal malpractice against Jaspan. The court denied Energy Brands' motion "without prejudice to renew upon proper papers." Energy Brands filed its renewed motion for vacatur of the January 31, 2005, Order on September 26, 2005. (R.13-15)

On December 21, 2005, the court denied Energy Brands' renewed motion for vacatur and reversed, *sua sponte* and without discussion or justification, its earlier finding that Energy Brands had a reasonable excuse for its default (the "December 21 Order"). (R.3) The December 21 Order also stated that the court reached its decision partially on the grounds of a clerical notation indicating that the matter had been settled. (R.3) This is plain error; the parties have not reached a settlement, neither party ever raised the issue of settlement with the court, and both parties went through two extensive rounds of motion submissions, hardly what would be expected of a case that was settled. Indeed, when the Court had previously found, in its May 26 Order, that Energy Brands had met the first prong of the standard for vacatur, it made no mention at all ***10** of this supposed settlement. (R.8-10) This appeal followed from the December 21 Order. (R.3)

ARGUMENT

A. THE SUPREME COURT ERRED IN SUA SPONTE REVERSING OR VACATING ITS PRIOR FINDING OF EXCUSABLE NEGLECT ON THE MOTION TO VACATE THE DEFAULT.

This Court has recently reiterated the ancient rule barring reconsideration by a court of a matter already decided on the merits absent extraordinary circumstances, writing:

The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (*see Bellavia v. Allied Elec. Motor Serv.*, 46 A.D.2d 807, 361 N.Y.S.2d 193). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (*see Gay v. Farella*, 5 A.D.3d 540, 772 N.Y.S.2d 871).

Brownrigg v. New York City Housing Authority, 29 A.D.3d 721,815 N.Y.S.2d 681, 683 (2d Dep't 2006). As this Court recognized in *Brownrigg*, this doctrine may be ignored only in "extraordinary circumstances," such as a change in law or a showing of new evidence. *See Foley v. Roche*, 86 A.D.2d 887, 447 N.Y.S.2d 528,529 ***11** (2d Dep't 1982). How extraordinary must the circumstances be for a court to depart from the law of the case doctrine? The Court of Appeals has taught, "The error sought to be corrected must, however, be so 'plain * * * [that it] would require [the] court to grant a reargument of a cause,' *Eaton v. Alger*, 47 N.Y. 345, 348 (1872)," *Foley*, 86 A.D.2d at 887, 447 N.Y.S.2d at 529; *see also* 10A CARMODYWAIT 2D §70:441 (2006) ("So long as the facts remain the same, a rule of law once laid down by the court of last resort remains the rule throughout the subsequent history of the cause in all its stages except under extraordinary circumstances.")

Here, however, there was no extraordinary circum-

stance -- no new law, no new evidence, no reason to believe that the earlier decision would ultimately lead to a legal miscarriage. Here there was not so much as a request or suggestion, much less a motion, by the respondent that its earlier finding of excusable neglect be revisited. “It is well settled that a trial court has no revisory or appellate jurisdiction to vacate, *sua sponte*, its own judgment (*see*, CPLR 5019 [a]; *Herpe v. Herpe*, 225 N.Y. 323, 122 N.E. 204 (1919)).” ***12** *Osamwonyi v. Grigorian*, 220 A.D.2d 400, 401, 631 N.Y.S.2d 906, 907 (2d Dep't 1995).

In Armstrong Trading, Ltd. v. MBM Enterprises, 29 A.D.3d 835, 815 N.Y.S.2d 689, (2d Dep't 2006), a case with many similarities to this one procedurally, this Court reversed the Supreme Court, ruling that it erred in *sua sponte* vacating its prior order granting a party's cross motion to vacate a judgment entered upon default where -- as here -- no motion was made requesting a change from the previous order, and none of the circumstances set forth in CPLR 5015(a) or 5019(a) were applicable. Notwithstanding a trial court's discretion in such matters, this Court ruled that the Supreme Court's stated “lack of recollection as to the reasoning” behind its original determination did not constitute a sufficient reason for vacating its own order in the interest of justice. *Id.* at 691.

