

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

DAVID RAMOS x

Index
Number 28985 2006

- against -

Motion
Date May 7, 2008

ONEBEACON INSURANCE CO., et al.

Motion
Cal. Number 48

Motion Seq. No. 1

x

The following papers numbered 1 to 13 read on this motion by defendant OneBeacon Insurance Company, pursuant to CPLR 3212, for summary judgment in its favor dismissing the complaint and cross claims against it; cross motion by the plaintiff for an award of summary judgment in his favor and against defendant OneBeacon Insurance Company; and cross motion by defendant Scuderi for summary judgment dismissing the plaintiff's complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motion - Affidavits - Exhibits ..	5-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is a declaratory judgment action in which the plaintiff, David Ramos, seeks a declaration that he is a covered insured under a policy of insurance issued to defendant Giovanni B. Scuderi by defendant OneBeacon Insurance Company (OneBeacon) and that defendants OneBeacon and Scuderi are obligated to defend and indemnify him in an underlying personal injury action entitled George Georgiadis v Giovanni B. Scuderi and David Ramos, bearing Queens County Index Number 21387/2006. Defendant OneBeacon issued a personal lines homeowners policy of insurance to defendant

Giovanni Scuderi and Giuseppa Scuderi (now deceased) under policy number SW624534 covering the insured premises located at 28-29 209th Place in Bayside, New York, from February 11, 2006 to February 11, 2007. There were two additional residences that were included under the subject policy . These additional residences, located at 71-38 70th Street in Glendale, New York and 13-39 209th Place in Bayside, New York, were each denominated "ADDITIONAL RESIDENCE RENTED TO OTHERS" on the attachments section of the subject policy.

The underlying personal injury action arises out of a construction-related accident that occurred on August 18, 2006, at the residence located at 13-39 209th Street in Bayside, New York. The premises at issue is a one-family residence that was owned by defendant Scuderi, but leased and occupied by defendant Scuderi's daughter, and her husband, the plaintiff David Ramos. The plaintiff in the underlying action was hired by Scuderi, to perform plumbing renovations at the premises, and alleges therein that he was injured by a saw that was operated by Ramos during the course of the renovations at the 13-39 209th Street premises.

By letter dated October 6, 2006, defendant OneBeacon notified plaintiff Ramos that it would not provide him with a defense or indemnification in the underlying action because he does not qualify as an "insured" under the policy that was purchased by defendant Scuderi. As a result of the foregoing, plaintiff Ramos commenced this action alleging that (1) the disclaimer against it by OneBeacon Insurance Company is not proper and (2) Scuderi is liable in negligence as the owner of the premises and because he hired, supervised, and controlled the work of the plaintiff in the underlying action.

Defendant OneBeacon now seeks summary judgment dismissing the complaint against it, upon a judgment declaring that it is not obligated to defend and indemnify the plaintiff in connection with the claims asserted in the underlying action, because plaintiff Ramos is a tenant of the insured, not an "insured," and there is no coverage for defendant Scuderi to insure the negligence of the tenants of the rentals. Plaintiff Ramos cross-moves for summary judgment in his favor and a declaration that defendant OneBeacon is obligated to defend him under the policy for the claims asserted against him in the underlying action because he is covered under Scuderi's OneBeacon policy as a resident of the Scuderi's household. Defendant Scuderi cross-moves for summary judgment dismissing the plaintiff's negligence claims against him based upon a determination of the court in the underlying action, dated October 30, 2007, that he was not negligent, as matter of law, for the happening of the underlying accident.

In support of summary judgment, defendant OneBeacon submits, inter alia, copies of the parties' examination before trial testimony and copy of the insurance policy at issue. The subject policy provides, in relevant part, as follows:

"In this policy, 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household. 'We', 'us' and 'our' refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:

3. Insured means you and residents of your household who are:

a. Your relatives; or

b. Other persons under the age of 21 and in the care of any person named above.

4. Insured location means:

a. The residence premises;

b. The part of other premises, other structures and grounds used by you as a residence and:

(1) Which is shown in the Declarations; or

(2) Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises in 4.a. and 4.b. above;

d. Any part of a premises:

(1) Not owned by an 'insured' and

(2) Where an insured is temporarily residing;

e. vacant land, other than farm land, owned by or rented to an insured;

f. Land owned by or rented to an insured on which a one or two family dwelling is being built as a residence for an insured. . . .

8. Residence premises means:

a. The one family dwelling, other structures, and grounds;

or

b. That part of any other building; where you reside and which is shown as the residence premises in the Declarations.

Residence premises also means a two family dwelling where you reside in at least one of the family units and which is shown as one of the residence premises in the Declarations."

