

WSTC Corp. v National Specialty Ins. Co.

2008 NY Slip Op 31915(U)

June 19, 2008

Supreme Court, Nassau County

Docket Number: 1368-07/

Judge: Joseph P. Spinola

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

WSTC CORP., d/b/a VIBE,
Plaintiff

Trial/IAS Part 19
Index No. 07-1368
Sequence No. 01, 02
Submit Date 4/14/08

against

NATIONAL SPECIALTY INSURANCE
COMPANY and NICHOLAS MELLO,
Defendants

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

PRESENT: HON. JOSEPH P. SPINOLA

This motion by the defendant National Specialty Insurance Company (“NSIC”) for an order pursuant to CPLR 3212 granting it summary judgment dismissing the plaintiff’s complaint is denied.

This cross-motion by the plaintiff WTSC Corp. d/b/a VIBE (“VIBE”) for an order pursuant to CPLR 3212 granting it partial summary judgment declaring that the defendant NSIC has an obligation to defend it in Nicholas Mello v Michael Green, Drego F. Cuadros and WTSC Corp. d/b/a VIBES and VIBES (Index No. 008435/06 Supreme Court Nassau County), is granted as provided herein.

In this action, the plaintiff VIBE seeks to compel the defendant NSIC to defend and indemnify it in Nicholas Mello v Michael Green, Drego F. Cuadros and WTSC Corp. d/b/a VIBES and VIBES (“the Mello action”). In that action, plaintiff Mello seeks to recover damages for personal injuries he sustained at VIBE, a bar in Rockville Center. Shortly after being served with the Summons and Complaint in the Mello action, VIBE forwarded a copy of it to NSIC. By letter dated September 12, 2006, RCA, NSIC’s agent, denied VIBE insurance coverage alleging that its Commercial General Liability policy specifically excluded coverage “for actions and proceedings to recover damages for

bodily injuries arising out of any assault, battery, fight, altercation, misconduct or similar incident or act of violence.” VIBE commenced this declaratory judgment action to procure NSIC’s defense and indemnification in the Mello v Green action.

NSIC seeks summary judgment dismissing the complaint. It maintains that the Assault and Battery Exclusion endorsement to VIBE’s policy bars coverage of VIBE in the Mello action. VIBE has cross-moved for various relief including, *inter alia*, a declaration that NSIC must defend it in the Mello action. NSIC’s application is denied and VIBE’s is granted as provided herein.

Under the policy, NSIC is obligated to pay “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which the insurance applies.” The Assault and Battery Exclusion endorsement provides that “this insurance does not apply to ‘bodily injury’ or ‘property damage’ arising out of any assault, battery, fight, altercation, misconduct or similar incident or act of violence.” The endorsement further provides that the Assault and Battery Exclusion “applies whether the violence was:

(a) caused by; (b) at the instigation of; or (c) at the direction of you, your ‘employee’, your customers, patrons, guests or any other person or cause whatsoever. This exclusion also applies whether the insured may be liable as an employer or in any other capacity.” The policy further provides:

“No coverage is provided under this policy if the underlying operative facts constitute an assault and/or battery irrespective of whether the claim alleges negligent hiring, training, supervision and/or retention against the insured, or for any other negligent actions of the insured.”

While the policy provides that it does not apply to “ ‘bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured,” that exclusion does not apply to “ ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.” In addition, the mandatory endorsement entitled New York Changes-Liquor Liability obligates the NSIC to pay claims “if liability for such injury is imposed on the insured by reason of selling, serving or furnishing of any alcoholic beverages.”

“It is well settled that an insurance company’s duty to defend is broader than its duty to indemnify.” Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 (2006). In fact, “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.’ ” Automobile Ins. Co. of Hartford v Cook, *supra*, at p. 137, quoting Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640, 648 (1993). That is, “the existence of such duty is triggered when the allegations of the complaint fall within the scope of the risks undertaken by the insurer.” Merrimack Mutual Fire Ins. Co. v Carpenter, 224 AD2d 894, 895 (3rd Dept. 1996), *lv dismiss*, 88 NY2d 1016 (1996). “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) citing International Paper Co. v Continental Cas. Co., 35 NY2d 322, 325 (1974); Lionel Freedman, Inc. v Glens Falls Ins. Co., 27 NY2d 364, 368 (1971); Goldberg v Lumber Mut. Cas. Ins. Co. of N.Y., 297 N.Y. 148, 154 (1948). “Thus, the issue of whether the insurer has a duty to defend can be determined by comparing the allegations made in the complaint to the terms of the insurance policy” (Merrimack Mutual Fire Ins. Co. v Carpenter, *supra*, at p. 895, citing A. Meyers & Sons Corp. v Zurich American Ins. Group, 74 NY2d 298, 302; Zurich-Am. Ins. Companies v Atlantic Mut. Ins. Companies, 139 AD2d 379, 384, *aff’d*, 74 NY2d 621 (1989).

