

Serio v Public Serv. Mut. Ins. Co.

2007 NY Slip Op 31272(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0403211/2112

Judge: Louise Gruner Gans

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AMENDED DECISION AND ORDER
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. LOUISE GRUNER GANS PART 61
Justice

Gregory V. Serio
- v -
Public Service Mutual Insurance Co.

INDEX NO. 403211/01
MOTION DATE _____
MOTION SEQ. NO. 9
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~~ the court's decision and order of July 9, 2003 is amended per annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: _____ J.S.C.

SCANNED
AUG 19 2003

Dated: 8/4/03

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
HON. LOUISE GRUNER GANS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61
----- X

GREGORY V. SERIO, SUPERINTENDENT OF
INSURANCE, AS LIQUIDATOR OF NEW YORK
MERCHANT BAKERS INSURANCE COMPANY,

Plaintiff,

-against-

AMENDED DECISION & ORDER

PUBLIC SERVICE MUTUAL INSURANCE
COMPANY, ATLANTIC EXPRESS, INC. and
AMBOY BUS COMPANY,

INDEX NO. 403211/01

Defendants.

----- X
GANS, LOUISE GRUNER, J.

Defendant Public Service Mutual Insurance Company ("Public") moves, pursuant to CPLR 3212, for summary judgment in its favor.

Plaintiff, Gregory V. Serio, Superintendent of Insurance, as liquidator of New York Merchant Bakers Insurance Company, cross-moves for summary judgment on its claims against Public.

Defendants Atlantic Express, Inc. ("Atlantic") and Amboy Bus Company ("Amboy") cross-move, pursuant to CPLR 3212, for summary judgment on their first and second cross-claims against Public and their first counterclaim against plaintiff, dismissing the complaint, and for costs and attorneys' fees.

Plaintiff brought this action for a declaratory judgment that Public is solely responsible for providing insurance coverage to Atlantic and Amboy in a Brooklyn personal injury action, *Mikhailov v NYC Board of Education*, Index No. 13732/97 ("the underlying

action"), which was settled in May 2002 for \$10,000.00.

Amboy is a provider of school transportation services. Atlantic is Amboy's corporate parent. The underlying action, brought against Atlantic, Amboy and municipal defendants, stemmed from the February 1996 assault of an eight-year-old boy by another student while they were on the way to school in a bus operated by Amboy. The assault allegedly started while the school bus was in transit and continued until it arrived at the school and a teacher boarded the bus and separated the two boys. The underlying suit is grounded in negligence, based both on the bus driver's conduct in allowing the assault to occur and continue, and Amboy's failure to have sufficient and capable attendants to monitor the children on the school bus.

At the time of the incident, Atlantic and Amboy were insured under two policies: a commercial general liability policy issued by Public and primarily covering premises owned by Atlantic; and a business automobile policy issued by New York Merchant Bakers Insurance Company ("Merchant"), which has since become insolvent and placed in liquidation. Plaintiff Superintendent of Insurance is Merchant's liquidator.

The dispositive issue raised in all three motions is which insurer, if any, must provide coverage.

Both insurers denied coverage. Public denied the claim on the ground that its policy specifically excludes coverage for personal injuries on motor vehicles (*Goldman Affid.* at Exhibit 10) and Merchant denied coverage because the infant's injuries did not ensue from an "accident" resulting from the ownership, maintenance or use of a covered auto (*id.* at Exhibit 9).

The Policies

Public's policy (*id.* at Exhibit 5) excludes from coverage claims for

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading"

(Commercial General Liability Coverage Form, ¶ I[2][g]). Merchant's policy (*id.* at Exhibit 11)

provides that Merchant

will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto"

(Business Auto Coverage Form, ¶ II.A). In addition, both policies exclude from coverage intentional torts by the insured, in identically phrased clauses: "'Bodily injury' or 'property damage' expected or intended from the standpoint of the 'insured'" (Public's Commercial General Liability Coverage Form, ¶ I[2][a]; Merchant's Business Auto Coverage Form, ¶ II.B[1]).

These three policy clauses must be analyzed to resolve the coverage issues raised in the instant motions: "use or operation" of a vehicle; "caused by an accident"; and, injury "expected or intended from the standpoint of the insured." In analyzing these provisions, it is not necessary to dwell at length on distinctions between cases decided under the No Fault law, where coverage is limited to injuries proximately caused by a motor vehicle (*Insurance Law* § 5102,5103; *Walton v Lumbermens Mut. Casualty Co.*, 88 NY2d 211,213 [1996]), and negligence claims arising under Vehicle and Traffic Law § 388(1), since the distinction was clearly drawn by the Court of Appeals in *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554,561 (1999). The purpose of VTL § 388(1) is to ensure that persons injured in

consequence of negligence in the use of an automobile have “recourse to the vehicle’s owner, a financial responsible party.” *Id.* Since the underlying action here was grounded in negligence, the cases relying on VTL § 388 are the ones germane to the interpretation of the clauses of the insurance contracts at issue.

