

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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E,
Plaintiff,

against-

Index No: _____ -
SUMMONS

F,
Defendant.

----- x

To the above-named Defendant:

F
_____.

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is the principal place of business of the Plaintiff, which is
_____.

Dated: New York, New York

E's Attorney

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

----- x

E,

Plaintiff,

Index No: _____ -

against-

COMPLAINT

F,

Defendant.

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NATURE OF ACTION

1. In this action Plaintiff, E, ("Plaintiff") is filing a Complaint against the law firm F ("Defendant-Attorneys"), on the basis of the underlying grounds.
2. S ("S"), a New York City based General Contracting firm, subcontracted Plaintiff to perform carpentry work at _____ under the sub-contract dated _____.
3. Plaintiff obtained primary liability insurance from Q for an amount of \$ _____ per occurrence and \$ _____ in aggregate pursuant to Commercial General Liability policy no. _____ between _____ - _____ and _____ between _____ - _____.
4. Plaintiff also obtained excess insurance coverage from IC ("IC") pursuant to Commercial Umbrella liability policy no. _____ for an amount of \$ _____.
5. T, was employed by the Plaintiff at relevant point of time as a carpenter. He alleges that he was injured at the construction site, while working, on _____. On the date of occurrence of the alleged accident, Q and IC insurance policies were in force.
6. T's attorney advised S's Corporate Claims Manager, V ("V"), about T's claim through a letter dated _____. V forwarded the letter to A ("A"), representative of S's primary insurer, N. A, by a letter dated _____ and also informed Q of T's alleged accident and requested Q to provide indemnification to S in connection with T's claim.

7. T filed a Personal Injury Action against S on _____. S filed a Third-Party Complaint on _____ against Plaintiff in order to implead Plaintiff as a Third-Party Defendant in T's Personal Injury Action. Defendant-Attorneys were retained as defense counsel by Q to represent Plaintiff in the said Third-Party Complaint. Thereafter, S filed a Declaratory Judgment action on _____ against Plaintiff, Q and IC. On _____, the Court held in S's Declaratory Judgment Action that Q was obligated to provide, on a primary basis, coverage and a defense to S. At the same time the Court also held that IC had no duty to provide coverage to and indemnify S.
8. Pursuant to E's Primary General Insurance Contract, for the period of _____ to _____ Q had a professional and a contractual duty to defend E in the litigation against T. Q assigned FR, of F (Defendant-Attorneys) to defend E in the aforementioned T action. E had absolutely no involvement in the decision to hire counsel on its behalf. That was the sole decision of Q.
9. The insurance contract in question dictated that Q provide written notice to the Plaintiff as soon as practicable that the General Liability limits were used up in an offer to settle an underlying claim.
10. Q's assigned counsel to Plaintiff and Q were obliged to collaborate and exchange claim information concerning their combined duties to avoid a defective written notice of policy exhaustion. The written notice of the exhaustion of the underlying policy is a condition precedent to notifying the excess carrier. It is a neglectful act to issue a written notice of exhaustion pursuant to the aforementioned policy on a day which will be deemed to be a late notice by the excess carrier.
11. The date on which this written notice is issued by the Defendants is a key date for the Plaintiff to obtain excess coverage.
12. The Defendant-Attorneys and Q became aware or should have been aware of the extent of T's injuries no later than _____, the date of T's deposition, or, in any event, no later than _____, the date of T's supplemental bill of particulars. Defendant-Attorneys were obligated to have an ongoing and continuous dialogue with Q concerning any claims in the T matter in order to properly discharge their duties relating to the required notice of exhaustion of the primary policy, if necessary.

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13. The severity of the T injuries and extended physical rehabilitations were blatantly clear in the _____ Bill of Particulars and _____ T's Deposition Testimony. Furthermore, the likelihood that further surgeries would be necessary was set out in T's _____ Supplemental Bill of Particulars. A significant factor which was presented to the Defendants, in the aforementioned Deposition Testimony, was the evidence to which T testified that he had been rendered totally disabled at the age of ____.
14. In his _____ Bill of Particulars, T provided details regarding the nature and severity of his injuries, hospitalizations, and treatments, which had included two total knee replacements, as well as details regarding his alleged pain, suffering, and likely permanent physical limitations and impairments caused by his injuries. T also reported approximately \$_____ to date in special damages for health care providers, for which a lien may exist.
15. The _____ Bill of Particulars indicated that T last worked on _____, and remained totally incapacitated from employment from that date. Based upon the itemized hourly wage rates and benefits that T had been earning, pursuant to the union collective bargaining agreements under which T had been employed at the time of his injury, T was claiming lost earnings to date of \$ _____, and lost annuities and benefits to date of \$ _____.
16. In his _____ deposition testimony, T further detailed and described his injuries, treatments, surgeries, hospitalizations, and pain and suffering. Specifically, T testified that his injuries and damages included four hospitalizations, arthroscopic surgery on both knees, total knee replacements on both knees, prolonged periods of physical therapy and pain, permanent disability from work, as well as lost past and further income in excess of the amount already set forth in his _____ Bill of Particulars.
17. In his _____ Supplemental Bill of particulars, T stated that he remained totally disabled from employment and was claiming continuing lost wages, at the previous rates claimed, in addition to continuing lost wages into the indefinite future. The Supplemental Bill of Particulars also stated that T had been advised by his doctor to anticipate future knee surgeries at a cost of approximately \$_____.

