

Greater N.Y. Ins. Co. v Allstate Ins. Co.

2005 NY Slip Op 30001(U)

September 7, 2005

Supreme Court, New York County

Docket Number: 0602284

Judge: Marilyn Shafer

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

PRESENT:
Index Number : 602284/2003
GREATER NEW YORK MUTUAL
vs
ALLSTATE INSURANCE
Sequence Number : 002
SUMMARY JUDGMENT

PART _____

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

The following papers, 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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied*
pursuant to attached Remt

FILED
SEP 09 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/7/05

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE [* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
GREATER NEW YORK INSURANCE COMPANY, as
subrogee of DAYTON TOWER CORP. and all
other named insureds under policy number
1131M81495,

Plaintiff,

Index No. 602284/03

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

-----X

Marilyn Shafer, J.:

In this action concerning insurance coverage, defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment on its complaint.

The policy at issue was a renters' insurance policy issued by defendant to Hynan and Vivian Kass for their apartment located at 8000 Shorefront Parkway, Rockaway Beach, New York. On February 4, 1999, a fire damaged the apartment, as well as other parts of the building. Neither named insured was living in the apartment at the time of the blaze. Hynan had died in 1994, and Vivian had been admitted to a nursing home in Florida in August of 1998. Their daughter, Rhoda Kass, resided in the apartment at the time of the fire. A claim was submitted to defendant on behalf of Vivian for damage to the personal property within the apartment. Defendant investigated the claim, and paid Vivian's representative the amount of the policy limits.

The complaint alleges that plaintiff covered its insureds under its policy number 1131M81495 for property damage to the building. The fire, which originated in the Kass apartment, caused property damage to the building in the sum of \$115,823.93. Plaintiff adjusted the claim, and paid its insureds \$114,823.93 after it deducted the \$1,000 deductible, and became subrogated to its insureds' claim. Plaintiff here sued the administratrix of Rhoda's estate (Rhoda had died prior to plaintiff's suit) in this court, under Index No. 113088/01, alleging that Rhoda had been covered by defendant under policy number 04350096807/25. Allstate did not defend and indemnify Rhoda's estate in that action, asserting that she was not an insured person within the meaning of the policy, and that the named insureds, Hynan and Vivian, did not reside in the premises at the time of the loss. A default judgment was entered against Rhoda's estate on July 22, 2002 in the amount of \$151,984.79.

Thereafter, plaintiff made a claim to defendant for the amount of the judgment, alleging that Rhoda had been an insured person under defendant's policy, and that her negligence had caused the fire. Defendant has not paid plaintiff any part of the amount of the default judgment.

The issue before the court is whether Rhoda was an insured person under the policy at the time of the fire, specifically, whether she was a member of Hynan and Vivian's

"household."

Defendant's policy provides that defendant "will pay damages which an insured person becomes legally obligated to pay because of ... property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy" (Defendant's Policy, Section II - Family Liability and Guest Medical Protection, Coverage X, at 16). The policy defines "Insured person(s)" as "you and, if a resident of your household: a) any relative; and b) any dependent person in your care" (*id.* at 2). It is undisputed that Rhoda was Hynan and Vivian's daughter. "Household" is nowhere defined in the policy.

"[I]t is well established that the party claiming insurance coverage bears the burden of proving entitlement, and, as we have recently held, a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage" (*Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Co.*, 5 AD3d 198, 200 [1st Dept 2004], citing *Moleon v Kreisler Borg Florman General Construction Co.*, 304 AD2d 337 [1st Dept 2003]).

The bases for plaintiff's contention that Rhoda was an insured person under the policy are: (1) defendant knew that its named insureds, Hynan and Vivian, did not reside in the apartment at the time of the fire, yet it paid the claim for damages to the limit of its coverage; therefore, defendant cannot now base its

denial of coverage on the basis that Hynan and Vivian did not reside in the apartment; (2) defendant's notes show that it felt that it had no subrogation potential to recover what it paid on the claim; plaintiff alleges that this is because an insurer cannot be subrogated against its own insured, and that in not attempting to recover its payment from Rhoda, it was, in effect, acknowledging that Rhoda was its insured; (3) defendant's policy does not require named insureds to reside at the premises at the time of a loss in order to be provided with the protection that they paid for; and (4) "household" is an ambiguous term, and ambiguities in policies are construed against the insurer.

None of these bases establishes that Rhoda was an insured under the policy. The first and second are based on plaintiff's unsubstantiated assumptions about what defendant "thought," and plaintiff would have no way of knowing that. The third, while it may be true, still does not establish that Rhoda was covered under the policy. And as for the fourth, it has been held that "[t]he term 'household' as used in insurance policies has been characterized as ambiguous and 'its interpretation requires an inquiry into the intent of the parties' [citation omitted]. 'The interpretation must reflect the reasonable expectation and purpose of the ordinary business man' and 'the circumstances particular to each case must be considered' [citation omitted]" (*Matter of Hartford Insurance Co. of the*

Midwest v Casella, 278 AD2d 417, 418 [2d Dept 2000]; see also *Kradjian v American Manufacturers Mutual Insurance Co.*, 206 AD2d 801, 802 [3d Dept 1994] ["household" is an ambiguous term "devoid of any fixed meaning"])). It has also been held that while "the ambiguous language of an insurance policy should be interpreted so as to favor any reasonable interpretation which results in coverage" (*Sekulow v Nationwide Mutual Insurance Co.*, 193 AD2d 395, 396 [1st Dept 1993]), application of the rule is not necessarily dispositive because one has to take into account "the reasonable expectations of the average person purchasing such insurance, as well as the particular circumstances of the individual case" (*ibid.*; see also *Schaut v Firemen's Insurance Co. of Newark*, 130 AD2d 477 [2d Dept 1987])). Often the finding in the above cases is that the intent of the parties is a question of fact which requires further inquiry by the trier of fact.

These considerations, along with plaintiff's failure to otherwise establish that Rhoda was an insured person under defendant's policy, require denial of plaintiff's cross motion for summary judgment on its complaint.

However, defendant also has not established its entitlement to summary judgment.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate

the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" [citations omitted]

(*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Defendant has not made its prima facie showing because it has not demonstrated that Rhoda was not an insured person under the policy. The term "household" remains an ambiguous term that requires further inquiry by the trier of fact. Therefore, defendant's motion for summary judgment is also denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied.

Dated: _____

9/7/05

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