Lutheran Social Services of Metroplitan New York, Inc. v Guide One Insurance

2005 NY Slip Op 30214(U)

September 26, 2005

Supreme Court, New York County

Docket Number: 0600328/2003

Judge: Karen Smith

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SCANNED ON 9/28/2005

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

PRESENT: KAREN SMITH J.S.C. PART 44

Justice

Lutheran Social Services of Metropolitan New York, Inc.

INDEX NO. 600328/03

MOTION DATE 7/25/05

- v -

MOTION SEQ. NO. ______

Guide One Insurance

MOTION CAL. NO. ______

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	
memorandum of law	3-4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion and the cross motion are decided in accordance with the annexed memorandum decision and order.

FILED

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

Dated: 9/26/05

KAREN SMITH J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

---X

LUTHERAN SOCIAL SERVICES OF METROPOLITAN NEW YORK, INC.,

Plaintiff,

-against-

GUIDE ONE INSURANCE,

Defendant.

---X

Index no.: 600328/2003
Motion seq.: 001
Motion date: July 25, 2005

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Lutheran Social Services of Metropolitan New York, Inc.'s motion, pursuant to CPLR § 3212, for summary judgment on its complaint is granted. Defendant Guide One Insurance's motion, pursuant to CPLR 3211 (a) (7), is denied.

Plaintiff initiated this lawsuit seeking coverage for its litigation expenses arising out of a lawsuit, pursuant to a general liability insurance contract between itself and defendant. Plaintiff now moves for summary judgment in the amount of $79,280.06, on the grounds that there is no material issue of fact concerning coverage. Defendant cross moves to dismiss the complaint, on the ground that plaintiff has not set forth a prima facie showing of entitlement.

The facts are contained in moving papers and are not in dispute. Plaintiff is a licensed adoption agency. Plaintiff alleges that, during the relevant time periods for this action, it had a general business liability insurance contract with defendant, bearing policy number 9619-113.[1] The policy contains the general provision concerning coverage:

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[1] Plaintiff has not submitted with its papers a copy of the policy for the time period in question. Defendant has provided a copy of a policy between itself and plaintiff, numbered 9619-113, covering the period of September 19, 2000 to September 19, 2001. Plaintiff has submitted a denial letter from defendant, dated March 7, 2000, that acknowledges the existence of an insurance policy between the parties, numbered 9619-113. Defendant does not dispute that a policy was in effect and refers to the policy it submitted with its papers to make substantive legal arguments against plaintiff's claim. Accordingly, the court will assume for the purposes of this motion that the policy contained in defendant's moving papers was substantially the same policy that was in effect when plaintiff initially filed its demand that defendant assume the defense of the litigation.

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or fraudulent. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

It also contains the following terms:

> This insurance applies to "bodily injury" and "property damage" only if: (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the coverage territory; [and] (2) the "bodily injury" or "property damage" occurs during the policy period.

The policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." It defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

On or about February 23, 2000, plaintiff was served with summons and complaint in an action pending in this court in Kings County entitled *Siler, et al v. Lutheran Social Services of Metropolitan New York*, Index Number 6632/2000 ("Siler Action"). In that action, Erik and Linda Siler, as individuals and as parents and legal guardians of Darrell Siler and Darrin Siler, sought damages against plaintiff arising from the Siler's adoption of Darrell and Darrin in April of 1989. The complaint alleged that, at the time of Darrell's and Darrin's birth, their birth mother was addicted to intravenous drugs. The complaint further alleged that, as a consequence, Darrell and Darrin were born with drug addictions and developed medical conditions as a result. It also alleges that Darrell and Darrin were born with Human Immunodeficiency Virus (HIV) which they had contracted from their birth mother in utero. The complaint alleged that plaintiff, as legal representative and agent for Darrel and Darrin, knew or should have known that their birth mother was an intravenous drug user and that Darrel and Darrin were born infected with HIV. The complaint contended that plaintiff had an affirmative duty to disclose this information to the Silers prior to their adoption of Darrin and Darrel, but failed to fulfill that duty.

