ORDER AND JUDGMENT

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT and NEW YORK SCHOOLS INSURANCE FOUNDATION as attorney-in-fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL,

Plaintiffs,

-against-

HANOVER INSURANCE COMPANY and ANA MARIE JACKSON,

Defendants.

Motion Sequence # 1
Submitted November 2, 2007
XXX

INDEX NO: 9357/06

The following papers were read on this motion:

Notice of Motion.....1
Memorandum of Law in Support.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

Plaintiffs, HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT") and NEW YORK SCHOOLS INSURANCE FOUNDATION as attorney-in-fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL (hereinafter referred to as "NYSIR"), move for an order, pursuant to CPLR §3212, granting plaintiffs summary judgment and declaring that 1) the DISTRICT is entitled to a complete defense and indemnification in an underlying action commenced by defendant, ANA MARIE

JACKSON, from defendant, HANOVER INSURANCE COMPANY (hereinafter referred to as "HANOVER"), 2) that NYSIR is entitled to be fully reimbursed by HANOVER for all defense costs incurred to date and in connection with the defense and potential indemnification of the DISTRICT in the JACKSON action and 3) that HANOVER's counter-claim be dismissed in its entirety. HANOVER opposes the motion, which is determined as follows:

Defendant, ANA MARIE JACKSON, commenced an action against the DISTRICT and the Long Island Masterworks for an injury sustained after a Long Island Masterworks concert held at the premises of the DISTRICT. Long Island Masterworks, using the premises with the permission of the DISTRICT, was required to provide liability coverage to the DISTRICT as an additional insured under its own general liability insurance for any injury arising from its use of the premises. This action arises out of a dispute between carriers concerning insurance coverage in the underlying personal injury action.

Plaintiffs seek summary judgment against HANOVER based upon the DISTRICT's coverage as an additional insured under the Long Island Masterworks policy, and reimbursement to NYSIR, which also insured the DISTRICT and has provided a defense upon HANOVER's refusal to do so.

Plaintiffs have submitted a copy of the HANOVER policy, a copy of the NYSIR policy, several deposition transcripts and correspondence between the two insurers, and have made a *prima facie* showing that they are entitled to be defended and indemnified under the HANOVER policy (see *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A. 1985]). The burden now shifts to defendant "to

produce evidentiary proof in admissible form establishing the existence of material questions of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]).

The only argument raised in opposition to plaintiffs' *prima facie* showing addresses insurance contract clauses governing whether the insurance provided to the DISTRICT as an additional insured on the policy issued to Long Island Masterworks is primary or excess. It is noted that HANOVER does not contend that the DISTRICT is not covered under its policy as an additional insured, and no longer contends that its insurance coverage was not triggered. Instead, HANOVER contends that its coverage is excess to the coverage provided by NYSIR.

The relevant clauses concerning coverage in the HANOVER policy read as follows:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under the Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when (b) below applies . . .
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement
>
> When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has

a duty to defend the insured against that "suit".

Thus, pursuant to the above quoted language, HANOVER's coverage is primary unless the DISTRICT has other primary premises liability coverage for which it has been "*added as an additional insured by attachment of an endorsement*" (emphasis supplied). HANOVER claims that its coverage for the DISTRICT is excess to that of the coverage provided by the NYSIR policy, pursuant to the foregoing clause 4(b)(2). However an examination of the NYSIR policy does not support HANOVER's position, as the DISTRICT is not an "additional insured by attachment of an endorsement" under such policy. On the date of loss, the DISTRICT was the named insured on the Declarations Page of a policy of general liability coverage issued by plaintiff NYSIR, and thus is not an "additional" insured by "attachment of an endorsement". Therefore, it is the judgment of the Court that subdivision (b) of the HANOVER policy is not applicable and HANOVER's coverage is primary.

With respect to whether the NYSIR's coverage is primary or excess, the relevant paragraphs state as follow:

> 4.(b) of the COMMERCIAL GENERAL LIABILITY CONDITIONS (Section IV) is amended as follows:
>
> b. Excess Insurance
>
> This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (4) That is valid and collectible insurance available to you as an additional insured under a policy issued to:
>
> (e) A permittee using property on premises owned by you.

Thus, under the NYSIR policy, the HANOVER policy constitutes valid and collectible insurance available to the DISTRICT as an additional insured under a policy issued to Long Island Masterworks as a permittee using the premises owned by the DISTRICT, and the NYSIR coverage is therefore excess.

As with any contract the "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning * * * and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 2007 Slip Op 9310 [C.A. 2007]). The policy language of the HANOVER and NYSIR policies unambiguously indicate that the NYSIR coverage for the DISTRICT as its insured was excess to that of HANOVER, and that the HANOVER coverage for the DISTRICT as an additional insured was primary. Thus it is HANOVER's obligation to defend and indemnify the DISTRICT as its insured (*see, General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 N.Y.3d 451, 796 NYS2d 2, 828 NE2d 959 [C.A. 2005]), and to reimburse NYSIR for all defense costs incurred to date and in connection with the defense and potential indemnification of the DISTRICT in the JACKSON action.

The court rejects HANOVER's contention by counterclaim that it is entitled to indemnification from the DISTRICT based upon the DISTRICT's negligence in the underlying JACKSON action. HANOVER's contention violates the anti-subrogation rule of *Pennsylvania General Ins. Co. v Austin Powder Co.* (68 NY2d 465, 510 NYS2d 67, 502 NE2d 902 [C.A. 1986]), which holds that an insurer has no right of subrogation against one of its own insureds for a claim arising out of the very risk for which the insured was covered (*supra*). "To allow the insurer's subrogation right to extend beyond third parties and to

reach its own insured would permit an insurer, in effect, 'to pass the incidence of the loss * * * from itself to its own insured and thus avoid the coverage which its insured purchased'" (*Pennsylvania General Ins. Co. v Austin Powder Co.*, *supra*). It matters not that the insurance was purchased for the insured as an additional insured by another (*Pennsylvania General Ins. Co. v Austin Powder Co.*, *supra*). Based on the foregoing it is hereby

ORDERED, that plaintiffs are granted summary judgment and it is declared that the DISTRICT is entitled to a complete defense and indemnification from defendant, HANOVER INSURANCE COMPANY , in the underlying action commenced by defendant, ANA MARIE JACKSON, and that NYSIR is entitled to be fully reimbursed by HANOVER for all defense costs incurred to date and in connection with the defense and potential indemnification of the DISTRICT in the JACKSON action; and it is further

ORDERED, that HANOVER's counter-claim is dismissed in its entirety; and it is further

ORDERED, that, as no claim is made against defendant, ANA MARIE JACKSON, the complaint is dismissed as against her as well.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 24, 2008

WILLIAM R. [illegible] J.S.C.

ENTERED

JAN 31 2008

NASSAU COUNTY

COUNTY CLERK'S OFFICE

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