

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - June 12, 2008

ROBERT A. SPOLZINO, J.P.
STEVEN W. FISHER
EDWARD D. CARNI
THOMAS A. DICKERSON, JJ.

2007-04425

DECISION & ORDER

Marie Jacqueline Antoine, plaintiff, v City of New York, defendant, Ocpard Realty Enterprises, LP, defendant third-party plaintiff-respondent; American Safety Indemnity Company, third-party defendant-appellant-respondent; Bilus Brokerage Inc., third-party defendant-appellant.

(Index No. 1347/05)

Gennet, Kallmann, Antin & Robinson, P.C., New York, N.Y. (Philip H. Ziegler of counsel), for third-party defendant-appellant-respondent American Safety Indemnity Company.

Edward J. Garfinkel (Fiedelman & McGaw, Jericho, N.Y. [James K. O'Sullivan], of counsel), for third-party defendant-appellant Bilus Brokerage, Inc.

Morris E. Barenbaum, Brooklyn, N.Y. (Vincent J. Licata and Louis A. Badolato of counsel), for defendant third-party plaintiff-respondent.

In an action to recover damages for personal injuries and a related third-party action, the third-party defendant American Safety Indemnity Company appeals from so much of an order of the Supreme Court, Kings County (Hinds-Radix, J.), dated April 11, 2007, as denied its motion for summary judgment dismissing the third-party complaint insofar as asserted against it, and the third-party defendant Bilus Brokerage, Inc., separately appeals from so much of the same order as denied its motion for summary judgment dismissing the third-party complaint and cross claims insofar as asserted against it.

November 18, 2008

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ORDERED that the order is modified, on the law, (1) by adding a provision thereto searching the record and awarding summary judgment to the defendant third-party plaintiff, Ocpard Realty Enterprises, LP, against the third-party defendant American Safety Indemnity Company on the issue of liability, and (2) by deleting the provision thereof denying the motion of the defendant third-party defendant Bilus Brokerage, Inc., for summary judgment dismissing the third-party complaint and cross claims insofar as asserted against it and substituting therefor a provision granting that motion; as so modified, the order is affirmed, with one bill of costs to the third-party defendant Bilus Brokerage, Inc., and the defendant third-party plaintiff Ocpard Realty Enterprises, LP, payable by the third-party defendant American Safety Indemnity Company.

On or about April 15, 2004, the plaintiff, Marie Jacqueline Antoine, was walking in front of 2561 Ocean Parkway in Brooklyn when she allegedly tripped and fell on a defect in the sidewalk abutting a building owned by Ocpard Realty Enterprises, LP (hereinafter Ocpard). Ocpard was insured under a policy procured by its insurance broker, Bilus Brokerage, Inc. (hereinafter Bilus), and issued by its carrier, American Safety Indemnity Company (hereinafter ASIC).

Antoine commenced an action against both Ocpard and the City of New York to recover damages for her injuries. Ocpard notified ASIC, but ASIC disclaimed, asserting that Ocpard had breached a warranty in its policy that the “insured premises, including but not limited to all buildings, structures and parking lots, are in compliance with all federal, national, state and local codes and/or requirements as respects fire, life safety (including, but not limited to: the National Fire Protection Association Life Safety Code Standard 101), building construction and building maintenance.”

Specifically, ASIC claimed that, at the time its policy was issued, there were code violations issued to Ocpard relating to the sidewalk where Antoine would later be injured, and that the violations still existed one year later when Antoine actually fell.

Ocpard thereupon commenced a third-party action against ASIC and Bilus, alleging that ASIC was in breach of its insurance contract and that Bilus had breached its brokerage contract by failing to obtain a policy without the warranty provision. ASIC moved for summary judgment dismissing the third-party complaint insofar as asserted against it and Bilus separately moved for summary judgment dismissing the third-party complaint and cross claims insofar as asserted against it. The Supreme Court denied both motions, and ASIC and Bilus separately appeal.

“As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . [A] contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion . . . Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract . . . If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer” (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [citations and internal quotation marks omitted]; see *Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177). Indeed, where a policy’s terms are ambiguous, the insurer can prevail only if it can demonstrate “not only that its interpretation is reasonable but that it is the only fair interpretation”

(*City of New York v Evanston Ins. Co.*, 39 AD3d 153, 156, quoting *Primavera v Rose & Kiernan*, 248 AD2d 842, 843). The dispositive issue here, therefore, is whether the warranty provision unambiguously applies to the City sidewalk outside Ocpard's building or, if not, whether the only fair interpretation of that provision is that, at the time of the issuance of the policy, Ocpard in fact warranted to ASIC that the City's sidewalk outside its premises was free of code violations.

The policy contains a provision entitled "Limitation of Coverage to Designated Premises or Operations" which, inter alia, lists the properties or "premises" for which coverage is afforded. The properties specified consist of certain apartment complexes with no mention of surrounding sidewalks. Moreover, the warranty provision at issue speaks of the "insured premises, including but not limited to all buildings, structures and parking lots." It does not mention surrounding sidewalks and the term "premises" is not otherwise defined anywhere in the policy. It can hardly be said, therefore, that the warranty provision unambiguously applies to the sidewalk in question.

In construing ambiguous language in a policy like this, the general rule is that insurance contracts are to be interpreted according to the reasonable expectations and purposes of ordinary businesspeople when making ordinary business contracts (*see General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 457; *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). Although, under New York law, the coverage afforded by a premises liability policy extends by implication to that portion of an outside sidewalk necessary for access to the covered premises (*see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990; *Ambrosio v Newburgh Enlarged City School Dist.*, 5 AD3d 410, 412; *cf. New York Convention Center Operating Corp. v Cerrullo World Evangelism*, 269 AD2d 275), we cannot say from that fact alone that a reasonable businessperson purchasing this policy would conclude that the only fair interpretation of its warranty provision would be that coverage is entirely eliminated if there are any violations relating to the sidewalk adjacent to the insured property which sidewalk is owned by the City and not mentioned in the policy.