The complaint asserted three separate causes of action against plaintiff. The first cause of action asserted that, by withholding Darrin's and Darrel's medical conditions and other pertinent

[* 4]

information, plaintiff fraudulently induced Erik and Linda Siler to adopt. It alleged that the Silers were damaged as a result of the adoption. The second cause of action asserted that plaintiff had negligently, carelessly, and recklessly failed to discover and disclose information concerning Darrin's and Darrel's medical condition and other pertinent information, causing the Siler's damage. The third cause of action contends that, as a result of plaintiff's failure to apprise the Silers of Darrin's and Darrel's medical conditions, Darrin and Darrell have suffered and will continue to suffer damages. The complaint did not set forth the nature of any of the damages alleged.

On March 3, 2000, plaintiff provided defendant with notice of the action and requested defendant provide legal defense. On March 7, 2000, defendant responded with a denial of coverage. Specifically, defendant stated that the claimed damages in the complaint were not for "bodily injury", "property damage", "personal injury", or "advertising injury" as those terms were defined in the policy.

Plaintiff then moved for summary judgment dismissing the complaint in the Siler Action. The Honorable Larry D. Martin, of the Supreme Court of the State of New York, County of Kings, denied its motion on April 25, 2003. On September 13, 2004, the Supreme Court of the State of New York, Appellate Division, Second Department reversed Justice Martin's decision and dismissed the complaint against plaintiff. The Appellate Division found that the first two causes of action, for fraudulent and negligent misrepresentation, were time-barred and that, on the third cause of action brought on behalf of Darrin and Darrell, plaintiff had demonstrated that it was not the proximate cause of any damage sustained by the twins.

Plaintiff commenced this lawsuit on January 30, 2003, seeking a declaratory judgment stating that defendant was obligated to fully defend plaintiff and pay all of plaintiff's defense costs incurred in the Siler Action, and seeking payment of all costs it had incurred in litigating the case up until that point. Issue was joined on March 25, 2003, by service of defedant's answer. The answer consisted of general denials of the allegations made in the complaint.

Plaintiff now moves for summary judgment on the complaint, on the grounds that no issue of fact exists on its claims. Defendant opposes plaintiff's motion and cross moves to dismiss, on the grounds that, as a matter of law, the complaint in the Siler Action did not set forth a cause of action that defendant would be obligated to defend under its policy. Defendant also argues that plaintiff

has not established that the policy provides coverage for the time the alleged tortious conduct took place, specifically from 1985, when plaintiff took Darrell and Darrin into custody, until April of 1989, when the Silers adopted Darrell and Darrin.

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 in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Id*). If an insurer has assumed a duty to defend the insured against a specified claim, that duty is broader than the insurer's ultimate duty to indemnify (Seaboard Surety Co. v. Gillette Co., 64 NY2d 304, 310 [1984]). An insurer's duty to defend its insured arises whenever the allegations in a complaint give rise to a reasonable possibility of recovery under the policy (*Fitzpatrick v. American Honda Motor Co.*, 78 NY2d 61, 66 [1991]). If the complaint in the action at issue contains any cause of action upon which the insured would be entitled to coverage, the insured is entitled to a defense under the policy. (*DeLuca v. Atlantic Mutual Insurance Co.*, 49 AD2d 153, 159, [2nd dept. 1975]). This is the case even where the complaint asserts some causes of action that are not covered within the policy (*Id*). An insurer can relieve itself of its duty to defend by showing that there is no possible factual or legal basis upon which it would be liable to indemnify the insured under the policy (*Allstate Insurance Co. v. Zuk*, 78 NY2d 41 [1991]). Any ambiguities under the policy must be construed in favor of the insured against the insurer (*United States Fidelity and Guaranty Co. V. Annuziata*, 67 NY2d 229, 232 [1986]).

