

Medrano v State Farm Fire & Cas. Co.

2007 NY Slip Op 31280(U)

April 30, 2007

Supreme Court, Queens County

Docket Number: 0025756/2994

Judge: Duane A. Hart

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

ELSA MEDRANO, et al.	x	Index Number <u>25756</u> 2004
		Motion Dates <u>December 13,</u> 2006
- against -		
STATE FARM FIRE & CASUALTY COMPANY, et al.		Motion Cal. Numbers <u>21 & 22</u>
		Motion Seq. Nos. <u>1 & 2</u>
	x	

The following papers numbered 1 to 28 read on these separate motions by plaintiffs for summary judgment in their favor and against defendant State Farm Fire & Casualty Company (State Farm) and by defendant State Farm for summary judgment in its favor and a declaration that it is not obligated to defend and indemnify defendant Robert Filer, an infant, by his parents and natural guardians Robert Filer and Marcia Filer (Filer) and on this cross motion by defendant Filer for summary judgment in his favor and against defendant State Farm on his cross claim for a declaration that defendant State Farm is obligated to defend and indemnify him in the underlying personal injury action and to pay the attorney's fees he incurred as a result of this action and in defending the underlying personal injury action brought against him.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits ...	9-12
Answering Affidavits - Exhibits	13-23
Reply Affidavits	24-28

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

In this declaratory judgment action instituted by plaintiffs for a declaration that defendant State Farm is obligated to defend

and indemnify its insured, defendant Filer in an underlying personal injury action entitled Elsa Medrano and Jorge Medrano v Robert Filer, an infant, by his parents and natural guardians, Robert Filer and Marcia Filer, Index No. 20919/03, pending in the Supreme Court, Queens County, plaintiffs move and defendant Filer cross-moves for summary judgment declaring the duty of defendant State Farm under a homeowner's insurance policy to defend and indemnify defendant Filer in the underlying personal injury action. Defendant State Farm moves for summary judgment declaring that it has no duty to defend or indemnify defendant Filer.¹

At all relevant times, defendant Filer was insured under a homeowner's policy issued by defendant State Farm which provided coverage pertaining to premises located at 150-24 119th Road, Jamaica, New York.

On March 28, 2003, at approximately 1:00 P.M., plaintiff Elsa Medrano, a teacher's aide, was working at Middle School 202 in Ozone Park, New York. She was monitoring a student in the cafeteria thereat when a food fight broke out among the 8th grade students. Defendant Filer, one of those students, threw a garbage can which struck plaintiff Elsa Medrano in the head. At the time of the incident, defendant Filer lived with his parents, Robert and Marcia Filer, at 150-24 119th Road, Jamaica, New York.

Defendant Filer testified that he threw the garbage can because it was next to him and he did not have anything else to throw. While he admitted that he threw trays and food at people in the cafeteria before and after he threw the garbage can, he testified that he did not throw the garbage can at anyone in particular and that he did not intend to hurt anyone when he threw it. He also testified that he did not see where the garbage can landed after he threw it and did not know that it hit plaintiff Elsa Medrano until a security guard at the school informed him thereof.

Plaintiffs commenced the underlying personal injury action on September 2, 2003. The complaint initially contained causes of action for negligence, assault and battery and loss of services. The cause of action for assault and battery, as well as,

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Plaintiffs' failure to obtain a judgment in the underlying personal injury action prior to suing the tortfeasor's insurer as required by Insurance Law § 3420 does not preclude consideration of the coverage issues herein since the insurer joined plaintiffs and the insured in seeking a declaration of its rights. (See Maroney v New York Central Mutual Fire Insurance Co., 5 NY3d 467 [2005].)

plaintiffs' claim for punitive damages, however, were withdrawn after defendant Filer's examination before trial was held.

Plaintiffs' attorney sent a letter dated July 19, 2004 to defendant State Farm at P.O. Box 1259, Melville, New York by both certified and regular mail. The letter enclosed the summons and complaint and answer in the underlying personal injury action and advised defendant State Farm of the facts of the underlying incident and that plaintiffs were making a claim against the Filers' homeowner's insurance with State Farm for the injuries sustained by plaintiff Elsa Medrano. The certified mail receipt indicates that State Farm received the letter on July 23, 2004, and that the letter was received by James Grant. A stamp, "Richard Malazzo, Jul 23, 2004, State Farm Insurance Company Melville CSO" appears on the first page of the letter. Another stamp, "Received by Sep 27, 2004, State Farm Jericho CSO" appears on the back of the first page of the letter.

On October 11, 2004, defendant State Farm sent disclaimer letters to Robert Filer, Jr. (c/o Marcia and Robert Filer) and to Robert and Marcia Filer. Defendant State Farm essentially disclaimed coverage on the grounds that:

1. The damages alleged do not qualify as an occurrence (defined in the policy as an accident which results in bodily injury);

2. An exclusion which states that bodily injury coverage does not apply to bodily injury: (1) which is either expected or intended by the insured; or (2) which is the result of willful and malicious acts of the insured; and