The policy further provides that OneBeacon would provide a defense and indemnification "if a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies." Moreover, the policy specifically excludes coverage for "bodily injury or property damage arising out of the rental or holding for rental of a part of any premises by an insured. This exclusion does not apply to the rental or holding for rental of an insured location: (1) on an occasional basis if used only as a residence; (2) in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or (3) in part, as an office, school, studio or private garage."

The examination before trial testimony of Janiene Palmeri, OneBeacon's senior business analyst, was also submitted in support of summary judgment. According to Ms. Palmeri, defendant Scuderi's policy provided coverage for the insured and residents of the insured's household. There is no provision in the subject personal homeowner's policy covering the acts of the tenants of the rental properties and they are not be covered under the policy because "household" does not include tenants. Further, if a tenant of a rental premises wanted to purchase coverage, it would be purchased under a separate renter's policy.

Upon examination before trial of the plaintiff, David Ramos, he testified that he resides at the premises where the underlying incident occurred, which is located at 13-39 209th Street in Bayside, with his wife and two children. He also resided there on the date of the incident and had lived there on a permanent basis for some time prior to the incident. At all times relevant to this matter, the subject premises was owned by defendant Scuderi,

defendant Ramos' father-in-law. Defendant Scuderi rented the house at 13-39 209th Street in Bayside, New York, to the Ramos family for approximately \$1,000 per month. Defendant Scuderi does not reside and has never resided at that address but, rather, resides at 28-29 209th Place in Bayside. The only time any other member of the Scuderi family has ever spent the night at the Ramos residence was after an occasional late night barbeque. Ramos testified that he did not have renter's insurance at the time of the underlying incident, but he has since obtained it.

Upon examination before trial, defendant Scuderi testified that he has resided at 28-29 209th Street for more than 20 years. Ramos did not reside with him but lived, approximately five to ten minutes away, at the premises where the underlying incident occurred. The renovations that were being performed at the Ramos residence were being performed with Scuderi's permission. Scuderi also stated that he did not know whether the insurance coverage he purchased provided personal coverage for all of his relatives.

Review of the parties' deposition transcripts and the documentary evidence submitted herein, which includes a copy of the OneBeacon insurance policy purchased by defendant Scuderi, demonstrates (1) that Ramos did not reside with Scuderi at the Scuderi residence, (2) that Ramos lived with only his wife and children and the premises where the underlying incident occurred, and (3) that Ramos was a renter, or lessee, of the premises where the incident occurred. Since defendant Scuderi, the named insured, did not reside with his son-in-law Ramos at the premises where the underlying incident occurred, and Ramos did not live in or occupy the premises where defendant Scuderi resided on the date of the underlying incident, Ramos cannot be considered a relative who resided in the named insured's household (see Biundo v New York Central Mutual, 14 AD3d 559 [2005]; cf. Auerbach v Otrego Mut. Fire Ins., Co., 36 AD3d 840 [2007]). Further, it is clear that defendant Scuderi insured the property where Ramos resided where and the underlying incident occurred as a rental property, not as a second residence (see Walburn v State Farm Fire and Cas. Co., 215 AD2d 837 [1995]). Thus, since Ramos is a tenant of the rental property where the incident occurred, and the subject insurance policy unequivocally provides that there is no coverage for Ramos as a tenant of that property, the court finds that defendant OneBeacon has demonstrated a prima facie entitlement to an award of summary judgment in his favor (see generally Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). Based upon the foregoing, it is entitled to a declaration that it is not obligated to defend and indemnify the plaintiff in connection with the underlying personal injury claims. In opposition, plaintiff Ramos has failed to raise a material triable issue of fact with respect thereto (Zuckerman v

City of New York, 49 NY2d 557 [1980]). Therefore, defendant OneBeacon's motion for summary judgment is granted.

Plaintiff Ramos' cross motion for summary judgment for a judgment in his favor declaring that defendant OneBeacon is obligated to defend and indemnify him in the underlying action is denied.

Defendant Scuderi's cross motion to dismiss plaintiff Ramos' complaint against him is granted based upon a prior order of Justice Kelly in the underlying action, dated October 30, 2007, wherein the court determined that Scuderi was not negligent with respect to the underlying incident (see generally Chalpin v Caro, 265 AD2d 155 [1999]; Oest v Excelsion Ins. National Nerderlanden North, 170 Misc 2d 787 [1986]; cf. Hershorm v Grae, Rybicki & Partners P.C., 43 AD3d 459 [2007]).

Accordingly, it is ordered, adjudged and declared that defendant OneBeacon Insurance Co. does not owe an obligation to provide a defense or liability coverage to plaintiff David Ramos for the incident which gave rise to the action entitled George Georgiadis v Giovanni B. Scuderi and David Ramos, and bearing Queens County Index Number 21387/2006.

The complaint and cross claims are hereby dismissed.

Dated: September 2, 2008

J.S.C.