

**National Football League v Vigilant Insurance
Company**

2005 NY Slip Op 30231(U)

June 28, 2005

Supreme Court, New York County

Docket Number:

Judge: Bernard J. Fried

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

PRESENT: HON. BERNARD J. FRIED

Justice

PART 60

0114928/2004

NATIONAL FOOTBALL LEAGUE
vs
VIGILANT INS. CO.

SEQ 1

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This judgment has been entered and notice of entry has been served on all parties. To obtain entry, counsel must appear in person at the County Clerk's Office (Room 141B).

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

This judgment has been entered and notice of entry has been served on all parties. To obtain entry, counsel must appear in person at the County Clerk's Office (Room 141B).

Dated: 6/28/05

Bernard J. Fried

HON. BERNARD J. FRIED ^{4S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
NATIONAL FOOTBALL LEAGUE,

This judgment has been entered and notice of entry of judgment must be obtained by the Clerk of the Court. To appear in person at the County Clerk's Office (Room 141B).

v.

INDEX NO.: 114928/04

VIGILANT INSURANCE COMPANY,

Defendant.

-----X
FRIED, J.:

In this action for insurance coverage, defendant Vigilant Insurance Co. (Vigilant) moves for an order, pursuant to CPLR 3211(a)(1,7), dismissing plaintiff National Football League's (NFL) complaint and, declaring that, under the terms of the insurance policy issued by Vigilant to NFL, Vigilant has no duty to compensate for loss associated with a federal lawsuit commenced by Maurice Clarret in the United States District Court for the Southern District of New York.¹ Plaintiff NFL, in opposition to Vigilant's motion requests that I hold as a matter of law, under the terms of the insurance policy, that Vigilant has a duty to compensate NFL for loss associated with the Clarret litigation.

As discussed below, Vigilant's motion for dismissal is granted, and it is declared that Vigilant has no duty to compensate NFL for loss associated with the Clarret litigation.

¹ Clarret v. National Football League, 369 F.Supp2d 379 (S.D.N.Y. 2004), *rev.* Clarret v. National Football League, 369 F.3d 124 (2d Cir. 2004).

Vigilant issued a Liability Insurance Policy entitled “Executive Protection Policy” to NFL effective April 30, 2003 to April 30, 2004. (Exhibit A) This policy provides coverage for “all Loss... which the insured person becomes legally obligated to pay on account of any Claim first made against him...”² The Executive Protection Policy contains an exclusion from coverage for “any Employment Practices”³. (Endorsement no. 3).

The dispute between NFL and Vigilant centers on whether the insurance policy covers or excludes coverage for losses associated with the litigation commenced by Maurice Clarret, a college football player who wanted to enter the 2003 NFL draft. The NFL has a policy that denies eligibility to players less than three years removed from their high school graduation. (Clarret’s Complaint, ¶14)

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Specifically, the Executive Protection Policy issued to NFL by Vigilant provides in Insuring Clause 1 that:

“The company shall pay on behalf of each of the **Insured Persons** all **Loss** for which the **Insured Organizations** becomes legally obligated to pay on account of any **Claim** first made against him, individually or otherwise, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act**, committed, attempted, or allegedly committed or attempted by such **Insured Person** before or during the **Policy Period**.” (Emphasis on original.)

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Employment practices are defined as:

“...Any actual or alleged or wrongful dismissal, discharge or termination of employment, breach of any oral or written employment contract or quasi-employment contract, employment related misrepresentation, violation of employment or discrimination laws (including workplace or sexual harassment), wrongful failure to employ or promote, wrongful deprivation of career opportunity, failure to grant tenure, negligent evaluation, employment-related invasion of privacy, employment-related defamation, or employment-related wrongful infliction of emotional distress or violation of any other federal, state, local or common law, statute, ordinance, rule or regulation or any public policy relating to employment or employees, including without limitation the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act, and any workers compensation, unemployment insurance, social security, disability benefits or similar law.” (Endorsement no. 3, ¶2.a.b.)