Moreover, as the Supreme Court seemed to recognize in its original decision, public policy favors resolution of cases on the merits rather than disposing of cases through default judgments. *Ahmad v. Anilowiski*, 28 A.D.3d 692, 814 N.Y.S.2d 666, 667 (2d Dep't 2006) (strong public policy exists which favors the disposition of ***13** matters on the merits); *M.S. Hi-Tech, Inc. v. Thompson*, 23 A.D.3d 442, 808 N.Y.S.2d 122, 123 (2d Dep't 2005) (public policy favors resolving cases on the merits); *see also Rockland Transit Mix, Inc. v. Rockland Enterprises, Inc.*, 28 A.D.3d 630, 631, 814 N.Y.S.2d 196, 197 (2d Dep't 2006) (reversing denial of motion for vacatur of default granted on summary judgment caused by law office failure where missed filing was inadvertent and not habitual). The Supreme Court's irregular, unrequested and unexplained *sua sponte* reversal (R.3) of its earlier decision (R.8-10) was not only improper in the absence of either a legal or factual ground to revisit the earlier opinion, it was especially unjust considering that it amounted to a grant of a default judgment where the record demonstrates that a trial on the merits would be appropriate.

B.THE SUPREME COURT ERRED IN REFUSING TO FIND THAT ENERGY BRANDS HAD A MERITORIOUS DEFENSE TO THE MOTION FOR SUMMARY JUDGMENT ON ITS MOTION TO VACATE THE DEFAULT.

The only issue properly before the Supreme Court on the motion that is the subject of this appeal was whether appellant could establish that it had a meritorious legal basis upon which to open the ***14** default entered against it on Jaspan's motion for summary judgment. Energy Brands submitted an extensive brief as well as an expert affidavit and an affidavit of counsel on the topic of legal malpractice to demonstrate its bona fides. (R.15-70) Respondent submitted no rebuttal expert's report. The Supreme Court ignored this record, developed in response to its own order, which is reversible error. Furthermore, because this Court must weigh the Supreme Court's denial of the motion made on these grounds, it must consider the merits of the underlying summary judgment motion and can order an appropriate plenary disposition. *See, e.g.*, *Walton v. Carrion*, 261 A.D.2d 469, 687 N.Y.S.2d 300 (2nd Dep't 1999) (finding triable issue of fact on review of vacatur of default on summary judgment motion), *Gluzman v. Jansen*, 5 Misc.3d 134(A), 799 N.Y.S.2d 160 (N.Y. App. Term 2004) (considering merits of underlying summary judgment motion on appeal of vacatur motion).

To prevail on a claim of legal malpractice under New York law, a party must demonstrate: “(1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by the breach of the duty.” ***15***Marshall v. Nacht*, 172

A.D.2d 727, 728, 569 N.Y.S.2d 113, 114 (2d Dep't 1991); *see also Ocean Ships, Inc. v. Stiles*, 315 F.3d 111, 117 (2d Cir. 2002); *Nobile v. Schwartz*, 265 F.Supp.2d 282, 288 (S.D.N.Y. 2003). A breach of duty is established upon a showing that one's attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community. *See Marshall*, 172 A.D.2d at 727-28, 569 N.Y.S.2d at 114; *Greene v. Payne, Wood and Littlejohn*, 197 A.D.2d 664, 666, 602 N.Y.S.2d 883, 885 (2d Dep't 1993); *Nobile*, 265 F.Supp.2d at 288. Furthermore, a showing that actual damages were proximately caused by the breach of duty is made upon submission of proof that "but for the defendant's negligence, [the plaintiff] would have prevailed in the underlying action or would not have sustained any damages." *Nobile*, 265 F.Supp.2d at 289 , citing *Davis v. Klein*, 88 N.Y.2d 1008, 1009-10, 648 N.Y.S.2d 871 (1996); *see also Logalbo v. Plishkin, Rubano & Baum*, 163 A.D.2d 511, 513, 558 N.Y.S.2d 185 (2d Dep't 1990).

***16** I. Energy Brands Can Demonstrate That Jaspan Owed a Duty *to Energy Brands*

It is axiomatic that where, as here, the subject matter of an attorney-client relationship specifically includes advice regarding the nature and extent of a client's insurance coverage for intellectual property matters, that lawyer is responsible for ensuring that claims are properly submitted when they become known to the insured and counsel. To evade this responsibility, Jaspan claims, self-servingly, that Betty Tufariello was "retained" by Energy Brands merely "to be intellectual property counsel and not insurance coverage counsel" (R.73)--language tracking *Darby & Darby, P.C. v. VSI Intern., Inc.*, 268 A.D.2d 270, 271, 701 N.Y.S.2d 50, 51 (1st Dep't 2000). But the decision in *Darby & Darby* does not support defendant and, in fact, bolster's appellant's position.

