

Novelty Crystal Corp. v Twin City Fire Ins. Co.

2008 NY Slip Op 30392(U)

February 6, 2008

Supreme Court, Queens County

Docket Number: 0012114/2005

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

NOVELTY CRYSTAL CORPORATION, X
et al.

INDEX NO. 12114/2005

MOTION SEQ. NO. 3

- against -

TWIN CITY FIRE INSURANCE COMPANY,
et al.
_____ X

BY: ELLIOT, J.

DATED: FEBRUARY 6, 2008

In this action for declaratory judgment, defendant Twin City Fire Insurance Company (Twin City) seeks an order granting summary judgment dismissing the complaint and all cross claims and declaring that Twin City has no duty to defend or indemnify the plaintiffs in the underlying action entitled Soonaa Lee v Eun Sook Ahn Individually, and d/b/a Pacific Buffet House, Novelty Crystal Corp. and Joseph Michaeli, (Index Number 13755/04). Plaintiffs Novelty Crystal Corporation (Novelty Crystal) and Joseph Michaeli cross-move for an order granting summary judgment on their first cause of action on the issue of liability, declaring that Twin City had an obligation to defend plaintiffs in the underlying action, and setting the matter down for a trial as to damages.

On May 27, 2005, plaintiffs commenced this action to determine the rights and obligations of the parties under three separate insurance policies in connection with the underlying action commenced by Soonaa Lee. These policies were issued by

Twin City, Mt. Hawley Fire Insurance Company and Burlington Insurance Company, and each policy covers three distinct policy periods. The policy issued to Novelty Crystal by Twin City was in effect for the period of November 6, 2002 to November 6, 2003. Plaintiffs, in their complaint, seek a defense and indemnification from Twin City in connection with incidents that occurred in August 2003, as alleged in Ms. Lee's second and third causes of action.

The underlying action was preceded by a landlord-tenant proceeding which resulted in the execution of a warrant of eviction on December 15, 2003, whereby Novelty Crystal recovered possession of commercial premises that it had leased to entities allegedly owned and operated by Soona Lee and her predecessor Eun Sook Ahn. On June 14, 2004, Soona Lee commenced an action against Novelty Crystal and Michaeli in which she alleged five causes of action: (1) for breach of contract against Ahn; (2) for tortious interference with a contract against Novelty Crystal; (3) for emotional damages against Novelty Crystal and Michaeli arising out of Novelty Crystal's alleged breach of an agreement with Lee regarding the payment of sewer and water charges; (4) for civil assault against Michaeli and Novelty Crystal; and (5) for false arrest against Michaeli and Novelty Crystal. Novelty Crystal and Michaeli notified Twin City of the Lee action on July 8, 2004, at which time they demanded that the insurer provide them with a

defense and indemnification in connection with that action. In a letter dated July 13, 2004, Twin City's claim administrator informed Mr. Michaeli and Novelty Crystal that it required all of the legal documents pertaining to this claim in order to evaluate whether coverage was applicable, it could not make a determination as to coverage and advised the insureds to retain counsel to represent them in the Lee action. In a letter dated July 20, 2004, Twin City's claim administrator requested all legal documents pertaining to Ms. Lee's claim in order to determine if there was coverage for Novelty Crystal. In a letter dated July 30, 2004, Twin City's claim administrator stated that, based upon the information it had received regarding the lawsuit by Soona Lee against Novelty Crystal, the insurer was reserving its rights for coverage, again requested all legal documents related to Ms. Lee's claims in order to evaluate if coverage was applicable, stated that it could make no determination of coverage at that time, and recommended that Novelty Crystal and Mr. Michaeli retain counsel to protect their interests in the Lee lawsuit. In a letter dated September 10, 2004, the claims administrator acknowledged receipt of a letter from Novelty Crystal's counsel and again requested all documents pertaining to this claim so that the applicability of coverage could be reviewed.

Twin City's claim administrator, in a letter dated May 25, 2005, declined to defend Novelty Crystal in the Lee action,

subject to a reservation of rights and set forth its analysis of coverage under the subject insurance policy. The insurer set forth the policy's provisions for coverage for bodily injury, property damages, personal and advertising injury; the exclusions for expected or intended bodily injury or property damage, and for personal injury and advertising injury; and the policy's definitions for bodily injury, occurrence, offense, personal and advertising injury and property damages. The insurer stated that the insurance agreement:

"...provides coverage for damages that we are 'legally obligated to pay.' The allegations in the Complaint made specifically against Novelty Crystal Corporation are sounded in Contract. The Complaint does not allege any bodily injury, property damage or personal injury caused by an accident or offense.

With respect to Joseph Michaeli, an occurrence is defined in the policy to mean an 'accident'. It is apparent from the allegations that his acts were 'willful and deliberate' and that this type of conduct is not an 'occurrence'. As such, the Hartford would have neither a duty to defend or indemnify for acts which are willful and deliberate as those allegations would not be an 'accident' as defined by the policy.

