Little Neck Jewish Ctr., Inc. v Utica Mut. Ins. Co.

2009 NY Slip Op 32151(U)

September 15, 2009

Supreme Court, Queens County

Docket Number: 18549/07

Judge: Peter Joseph Kelly

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M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

LITTLE NECK JEWISH CENTER, INC.,

Plaintiff,

- against -

UTICA MUTUAL INSURANCE COMPANY,

Defendant.

BY: KELLY, J

INDEX NO. 18549/07

MOTION DATE JULY 17, 2009

MOT. SEQ. NUMBER 1

In this declaratory judgment action the plaintiff Little Neck Jewish Center, Inc., (LNJC), moves for summary judgment declaring that defendant has an obligation to cover, defend, and indemnify LNJC for an incident at its premises resulting in alleged personal injuries. The defendant Utica Mutual Ins. Co. cross moves for summary judgment dismissing LNJC's complaint, and declaring that defendant has no such obligation.

The moving and cross moving papers establish that defendant issued a policy of insurance to LNJC. The policy obligated LNJC to notify defendant "as soon as practicable of an 'occurrence' or an offense which may result in a claim." During the policy period - on October 8, 2006 - Joseph Pearson (Pearson) was allegedly injured when he fell down a flight of four stairs at LNJC, for which there now exists an underlying personal injury action.

Pearson was present at LNJC for the Bar Mitzvah of his nephew, whose family were congregants of LNJC. Joshua Glick (Glick) the president of LNJC on the date in question, was immediately aware of the alleged accident. However, he did not notify Utica until on or about March 6, 2007, after he had received a letter from Jacoby & Meyers LLP, advising LNJC that the former had been retained by Pearson in connection with the accident that had occurred approximately five (5) months earlier. On March 19, 2007, defendant issued a disclaimer of coverage due to LNJC's failure to notify defendant in a timely fashion.

When a policy of general liability insurance requires that notice of an occurrence be given "as soon as practicable," the failure of the insured to furnish such notice within a reasonable period of time under the circumstances constitutes a failure to satisfy a condition precedent (See, Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]; Avery & Avery, P.C. v American Ins. Co., 51 AD3d 695 [2008]; Donovan v Empire Ins. Group, 49 AD3d 589 [2008]), and thereby vitiates the policy (See, Great Canal Realty Corp., 5 NY3d at 743; Sputnik Rest. Corp. v United Natl. Ins. Co., 62 AD3d 689 [2009]; Seneca Ins. Co. v W.S. Distrib., Inc., 40 AD3d 1068 [2007]). There may be certain circumstances, however – such as a reasonable belief in nonliability – that will excuse any such delay by the insured; the insured has the burden of

demonstrating a reasonable excuse for the delay (See, White v City of New York, 81 NY2d 955, 957 [1993]; Avery & Avery, P.C., 51 AD3d at 697; St. James Mech., Inc. v Royal & Sunalliance, 44 AD3d 1030 [2007]).

On the facts of this case defendant has established a prima facie entitlement to judgment as a matter of law in its cross motion as the record reveals that Utica was not notified of the occurrence of a witnessed trip and fall accident where the injured party was removed by ambulance until approximately five (5) months after the accident (See, generally Evangelos Car Wash, Inc. v Utica First Ins. Co., 45 AD3d 727 [2007]; Matter of Temple Const. Corp. v Sirius Am. Ins. Co., 40 AD3d 1109 [2007] ; 120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co., 40 AD3d 719 [2007]; Felix v Pinewood Bldrs., Inc., 30 AD3d 459 [2006]).

Submitted in support of LNJC's motion requesting coverage from Utica is the deposition testimony of Glick. Glick was present on the date of the accident as he was giving a presentation for the Bar Mitzvah boy. Glick testified that he heard a commotion in the lobby which caused him to walk out into same; that he observed several people gathered around Pearson, who was on the floor near the subject stairs; that it appeared to him that the situation was under control; that he returned to the sanctuary of the synagogue; that he noticed that after a period of time, Pearson was being carried away on a

gurney through the back entrance; that he did not inquire as to Pearson's condition or about the details of the accident; that he was not approached by anyone, including Pearson's family members – who were congregants of the synagogue – as to the state of Pearson's condition or the cause of the accident. He further averred that he "didn't think it was a big deal" due to: (1) Pearson's apparent lack of pain/injury after having viewed him from a distance; (2) the fact that no one accompanied Pearson to the hospital; (3) the fact that the Bar Mitzvah continued, uninterrupted; (4) the fact that Pearson appeared to be "an elderly man who was overweight" and that he fell because of these reasons; and (5) the fact that he believed that the presence of an ambulance was simply a formality. As a result of the above, Glick stated that he did not have any reason to believe that further investigation was necessary.

LNJC also submits the deposition testimony of Alfred Senior (Senior), who was employed as a custodian at the time of the accident. Senior testified that he witnessed Pearson's fall and concluded that Pearson had fallen because he missed a step and was not holding on to the handrails. After the stairs had been cleared of the crowd, Senior inspected the accident location and said he did not observe any dangerous condition or defect. However, pursuant to Glick's testimony, Glick conceded that he did not know that Senior had witnessed the fall until after proceedings against LNJC were commenced by Pearson.

Based on the above, LNJC has failed to demonstrate that it had a reasonable belief that no claim would be asserted against it (*See*, Avery & Avery, P.C., 51 AD3d at 697; J.C. Contr. of Woodside Corp. v Insurance Corp. of New York, 48 AD3d 422 [2008]; Reznick v Zurich N. Am. Specialties, 45 AD3d 750 [2007]; Evangelos Car Wash, Inc., 45 AD3d at 727). Glick was president of the synagogue, was present in the building on the subject date, and knew of Pearson's accident; as such, a prudent insured "should have realized that there was a reasonable possibility of the subject policy' s involvement" (C.C.R. Realty of Dutchess v New York Cent. Mut. Fire Ins. Co., 1 AD3d 304 [2003]; *See*, 120 Whitehall Realty Assoc., LLC, 40 AD3d at 721; Fischer v Centurion Ins. Co., 9 AD3d 381 [2004]). Whether or not LNJC believed that Pearson's underlying claim would ultimately be found to have been without merit is irrelevant to the issue at hand, as this belief speaks only to the strength of Pearson's claim and not to LNJC's duty to report the accident to defendant within a reasonable time (See, Avery & Avery, P.C., 51 AD3d at 698; Natural Stone Indus., Inc. v Utica Natl. Assur. Co., 38 AD3d 862 [2007]; Modern Cont. Constr. Co., Inc. v Giarola, 27 AD3d 431 [2006]). LNJC's "good faith belief" is belied by its blatant failure to even minimally inquire into the circumstances of the accident or occurrence despite Glick having seen Pearson lying on the floor after his fall and being taken away by an ambulance (See, Great Canal Realty Corp., 5 NY3d at 744; *Donovan*, 49 AD3d at 591; Felix, 30 AD3d

at 461). The court finds that, under the circumstances of this case, notice was not given to defendants "as soon as practicable" as was required under the policy.

Accordingly, LNJC's motion for summary judgment is denied; defendant's cross motion for summary judgment is granted. The court declares that defendant does not have a duty to defend and indemnify LNJC in the underlying action entitled Pearson v Little Neck Jewish Center, Inc. (Index No. 14951/07).

Settle judgment.

Dated: SEPTEMBER 15, 2009

Peter J. Kelly, J.S.C.