

**State Farm Fire Ins. Co. v Parker**

2007 NY Slip Op 31911(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0005325/2006

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 2-27-07  
ADJ. DATE 3-20-07  
Mot. Seq. # 001 - MD

-----X			
STATE FARM FIRE INSURANCE COMPANY,	:	KELLY, RODE & KELLY, LLP	
	:	Attorneys for Plaintiff	
	:	218 Griffing Avenue	
Plaintiff,	:	Riverhead, New York 11901	
	:		
- against -	:	NILS HUNTER BERLIN, P.C.	
	:	Attorney for Defendant Parker	
	:	130 West Main Street	
MICHAEL PARKER, THOMAS BREGARTNER	:	East Islip, New York 11730	
and BARBARA BREGARTNER,	:		
	:	PURCELL & INGRAO, P.C.	
	:	Attorneys for Defendants Bregartner	
Defendants.	:	204 Willis Avenue	
-----X		Mineola, New York 11501	

Upon the following papers numbered 1 to 35 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 19 - 32; Replying Affidavits and supporting papers 33 - 35; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by plaintiff State Farm Insurance Company for an order pursuant to CPLR 3212 declaring that it has no right or obligation to provide a defense or indemnity to defendants Thomas Bregartner and Barbara Bregartner under the terms of their homeowner’s insurance policy is denied.

This is an action by State Farm Fire Insurance Company for a declaratory judgment declaring that it has no right or obligation to provide a defense or indemnity to defendants Thomas Bregartner and Barbara Bregartner in the underlying action entitled, *Michael Parker v Thomas Bregartner and Barbara Bregartner* under Index number 24053-05 seeking damages for a slip and fall accident that occurred on their premises on November 10, 2004. State Farm Insurance Company (“State Farm”) is seeking to disclaim liability on the grounds that the injured party in the underlying action, Michael Parker, was a resident relative of the Bregartner’s home and was therefore excluded from coverage under the language of their homeowner’s insurance policy.

In support of its motion State Farm submits, *inter alia*, copies of the pleadings; excerpts of the Homeowner's Insurance Policy it maintained with the Bregartners; copies of its denial of claim letter dated December 30, 2004 and Michael Parker's W-2 form and driver's license which lists the insured property as his address. State Farm's motion also included a copy of Michael Parker's deposition transcript.

The Bregartners and Michael Parker both oppose State Farm's motion. Both parties contend that State Farm's motion should be denied because there is an issue of fact as to whether Michael Parker was a resident at the Bregartner's home at the time of the incident. Alternatively, the Bregartner's argue that even if Mr. Parker was a resident at the time of the accident, State Farm is required to defend because even where extrinsic facts suggests that a claim may be meritless or outside the insurer's policy coverage, an insurer cannot avoid its commitment to provide a defense since a complaint subject to defeat because of debatable theories must nevertheless be defended by the insured (*Fitzpatrick v America Honda Motor Co.*, 78 NY2d 61, 571 NYS2d 672 [1991]). The Bregartners also submitted copies of the pleadings and their own deposition testimony. In addition to his personal affidavit wherein he denies residing with the Bregartners, Michael Parker submitted the deposition testimony of non party witness, Peter Vail.

Section II 1(h) of State Farm's policy states that coverage L and M do not apply to "...bodily injury to [the insured] or any other insured within the meaning of part (a) or (b) of the definition of insured". The policy further defines insured as "...you and, if residents of your household: (a) your relatives and (b) any other person under the age of 21 who is in the care of a person described above". Although the term residence is used throughout the policy, it is not among those terms defined in the policy.

In order to obtain summary judgment, the movant must establish his cause of action or defense sufficiently, by tender of evidentiary proof in admissible form, to warrant the court to direct judgment in his favor as a matter of law. On the other hand, to defeat a summary judgment motion, the opposing party must show facts sufficient to require a trial of any issue of fact. Thus, on a motion for summary judgment the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Nevertheless, mere conclusions or unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, an insurer will be called upon to provide a defense whenever the underlying complaint suggests a reasonable possibility of coverage (*Cont'l Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 593 NYS2d 966 [1993]). The duty remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless, or not covered (*Fitzpatrick v America Honda Motor Co.*, *supra*). Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has ran its course (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 878 NYS2d 176 [2006]). Nevertheless, where as in this case, the insurer seeks to disclaim coverage on the basis of exclusions, the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast the pleadings solely and entirely within the policy

exclusions, and that the allegations *in toto*, are subject to no other interpretation (*see, Allstate Ins Co., v Mugavero*, 79 NY2d 153, 581 NYS2d 142 [1992]).

