

McGinley v Odyssey Re. (London)

2004 NY Slip Op 30290(U)

February 23, 2004

Supreme Court, New York County

Docket Number: 401966/03

Judge: Rosalyn H. Richter

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Interim Order

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

PRESENT: Richter
Justice

PART 24

Comment
2/24/04
Entered

McGinley, Kevin
- v -
Odyssey, re (London)

INDEX NO. 401966
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following paper, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
PAPERS RECEIVED
FEB 24 2004
ORDER SECTION - RM 119

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Case on Pt 24 CAL for 2/25/04
for additional Argument at 10:00 am

Dated: 2/23/04

R. Richter

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Interim Order

HON. ROSALYN RICHTER
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----X
Kevin McGinley,

Plaintiff,

-against-

Index No. 401966/03

Decision & Order

Odyssey Re. (London) formerly known as
Sphere Drake Insurance Company, Ltd., and
Westco Claims Management Services Inc.,

Defendant
-----X

Richter, J.:

Defendants Odyssey (formerly known as Sphere Drake) and Westco, the claims administrator for Odyssey, **seek** summary judgment dismissing plaintiffs claims. As a threshold matter, the Court notes that plaintiff has not addressed Westco's arguments that, **as** the claims administrator, it had no independent coverage obligations and therefore should not have been sued. Thus, the claims against Westco are dismissed.

This action arises as a result of injuries sustained by the plaintiff in an altercation at a tavern named Sam McGuire's, which was insured by Sphere. On May **26**, 1998, plaintiff brought an action against the tavern, and a default judgment was entered. After **an** inquest held in April 2002, damages were awarded in the amount of \$500,000.

Defendant contends that it first received notice of the incident and plaintiff's claims on Feb. 17, 2000 and it immediately opened **an** investigation to **determine** whether the incident was covered. On March 28, 2000, defendants denied coverage based on the fact that the policy contained an "assault and battery" exclusion **and** because the insured had not filed timely notice either of the occurrence or the lawsuit. The disclaimer letter

was sent to both the insured and the plaintiff.

Defendant had issued to the tavern a Commercial General Liability Policy, which included an endorsement for Commercial Liquor Liability Coverage. According to Robert Obernesser, attorney for Westco, a complete copy of the policy is unavailable because it was in the office of the broker, which was destroyed in the World Trade Center attacks. Mr. Obernesser's affidavit alleges that the standard exclusion in the General Liability Policy provided that the insurance did not apply to any claim arising out of any "Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent . . .". The policy also did not apply to any actual or alleged negligent act or omission in the employment or supervision "of a person for whom the insured is or ever was legally responsible, which results in Assault and/or Battery or any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery." It is undisputed that this clause does not make specific reference to the Dram Shop Act, which is the basis for the judgment in the underlying personal injury litigation.

However, several courts have held that such clauses in are applicable to causes of action which involve an assault or battery, even if the claim is pled under the Dram Shop law. *See Shanna Golden, Ltd. v. Tower Insur. Co.* *¶ N. Y.*, 1 A.D.3d 586 (2d Dept. 2003); *Sphere Drake Insur. Co. v. Block 7206 Corp.*, 265 A.D.2d 78 (2d Dept. 2000). As the Court noted in *Sphere Drake*, 265 A.D.2d at 78, this exclusion should apply where "the cause of action would not exist but for the assault."

The more difficult question here is whether the Liquor Liability Coverage Form, which is annexed to the reply papers, provides coverage for Dram Shop Act claims if an assault or battery occurred also during the incident. The Court does not have a complete

copy of the policy for the reasons set forth above, but defendant has provided a copy of two standard Liquor Liability Coverage forms, which were in use during the period at issue here. The Liquor Liability Forms contain **an** exclusion providing that the insurance does not apply to “injury expected or intended from the standpoint of the insured.” Section 2(e) further provides that the exclusion does not apply to “injury” for which the insured or the insurer’s indemnities may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol;
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

However, the form makes no reference to the assault and battery exclusion in the Commercial General Liability policy. The courts have held that “the words of the policy remain in full force and effect except as altered by the words of the endorsement.”

Handlebar Inc. v. Utica First Ins. Co., 290 A.D.2d 633 (3d Dept. 2002). Thus, the claim at issue here, which arises out of **an** assault **and** battery, would still be barred absent any specific language in the Liquor Liability Coverage endorsement indicating that the exclusion in the General Liability policy did not apply.