In *Darby & Darby*, the First Department ruled only that an attorney retained, unlike defendants here, *specifically* to defend a business client in a *specific* intellectual property litigation has no duty to inquire into the existence, nature and scope of insurance policies previously procured by the client and to determine whether any ***17** such policy provides the client with any entitlement in relation to the claim being litigated. The facts in *Darby* were markedly different from those here, as demonstrated by this excerpt:

The [ ] counterclaims [in *Darby*] allege that defendant retained [appellant] law firm to provide legal services in connection with defending them in an intellectual property infringement matter brought against defendant...

We conclude that the allegations contained in the defendant' answer are insufficient to support findings of either professional malpractice or breach of fiduciary duty. *In the absence of a factual assertion that the scope of the task for which counsel was retained specifically included inquiry into the nature and extent of its insurance coverage and whether it was applicable to the claim*, the retention of counsel for the defense of such an action simply does not include any responsibility for assisting the client in determining whether sources exist from which to pay for that defense and any ultimate liability finding.

Id. at 271 (emphasis added). See also, *Gursky & Ederer, LLP v. GMT Corp.*, 5 Misc.3d 1022(A), 799 N.Y.S.2d 160 (N.Y. Sup. Ct. 2004) (defendant's allegations insufficient to give rise to any duty of appellant to ascertain the availability of insurance coverage for the defense of specific litigation).

No New York cases allege facts, as appellant does here, where the breadth of the attorney-client relationship is admitted by the ***18** attorney herself (at least in her depositions) as including advice regarding the tender of a claim to an insured's carrier. But in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 958 P.2d 1062 (1998), the California Supreme Court held that a law firm client suffered actual injury under a statute of limitations analysis when its attorneys failed to investig-

ate insurance coverage or advise the client to notify its insurers of the underlying suit. There is nothing in the rule of *Darby,* nor is there any other principle of New York law, that provides--as defendants maintain--an absolute bar of malpractice claims no matter how obviously the facts of the representation cry out that the attorney should have acted to secure appropriate insurance coverage for defense and indemnification.

Not only is there no such blanket rule, but it is not enough to attempt, *ex post facto,* to narrow the scope of a lawyer's representation merely by asserting its narrowness. New York law, in fact, properly places the burden of demonstrating a limitation on representation and, critically, of showing the client's *awareness* of this limitation, on the professional, not on the lay client (one reason summary judgment on this motion is so inappropriate). In fact, even matters technically ***19** outside the scope of a strictly-defined representation may still trigger a duty to provide appropriate professional advice and counsel:

An attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention.... The attorney need not represent the client on such matters. The client, however, should be informed of the limitations of the attorney's representation and of the possible need for other counsel. *An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.* The rationale is that, as between the lay client and the attorney, the latter is much more qualified to recognize and analyze the client's legal needs.

Davis v. Klein, 224 A.D.2d 196, 197, 637 N.Y.S.2d 137, 139 (1st Dep't 1996) (attorneys not entitled to summary judgment on ground that representation of appellant was limited to workers' compensation claim and that any potential personal injury action appellant might have was beyond the scope of representation) (internal quotations and citations omitted; emphasis added).

The language of *Davis v. Klein* is powerful, and its thesis is compelling: Lawyers are professionals and counselors who may not merely stand by and urge "It's not my job" when time-sensitive and ***20** obvious legal issues, such as given notice of a liability claim, arise and clients are not sufficiently sophisticated to recognize them.

But Energy Brands' argument for the recognition of the scope of the attorney-client relationship here is not merely about shifting burdens and presumptions. Ms. Tufariello's testimony paints a compelling contrast with the facts in *Darby & Darby,* making summary judgment inappropriate. Here, the *facts* support Energy Brands' assertion that the legal representation provided to it by Jaspan quite specifically included insurance advice connected to intellectual property. In marked contrast to the facts in *Darby & Darby,* Ms. Tufariello's own testimony demonstrates that Ms. Tufariello was involved, hands-on, in her clients' insurance coverage for copyright and trademark infringement liability. She admits that in cases where her clients faced claims of trademark infringement, she has advised them to notify their insurance broker, and sometimes she even took on that role herself on the client's behalf. "Most of the time," she testified, "I contacted the broker or the carrier directly." (R.45) Critically, she readily acknowledges her direct involvement, at least on a quarterly basis, in reviewing Energy Brands' IP portfolio ***21** and *making specific recommendations to Energy Brands regarding IP-related insurance coverage:*

Q: [Do you recall w]hether or not [Energy Brands' Mr. Bikoff] informed his carrier of the possibility of a claim in the patent case?

