

**Picone v Great N. Ins. Co.**

2009 NY Slip Op 32185(U)

September 23, 2009

Supreme Court, Suffolk County

Docket Number: 07-28783

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 1-13-09  
ADJ. DATE 2-10-09  
Mot. Seq. # 007 - MG

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant General Star, dated December 16, 2008, and supporting papers (including Memorandum of Law dated \_\_\_\_\_); (2) Affirmation in Opposition by the plaintiffs, dated January 20, 2009, and supporting papers; (3) Reply Affirmation by the defendant General Star, dated February 9, 2009, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendant General Star Indemnity Company for leave to reargue its prior motion for summary judgment dismissing the complaint and all cross claims against it, which was denied by order of this Court dated November 3, 2008, is granted; and it is further

**ORDERED** that, upon reargument, the motion for summary judgment dismissing the complaint and any cross claims against defendant General Star Indemnity Company is granted.

The question before the Court is whether a commercial general liability insurance policy issued to plaintiff Joseph Picone & Son, Inc. (hereinafter P & S) by defendant General Star Indemnity Company provided coverage for the risk of an accident involving a Polaris utility vehicle (also commonly referred to as an ATV), as well as whether coverage extended to Joseph Picone, III and 1637 Leasing, Inc. The subject policy, as amended by a general changes endorsement issued February 5, 2003, covered 12 separate properties allegedly owned by P & S or by other corporations for which it is the sole shareholder, and insured against bodily injury and property damages for the period January 25, 2005 through January 25, 2006. As relevant to the instant controversy, the properties listed on the policy's declarations page include a location referred to as "246 Old Eddy Road & 53 Kelfarns Bridge Road." Hankins, New York owned by a P & S subsidiary, plaintiff Little Joseph Realty, Inc. It is noted that while the property identified as "246 Eddy Road & 53 Kelfarns Bridge" was classified in the declarations page as improved with a one-family dwelling, the evidence in the record shows the property referred to as 246 Eddy Road actually is comprised of six or seven acres of vacant, undeveloped land. The policy also covered property referred to simply as "Ridge Road (Tax #32-1-12.1), Hankins, N.Y."

Briefly stated, in April 2005, plaintiff Joseph Picone, Jr., his teenage son, Joseph Picone III, and his son's teenage friend, Daniel Flynn, traveled to Hankins in Sullivan County to spend the weekend at the Ridge Road property. The property, a wooded, six-acre lot, has a mobile home situated on cinder blocks on it, in which Mr. Piccone and his family reside while visiting, as well as a garage measuring 24 feet by 24 feet. On April 5, 2005, Joseph Picone III and Daniel Flynn took a Polaris utility vehicle kept at the Ridge Road property and rode over to the 246 Old Eddy Road property. Daniel Flynn allegedly injured his hand as he and Joseph Picone III, using a steel cable and a motorized winch on different Polaris utility vehicle, attempted to free the utility vehicle that they had been riding on after it got stuck in mud at the 246 Eddy Road property. According to deposition testimony by Joseph Piccone, Jr., the Polaris utility vehicle with the motorized winch was owned by 1637 Leasing, Inc., a subsidiary of P & S, as was the vehicle stuck in the mud. After reaching a settlement agreement with Daniel Flynn, plaintiffs commenced this action for, inter alia, a declaration that defendant insurance carriers were obligated to indemnify them for the settlement.

By order dated November 3, 2008, this Court granted motions by Continental Casualty Company, Great Northern Insurance Company, and Foremost Insurance Company for summary judgment dismissing the claims against them. However, this Court denied a motion for the same relief made by General Star Indemnity Corporation (hereinafter General Star), rejecting the argument that the subject policy provided coverage only for liability arising out of a one-family dwelling on the 246 Eddy Road property. Rather, the Court determined that, in view of undisputed evidence showing that the 246 Eddy Road property is vacant land, an issue of fact exists as to whether an event involving an ATV is

covered under the policy.

General Star now moves for leave to reargue its prior summary judgment motion and, upon reargument, for dismissal of all claims against it. General Star asserts that this Court's determination that a triable issue exists as to whether injury arising from the use of an ATV at the 246 Eddy Road property is covered under the policy rendered meaningless the classification set forth in the insurance contract. Further, General Star alleges reargument is appropriate, as the Court failed to make determinations as to its defense that it properly disclaimed coverage on grounds that neither Joseph Picone III nor the owner of the utility vehicle were insured under the subject commercial liability policy. Plaintiffs oppose the motion, arguing that an issue of fact exists as to whether Joseph Picone III is an insured. Further, plaintiffs assert that, even if Joseph Picone III is not an insured, a question exists as to whether Daniel Flynn's injuries are covered under the policy, as the accident occurred on property insured by the policy and involved an ATV owned by a subsidiary of P & S.

The portion of General Star's motion for leave to reargue based on the Court's determination that an issue exists as to whether an event involving an ATV is covered under the policy is denied, as defendant failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching such determination (*see Saccomagno v City of New York*, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; *McGill v Goldman*, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). However, the portion of General Star's motion seeking reargument based on the failure to address its claims that Joseph Picone III and 1637 Leasing, Inc. are not "insureds" under the terms of the subject policy is granted.