18. Pursuant to the duties owed as Counsel for Plaintiff, Defendant-Attorneys had an obligation to communicate directly with Q and the Plaintiff to put them on notice as to any significant developments as they related to the T litigation. Pursuant to the aforementioned damages, Defendant-Attorneys clearly had an obligation to inform the aforementioned parties of the significant damages and knew that there were issues as to the exhaustion of the primary policy.
19. Defendant-Attorneys knew that Plaintiff had an excess policy to cover damages which would be triggered upon proper notice. They knew that the excess carrier was IC. They knew that lack of a proper notification, based upon the knowledge of the scope of T's injuries, to IC would preclude Plaintiff's access to the excess coverage and expose it to uninsured catastrophic losses.
20. Pursuant to the contract, Defendant-Attorneys sent a letter to Plaintiff as late as on _____ advising Plaintiff of the potential for an excess insurance trigger. Because of Q and Defendant-Attorneys' late notice, Plaintiff could not inform IC on a timely basis as to the exhaustion of the primary policy.
21. As a result of IC's declination of coverage, Plaintiff filed a Complaint seeking Declaratory Judgment against IC, the excess carrier, on _____ demanding that IC defend and indemnify Plaintiff in T's Personal Injury Action. On _____, IC filed a Summary Judgment, the Lower Court granted IC's Summary Judgment Motion and dismissed Plaintiff's Complaint by an Order and Judgment dated _____.
22. Plaintiff is now exposed to any potential damages arising out of the T litigation that are in excess of \$ _____, as a direct result of the Defendant-Attorneys inadequate representation of the Plaintiff. Defendant-Attorneys had an obligation to coordinate with Q, to ensure that Plaintiff received timely written notice as to the extent of T's "claims", specifically if there was evidence that the primary insurance policy would be exhausted. Due to such negligent conduct on the part of Defendant-Attorneys, Plaintiff did not receive timely notice that T's injuries exhausted the primary policy and thus could not timely notify IC that the excess policy was triggered.

23. Defendant-Attorneys did not have a plausible cause for the aforementioned late notice. The belated notice of _____ by Defendant-Attorneys exposed Plaintiff to liability in the underlying Third-Party Complaint.
24. The Defendant-Attorneys continuously represented Plaintiff on this very same matter, from which this malpractice claim arises, from at least _____ to _____.
25. Accordingly, Plaintiff is filing the present Complaint against the Defendant-Attorneys on the grounds of breach of fiduciary duty, negligent conduct, and legal malpractice claiming relief of punitive, compensatory and consequential damages, interest, costs, and attorney's fees.

PARTIES

PLAINTIFF E has its principal place of business at _____.

DEFENDANT F has its principal place of business at _____.

JURISDICTION AND VENUE

Jurisdiction is proper under CPLR § 301.

Venue is proper in New York pursuant to CPLR § 503 because it is the county in which Plaintiff has its principal places of business.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

26. Plaintiff incorporates by reference paragraphs 1-25 as though fully set forth herein
27. The elements of a breach of fiduciary duty claim are (1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) damages as a result of the breach.
28. At all times pertinent herein, Plaintiff relied on the Defendant-Attorneys for advice and counsel regarding its claims in the Third-Party Complaint. Defendant-Attorneys were

obligated by the attorney-client relationship to fully, fairly and competently represent Plaintiff in all respects.

29. Defendant-Attorneys held themselves out as experts in the matters for which they represented Plaintiff. Plaintiff relied on the representations made by the Defendant-Attorneys and entrusted the Defendant-Attorneys with the duty to defend Plaintiff in the Third-Party Complaint.
30. The Defendant-Attorneys were obligated by the attorney-client, fiduciary relationship to deal competently with the Plaintiff, to fulfil its contractual obligations to Plaintiff, and to place Plaintiff's interest before Defendant-Attorneys' own interest. The Defendant-Attorneys' had a duty to Plaintiff that required that they disclose all material information and developments in the course of a litigation reasonably necessary to make informed decisions.
31. Upon information and belief, during the period of representation, Defendant-Attorneys failed to exercise reasonable care, skill, and diligence in performing legal services for Plaintiff and breached their fiduciary duty in their representation of Plaintiff as set forth below.
32. Upon information and belief, during the period of representation, Defendant-Attorneys breached their fiduciary duties to Plaintiff and failed to disclose material information that the available evidence known to Defendant-Attorneys, concerning T's injuries, clearly showed that the primary policy would be exhausted.
33. Defendant-Attorneys breached their duties by not notifying the relevant insurance carriers or the Plaintiff in a timely manner as to the available evidence which clearly indicated that the primary policy would be exhausted.
34. Therefore, Plaintiff is entitled to any and all damages resulting from Defendant-Attorneys' breach of fiduciary duty and professional misconduct due to their failure to provide a diligent and competent defense in the underlying Third-Party Complaint.