3. Late notice of the incident and resultant lawsuit provided by the Filers to State Farm.

It is well established that an insurance company's duty to defend is broader than its duty to indemnify. (See Automobile Insurance Co. of Hartford v Cook, 7 NY3d 131 [2007]; see also Continental Casualty Co. v Rapid-American Corp., 80 NY2d 640 [1993]; Seaboard Surety Co. v Gillette Co., 64 NY2d 304 [1984].) The duty to defend is determined by the allegations in the complaint against the insured and arises whenever those allegations fall within the scope of the risks undertaken by the insurer. (See A. Meyers & Sons Corp. v Zurich American Insurance Co., 74 NY2d 298 [1989].) In order to escape the duty to defend, an insurer must demonstrate that the claimant's allegations fall solely or entirely outside the policy coverage and are subject to no other interpretation, or establish as a matter of law that there

is no factual or legal basis upon which it might eventually be obligated to indemnify the insured. (See International Paper Co. v Continental Casualty Co., 35 NY2d 322 [1974] If the claims, however debatable or untenable, may rationally be said to fall within policy coverage or the facts alleged raise a reasonable possibility that the insured may be held liable for some act covered by the policy, the insurer is obligated to defend. (See Fitzpatrick v American Honda Motor Co., Inc., 78 NY2d 61 [1991]; see also A. Meyers & Sons Corp. v Zurich American Insurance Co., supra; Seaboard Surety Co. v Gillette Co., supra.) The duty to defend is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. (See Seaboard Surety Co. v Gillette Co., supra.)

Where an insurer seeks to disclaim coverage on the further basis of an exclusion, as in this case, the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast the pleading solely and entirely within the policy exclusions, and further, that the allegations, completely, are subject to no other interpretation. (See Automobile Insurance Co. of Hartford v Cook, supra; see also Allstate Insurance Co. v Mugavero, 79 NY2d 153 [1992].) Exclusions are subject to strict construction and must be read narrowly. (See Seaboard Surety Co. v Gillette Co., supra.)

In this case, the complaint in the underlying action alleging negligence and later testimony of defendant Filer indicating a lack of intent to injure plaintiff Elsa Medrano are sufficient to bring this action within the parameters of the subject policy and to create a duty to defend. Contrary to defendant State Farm's assertion, the damages alleged do qualify as an occurrence as defined in the subject policy. In addition, since there is no evidence that defendant Filer intended to injure plaintiff Elsa Medrano, the intentional act exclusion could apply only if the injury was "inherent in the nature" of the wrongful act. (See Allstate Insurance Co. v Mugavero, supra.) Although defendant State Farm contends that defendant Filer's act was inherently harmful because throwing a garbage can in a crowded cafeteria is dangerous, it has been long recognized that insurable accidental results may flow from intentional causes. (See McGroarty v Great American Insurance Co., 36 NY2d 358 [1975].) Defendant Filer's conduct, although reckless, was not inherently harmful for the purpose of the intentional act exclusion. (See Slayko v Security Mutual Insurance Co., 98 NY2d 289 [2002].) Thus, the subject policy's intentional act exclusion is inapplicable to the facts herein.

Turning to the issues of timely notice and timely disclaimer, when an injured party exercises his or her right to provide notice of an accident, the insurer must promptly advise the injured party with a high degree of specificity of the ground or grounds upon which the disclaimer is predicated. (See General Accident Insurance Group v Cirucci, 46 NY2d 862 [1979]; see also Halali v Evanston Insurance Co., 8 AD3d 431 [2004].) In this case, defendant State Farm did not disclaim on the ground of late notice from plaintiffs and thus cannot rely on that ground now. Moreover, even assuming that plaintiffs failed to comply with the notice provision of the subject policy by failing to give proper notice to the proper entity, that is, State Farm Fire & Casualty Co. rather than State Farm Mutual Automobile Insurance Co., defendant State Farm's failure to timely disclaim on that basis precludes defendant State Farm from relying on that ground now. (See Matter of State Farm Insurance Co. v Brosnan, 220 AD2d 599 [1995].) Furthermore, even if defendant State Farm had disclaimed on these grounds, its unexplained 80-day delay in disclaiming coverage was unreasonable as a matter of law. (See First Financial Insurance Co. v Jetco Contracting Corp., 1 NY3d 64 [2003]; see also Halali v Evanston Insurance Co., *supra*; Faas v New York Central Mutual Fire Insurance Co., 281 AD2d 586 [2001].)

In light of the foregoing, defendant State Farm has a duty to defend defendant Filer in the underlying personal injury action. A determination as to whether defendant State Farm is obligated to indemnify defendant Filer should await the outcome of the underlying personal injury action. (See Frontier Insulation Contractors, Inc. v Merchants Mutual Insurance Co., 91 NY2d 169 [1997].)

Defendant Filer failed to meet his burden of demonstrating his entitlement to summary judgment as a matter of law on his cross claim for attorney's fees from defendant State Farm.

Accordingly, it is

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

ORDERED and ADJUDGED that plaintiffs' motion and the branch of defendant Filer's cross motion for summary judgment declaring that defendant State Farm is required to defend defendant Filer in the underlying personal injury action entitled Elsa Medrano and Jorge Medrano v Robert Filer, an infant, by his parents and natural guardians, Robert Filer and Marcia Filer, Index No. 20919/03, are granted; and it is further

ORDERED, ADJUDGED and DECLARED that defendant State Farm is required to defend and, if necessary, indemnify, defendant Filer in the underlying personal injury action entitled Elsa Medrano and Jorge Medrano v Robert Filer, an infant, by his parents and natural guardians, Robert Filer and Marcia Filer, Index No. 20919/03; and it is further

ORDERED and ADJUDGED that the branch of defendant Filer's cross motion for summary judgment on his cross claim for attorney's fees is denied.

Dated: April 30, 2007

J.S.C.