This, however, does not resolve the question of whether the disclaimer was timely. The determination of “whether a notice of disclaimer **has** been sent **as** soon as is reasonably possible will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for **an** insurer to investigate coverage.”

First Financial Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64 (2003). The burden is

on the insurer to explain its delay. *Id.* Here, Westco was first made aware of the claim on Feb. 17, 2000 when it received information from the broker. The disclaimer letter **was** issued thirty-nine days later on March 28, 2000.

Here, the fact that the insured had not provided Westco or Sphere with notice of the occurrence or the litigation should have been apparent immediately and no investigation was needed. *McGinnis v. Mandracchia*, 291 A.D.2d 484 (2d Dept. 2002); *West 16th St. Tenants Corp. v. Pub. Serv. Mut.*, 290 A.D.2d 278 (1st Dept. 2002); *City of New York v. Investors Ins. Co.*, 287 A.D.2d 394 (1st Dept. 2001). Thus, the Court finds that defendant has not met its burden of justifying its denial as it relates to this ground in the disclaimer letter. Furthermore, even if a brief delay was needed to ensure that the tavern had been properly served with pleadings by the plaintiff, the documentation annexed to the reply papers indicates that by March 6, 2000, defendant was aware that the tavern had been served in June 1999. Yet, defendant waited several more weeks to disclaim.

If the failure of the insured to give timely notice was the only basis for this disclaimer, the Court would be prepared to accept plaintiffs argument. However, the disclaimer letter issued here contains **an** additional ground, the assault and battery exclusion, which required some investigation by defendant. In the reply papers, defendant sets forth a detailed chronology as to its actions including the fact that it needed to obtain a legal opinion once it received a copy of the policy from the broker. The documentation shows that defendant acted expeditiously to obtain that opinion after it obtained the policy from the broker on March 6. In fact, only twenty-two days passed between **from** the date when defendant received the policy to the day it issued the

disclaimer letter. The Court is persuaded that, under all the circumstances, such a brief delay, which was necessitated by the need to do some legal research, is not unreasonable. Thus, the Court finds the March 28 disclaimer letter was timely as a matter of law. *See Artis v. Aetna Casualty & Surety Co.*, 256 A.D.2d 429 (2d Dept. 1998); *Structure Tone, Inc. v. Burgess Steel Prods. Corp.*, 249 A.D.2d 144 (1st Dept. 1998); *DeSantis Bros. v. Allstate Ins. Co.*, 244 A.D.2d 183 (1st Dept. 1997).

Plaintiff correctly notes that the March 28 disclaimer letter does not include late notice by the injured party as a ground for disclaimer and therefore is ineffective against the plaintiff. *Gross v. NY Central Mut. Fire Ins. Co.*, 2002 WL 31914673 (App. Term. 1st Dept. 2002). Based on the submissions with the motion, it appears that the first notice sent by the plaintiff to the insurer was a letter dated Aug. 21, 2002. On Sept. 23, 2002, the insurer wrote back to plaintiffs counsel reiterating the grounds set forth in the March 28, 2000 disclaimer letter and also stating that “it remains undetermined whether your client undertook appropriate steps to identify and provide timely notice to the insurer here.” Assuming *arguendo* that notice to the insurer was not provided by the plaintiff prior to Aug. 21, 2002, the burden would be on the plaintiff to explain the reasons for the delay. *See Serravillo v. Sterling Ins. Co.*, 261 A.D.2d 384 (2d Dept. 1999).

However, before reaching this issue, the Court must determine whether the language in the Sept. 23, 2002 letter concerning the plaintiffs actions is sufficient “to properly apprise the injured party. . . with a high degree of specificity, or the ground or grounds on which the disclaimer is predicated.” *State Farm Mut. Auto. Ins. Co. v. Cooper*, 303 A.D.2d 414 (2d Dept. 2003). The Court notes that the relevant paragraph in the first page of the letter does not specifically indicate that coverage is being disclaimed

on this ground, but rather indicates that the issue is “undetermined.” Yet, defendant indicates in this letter that it is not providing coverage for the incident that is the subject of this litigation.

In light of the fact that the parties did not specifically brief this issue, the Court is requesting additional argument on this point only and will hold that argument on Feb. 25 when a conference is already scheduled. The Court will hold this aspect of the motion in abeyance pending that additional argument.

This constitutes the decision and order of the Court.

Feb. 23, 2004


Justice Rosalyn Richter