SECOND CAUSE OF ACTION

LEGAL MALPRACTICE

Plaintiff incorporates by reference paragraphs 1-34 as though fully set forth herein.

35. An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages.
36. The Defendant-Attorney in this action failed to exercise the degree of care, skill, and diligence demanded by members of the legal community. The Defendant-Attorneys' negligence was a proximate cause of Plaintiff's damages and Plaintiff would not have incurred damages "but for" such negligence.
37. During the course of Defendant-Attorneys' representation of Plaintiff, there are instances wherein the conduct of the Defendant-Attorneys fell below the applicable standard of care, as set forth herein. Defendant-Attorneys had a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise, in providing legal services to Plaintiff herein.
38. As to the first prong to prove negligence claim, the Defendant-Attorneys herein are liable for ignorance of the rules of practice, for failure to comply with proper representation of Plaintiff in the underlying the Third-Party Complaint, for neglect to prosecute or defend an action, and for failure to timely notify Plaintiff about the excess claim with regard to the Third-Party Complaint.
39. Upon information and belief, the Plaintiff was not aware of the about the quantum of damages claimed by T as the Complaint was silent about the amount of damages claimed. When T started submitting various Bills of Particulars subsequent to the Complaint and testified in the aforementioned Deposition, Defendant-Attorneys neglected their duty of care in assessing the scope of the damages and the effect of said scope on the limits of the underlying primary insurance policy. The Defendant-Attorneys compounded the breach of their duty of care by ignoring the obligations Plaintiff had with respect to notifying the excess carrier upon the reasonable expectation of exhaustion of the primary policy. The

Defendant-Attorneys knew that failure on the part of the Plaintiff to timely notify the excess carrier would expose Plaintiff to the uninsured excess damages which it now faces as a result of Defendant-Attorneys' negligence.

40. Upon information and belief, Q and Defendant-Attorneys were aware of the excess claim on or around _____. The Defendant-Attorneys informed about the excess claim to Plaintiff much later through its letter addressed to the Plaintiff dated _____. The Defendant-Attorneys, pursuant to the attorney-client relationship that they had with the Plaintiff, owed a duty to provide notice to Plaintiff within reasonable time period; but it failed to do so. Based upon the limited information provided to the Plaintiff by Defendant-Attorneys, Plaintiff believed and acted to its detriment. Defendant-Attorneys failed to take appropriate measures to pass on the significant information about the excess coverage to Plaintiff. Such conduct of Defendant-Attorneys fell below the standard of care.
41. Because the _____ notice was sent at such a late date, Plaintiff was left on its own without any insurance coverage for T's Third-Party claim, in spite of having paid insurance premiums. Had the Defendant-Attorneys acted carefully by issuing notice on time, Plaintiff would have been able to avoid the resultant harm and ultimately the financial loss. The Plaintiff would have escaped colossal monetary liability if Defendant-Attorneys would have intimated about the excess coverage in a timely manner. There was a failure by the Defendant-Attorneys to act promptly on the given matter. Such negligent conduct of the Defendant-Attorneys fell below the applicable standard of care and was the proximate cause of damages incurred by the Plaintiff.
42. As such Defendant-Attorneys' failure to submit a timely notice about the excess claim amounts to negligent conduct and as a direct and proximate result of the conduct of Defendant-Attorneys as set forth herein, Plaintiff suffered damages by being subjected to liability in the Third-Party Complaint.
43. Therefore, the Plaintiff is entitled to any and all damages for the losses suffered due to the negligent conduct on the part of the Defendant-Attorneys.