The third cause of action set forth in the complaint in the Siler Action, for damages to Darrell and Darrin, could reasonably be construed to be one for bodily injury falling within the policy. By failing to inform the Silers of Darrell's and Darrin's medical conditions, the plaintiff could have caused physical injury to Darrell and Darrin, by delaying necessary medical treatment for their conditions. Indeed, it is difficult to discern what other ground Darrell and Darrin would have for seeking damages against plaintiff. Defendant points out that the complaint alleged that Darrin's and Darrell's medical conditions were pre-existing. However, Darrell and Darrin could well have been further injured by not receiving treatment that they would have received had plaintiff timely

informed itself and the Silers of their condition. Defendant's contention that plaintiff's failure to warn is not an "occurrence" as defined under the policy does not affect defendant's duty to defend. The policy defines an "occurrence" as " an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While plaintiff's failure to inform the Silers that Darrell and Darrin were HIV positive may not have been a specific event, their injury may well have been one. For instance, Darrell and Darrin could have been injured by receiving medical treatment that they would not have otherwise received had the treating doctor known that they were HIV positive. Or they simply could have developed full-blown auto-immune deficiency syndrome ("AIDS") because they did not receive the proper medication for their condition. Either one of these events could be reasonably interpreted as an occurrence under the policy. As such, defendant had an obligation to indemnify.

While it is not clear that the causes of action asserted by Erik and Linda Siler personally arise from personal or "bodily" injuries, that issue is of no moment, as the third cause of action is sufficient to trigger defendant's duty to defend. Nor is it of issue that the causes of action in the Siler action were all dismissed. The policy itself states that defendant will have "a duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent." The defendant may relieve itself of its burden to defend only by showing that there is no possible factual or legal basis under which it would be liable to indemnify plaintiff. As discussed above, one reasonable reading of the complaint in the Siler action would potentially obligate defendant to indemnify plaintiff. Accordingly, defendant was obligated to defend plaintiff in the Siler action.

Defendant's contention that questions of fact exist concerning whether the accident occurred during the coverage period is without merit. The insurer's notice of disclaimer must set forth the reasons for its denial of coverage with a high degree of specificity, or the insurer will be precluded from raising asserting that ground in later litigation. (*General Accident Insurance Groupv. Cirucci*, 46 NY2d 862, 863 [1979].) Defendant's March 7, 2000 letter denies coverage on the grounds that the damages in the Siler Action were not for "bodily injury", "property damage", "personal injury," or "advertising injury". It made no disclaimer on the grounds that the causes of action accrued before the policy coverage period. As such, it would be precluded from raising that argument in this

action. Moreover, defendant has not demonstrated that, if the policy had not been in effect from the time Darrell and Darrin were in plaintiff's custody until the time the Silers adopted them, defendant would be conclusively relieved of its duty to indemnify plaintiff.

Since defendant has not shown that, as a matter of law, it was not obligated to defend plaintiff in the Siler action, its motion to dismiss is denied. Since plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law, and defendant has failed to demonstrate a material issue of fact, plaintiff's motion for summary judgment is granted. In its complaint plaintiff sought a declaratory judgment stating that the policy obligated defendant to fully defend plaintiff in the Siler action and related actions, and to indemnify plaintiff for any sum it may become legally obligated to pay in the Siler action or any related action. Plaintiff also sought actual damages in an amount not less than $100,000. Plaintiff now seeks summary judgment in the amount of $79,280.06, the amount it contends represents its expenses in litigating the Siler action. Plaintiff has provided detailed billing statements from its attorneys that break down all the expenses related to the litigation. Defendant does not contest any of the figures cited. Therefore, this court will enter judgment in that amount. Plaintiff has also requested attorney's fees for bringing this action, but has failed to set forth any basis upon which it would be entitled to such an award. As such, that request is denied. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is denied, and it is further

ORDERED that plaintiff's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $79,280.06, together with interest as prayed for allowable by law until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

Dated: September 26, 2005
New York, New York

ENTER:

Karen S. Smith, J.S.C.

FILED
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