Notwithstanding State Farm's contention that Mr. Parker resides at the insured property, it has failed to demonstrate that the pleadings in the underlying action are solely and entirely cast within the policy exclusion, and that the allegations contained therein are subject to no other interpretation (*Automobile Ins. Co. of Hartford v Cook, supra; Merchants Ins. of N.H. v Weaver*, 31 AD3d 945, 819 NYS2d 594 [2006]). Indeed, the basis for State Farm's exclusion of coverage turns upon an unresolved factual dispute and not whether the allegations *in toto*, are excluded or subject to no other interpretation. As such, on its face the claim is within the embrace of the policy and State Farm must defend the Bregartners even though facts outside the four corners of the allegations suggests that their claim may be meritless, or not covered (*see, Automobile Ins. Co. of Hartford v Cook, supra; Merchants Ins. of N.H. v Weaver, supra; Allcity Ins. Co. v Fisch*, 32 AD3d 407, 820 NYS2d 107 [2006]).

Notwithstanding State Farm's allegations, the testimonial evidence submitted by the defendants in opposition to State Farm's motion demonstrates the existence of a genuine issue of fact concerning Mr. Parker's alleged residency at the Bregartner's home (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). For the purpose of home insurance policies, residency requires something more than temporary or physical presence. It requires a certain degree of permanency and intention to remain (*see, Matter of State Farm Mut. Auto Ins. Co. v Jackson*, 31 AD3d 1171, 818 NYS2d 882 [2006]). Furthermore, even where an individual has used a particular address for the purposes of registration to vote, filing of tax returns and for purposes of one's driver's license, those incidents, standing alone do not establish residence at a given address (*see, De Cegile v State Farm Ins. Co.*, 13 Misc3d 1202A, 824 NYS2d 753 [2006]; *American Nat'l Prop. & Cas. Co. v Chulack*, 265 AD2d 550, 697 NYS2d 153 [1999]). Here, although Mr. Parker testified that a number of documents in his name, including his driver's license, his vehicle registration, W-2 form and voter's registration displays the insured premises as his address, he contends that he does not live there permanently, but merely uses it as his mailing address. Barbara Bregartner also testified that despite visiting her up to every six weeks, her father did not reside at her home and merely used it as his mailing address. Similarly, non-party witness Peter Vail testified that Mr. Parker resided on a camping ground located in upstate New York, but that in 2004 according to their ongoing arrangement, Mr. Parker stayed in a trailer home that was parked on the premises of Vail's Long Island home during the months of January through May.

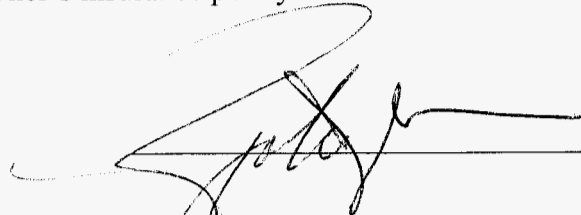
With respect to the question of indemnification, the factual dispute concerning Mr. Parker's residency also precludes summary judgment in this area since any such judgment would be premature before resolution of this issue of fact (*Allcity Ins. Co. v Fisch, supra; Murphy v Nutmeg Ins. Co.*, 5 AD3d 358, 773 NYS2d 413 [2004]; *Cepeda by Rodriguez v Varveris*, 239 AD2d 536, 658 NYS2d 981 [1997]). The Court also finds plaintiff's request for alternate relief in the form of a framed issue hearing pursuant to CPLR 3212(c) to be inappropriate at this time since such trials are only appropriate where the issue in controversy either relates to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211 (*see, Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 631 NYS2d 125 [1995]; *Baseball Office of the Comm'r v Marsh & McLennan*, 295 AD2d 73, 742 NYS2d 40 [2002]; *Rojas v McDonald*, 267 AD2d 130, 701 NYS2d 21 [1999]; *see also, Weinstein, Korn, Miller*, 1-21 Weinstein, Korn & Miller CPLR Manual §21.08

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[Matthew Bender & Co. Inc., 2006]).

Accordingly, plaintiff State Farm's motion for a declaratory judgment declaring that it has no right or obligation to provide a defense or indemnity to defendants Thomas Bregartner and Barbara Bregartner under the terms of their homeowner's insurance policy is denied.

Dated:         JUN 25 2007        

  
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J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION