MDW Enterprises, Inc. v CNA Insurance Co.

2002 NY Slip Op 30042(U)

June 20, 2002

Supreme Court, Suffolk County

Docket Number: 1002840/2000

Judge: William L. Underwood

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SHORT FORM ORDER

INDEX NO. 28404-2000

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

PRESENT:
Hon. WILLIAM L. UNDERWOOD. JR.

MDW ENTERPRISES, INC.,

Plaintiff(s),

-against-

CNA INSURANCE COMPANY, VALLEY FORGE INSURANCE COMPANY and A.C. EDWARDS, INC.,

Defendant(s).

ORIG. RETURN DATE: 10/23/01
FINAL RETURN DATE: 04/23/02
MTN. SEQ. #: 001 -MOT D
002 -MOT D

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 39 read on this motion for summary judgment Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers 12-17; Answering Affidavits and supporting papers 18-25; Replying Affidavits and supporting papers 26-30: 31: 32-37 ;Other 38-39; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the plaintiff MDW Enterprises Inc.'s motion for summary judgment is denied under the circumstances presented herein. It is further

ORDERED that the defendants CNA Insurance Company, Valley Forge Insurance Company and A.C.Edwards, Inc.'s cross motion for summary judgment is granted.

This is an action for breach of contract. The plaintiff, MDW Enterprises Inc., ("MDW") purchased an "all risk" commercial insurance policy for its property located at 20 Mooney Pond **Road,** Coram, New **York,** from defendant CNA Insurance Company ("CNA"). Coverage from said policy, which was obtained through defendant A.C.Edwards Inc., ("Edwards") an insurance broker, was to be provided by defendant Valley Forge Insurance Company. ("Valley Forge").

The plaintiff alleges that on or about February, **1999** its president, Michael J. Tenzyk advised an account representative of defendant Edwards that the insured property was vacant and under contract of sale. He was told that the terms of the policy did not have to be changed because of the pending sale and that it should be left "as is". On March **23,2000,** the subject premises were destroyed by fire. By letter dated May 11,2000, the plaintiff was advised by the defendant CNA that coverage was being disclaimed pursuant to an exclusion in its policy for damage caused by vandalism citing the following clause in the subject policy:

> **E. LOSS** CONDITIONS
>
> The following conditions apply in addition to the Common Policy Conditions and Commercial Property Conditions.
>
> *6.* Vacancy
>
> **b.** Vacancy Provisions
>
> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before the loss or damage occurs:

(1) We will not pay for any loss or damage cause by any of the following even if they are a Covered Cause of Loss:

(a) Vandalism;
(b) Sprinkler leakage, unless you have protected the system against freezing;
(c) Building glass breakage;
(d) Water damage;
(e) Theft; or
(f) Attempted theft.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York University Medical Center,*** 64 N.Y2d 851,853, 487 N.Y.S.2d 316; ***Zuckerman v. City of New York,*** 49 N.Y.2d 557,562). Of course, *summary* judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***State Bank of Albany v. McAuliffe***, 97 A.D.2d 607,467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposiing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (***Alvarez v. Prospect Hospital,*** 68 N.Y.2d 320, 324,508 N.Y.S.2d 923 [19861).

In support af its motion, the plaintiff avers that the term vandalism as set forth in the exclusionary clause is ambiguous and must be construed against defendant **CNA.** More specifically, the plaintiff asserts that vandalism is not defined within the context of the policy and because neither fire nor arson are among the listed events which would exclude

coverage, there is no basis for the denial of the plaintiffs claim.

"Where an insured has met its burden of showing that a valid insurance policy was in full force and effect and that it incurred a presumptively covered loss, the burden of proof shifts to the insurer to demonstrate that an exclusion contained in the policy defeats the claim *(see, Moneta Dev. Corp. v. Generali Ins. Co.,* 212 A.D.2d 428,429, 622 N.Y.S.2d 930). To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation and applies in the particular case *(Continental Cas. Co. v. Rapid-American Corp.,* 80 N.Y.2d 640,652,593 N.Y.S.2d 966,609 N.E.2d 506), and that its interpretation of the exclusion is the 'only construction that [could] fairly be placed thereon' (*Vinocur's Inc.* v. *CNA Ins.* Cos., 132 A.D.2d 543, 544, 517 N.Y.S.2d 277, *lv. denied* 71 N.Y.2d 803, 527 N.Y.S.2d 769, 522 N.E.2d 1067, quoting *American Home Assur. Co. v. Port Auth.,* 66 A.D.2d 269,276,412 N.Y.S.2d 605; *see also, Sincoff v. Liberty Mut. Fire Ins. Co.,* 11 N.Y.2d 386, 390, 230 N.Y.S.2d 13, 183 N.E.2d 899). ***(Throgs Neck Bagels Inc. v. GA Insurance Company of New York,*** 241 A.D.2d 66,671 N.Y.S.2d 66, 69 [1st Dept. 19981).