A: Probably not, and the reason for this is because most commercial general liability policies do not provide for patent infringement. They are covered by a separate rider and I know for a fact that he had been thinking of the possibility of getting patent in-

fringement [coverage]. *I alerted him, I said you are getting into some pretty dangerous waters, it might be a good idea to supplement your insurance policy* with patent infringement.
...
Q: At that time, did you ask about his trademark coverage?
A: It might be helpful if I explained to you how I did business with Mr. Bikoff ... Mr. Bikoff's [trademark] portfolio ... grew as the company grew. It go to the point he must have had over 40 or 50 trademarks ... It got so big that it was very important that we did inventory on the portfolio at least quarterly where we would review the files ...
...
While I was there I had an opportunity, like every attorney, to develop a relationship with him and I started asking a lot of questions. It was my job to protect his intellectual property portfolio.... Likewise, the other way around, *part and parcel of that quarterly review I would occasionally say how is* ***22** *your insurance, did you look at it, do you have trademark coverage, what about patents.* It was in the general sense of doing business, making sure ... So any issue of insurance, whether he had coverage or not occurred way before this dispute happened.

(R.482-485 emphasis added) In fact, later in her testimony she claims that, upon receiving the November 2001 letter from White & Case, she advised Energy Brands to contact its carriers:
Q: Did you tell him that White & Case was unlikely to go away unless they received money?
A: I didn't say unless they received money. What I said was, I don't know, Darius, if this is just going to go away, White & Case is a big firm. That's what I said.
Q: Did you tell him -- you indicated you told him to contact his insurance company?
Yes.
Q: That's because you understood that there was a likelihood of a claim being made?
A: Yes. That's my habit with all my clients.
Q: That's your habit back in 2001?
A: Yes.

(R.514-515) No written record or other corroboration of that alleged advice is available, but the critical fact question of whether it was given at all and if so whether that suggestion satisfied Jaspan's ***23** obligation to give it under the circumstances is one reason summary judgment is not appropriate. Ms. Tufariello's testimony does, however, corroborate that of Darius Bikoff that "Very early in the relationship, [Ms. Tufariello] asked to see a copy of the policy" providing insurance coverage to Energy Brands (R.394) and that Ms. Tufariello "wanted to make sure we had an appropriate coverage for any kind of intellectual property matters." (R.394) These facts make it impossible to credit Jaspan's fundamental defense--its claim that advice about insurance was beyond the scope of its representation.

Quite unlike the facts in *Darby & Darby*, where the defendant law firm was retained *specifically* for the defense of a *particular* lawsuit, here the Jaspan firm acted in a far broader capacity, and, as Ms. Tufariello's testimony demonstrates, both evaluated intellectual property-related insurance coverage and actually undertook to make recommendations on the topic in general and with respect to this particular case. Defendant submitted nothing below to demonstrate or even suggest that there was any reason whatsoever for Energy Brands to believe that, despite the fact that insurance coverage for intellectual property was an ongoing, substantive area of Jaspan's ***24** representation, suddenly in *this* case, involving *this* litigation, Energy Brands should have thought that Jaspan was merely "intellectual property counsel," and no more.

There is thus no room to dispute that there was a pre-existing attorney-client relationship that continued up to and including the time when the underlying events at issue in this litigation occurred. There is also no dispute that the scope of Jaspan's representation, and thus Ms. Tufariello's duty to her client, covered matters relating to the client's insurance coverage for commercial liability claims. That is why, albeit belatedly, after the February 14th let-

ter from White & Case, Ms. Tufariello said, “Darius, now it's serious. They are coming back, they are putting this information in and even though we may still disagree with the merits of the case, I think it's very important that you contact the insurance company and I am going to do it for you whether you like it or not...” (R.491) Ms. Tufariello admitted that she knew the claim was serious in November 2001--“What I said was, I don't know, Darius, if this is just going to go away, White & Case is a big firm.” (R.90)

