

Metalios v Tower Ins. Co. of N.Y.

2009 NY Slip Op 31309(U)

June 9, 2009

Supreme Court, New York County

Docket Number: 101735/07

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **LOUIS B. YORK**
J.S.C.

PART 2

Index Number : 101735/2007
METALIOS, MELINA
VS.
TOWER INSURANCE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/9/09

[Signature]
J.S.C.

LOUIS B. YORK
~~NON-FINAL DISPOSITION~~

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
MELINA METALIOS and PLUCK NINTH AVE
INC. T/A PLUCK U,

Plaintiffs,

Index No.: 101735/07

-against-

DECISION

TOWER INSURANCE COMPANY of NEW YORK and
THE AUTOMOBILE INSURANCE COMPANY of
HARTFORD, CONNECTICUT,

Defendants

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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

YORK, J.:

BACKGROUND

Defendant, The Automobile Insurance Company of Hartford, Connecticut (AIC), moves, pursuant to CPLR 3212, to dismiss the complaint and any cross motions against it, and to declare that it has no duty to defend or indemnify plaintiffs in the underlying personal injury lawsuit. Defendant, Tower Insurance Company of New York (Tower) cross-moves, pursuant to CPLR 3212, for summary judgment declaring that it has no duty to defend or indemnify the plaintiffs in the underlying personal injury action.

Plaintiff, Melina Metalios (Metalios), has a condominium homeowner's policy with AIC in which she is the named insured, and defendant Pluck Ninth Ave Inc. T/A Pluck U (Pluck) is not named as an insured or as an additional insured under that

policy. Pluck has a general commercial liability policy with Tower as the named insured. Metalios is an owner of Pluck, a restaurant.

The underlying lawsuit, entitled *Haydee Albino, as Administrator of the Estate of Michael Ruocco, Deceased, and Jovannie Solis, an infant, by his natural guardian, Brenda Solis, and Brenda Solis, Individually v Pluck Ninth Avenue, Inc. t/a Pluck U and Melina Metalios*, pending in the Supreme Court, Kings County, under Index No.: 5829/06, was instituted after Michael Ruocco (Ruocco) was attacked and killed, and Jovannie Solis (Solis) was attacked and injured, outside of Pluck, after having left the restaurant. The complaint alleges that Pluck and its owner Metalios were negligent when one of Pluck's employees assaulted Ruocco and Solis after an alleged altercation within the restaurant.

Pursuant to the AIC policy, Section II, there is an exclusion of coverage for any bodily injury or property damage "arising out of business pursuits of any insured or the rental or holding for rental any part of any premises by any insured." It is noted that Pluck's location is not the same as the condominium for which the policy was issued.

AIC timely disclaimed coverage with respect to Metalios based on the above-referenced business pursuits exclusion, and with respect to Pluck based on the fact that Pluck is neither an

insured or named insured under its policy.

MetaliOS asserts that the incident at Pluck occurred when she was hosting a private party after the restaurant closed, and therefore does not come within the business pursuit exclusion. MetaliOS affirmed that the guests included all employees of Pluck, none of whom were compensated for being at the party, and some personal friends of hers and the employees, and stated that the reason for the party was to boost employee morale. MetaliOS EBT p. 52.

The Tower general commercial liability policy, which also includes a liquor liability coverage part, both of which provide exclusions for claims arising out of

- "a. Assault and/or Battery committed by any insured, any employee of any insured, any patron or customer of the insured, or any other person; or
- b. The failure to suppress or prevent any Assault and/or Battery or any act or omission in connection with any Assault and/or battery; or
- c. The negligent hiring, supervision or training of any employee or agent of the insured with respect to the events described in a. and b. above."

Tower timely disclaimed coverage based on the above-referenced assault and battery exclusion.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and

citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion’s opponent to “present facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

AIC’s motion is granted.

There is no argument that Pluck, being neither an insured nor an additional insured, is covered by the policy, and Pluck does not argue this point.

