

Picone v Great Northern Ins. Co.

2008 NY Slip Op 33029(U)

November 3, 2008

Supreme Court, Suffolk County

Docket Number: 07-28783

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-26-07 (001)
MOTION DATE 4-1-08 (002)
MOTION DATE 4-15-08 (003, 004 & 005)
MOTION DATE 6-10-08 (006)
ADJ. DATE 8-19-08
Mot. Seq. # 001 - MotD # 002 - MG
003 - MG # 004 - MG
005 - XMG # 006 - MD

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant JJB Brokerage, Inc., dated October 26, 2007; and a Notice of Motion/Order to Show Cause by the defendant Continental Casualty Company, dated February 22, 2008; and Notice of Motion/Order to Show Cause by the defendant Great Northern Insurance Company, dated March 28, 2008; and Notice of Motion/Order to Show Cause by the defendant Foremost Insurance Company, dated April 1, 2008; and Notice of Motion/Order to Show Cause by the defendant General Star Management Company, dated May 20, 2008 and supporting papers; (2) Notice of Cross Motion by the plaintiffs, dated April 4, 2008, and supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated May 9, 2008 and June 3, 2008, and supporting papers; (4) Reply Affirmation by the defendant JJB Brokerage, Inc., dated May 13, 2008; and Reply Affirmation by the defendant Continental Casualty Company, dated April 11, 2008; and Reply Affirmation by defendant Great Northern Insurance Company, dated May 21, 2008; and Reply Affirmation by defendant General Star Management Company, dated June 9, 2008; and supporting papers; (5) Other (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant JJB Brokerage Inc. for an order, pursuant to CPLR 3211(a)(7), dismissing the plaintiffs' complaint is granted solely to the extent that the demand for punitive damages is dismissed, and it is further

ORDERED that the cross-motion by the plaintiffs for leave to amend the complaint is granted, and it is further

ORDERED that the motions by the defendants Great Northern Insurance Company, Continental Casualty Company and Foremost Insurance Company for summary judgment are granted and it is declared that those defendants have no duty to defend or indemnify the plaintiffs with respect to the underlying claim, and it is further

ORDERED that the motion by the defendant General Star Indemnity Company for summary judgment in its favor is denied.

On April 9, 2005, Daniel Flynn was injured while a passenger on an all-terrain vehicle (ATV) owned by 1637 Realty Corp and operated by Joseph Picone III, the son of the plaintiff Joseph Picone, Jr. The incident occurred on a parcel of real property owned by the plaintiff Little Joseph Realty Inc. located at 246 Old Long Eddy Road in Sullivan County. Joseph Picone Jr. owns a parcel of property located at 243 Ridge Road which contains a mobile home and is in close proximity to the property where the incident occurred. The ATV was apparently kept at Picone's property at 243 Ridge Road and was driven to 246 Old Long Eddy Road. The plaintiffs notified their various insurance carriers of the incident and the insurers subsequently disclaimed coverage. The plaintiffs commenced this action seeking a judgment declaring that the insurance carriers are obligated to indemnify them for a settlement reached with Flynn. The plaintiffs also assert a claim against the defendant JJB Brokerage, Inc. (JJB), one of the their insurance brokers, alleging breach of fiduciary duty and negligence. The plaintiffs seek to recover costs and attorneys fees and also seek punitive damages. JJB now moves for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action and the plaintiffs cross-move to amend the complaint. The defendants Great Northern Insurance Company (Great Northern), Continental Casualty Company (Continental), Foremost Insurance Company (Foremost) and General Star Indemnity Company (General Star) each move for summary judgment in their favor.

An insurance agent or broker has a common law duty to obtain requested coverage for a client within a reasonable amount of time or inform the client of the inability to do so (*see Murphy v Kuhn*, 90 NY2d 266; *JKT Construction v United States Liab. Ins. Group*, 39 AD3d 594 [2d Dept 2007]). Absent a specific request for coverage not already in a client's policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide or direct a client to obtain additional coverage (*see Murphy v Kuhn, supra; JKT Construction v United States Liab. Ins. Group, supra*).

Here, JJB contends that it did not owe a fiduciary duty to the plaintiffs and that the plaintiffs have failed to allege any special circumstances. In support of the cross-motion, the plaintiffs submit a proposed

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amended complaint and an affidavit from Joseph Picone, Jr., who asserts that he had a 20-year relationship with Jack Glickman, an agent for JJB, and that Glickman gave advice and guidance regarding his insurance needs. Picone claims that he had existing insurance policies covering his ATV's but that Glickman specifically advised him not to renew the policies because the plaintiff had sufficient coverage in his other policies. This is not a case in which an agent failed to advise a client to obtain additional coverage. Rather, the plaintiffs allege that the broker advised them to cancel existing policies because those policies duplicated other coverage. These allegations, which must be accepted as true on a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87), are sufficient to state a cause of action (*see NWE Corp v Atomic Risk Management*, 25 AD3d 349 [1st Dept 2006]). However, the allegations, even if true, do not support a claim for punitive damages (*see Grazioli v Encompass Ins. Co.*, 40 AD3d 696 [2d Dept 2007]; *Johnson v Allstate Ins. Co.*, 33 AD3d 665 [2d Dept 2006]). Accordingly, the motion by JJB is granted solely to the extent that the plaintiffs' demand for punitive damages is dismissed. The plaintiffs' cross-motion to amend the complaint is granted.