***25** Ms. Tufariello claims she advised Energy Brands to put their insurer on notice in November, yet only after the February 14th letter did she make it her business to make sure this happened: “I think it's very important that you contact the insurance company and I am going to do it for you whether you like it or not....” (R.491) In fact, it was “very important” in November as well. When asked why she waited so long to take action, Ms. Tufariello responded that at this juncture, “The fact that they attempted to assemble evidence to show use indicated to me that they were preparing for a fight and that they thought it was serious enough to send it to us as proof.” (R.491) Given this testimony, there is no serious question as to whether Ms. Tufariello thought this analysis and these actions were part of her job, nor whether her client would have had any reason to believe otherwise. The problem was not the scope of representation but, unfortunately, Jaspan's competence in failing to make sure the carriers received timely notice of a claim which the firm was aware of all along: “They can't be sending a cease and desist like that to just go away.” (R.510)

***26** II. Energy Brands Can Demonstrate the Breach of a Duty by *Jaspan*

As demonstrated above, the accepted standard of care that applies when an attorney receives notice that a client is or may be the subject of a potential liability claim, and the attorney knows that there is or may be insurance coverage for that claim, requires the attorney to take every reasonable step to protect the client's rights under the liability policy. Thus, where a client's private attorney has failed to protect the client in this or some comparable way, then that attorney has failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community similarly situated.

In this case, Ms. Tufariello received actual notice of a potential claim in early November, 2001 when her client faxed to her a copy of the cease and desist letter from White & Case, the attorneys for Global Brands. That was the first notice Ms. Tufariello had that Global Brands was asserting a claim for “advertising injury” under Energy Brands' general commercial liability policies. (R.456) At that moment, given her ongoing relationship with Energy Brands which ***27** included advice regarding insurance protection for intellectual property claims, Ms. Tufariello's first and absolute duty was to protect her client's right to a defense and to be indemnified for the claim. To do that, she should have given written notice immediately to Energy Brands' carrier, or satisfied herself that this would be done promptly and properly by Energy Brands, when she received the White & Case letter in early November, 2001.

But Ms. Tufariello did not protect her client by meeting this common-sense standard. Instead, she conducted her own research. Concluding that the claim lacked merit, she bought time in the Global litigation--even as she squandered it with the insurance carriers--by demanding more information from White & Case. (R.465-466) While conducting her own analysis of the claim may have been within the scope of her duty to her client, it did not discharge that duty. Rather, she completely ignored her duty, which she assumed by virtue of the nature of her admitted role as general business and IP advisor to the client, to protect the client's rights to a defense and to indemnification under its liability policy. Rather than giving the carrier immediate notice, or making sure that her client did so itself, instead she ***28** improvised and delayed, giving the

carriers a basis to deny both coverage and a defense under New York's strict timely-notice standard.

On or about February 14, 2002, approximately three and a half months after the first cease and desist letter, Ms. Tufariello received a second letter from White & Case relating to Global Brands' claim against Energy Brands. (R.492) Two weeks later on March 1, 2002--*nearly four months* after the initial claim letter--Ms. Tufariello first called and wrote to Joyce Panetta of the Libardi Service Agency, Utica Mutual's insurance agent, to give notice of the Global Brands claim. (R.492-493) Such a protracted delay constitutes a serious lack of diligence on the part of the attorney and is contrary to that degree of care and attention required by accepted standards of practice in the legal community. As a result of that unacceptable delay, both Hermitage and Utica Mutual were furnished with the factual justification to assert their late notice of claim positions so as to disclaim coverage and deny a defense to their insured.

Even though Ms. Tufariello did eventually recognize her duty to transmit claim information to Energy Brands' carriers by writing to ***29** them on March 1st, she again fell asleep at the switch on March 4, 2002, when Global Brands filed an action in the U.S. District Court seeking injunctive and monetary relief. Ms. Tufariello received a copy of the summons and complaint in that action yet, inexplicably, again failed to forward them to Libardi, the insurance agent with whom she had communicated only a few days earlier, or to the insurance carriers. (R.49) This final, fatal failure to furnish the summons and complaint to Libardi or the carriers was an egregious deviation on Ms. Tufariello's part from accepted standards. (R.49) Given these facts, it certainly cannot be said as a matter of law that Jaspan's inaction did not constitute a breach of an attorney's duty to her client.