Accordingly, because the language of the warranty does not unambiguously apply to the sidewalk outside the premises, because the ambiguous warranty provision must be interpreted in favor of the insured and against the insurer unless a contrary construction is the only fair interpretation, and because the inclusion of the City's sidewalk within the warranty provision is not the only fair interpretation of that provision, we conclude, as a matter of law, that Ocpard did not breach the warranty, that ASIC is therefore obligated to defend and indemnify, and that nothing Bilus did or failed to do caused Ocpard to sustain damages.

SPOLZINO, J.P., FISHER and DICKERSON, JJ., concur.

CARNI, J., concurs in part and dissents in part, and votes to reverse the Supreme Court's order and grant the motion of the third-party defendant American Safety Indemnity Company for summary judgment dismissing the third-party complaint insofar as asserted against it, and grant the motion of the third-party defendant Bilus Brokerage, Inc., for summary judgment dismissing the third-party complaint and cross claims insofar as asserted against it, with the following memorandum:

I agree with the majority's conclusion that the coverage afforded by the commercial general liability policy at issue includes the sidewalk section where the plaintiff tripped and fell. Thereafter, insofar as ASIC's motion for summary judgment is concerned, I respectfully dissent.

It is well settled that such policies extend to sidewalks incidental to and necessarily used for access to the premises (*see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990). Indeed, it is this well-settled rule that provides the basis for the insurer to evaluate the risk associated with issuing such a policy covering a particular location (*see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d at 991).

As part of that risk analysis, Ocpard made a warranty to ASIC concerning the condition of the insured premises "including but not limited to all buildings, structures and parking lots." This warranty allowed ASIC to accurately evaluate and rate, using the majority's language, the insured's "liability profile."

The policy was issued for the period of June 20, 2003, to June 20, 2004. There is no dispute that on June 3, 2003, the New York City Department of Transportation issued a notice of violation to Ocpard which recited that Ocpard's property was in violation of Section 2904 of the New York City Charter and Section 19-152 of the New York Administrative Code, which require property owners to maintain the sidewalks adjacent to their property. The notice of violation identified the existence of, inter alia, a "trip hazard" and other defects in the sidewalk section at issue. The plaintiff allegedly tripped and fell on this sidewalk section on April 15, 2004. There is no dispute that Ocpard was aware of the notice of code violations, the accuracy of which it does not dispute, for over 10 months prior to the plaintiff's fall.

At the inception of the policy, Ocpard made two categories of warranty concerning the condition of the property to the effect that the "insured premises" were in compliance with all (1) "federal, national, state and local codes," and (2) "requirements as respects fire, life safety (including, but not limited to: National Fire Protection Association Life Safety Code Standard 101), building construction and building maintenance." The policy also provided that if the insured failed to comply with any of the representations and warranties "at any time during the 'policy period,'" then the named insured shall be deemed in breach of the policy.

In my view, New York City Administrative Code § 19-152, entitled "Duties and obligations of property owner with respect to sidewalks and lots," expressly applies to Ocpard as the abutting property owner. That provision defines a substantial defect in a sidewalk as including, inter alia, trip hazard, loose sidewalk flag, cracked sidewalk flag and improper slope—all defects which the insured does not dispute existed in the sidewalk at the time of the plaintiff's trip and fall. Under the code, the owner of the property fronting or abutting the sidewalk—here Ocpard—is required to repair the defect within 45 days of notice thereof (*see New York City Administrative Code § 19-152 [c]*).

There is no dispute that Ocpard did not repair the defect and the sidewalk remained in continuous violation of the code up to and including the date of the plaintiff's trip and fall. I do not find anything ambiguous about the policy's language concerning Ocpard's continuous obligation to

comply with this local code provision insofar as Ocpard simultaneously seeks liability coverage for bodily injury arising from the very same sidewalk.

Lastly, and perhaps most fundamentally, accepting as we must that the policy includes the sidewalk within the “premises” for the purpose of requiring coverage, I cannot find at the same time that the warranty’s more expansive and inclusively descriptive language that the “insured premises, including but not limited to all buildings, structures, and parking lots,” were in compliance with local codes did not include the very same sidewalk. While the term “premises” for purposes of coverage is undefined, the warranty language is more expansive and inclusive of the sidewalk at issue because it contains the language “including but not limited to, all buildings and structures.” In other words, if we are to include the sidewalk within the singular word “premises,” surely the same sidewalk must be included in the all-encompassing phrase “insured premises including but not limited to all buildings, structures and parking lots.” I submit that we should read and apply the policy in a uniform and consistent manner and I cannot reconcile the conclusion that the “premises” includes the sidewalk for coverage purposes but does not include the same sidewalk within Ocpard’s warranty concerning the condition of the very same “insured premises.” The majority’s inconsistent reading of the policy is, in my mind, not a fair interpretation. I find it unreasonable for a business person, in reliance upon the word “premises,” to expect and believe that he has liability coverage for bodily injury occurring on a defective abutting City sidewalk and at the same time believe that his warranty that the “insured premises, including but not limited to all buildings, structures and parking lots” are code compliant does not include the very same sidewalk.

Accordingly, I respectfully dissent in part.

ENTER:



James Edward Pelzer
Clerk of the Court