UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of March, two thousand and five.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER,
HON. BARRINGTON D. PARKER, JR.

Circuit Judges,

ROSENBERG DIAMOND DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v. No. 04-3698

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Defendant-Appellee,

For Plaintiff-Appellant: JOHN D. D'ERCOLE, Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York, NY

For Defendant-Appellee: MARSHALL T. POTASHNER, Jaffe & Asher LLP, New York, NY

Appeal from the United States District Court for the Southern District of New York (Castel, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Plaintiff Rosenberg Diamond Development Corporation ("Rosenberg") appeals from the decision of the district court (Castel, *J.*) granting summary judgment to the defendant, Employers Insurance Company of Wausau ("Wausau"). The district court found that Wausau, which insures Rosenberg for Comprehensive General Liability ("CGL"), had no duty to defend Rosenberg in a Fair Housing Act case brought against Rosenberg by the Association of Community Organizations for Reform Now ("ACORN"). We assume that the parties are familiar with the facts, the procedural history, and the scope of the issues presented on appeal.

"It is well settled under New York law that an insurer's duty to defend is 'exceedingly broad.'" *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 165 (2d Cir. 1998) (quoting *Continental Cas. Co. v. Rapid-Am. Corp.* , 80 N.Y.2d 640, 648 (1993)). So long as the underlying complaint alleges facts that might bring a suit within the scope of the insured's coverage, the insurer has a duty to defend the action. *See Seabord Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310 (1984). A court should not, however, "attempt to impose [a] duty to defend on an insurer through a strained, implausible reading of the complaint." *Northville Indus. Corp. v. National Union Fire Ins. Co.,* 89 N.Y.2d 621, 634-35 (1997).

Rosenberg alleges that Wausau might have a duty to indemnify the claims raised in the ACORN complaint under two provisions of the CGL policy: 1) "Coverage A" (Bodily Injury and Property Damage Liability) and 2) "Coverage B" (Personal and Advertising Injury Liability). If

either of these provisions might afford coverage for any of the acts alleged in the ACORN complaint, Wausau would have a duty to defend the ACORN action. We find, however, that Wausau correctly concluded that the acts alleged in the ACORN complaint would not be subject to coverage under either provision of the policy.

Although Rosenberg argues otherwise, the ACORN complaint alleged only intentional racial discrimination. And, under New York law, it is clear that the type of language included in the CGL policy's "Coverage A" does not extend to such intentional discriminatory acts. *See Mary & Alice Ford Nursing Home v. Fireman's Ins. Co. of Newark*, 446 N.Y.S.2d 599, 601 (N.Y. App. Div. 1982) (holding that there was no duty to indemnify, and thus no duty to defend, an intentional discrimination claim under a coverage provision comparable to Rosenberg's "Coverage A"), *aff'd for the reasons stated by the App. Div.*, 439 N.E.2d 883 (N.Y. 1982). Nor would the possibility of "vicarious liability" bring the allegations of the complaint within the scope of "Coverage A" coverage, as it is the underlying acts alleged – not the legal theory pled – which controls the existence of coverage under New York law. *See, e.g., Green Chimneys Sch. for Little Folk v. National Union Fire Ins. Co.*, 664 N.Y.S.2d 320, 321 (N.Y. App. Div. 1997).

We also conclude that the acts alleged in the ACORN complaint would not have been subject to indemnification under the "Coverage B" provision of Rosenberg's CGL policy. While it might be possible to read "Coverage B" to extend to a small subset of the claims asserted in the ACORN action, *see Winters v. Transamerica Ins. Co.*, 194 F.3d 1321 (Table), 1999 WL 699835 at *3-4 (10th Cir. Sep. 9, 1999)[1], any such coverage would have been barred as a matter of

[1] The Tenth Circuit does not prohibit citation to unpublished summary orders as persuasive authority. *See* Tenth Cir. Local R. 36.3.

public policy under New York law. *See* N.Y. Ins. Circular Letter No. 1994-6. Although, as Rosenberg points out, New York public policy does not bar coverage for some forms of vicarious liability, *see id.*, it is evident that this "vicarious liability exception" is not intended to extend to the types of actions alleged in the ACORN complaint. *See* N.Y. Gen. Counsel Op. 3-17-2000 (#1).

Because the facts alleged in the ACORN complaint would not have triggered coverage under any of the provisions of Rosenberg's CGL policy, Wausau had no duty to defend the ACORN action. *See, e.g., Northville Indus. Corp.*, 89 N.Y.2d at 635.

We have considered all of Rosenberg's arguments and find them to be without merit. We therefore AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE,

Clerk of the Court

by: _____