Public Service Mutual Insurance Company:

Experientially, the injuries alleged in the underlying negligence action appear to be closely linked to the use of the vehicle as a school bus. However, the Appellate Division, First Department has taken a more restrictive view. In *Culvert Ins. Co. v CZGNA Ins. Co.*, 239 AD2d 243 (1st Dept 1997), it held that “[t]he alleged assault on the infant plaintiff. . . while a passenger on a school bus did not arise out of the use of that vehicle (*see, Homey v Tisyl Taxi Corp.*, 93 AD2d 291).” *Culvert Ins. Co. v CZGNA Ins. Co.*, 239 AD2d 243 (1st Dept 1997). The trial court decision in *Culvert* discloses that the assault involved was by one school bus passenger against another, as was the case here, and the underlying action was a negligence action. Accordingly, Public’s exclusion from coverage based on “use” is inapplicable.

With regard to Public’s intentional torts exclusion, the court finds that it is also inapplicable. The language excluding “bodily injury or property damage expected or intended from the standpoint of the insured” fails specifically to exclude an assault perpetrated by one pupil against another. *2500 Motel Corp. v Zvestors Ins. Co. Of America*, 169 AD2d 604 (1st Dept 1991), *app denied* 78 NY2d 857 (1991) and *Blake v Daily Bus & Truck Rental*, 299 AD2d 441 (2d Dept 2002) both held that an insurer’s intention to exclude coverage for injuries caused by the criminal acts of third persons must be expressed in clear and unmistakable language in order for the exclusion to be effective. Since Public has failed to include the necessary language,

its intentional tort exclusion is likewise inapplicable here. Accordingly, Public has failed to demonstrate its entitlement to summary judgment on the issue of coverage. Thus, plaintiff's cross-motion for a declaratory judgment that Public must provide insurance coverage to Atlantic and Amboy is granted, and Atlantic and Amboy's cross-motion is granted to the extent of its cross-claims against Public.

Serio, as Liquidator for Merchant Bakers Insurance Company

Merchant is not obligated to provide coverage in this case because under *Culvert, supra*, and *Towne Bus Corp. v Ins. Co. of the State of Pennsylvania*, 295 AD2d 272 (1st Dept 2002), the personal injuries suffered by the plaintiff in the underlying negligence action cannot "be considered as resulting from either an 'accident' or the 'ownership, maintenance or use' of a covered auto, both conditions of coverage under the auto policy (*see, Michaels v City of Buffalo*, 85 NY2d 754, 758; *Culvert Ins. Co. v CZGNA Ins. Co.*, 239 AD2d 243; *Olin v Moore*, 178 AD2d 517, 518)." *Towne Bus Corp.*, 295 AD2d at 273. Since the underlying tort claim is thus outside the scope of Merchant's coverage, the possible exclusions from such coverage need not be addressed.

Legal Fees

Atlantic and Amboy move, *inter alia*, to recover costs and attorneys' fees. Since Public did not commence this declaratory judgment action and cast its insureds into a defensive posture, it is not obligated to pay their legal expenses (*see Mighty Midgets v Centennial Ins. Co.*, 42 NY2d 12, 21 [1979]; *Johnson v General Mut. Ins. Co.*, 24 NY2d 42, 50 [1969]; *Chase Manhattan Bank v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1, 4 [1st Dept 1999]). To the extent it is obligated to defend and indemnify Atlantic

and Amboy in the underlying action, which it declined to do at the time, it is liable for the reasonable legal fees that Atlantic and Amboy incurred in that action.

Thus, Public's motion for summary judgment is denied, plaintiffs cross-motion is granted, and Atlantic and Amboy's cross-motion is granted to the extent that it seeks summary judgment on its cross-claims against Public and is otherwise denied.

Accordingly, it is hereby

ADJUDGED AND DECLARED that defendant Public Service Mutual Insurance Company is obligated to defend or indemnify Atlantic and Amboy in the underlying action, reimburse Atlantic and Amboy for reasonable legal costs incurred in the underlying action, but is not obligated to reimburse Atlantic and Amboy for reasonable legal costs incurred in this action; and it is further

ORDERED that judgment shall be entered in favor of Atlantic and Amboy and against Public Service Mutual Insurance Company in the sum of \$10,000.00, but their claim for reasonable legal costs shall be severed; and it is further

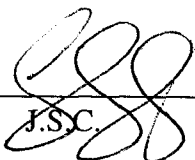
ADJUDGED AND DECLARED that Plaintiff is not obligated to defend and indemnify Atlantic and Amboy under the New York Merchant Bakers Insurance Company policy in the underlying action; and it is further

ORDERED that the issue of the reasonable value of Atlantic and Amboy's costs and attorneys' fees in the underlying action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that Atlantic and Amboy's cross-motion for attorney's fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

DATED: 8/4/03

ENTER: 
J.S.C.

HON. LOUISE GRUNER GANS