The basis of AIC’s motion with respect to disclaiming the obligation to indemnify and/or defend Metalios is that the incident occurred as part of her business pursuits, and is therefore excluded.

To be considered a business, two elements must exist: (1) the activity must be continuous; and (2) the activity must be motivated by profit. *Showler v American Manufacturers Mutual Ins. Co.*, 261 AD2d 896 (4th Dept 1999). Neither side disputes that Metalios’ activity with respect to Pluck was continuous; the contention lies in how each side interprets the party at Pluck.

In her examination before trial, Metalios admitted that the party was given to bolster employee morale. In the underlying personal injury lawsuit, Metalios is being sued, not for any individual wrongdoing, but under the doctrine of respondeat superior as one of the owners of Pluck who was present when the assault took place. Activities that are incidental to actual business, but performed in conjunction with a business motive, may also be considered as falling within the business pursuits exclusion in this type of insurance policy. See *Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991 (4th Dept 1995); see generally *Outwater v Ballister*, 253 AD2d 902 (3d Dept 1998). The fact that Metalios appears to be giving the party primarily for Pluck employees as part of management's attempts to increase employee morale, coupled with the theory of recovery against Metalios as an employer and restaurant owner in the underlying personal injury action, leads to the conclusion that the assault occurred incident to Metalios' business pursuits. Therefore, AIC is under no duty to indemnify or defend Metalios.

Similarly, Tower's cross motion is also granted with respect to its obligation to defend and indemnify Pluck.

"A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured [and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions."

BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708, 714 (2007).

The complaint in the underlying personal injury action alleges that those plaintiffs were "assaulted and battered" by an employee of Pluck, and further alleges that Pluck "negligently retained" the perpetrator as an employee, which resulted in bodily injury and death. Both allegations fall squarely within the policy's exclusions quoted above.

"[I]f the allegations interposed in the underlying complaint allow for no interpretation which brings them within the policy provisions, then no duty to defend exists. [A]n 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, and an insured may not by use of a 'shotgun' allegation, create a duty to defend beyond that which was anticipated by the parties when they entered into the policy contract [internal quotation marks and citations omitted]."

Atlantic Mutual Ins. Co. v Terk Technologies Corp., 309 AD2d 22, 29 (1st Dept 2003).

Consequently, based on the allegations of the underlying complaint, Tower is under no duty to defend or indemnify Pluck, because the actions complained of fall within the insurance policy's assault and battery exclusion.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and **ADJUDGED** that defendant The Automobile Insurance Company of Hartford, Connecticut's motion for summary judgment

dismissing the complaint and any cross motion is granted with costs and disbursements to said defendant of \$ _____ as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED and **DECLARED** that The Automobile Insurance Company of Hartford, Connecticut has no duty to defend or indemnify plaintiffs in the underlying personal injury action entitled *Haydee Albino, as Administrator of the Estate of Michael Ruocco, Deceased, and Jovannie Solis, an infant, by his natural guardian, Brenda Solis, and Brenda Solis, Individually v Pluck Ninth Avenue, Inc. t/a Pluck U and Melina Metalios*, pending in the Supreme Court, Kings County, under Index No.: 5829/06; and it is further

ORDERED and **ADJUDGED** that defendant Tower Insurance Company of New York's motion for summary judgment declaring that it has no duty to defend or indemnify plaintiffs in the underlying personal injury action is granted with costs and disbursements to said defendant OF \$ _____ as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED and **DECLARED** that Tower Insurance Company of New York has no duty to defend or indemnify the plaintiffs in the underlying personal injury action entitled *Haydee Albino, as Administrator of the Estate of Michael Ruocco, Deceased, and*

Joevannie Solis, an infant, by his natural guardian, Brenda Solis, and Brenda Solis, Individually v Pluck Ninth Avenue, Inc. t/a Pluck U and Melina Metalios, pending in the Supreme Court, Kings County, under Index No.: 5829/06.

Dated: 6/9/09

ENTER:

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Louis B. York, J.S.C.

LOUIS B. YORK
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