The allegations of arrest, detainment and false imprisonment are cited to have occurred on February 23, 2004 which is outside of the policy period.

We would not participate in the defense of Eun Sook Ahn as she does not qualify as an Insured under the policy.

We are unable to provide a defense and/or indemnification for this matter, based upon

the grounds outlined above, or upon any of the terms, exclusions or conditions contained in this policy, whether mentioned in this letter or not, and whether based upon newly discovered evidence or not. This letter should not be construed as a waiver of any of our rights."

The Lee action was dismissed as against Novelty Crystal and Joseph Michaeli pursuant to an order dated May 11, 2006 and entered on May 18, 2006. The action as against defendant Ahn continued. Therefore, the only issue here is whether Twin City has a duty to reimburse the plaintiffs for their attorney's fees and costs incurred in defending the Lee action up until the date of dismissal as against the plaintiffs herein.

The Court of Appeals in Automobile Ins. Co. of Hartford v Cook, (7 NY3d 131, 137 [2006]) restated the principles governing an insurer's duty to defend its insured as follows:

"It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage' (Continental Cas. Co v Rapid-American Corp., 80 NY2d 640, 648 [1993]). 'If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be' (Ruder & Finn Inc. v Seaboard Sur Co., 52 NY2d 663, 670 [1981]).

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 Am. Honda Motor Co., Inc., 78 NY2d 61, 63 [1991]). For this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes 'litigation insurance' in addition to liability coverage (see Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 310 [1984], quoting International Paper Co. v Continental Cas. Co., 35 NY2d 322, 326 [1974]). Thus an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course."

Furthermore, "[i]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action" (Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d 169 [1997]). Indeed, "the duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer ... nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions." (Seaboard Surety Co. v Gillette Co., 64 NY2d 304, 310 [1984] [citations omitted]). When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage (see International Paper Co. v Continental Cas. Co., 35 NY2d 322, 325 [1974]; Technicon, 74 NY2d at 73-74). The merits of the complaint are irrelevant and, "an insured's right to be accorded legal representation is a contractual right and

consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured" (International Paper, 35 NY2d at 325; Town of Massena v Healthcare Underwriters Mut. Ins. Co., 98 NY2d 435, 444 [2002]). However, it is well settled that "an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (Allstate Ins. Co. v Zuk, 78 NY2d 41, 45 [1991]).

As stated in the letter of disclaimer, Twin City's insurance policy provides, in pertinent part as follows:

"SECTION I - COVERAGES

Bodily Injury, Property Damage, Personal and Advertising Injury.

1. Insuring Agreement.

a. We will pay on behalf of the insured those sums that the insured shall become legally obligated to pay as damages because of 'bodily injury', 'property damage' or 'personal or advertising injury' to which this policy applies. We will have the right and duty to defend the insured against any 'claim' or 'suit' seeking damages even if the allegations of the 'suit' are groundless, false, or fraudulent. However, we will have no duty to defend the insured against any 'suit' seeking damage for any injury or damage to which this policy does not apply.

b. This policy applies to 'bodily injury', 'property damage' or 'personal' or 'advertising injury' only if:

(1) (a) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and

(b) The 'bodily injury' or 'property damage' occurs during the 'policy period';

(2) (a) the 'personal and advertising injury' is caused by an 'offense' committed in the 'coverage territory'; and

(b) The 'offense' is committed during the 'policy period.'

2. Exclusions.

This policy does not apply to:

a. Expected or Intended Injury 'Bodily injury' or 'property damage' expected or intended from the standpoint of Insured."

Also as stated in the disclaimer letter, Section V of the policy contains the following definitions:

"6. 'Bodily injury' means bodily injury, sickness or disease sustained by a person, including mental anguish or death resulting from any of these at any time.

18. 'Occurrence' means, with respect to 'bodily injury' or 'property damage' an accident, including continuous or repeated exposure to substantially the same harmful conditions.

19. 'Offense' means, an offense described in the definition of 'personal and advertising injury'.

20. 'Personal and advertising injury' means injury other than 'bodily injury' arising out of your business and arising out of one or more of the following 'offenses':

a. False arrest, detention or imprisonment;

- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of it's owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or disparages a person's or organization's goods, products or services;
- e. Oral or written publication of material that violates a person's right of privacy.

24. 'Property damage' means

- a. Physical injury to tangible property, including all resulting loss of use of that property.
- b. Loss of use of tangible property that is not physically injured"

Here, in the underlying complaint, Lee's first cause of action only asserted a claim against Ahn and plaintiffs do not claim that Twin City had any duty to provide a defense to Ahn. The fourth and fifth causes of action against Novelty Crystal and Michaeli are for assault and false arrest and Ms. Lee alleged that these events occurred on December 8, 2003, which was after the Twin City policy expired. These claims are excluded from coverage as the Twin City policy specifically provides that coverage is available for "bodily injury" or "personal injury" only where the "occurrence" or "offense" is committed during the policy period. Although Twin City disclaimed coverage as to all of these causes of action, it was not required to do so, as such coverage never

existed (Handelsman v Sea Ins. Co., 85 NY2d 96 [1994]; Zappone v Home Ins. Co., 55 NY2d 131 [1982]; Albert J. Schiff Assocs. v Flack, 51 NY2d 692 [1982]; Nassau Ins. Co. v Manzione, 112 AD2d 408 [1985]; Van Buren v Employers Ins., 98 AD2d 774 [1983]).