“When an insurer seeks to disclaim coverage on the further basis of an exclusion . . . the insurer will be required to ‘provide a defense unless it can “demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and further, that the allegations, *in toto*, are subject to no other interpretation.” ’ ” Automobile Ins. Co. of Hartford v Cook, *supra*, at p. 137, quoting Allstate Ins. Co. v Mugavero, 79 NY2d 153, 159 (1992). “[E]xclusions are subject to strict construction and must be read narrowly.” Automobile Ins. Co. of Hartford v Cook, *supra*, at p. 137, citing Seaboard Sur. Co. v Gillette, Co., 64 NY2d 304, 411 (1984). “An exclusion for assault and/or battery applies if no cause of action would exist ‘but for’ the assault and/or battery.” Anastasis v American Safety Indem. Co., 12 AD3d 628 (2nd Dept. 2004), citing Mount Vernon Fire Ins. Co. v Creative Hous., 88 NY2d 347 (1996).

The Complaint in the Mello action and the policy issued to VIBE are determinative here.

As and for its first cause of action, VIBE alleges that the plaintiff in the Mello action alleges that he was injured by VIBE’s employees while on VIBE’s premises and therefore NSIC is required to defend and indemnify it in that action. As and for its second cause of action, VIBE alleges that no one ever signed the Assault and Battery Exclusion endorsement on its behalf, which it characterizes as an **optional**—not mandatory—and so it does not apply here and NSIC is accordingly required to defend and indemnify it in the Mello action. As and for its third cause of action, VIBE alleges that even if the Assault and Battery Exclusion endorsement applies, since by and for his first cause of action, plaintiff Mello alleges that his injuries were the result of VIBE’s negligence, that cause of action does not plead facts constituting an assault and/or battery and NSIC is accordingly required to defend and indemnify it. As and for its fourth cause of action, VIBE alleges that NSIC breached their contract by denying them insurance coverage in the form of a defense and indemnification in the Mello action. VIBE seeks to recover damages in the amount expended by it in defending itself in that action, as well as the attorneys’ fees and expenses incurred in this action.

In his Complaint, as and for his first cause of action, Mello alleges that when he was a patron at VIBE in November, 2005, it was VIBE’s duty to maintain order at the premises and that VIBE so negligently performed that duty so as to create a danger to

him, resulting in serious injury. More specifically, he alleges that he "was handled in a negligent, reckless and careless manner" that VIBE created and/or controlled and that he was "improperly mishandled" by VIBE's employees or bouncers. As and for his second cause of action, Mello alleges that while a patron at VIBE on November 19, 2005, as a result of VIBE's carelessness and negligence, he "was suddenly assaulted by two unknown male bouncers employed by VIBE." He further alleges that he was negligently served several alcoholic beverages at VIBE while in an "obvious," "apparent" or "actual" state of intoxication and that after placing him in a "further state of intoxication," VIBE failed to protect him from the two bouncers who assaulted him. He further alleges that VIBE "negligently and recklessly failed to supervise, manage and operate its premises in a safe and prudent manner" and "failed to afford [him] protection from the unlawful acts of other patrons or to stop or otherwise control the offensive and illegal conduct of other patrons and/or their own agents and/or employees including [their] own bartender and two unknown male bouncers."

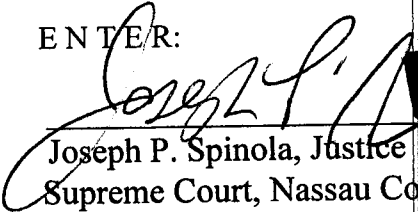
While VIBE denies ever executing or agreeing to the Assault and Battery Exclusion endorsement relied upon by NSIC in denying VIBE coverage in the Mello action and questions whether the endorsements were mandatory or optional, assuming, *arguendo*, that the Assault and Battery Exclusion endorsement is binding and that it applies here, in light of plaintiff Mello's first cause of action in which he advances a claim sounding in straightforward negligence which is covered by the policy, NSIC must defend VIBE in the Mello action. See Automobile Ins. Co. of Hartford v Cook, *supra*; State Farm Mut. Auto Ins. Co. v Van Dyke, 247 AD2d 848 (4th Dept. 1998); Jubin v St. Paul Fire and Marine Ins. Co., 236 AD2d 712 (3rd Dept. 1997); Merrimack Mut. Fire Ins. Co. v Carpenter, *supra*; Essex Ins. Co. v T-Birds Nightclub & Restaurant, Inc., 229 AD2d 919 (4th Dept. 1996); Mumford v 854 Gerard Ave. Corp., 12 Misc3d 1168(A) (Supreme Court NY Co. 2005).

Any further determinations at this juncture as to whether the Assault and Battery Exclusion endorsement applies here would be premature. See, Love Picin, Inc. v Certain Interested Underwriters at Lloyd's, London, 35 AD3d 282 (1st Dept. 2006) citing Servidone Constr. Corp. v Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985).

In conclusion, the defendant NSIC's motion is denied and the plaintiff VIBES' motion is granted to the extent that NSIC is directed to defend VIBE's in the Mello action.

This constitutes the decision and order of the Court.

ENTER:


Joseph P. Spinola, Justice
Supreme Court, Nassau County

ENTERED

JUN 30 2008

Dated: June 19, 2008
Mineola, NY

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**