As a result, the NFL denied draft eligibility to Clarret, who having graduated high school on December 11th, 2001, was a season shy of eligibility for the 2003 draft.

(¶¶18,24)

After being denied eligibility to enter the draft, on September 23, 2003, Clarret filed a complaint naming as NFL defendant in the Southern District of New York. In his complaint, Clarret alleged that the NFL's draft eligibility rule violated the Sherman Anti-Trust Act because it constitutes a "group boycott and a concerted refusal to deal with individuals such as Clarret." and that the rule "substantially burdens competition without advancing any important interest of active football players as employees." (Clarret Complaint ¶¶ 34, 35, 36)

On February 5, 2004, the district court granted summary judgment in favor of Claret and ordered him eligible to enter the 2004 draft. On appeal, the Second Circuit unanimously held that the NFL's actions did not violate the Sherman Anti-Trust Act because they fell under the non-statutory labor exemption to anti-trust laws. The Court further explained that because the claim merely reflected a prospective employee's objection to a labor union's criteria for employment, any potential remedy would be "in the province of labor law" rather than under the Sherman Anti-Trust Act. (See footnote 1, supra)

On October 14, 2003, the NFL through its broker, sent notice of Clarret's complaint to Vigilant. (Notice of Motion, Exhibit 1, ¶ 20) Replying in a letter dated December 22, 2003, Vigilant denied NFL coverage for costs associated with the Clarret Litigation. (¶ 21)

After it had received the letter denying coverage, NFL commenced this action for declaratory judgment and breach of contract. In its Complaint, NFL seeks, among other things, a judgment: (a) declaring that Vigilant is contractually obligated under the Policy, subject to any deductible shown by Vigilant to be clearly applicable, to pay the NFL all losses that it has incurred or will incur as a result of the Clarret case, including all attorney's fees and other costs; and (b) awarding NFL compensatory damages for Vigilant's breach of its contractual duty to pay the NFL for all losses it has incurred as a result of the Clarret case, including all attorney's fees and other costs. (NFL Complaint, Exhibit A, p. 7)

Defendant Vigilant then moved for dismissal pursuant to CPLR 3321(a)(1) and (7), and sought an order declaring that Vigilant is not obligated to cover any judgment, settlement, defense costs, or pay any attorney's fees or expenses NFL may incur in connection with the Clarret litigation because the unambiguous language of the policy expressly excludes coverage for employment practices claims like those in the Clarret litigation.

At issue is whether the language of the insurance policy exclusion for Employment Practices bars coverage for the Maurice Clarret's litigation against NFL.

In New York, insurers claiming an exclusion to coverage bear a heavy burden in demonstrating that theirs is the correct interpretation of the exclusionary language, and that the language applies to the claim. Our courts have consistently held that 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", " with any ambiguity

resolved against the insurer.” (Belt Painting Corp. v. TIG Ins. Co., 100 N.Y. 2d 377, 383 [2003]. See also; RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 2 N.Y.3d 158 [2004]; Continental Cas. Co. v Rapid-American Corp., 80 N.Y.2d 640 [1993]; and Seaboard Sur. v. Gillette Co., 64 N.Y.2d 304, 311 [1984])

It is basic that “the interpretation of a contract is a question of law for the court”. (National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assoc., 257 A.D.2d 1,11 [1st Dept., 1999]). A contract must be interpreted so as to give “effect to the intention of the parties as expressed in the unequivocal language employed.” (Wallace v. 600 Partners, Co., 86 NY 543, 548 [1995][internal citations omitted]). This requires that in doing so, I should “avoid an interpretation that would leave a contractual clause meaningless’ (Two guys from Harrison-N.Y. Inc. v. S.F.R. Realty Assocs., 63 NY2d 396,403 [1984]), rather, an interpretation should be adopted which gives “meaning to every provision of the contract. (Muzak Corporation v. Hotel Taft Corporation, 1 NY 42,46 [1956])

Endorsement No. 3 of the Policy provides that: “The Company shall not be liable... for loss on account of any Claim made against the Insured Organization... for any Employment Practices.” (§ 5) The definition of excluded “Employment Practices” is set forth as a list containing thirteen items: (§ 2.a.b.) The items that Vigilant argues excludes Clarret’s claim are⁴:

[1] “wrongful failure to employ or promote,”

[2] “wrongful deprivation of career opportunity.”