THIRD CAUSE OF ACTION

BREACH OF IMPLIED CONTRACT

44. Plaintiff incorporates by reference paragraphs 1-44 as though fully set forth herein.
45. A contract implied-in-fact is just as binding as an express contract arising from declared intentions of the Parties. The elements of an Implied Contract are consideration, mutual assent, legal capacity and legal subject matter. The elements of a cause of action for breach of an Implied Contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage.
46. The Defendant-Attorneys were assigned to represent the Plaintiff in the afore-pled underlying action. This assignment was made pursuant to the contractual terms that existed between Q and the Plaintiff.
47. The Defendant-Attorneys accepted the assignment and entered into an implied contractual agreement, which incorporated the terms of the Q contract with the Plaintiff that pertained to the defense of said Plaintiff in said underlying action. The Defendant-Attorneys knew that the terms of said contract were restricted to representation within the confines dictates of the limits of the General Liability Policy. The Defendant-Attorneys agreed pursuant to said implied contract between the Parties in this action to represent the Plaintiffs and provide the Plaintiffs with proper written notice as soon as reasonably possible as to the fact and circumstances, to which they exercised exclusive control and domain in concert with Q, as to the grounds of the claim which would exhaust the primary liability insurance.
48. The Defendant-Attorneys knew that failure to meet this contractual term would result in the Plaintiff losing its excess insurance coverage.
49. The Defendant-Attorneys breached the contract provision in question.
50. As a result of said breach, the Plaintiff has sustained damages of the loss of its excess insurance policy coverage, including the legal defense of the excess issues.
51. The damages for said breach of contract are ongoing and have not been capped.

FOURTH CAUSE OF ACTION**BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

52. Plaintiff incorporates by reference paragraphs 1-52 as though fully set forth herein.

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53. Every contract has an implicit covenant that in the course of performing the contract, neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.
54. Under New York Law, the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship. They encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included.
55. In addition to the afore-pled deviations from the standards of care - notice of the Bill of Particulars, Supplemental Bill of Particulars, and the Deposition testimony of T - the Plaintiff had a reasonable expectation that the inherent duty of good faith and fair dealing with its attorneys. This standard dictated that any and all claims that were presented to them, that would pose an exhaustion of its General Liability coverage, would be conveyed in writing to said Plaintiffs.
56. On or about _____, the Defendant-Attorneys participated in a multi-party mediation in which Plaintiff's Counsel in the T action made a multi-million-dollar demand in said mediation conference.
57. The Defendant Attorney's letter dated _____ provides that:

E's insurer in this matter is Q insurance. Based upon the contract between S and E, Q eventually took over defense and indemnification of S as well. Q's policy is \$ _____. That \$ _____ has been offered in settlement, but in light of the settlement demand, this is not enough to settle the case. A problem has arisen with respect to excess coverage.

58. An examination of the aforesaid letter reveals that Defendant-Attorneys had knowledge about the contractual claim and duties between Q and E. The Defendant-Attorneys had knowledge that Q had a contractual duty to provide written notice to E, as soon as practical, that the policy limits were exhausted. Further, the Defendant-Attorneys were aware of the obligation that E had to its excess carrier, IC, to provide written notice of the claim.

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59. The Defendant-Attorneys also knew that I had disclaimed coverage on the basis of deferred notice and that this denial was a result of Defendant-Attorney's late notice to Plaintiff and to the excess carrier pursuant to their duties of good faith and fair dealing.
60. Further, on or about _____, a Summary Judgment Motion was brought in the underlying case by S ("S"), the Plaintiff's Co-Defendant in said underlying action. The relief S sought, *inter alia*, was an order from the Court adjudicating that the Plaintiff had a contractual obligation to provide a full indemnification to S for any and all instances which occurred within the scope of the Plaintiff's work. The Defendant-Attorneys filed an Affirmation which stated that the issue was moot, based upon their very appearance in defense. They breached their duty of good faith and fair dealing by failing to raise the fact that the Purchase Orders, which govern the relationship between the Plaintiff and S, did not provide contractual indemnification by Plaintiff to said Co-Defendant.
61. This breach of good faith and fair dealing has allowed S to seek full indemnification and has caused Plaintiff damages in presenting the defense to the demand for full indemnification with respect to the excess damage issue.
62. As such Defendant-Attorneys, by virtue of their relationship with E had a duty in good faith to disclose to E, any and all relevant information within their knowledge about the coverage issues. They acted to the detriment of E and the inactions of Defendant Attorneys had the effect of destroying or injuring E's right to receive excess coverage and to defeat a demand by S for full contractual indemnification as to the excess damage issues.
63. Therefore, Plaintiff is entitled to any and all damages resulting from Defendant-Attorneys' breach of implied covenant of good faith and fair dealing due to their failure to act in good faith and disclose all and any relevant information within their knowledge about the coverage issues.

PRAYER FOR RELIEF

WHEREFORE, the actions of Defendant-Attorneys alleged above constitutes conduct which was carried out by them with a disregard for the rights of the Plaintiff, in direct violation of Defendant-Attorneys fiduciary duties, and fell below the applicable standard of care amounting to legal malpractice, as well as negligence by virtue of their inattentive attitude towards timely notice of excess claim to Plaintiff and breach of their fiduciary duties. As a consequence, thereof, Plaintiff respectfully prays to grant judgement against Defendant-Attorneys and to provide relief in form of damages as hereinafter set forth:

Dated: New York, New York

E's Attorney