III. Energy Brands Can Demonstrate That Jaspan's Breach of *Duty Resulted in Substantial Harm to Energy Brands*

As a result of Jaspan's acts of malpractice, both Hermitage and Utica Mutual Insurance were given a factual ground on which to deny coverage and a defense to Energy Brands, Inc. in the underlying advertising injury claim. As a result, Energy Brands was deprived of the benefits under one or both of its commercial liability insurance ***30** policies to have the insurer pay for its defense and indemnification costs in the underlying litigation. Even if the carriers chose to reserve their rights as to coverage, their duty to defend the insured, Energy Brands, Inc., was nevertheless absolute and could only have been protected for the benefit of the insured by giving timely notice of the claim, which Ms. Tufariello failed to do or to have done. Because the carriers asserted that they had received late notice of the claim, they refused to assume the defense from the Debevoise firm, which required the client to hire its own defense counsel. (R.50) Of course, if Ms. Tufariello had seen to it that timely notice was given, the carriers would have designated and paid for defense counsel to represent Energy Brands, Inc. (R.50)

As of the date of appellant's Verified Bill of Particulars (October 28, 2003), the cost to the appellant for legal fees to the Debevoise & Plimpton law firm in Manhattan was $267,683.60, plus costs of $19,745.79 and $8,365.00 in expert witness fees, for a total of $295,794.39. (R.51) Had the carriers provided the required defense, even under a reservation of rights, appellant would typically have been spared all or most of these expenses. In the likely event that the ***31** Court, at trial, finds that there was indeed coverage, the damages due to Jaspan's failure to provide timely notice, or to otherwise act to insure that such notice be given, would include the $75,000 settlement of the underlying Global Brands action. Energy Brands' damages, therefore, incurred due to Jaspan's malpractice total $370,794.39 thus far. (R.51) Clearly, by reason of the failure of defendant law firm to give timely notice to the carrier as stated above, the appellant has been caused financial damage. As a result, the defendant law firm is liable for the depar-

tures from accepted standards of care attributable to its then-partner, Ms. Tufariello. (R.51)

C. THE COURT ERRED IN DENYING THE MOTION TO VACATE ON THE BASIS THAT THE ACTION HAD BEEN SETTLED WHEN NO SETTLEMENT HAS BEEN REACHED

The Supreme Court also erred when it denied Energy Brands' renewed motion to vacate the January 31, 2005, Order on the premise that the case had been settled when, in fact, no settlement has been reached between Energy Brands and Jaspan. (R.3) Neither party ever raised the issue of settlement before the Court; both parties ***32** submitted papers arguing their position on the motion -- twice. Indeed, the May 26 Order was issued with no reference whatsoever to this erroneous clerk's entry. (R.8-10) Energy Brands should not be fatally penalized for a clerk's error in the Court's own administrative organs and which the Court had to know was a mistake.

In *Zrake v. New York City Dept. of Educ.*, 17 A.D.3d 603, 793 N.Y.S.2d 151 (2d Dep't 2005), this Court held that the lower court improvidently exercised it discretion when it denied the appellant's motion to vacate a default judgment where there was evidence that the case was originally marked “off” because of a failure of communication with the court clerk and the appellant's cross motion was not accepted for filing, even though it was timely. This clerical error resulted in a default judgment against the appellant. 17 A.D.3d at 603-604, 793 N.Y.S.2d at 151. *See also Quenqua v. Turtel*, 146 A.D.2d 686, 536 N.Y.S.2d 1018 (2d Dept' 1989) (court did not abuse its discretion in vacating default judgment where default resulted from a clerical error); *Rogers v. Hillside Assocs.*, 89 A.D.2d 1045, 456 N.Y.S.2d 116 (3rd Dep't 1982) (court correctly granted appellant's ***33** motion to restore case to calendar where case mistakenly marked “settled” and removed from calendar).

The clerical error here denoting the case as “settled” (R.3) did not result in Energy Brands' default, but denying a motion to vacate, renewed with leave after a ruling of an earlier motion, because the case was inexplicably marked “settled,” when in fact no settlement has been reached, was more than an improvident exercise of discretion. It was a serious miscarriage of justice.

CONCLUSION

For the foregoing reasons, the Supreme Court's December 21, 2005, Order should be reversed, the motion by appellant to vacate the default judgment granted, and the cause herein placed on the trial calendar in the Supreme Court.

ENERGY BRANDS, INC., Plaintiff-Appellant, v. UTICA MUTUAL INSURANCE COMPANY, Hermitage Insurance Company, Defendants, Jaspan Schlesinger Hoffman, LLP, Defendant-Respondent.
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