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The entire definition can be read Supra at footnote 3.

[3] “or violation of any other federal, state, local or common law, statute, ordinance, rule or regulation or any public policy relating to employment or employees, including without limitation the Employee Retirement Income Security Act of 1974 [ERISA], the Fair Labor Standards Act [FLSA], the National Labor Relations Act [NLRB], the Worker Adjustment and Retraining Notification Act [WAA], the Consolidated Omnibus Budget Reconciliation Act of 1985 [COBRA], the Occupational Safety and Health Act [OSHA], and any workers compensation, unemployment insurance, social security, disability benefits or similar law.”

In opposition, NFL argues that the language of the Employment Practices definition does not bar coverage for Clarret’s complaint because: (1) Each of the items listed refer to an “employment-law cause of action”; and (2) the Sherman Anti-Trust Act is not a “similar law” under the language of the definition.

It is undisputed that if any item listed in the Employment Practices definition applies to Clarret’s claim against NFL, then coverage is excluded.

Clarett’s federal claim was for a “wrongful deprivation of career opportunity”. In his complaint, Clarret alleged that “[p]laying football professionally is the only means by which [he] can profit from his athletic ability” and that “[a]s a result of NFL’s position on this issue, [he] did not declare himself eligible for the 2003 Draft...”. (Clarett Complaint, ¶¶ 29, 27) Clarret’s claim challenged the NFL draft eligibility rule which evidently he believed to have wrongfully denied him of a career

opportunity. Thus, this claim falls within the plain meaning of the words “wrongful denial of career opportunity”.

Additionally, that “wrongful denial of career opportunity” was not the particular “cause of action” of Clarret’s lawsuit against the NFL does not warrant a conclusion that the exclusion is inapplicable. The list of excluded items in the definition clearly refers to factual bases for lawsuits that may give rise to various causes of action not to any particular cause of action. For example, neither “failure to grant tenure” nor “negligent evaluation” are independent causes of action and the other items in the Employment Practices definition refers to factual bases for claims excluded by the Policy. These factual bases can give rise to various causes of action, and, if the facts underlying the claim fit into the definition of “Employment Practices”, than the coverage is barred. This is precisely the situation with the Clarret litigation. Clarret’s cause of action may have been brought under the Sherman Anti-Trust Act, but the essence of his claim is grounded in the factual basis of a “wrongful denial of career opportunity”. And claims based on “wrongful denial of career opportunity” are not afforded coverage under the Policy. For this reason, the motion to dismiss must be granted.

Inasmuch as I am satisfied that coverage is excluded because the lawsuit was grounded in the factual claim of a “wrongful deprivation of career opportunity”, there is no need not consider Vigilant’s other arguments for excluding coverage.

Accordingly,

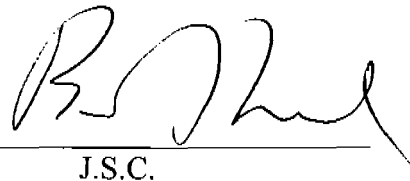
It is ORDERED that defendant Vigilant's motion for dismissal is granted, and it is further

ORDERED and ADJUDGED that defendant Vigilant's motion for a declaration that Vigilant has no duty to compensate for NFL's loss associated with Clarret Litigation is granted.

This constitutes the order and judgment of the court.

Dated: 2/21/05

ENTER:



A handwritten signature in black ink, appearing to read 'B. J. Fried', is written over a horizontal line.

J.S.C.

HON. BERNARD J. FRIED