Herein, there is no dispute that a valid policy was in effect at the time of the insured's loss. **As** such, it is the defendants' burden to establish that the exclusions set forth in the subject policy are applicable herein. In the mater at bar, to reach such conclusion, the following two issues must be determined: (1) was the fire at the subject premises caused by an act of arson and; **(2)** does arson constitute an act of vandalism? In opposition thereto and

in support of their moss motion for summary judgment, the defendants have submitted the Town of Brookhaven Division of Fire Prevention Incident Report as well as an affidavit of William P. Nolan, an investigator employed by Connel, Nolan Associates, Inc., a firm retained by defendant CNA to investigate the origin and cause of fires and explosions. The Fire Marshall of the Town of Brookhaven, after investigation, concluded that the "fire was incendiary in nature, with all apparent accidental causes eliminated." After investigation, Mr. Nolan also concluded "that the fire was incendiary in nature, the result of a malicious human act." Clearly, the defendants have made a prima facie showing that the subject fire was the result of arson and the plaintiff has failed to produce evidentiary proof to the contrary. As such, we find that there is no issue of fact present as to the nature and cause of the fire at the subject premises.

Neither the terms vandalism nor arson are defined within the subject policy. Webster's New World Dictionary, Second College Edition, 1978 defines vandalism as "the actions or attitudes the vandals or of a vandal; malicious or ignorant destruction of public or private property, esp. of that which is beautiful or artistic." Arson is defined as "the crime of purposely setting ai fire to another's building or property, or to one's own, as to collect insurance."

"Unless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense (see, *Michaels* v. *City of Buffalo*, 85 N.Y.2d 754, 757, 628 N.Y.S.2d 253, 651 N.E.2d

1272). Where the policy contains language possessing a definite and precise meaning, and containing no inherent ambiguity or uncertainty, the court should not 'superimpose an unnatural or unreasonable construction' *(Maurice Goldman & Sons v. Hanover Ins. Co.,* 80 N.Y.2d 986,987,592 N.Y.S.2d 645,607 N.E.2d 792; *see, Government Empls. Ins. Co. v. Kligler,* 42 N.Y.2d 863,864,397 N.Y.S.2d 777,366 N.E.2d 865). Although any ambiguities must be resolved in favor of the insured, where the provisions of an insurance contract are clear and unambiguous, they must be enforced as written (see, [223 A.D.2d 213] *Breed v. Insurance Co. of N. Am., supra,* at 353-355,413 N.Y.S.2d 352,385 N.E.2d 1280), and the court 'should refrain from rewriting the agreement' *(United States Fid. & Guar. Co. v. Annunziata,* 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 492 N.E.2d 1206)." (***Hartford Insurance Company of the Midwest v. Halt,*** 223 A.D.2d 204,646 N.Y.S.2d 589, 594 [4th Dept. 19961).

It appears that the issue of whether an act of arson is vandalism within the meaning of a vacancy exclusion of a property insurance policy is one of first impression in this State. The terms as applied in the within policy are not inherently ambiguous and as such, their ordinary meaning should be applied. ***(Michaels** v. **City of Buffalo,** supra).* Defense counsel has cited decisions from various jurisdictions that have held that the intentional setting of a fire is vandalism and as such, the exclusion clause is applicable under such circumstances. In ***Brinker v. Guiffrida,*** 629 F. Supp 130 [E.D. Pa. 1985] the Court noted at page 135 of its opinion that "Vandalism at common law has been defined as the willful or malicious

destruction or defaicement of things of beauty or of public or private property. It includes both personal property and real property. Arson, under a broadened common-law definition, includes the willful and malicious burning or attempt to burn any building, structure or property of another or of one's own, with criminal or fraudulent intent. It is clear that arson is a type of vandalism, **i.e.,** the willful or malicious destruction or defacement of property by burning." We agree.