Therefore, the only question to be determined here is whether the allegations contained in the second and third causes of action of the underlying complaint fall within the terms of the policy. Although the Lee complaint is lacking in clarity, the second cause of action alleges that Novelty Crystal tortiously interfered with her contract with Ahn resulting in a breach of contract. Ms. Lee's third cause of action alleges that Novelty Crystal engaged in a course of conduct to effect a breach of a payment plan she had with the NYC Department of Environmental Conservation for the payment of water charges, as well as breaching an agreement she had with Novelty Crystal concerning the water charges, causing her to sustain emotional harm and injury. To the extent that these causes of action allege claims for breach of contract, damages arising out of the breach of a contract are not covered losses under a commercial general liability policy such as the one at issue here (see, Perras Excavating Inc. v Transp. Ins. Co., 291 AD2d 643, 644 [2002]; Shared-Interest Mgt. v Travelers Prop. Cas. Corp., 265 AD2d 622, 623 [1999]). In view of the fact that the policy provided no coverage for breach of contract,

defendant's alleged failure to previously disclaim coverage on that ground did not effect a waiver (see, Schiff Assoc. v Flack, supra; Perras Excavating Inc. v Transp. Ins. Co., supra; Hartford Acc. & Indem. Co. v Roerig, 93 AD2d 933, 934 [1983]; Albert J. Schiff Associates, Inc. v Flack, supra).

Ms. Lee, in her second cause of action alleged that Novelty Crystal tortiously interfered with and procured the breach of the agreement between Lee and Ahn for the purchase of Ahn's business resulting in economic damages. Such economic damages do not fall within the policy's definition of "bodily injury", "property damage" or "personal or advertising injury," and plaintiffs do not assert that this claim arguably falls within the scope of the subject insurance policy.

The court further notes that tortious interference with contract is an intentional tort (see generally Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 [1996]), and, as a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance (see Town of Massena v Healthcare Underwriters Mut. Ins. Co., supra at 445; Public Service Mut. Ins. Co. v Goldfarb, 53 NY2d 392, 399-400 [1981]; Messersmith v American Fid. Co., 232 NY 161, 163-165 [1921]).

To the extent that Ms. Lee's third cause of action alleged a claim of intentional infliction of emotional harm by Novelty Crystal, this intentional tort is based upon an alleged

breach of contract and seeks damages for emotional harm arising out of Novelty Crystal's payment of outstanding water and sewer charges and its summary proceeding to recover possession of the real property. As this claim is not based upon the alleged confrontation which formed the basis of her claims for assault and false imprisonment, plaintiffs' reliance upon Jubin v St. Paul Fire and Marine Ins. Co., (236 AD2d 712 [1997]), is misplaced. Furthermore, although the policy's definition of "bodily injury" includes mental anguish and therefore emotional distress, the policy clearly requires that "bodily injury" must arise out of an "occurrence" which is defined as an "accident." Here, Ms. Lee's claimed damages were alleged to be caused by Novelty Crystal's intentional acts of paying the water and sewer charges and instituting a summary proceeding. These intentional acts do not constitute an accident or an occurrence (see generally, Shared-Interest Management Inc. v Travelers Prop. Cas. Corp., 265 AD2d 622, 623 [1999]).

Plaintiffs' claim that Endorsement No. 11 entitled "Imputed Legal Liability Endorsement" affords coverage as regards the underlying complaint, is rejected. This endorsement is clearly intended to provide coverage for legal liability *imputed* to an insured for the intentional torts of another and not for the breach of a contractual duty. Furthermore, any such *imputed* legal liability would not provide coverage to the insured for its own

intentional acts which would otherwise fall outside of the scope of coverage.

Therefore, comparing the allegations set forth in the second and third causes of action, as reasonably construed, against the subject insurance policy, as written, the claimed tortious conduct is outside the scope of coverage. Under such circumstances, a duty to defend does not exist (Shapiro v Glens Falls Ins. Co., 39 NY2d 204 [1976]; Albert J. Schiff Associates, Inc. v. Flack, supra).

Accordingly, plaintiffs' motion for summary judgment is denied. The cross motion by defendant Twin City Fire Insurance Company for summary judgment dismissing the complaint and any cross-claims as against it is granted. It is the declaration of the court that defendant Twin City had no duty to defend the plaintiffs in the underlying action and thus has no duty to reimburse the plaintiffs for legal fees and costs incurred in that action.

Settle order.

J.S.C.