Continental issued a "Business Auto" policy to the plaintiff Joseph Picone & Son Inc., which defines "auto" as "a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include 'mobile equipment'." Vehicle and Traffic Law § 2281 defines an ATV as "any self-propelled vehicle which is manufactured for sale or operation primarily on off-highway trails or off-highway competitions and only incidentally operated on public highways." Thus, an ATV, which is designed for off-road use, is not a covered auto within the meaning of the Continental policy (*see e.g., Matter of Progressive Northeastern Ins. Co v Scalamandre*, 51 AD3d 932 [2d Dept 2008]; *Mueller v Allstate Ins. Co.*, 21 AD3d 1010 [2d Dept 2005]). In opposition, the plaintiffs contend that an issue of fact exists because of a mobile equipment endorsement included with the policy. However, the endorsement is blank and identifies no ATV's or mobile equipment. The plaintiffs have submitted no evidence that any request was made to include coverage for ATV's in the policy. Therefore, the plaintiffs have failed to demonstrate the existence of a triable issue of fact. Accordingly, Continental's motion for summary judgment is granted and it is declared that Continental has no duty to defend or indemnify the plaintiffs with respect to the underlying claim.

Great Northern issued a "Masterpiece" policy to Joseph Picone Jr., which covered the property at Ridge Road as well as other real property and certain motor vehicles. The policy contains an exclusion for "motorized land vehicles" which provides that "we do not cover any damages arising out of the ownership, maintenance, use, loading or towing of any motorized land vehicle * * * This exclusion does not apply to motorized land vehicles * * * used solely on and to service a residence premises shown in the Coverage Summary * * * This exclusion does not apply to the Extra Coverage, Rented or Borrowed Vehicles."

Great Northern contends that, under the plain language of the exclusion, there is no coverage for the accident. The plaintiffs assert that the exception to the exclusion is applicable because the ATV was used to service the premises at Ridge Road. However, the ATV was not used solely on the premises as the accident occurred on a different parcel of property that was owned by another entity. The incident did not occur on a residence premises shown in the coverage summary as required by the policy. Therefore, the exception to the exclusion is not applicable (*see D'Arrigo v Aetna Cas. & Sur. Co.*, 115 AD2d 345 [4th Dept 1985]). In addition, the Rented or Borrowed Vehicles exception is also inapplicable because such coverage is not provided when the insured is the owner of their own vehicle.

The plaintiffs also contend that Great Northern failed to disclaim in a timely manner. Insurance Law § 3420(d) requires written notice of a disclaimer to be given “as soon as is reasonably possible” after the insurer learns of the grounds for disclaiming liability (see *First Fin. Ins. Co v Jetco Contr. Corp.*, 1 NY3d 64; *Lancer Ins. Co v T.F.D. Bus Co.*, 18 AD3d 445 [2d Dept 2005]). The insurer bears the burden of justifying any delay (see *First Fin. Ins. Co v Jetco Contr. Corp.*, *supra*). An investigation into issues affecting an insurer’s decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer (see *First Fin. Ins. Co v Jetco Contr. Corp.*, *supra*).

Here, the record indicates that Great Northern received notice of the claim on or about June 28, 2005 and issued a disclaimer letter on August 19. Although the initial notice indicated that the accident involved an ATV, the record does not establish that the motorized land vehicles exclusion would have been immediately applicable since there are exceptions to that exclusion. Thomas Acocella, the claims adjuster, submits an affidavit asserting that he had received conflicting information as to exactly how and where the accident occurred. As a result, Acocella assigned an investigator to the claim on July 6. The investigator obtained sworn statements from the insured and his son and issued a report which was apparently received by Great Northern on August 9. The disclaimer letter was then issued on August 19. Under these circumstances, the delay of less than two months to investigate the claim was reasonable (see *Hermitage Ins. Co v Arm-ing, Inc.*, 46 AD3d 620 [2d Dept 2007]; *Farmbrew Realty Corp v Tower Ins. Co.*, 289 AD2d 284 [2d Dept 2001]). Accordingly, Great Northern’s motion for summary judgment is granted and it is declared that Great Northern has no duty to defend or indemnify the plaintiffs with respect to the underlying claim.

Foremost issued a mobile home policy to Joseph Picone, Jr. for the property located at 243 Ridge Road. That policy also contains an exclusion for a recreational land motor vehicle. Although the exclusion does not apply to a vehicle on the insured’s premises, the accident did not occur on the insured’s premises. The accident occurred on a separate parcel of property owned by Little Joseph Realty, which is not a named insured under the policy. Therefore, the exclusion is applicable to preclude coverage. Accordingly, Foremost’s motion for summary judgment is granted and it is declared that Foremost has no duty to defend or indemnify the plaintiffs with respect to the underlying claim.

General Star issued a commercial general liability policy to the plaintiff Joseph Picone & Son Inc. The declarations page of that policy identifies 12 properties that the insured owns, rents or occupies and item 12 lists “246 Old Long Eddy Road & 53 Kelfarns Bridge Rd. Hawkins, NY.” The policy also contains a “Classification Limitation” which provides that the “policy does not apply to any damages for which the insured is legally liable, or costs or expenses, arising out of, resulting from, caused or contributed to by any operation or activity that is not described by a CLASSIFICATION shown under item 3 of the Declarations.”

The classification shown in item 3 of the declarations for 246 Old Long Eddy Road and 53 Kelfarns Bridge Road is “Dwelling - One Family.” General Star contends that coverage is only available for liability arising out of a one family dwelling on the premises and that the accident involving an ATV would not be covered. However, the record indicates that the subject property was vacant land and that there is no dwelling on the premises. There is no evidence as to whether there is a structure on 53 Kelfarns Bridge Road. This would appear to create an ambiguity as to what coverage is applicable to the two properties listed in item 12. Since 246 Old Long Eddy Road is vacant, the classification limitation would have no

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meaning because no activities would be covered under the policy. Under these circumstances, General Star has not established its entitlement to judgment as a matter of law. Accordingly, the motion by General Star is denied.

Dated: _____

11/3/08


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