It is without dispute that the subject premises were vacant at the time of the fire. The policy clearly provides for an exclusion of coverage when the premises were vacant for more than sixty (60) days prior to the incident and the damages were caused by vandalism. Accordingly, based upon the foregoing and the circumstances presented herein, the defendants CNA Insurance Company and Valley Forge Insurance Company's motion for *summary* judgment as to the first cause of action set forth in the plaintiffs complaint is granted.

The defendants' cross motion for summary judgment as to the second and third causes of action in said complaint is also granted. "As a general rule, insurance agents and brokers have a common law duty to obtain requested coverage for their clients within a reasonable time, or to inform the client of their inability to do so. A broker may be held liable for neglect in failing to procure the requested insurance. An insured must show that the broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that the broker breached the agreement or that it failed to exercise due care in the transaction.

(see *Santaniello* v. Interboro *Mut.* Indem. Ins. Co., 267 A.D.2d 372, 700 N.Y.S.2d 230; Storybook***Farms*** v. *Ruchman* Associates, Inc., 284 A.D.2d 450,726 N.Y.S.2d 867)." (***Reilly v. Progressive Ins. Co.,*** 288 A.D.2d 365,733 N.Y.S.2d 220,221 [2nd Dept. 20011).

In support of its motion, the plaintiffs principal, Michael J. Tenzyk, by way of affidavit alleges that in or about February, 1999 he advised an unnamed account representative of defendant Edwards that the subject premises were vacant and questioned whether his policy should be altered to reflect the changed circumstances. The account executive advised him that no change in the policy was necessary due to the pending sale of the property. Subsequent thereto and prior to the fire of March 23,2000 Tenzyk received the subject policy which was to cover the period of the loss.

It is well settled that "once an 'insurance policy has been received, it constitutes conclusive presumptive knowledge of **** [its] terms and limits.' (*Madhvani v. Sheehan,* 234 A.D.2d 652, 654-655, 650 N.Y.S.2d 490, quoting ***Rogers*** v. Urbanke, 194 A.D.2d 1024, 1024-1025, 599 N.Y.S.2d 697)." (***Hess v. Baccarat,*** 287 A.D.2d 834, 73 1 N.Y.S.2d 296, 299 [3rd Dept. 20011). Notwithstanding the presumptive knowledge imputed to the plaintiff, the plaintiff did not make a specific request for coverage, instead inquiring of an unknown account executive whether the policy should be changed. As a general rule, 'insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage' (***Murphy* v.**

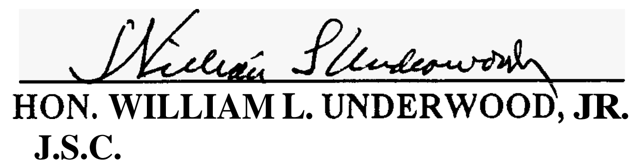
Kuhn, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972; *see, M & E Mfg. Co. v. Reis Inc.*, 258 A.D.2d 9, 11, 692 N.Y.S.2d 191,193; ***Hennesseyv. General Acc.*** *Ins. Co. of Am.*, 257 A.D.2d 750, 751, 683 N.Y.S.2d 342, 343)." ***(Ambrisino v. Exchange Ins. Co.,*** 265 A.D.2d 627, 695 N.Y.S.2d 767, 769 [3rd Dept. 19991). Herein, no specific request for additional coverage was made. The plaintiff instead sought advice from an account executive. Absent **a** special relationship, defendant Edwards duty to the plaintiff was limited to obtaining specifically requested coverage, and not advisement with regard to sufficient coverage. The insurance agent-insured relationship is not a generally recognized professional relationship where continuing obligations to advise exist, but is an ordinary commercial relatioinship which does not give rise to a duty of ongoing guidance. (***M& G Mfg. Co. Inc. v. Frank H Reis, Inc.*** 262 A.D.2d 746,692 N.Y.S.2d 189 [3rd Dept 19991). Under the circumstances presented herein, we cannot find that such special relationship exists. ***(see Murphy v. Kuhn,*** 90 N.Y.2d 266,660 N.Y.S.2d 371 [19971). As such, defendant Edwards duty was limited arid as a matter of law, it is entitled to judgment.

Accordingly, based upon the circumstances presented herein the defendants cross motion for summary judgment as to the second and third causes of action is also granted.

Settle judgment.

So ordered.

Dated: June 20,2002



HON. WILLIAM L. UNDERWOOD, JR.
J.S.C.

CHECK ONE: __X_FINAL DISPOSITION ____NON-FINAL DISPOSITION