As relevant to the instant motion, the Common Policy Declarations page of the commercial general liability policy issued to P & S by General Star states that P & S's form of business is "Organization (Other than Partnership, Joint Venture or Limited Liability Company)." The General Changes Endorsement page states, "[t]he named insured is amended as follows [:] Joseph Picone & Son, Inc. and Location #1 Michael Grillo as Trustee for the Benefit of Joanna Picone, #2 & 5 Broad Properties Inc., #3 & 6 Hollow Properties Inc., #4 Vito & Maria Realty Co. Inc., #7 & 11 Carmen Road Realty Inc., #8 & 10 One Ten Building Service Inc., #9 & 12 Little Joseph Realty Inc." The Commercial General Liability Declarations page states that location #4 is the Ridge Road property, and that location #12 is the 246 Old Eddy Road property. Further, Section II of the policy, entitled "Who is an Insured," states that if designated in the Declarations as an organization, "you are insured. Your executive officers' and directors are insured, but only with respect to their duties as your officers and directors. Your stockholders are also insureds, but only with respect to their liability as stockholders." It states employees, other than executive officers of the organization, also are "an insured" under the policy, "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." In addition, the policy states the term "employee" does not include a "temporary worker," which is defined as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions."

Courts bear the responsibility of determining the rights and obligations of parties to an insurance contract based on the specific language used in the policy (*State of New York v Home Indemn. Co.*, 66

NY2d 669, 671, 495 NYS2d 969 [1985]). As a general rule, policies of insurance are construed liberally in favor of the insured and strictly against the insurer (*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864, 397 NYS2d 777 [1977]; *State Farm Mut. Auto. Ins. Co. v Westlake*, 35 NY2d 587, 591, 364 NYS2d 482 [1974]; see *Matter of New York Cent. Mut. Fire Ins. Co. v Ward*, 38 AD3d 898, 833 NYS2d 182 [2d Dept 2007]), and any ambiguity must be construed in favor of the insured and against the insurer (*White v Continental Cas. Co.*, 9 NY3d 264, 267, 848 NYS2d 603 [2007]; *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986]; *Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014, 1015, 845 NYS2d 90 [2007]). However, where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (*White v Continental Cas. Co.*, *supra*, at 267, 848 NYS2d 603; see *NIACC, LLC v Greenwich Ins. Co.*, 51 AD3d 883, 857 NYS2d 723 [2d Dept 2008]; *Marshall v Tower Ins. Co. of N.Y.*, *supra*; *Hiraldo v Allstate Ins. Co.*, 8 AD3d 230, 778 NYS2d 50 [2d Dept 2004], *affd* 5 NY3d 508, 806 NYS2d 451 [2005]). Courts may not vary the terms of an insurance contract to accomplish their notions “of abstract justice or moral obligation, since ‘equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against’” (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], quoting *Weinberg & Holman v Providence Washington Ins. Co.*, 254 NY 387, 391, 173 NE 556 [1930]; see *Government Empls. Ins. Co. v Kligler*, *supra*).

A party claiming insurance coverage bears the burden of proving entitlement to such coverage, and an insurer bears the burden of proving an exclusion in the policy applies to defeat coverage (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 746 NYS2d 622 [2002]; *Metropolitan Heat & Power Co., Inc. v A.I.G. Claims Servs., Inc.*, 47 AD3d 621, 850 NYS2d 142 [2d Dept 2008]). Insurance coverage “extends only to named entities and/or individuals defined as insured parties under the relevant terms of the policy” (*Catholic Health Serv. of Long Is., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 46 AD3d 590, 592, 847 NYS2d 638 [2d Dept 2007]; see *Sanabria v American Home Assur. Co.*, 68 NY2d 866, 508 NYS2d 416 [1986]). “The four corners of an insurance agreement cover who is covered and the extent of that coverage” (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 825 NYS2d 46 [1st Dept 2006]). A person or entity not specifically named as an insured in an insurance contract may be entitled to coverage for a loss if it is established that such person or entity was an intended third-party beneficiary of the contract (see *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 418 NYS2d 76 [1st Dept 1979]; see generally *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 495 NYS2d 1 [1985]). When determining whether a third party is an insured under a liability insurance policy, a court must ascertain the intentions of the parties by looking to the language in the policy (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, *supra*; *Binasco v Break-Away Demolition Corp.*, 256 AD2d 291, 681 NYS2d 309 [2d Dept 1998]; *I.S.A. In N.J. v Effective Sec. Sys.*, 138 AD2d 681, 526 NYS2d 424 [2d Dept 1988]), as a duty to insure a third party will be imposed only if the parties to the insurance contract intended that such contract insure the third party (see *Bronxville Props., Inc. v Friedlander Group, Inc.*, 307 AD2d 245, 763 NYS2d 834 [2d Dept 2003]; *Stainless, Inc. v Employers Fire Ins. Co.*, *supra*).

Great Star made a prima facie showing of entitlement to judgment as a matter of law with submissions demonstrating that Joseph Picone III and 1637 Leasing, Inc. are not “insureds” entitled to

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coverage under the commercial general liability insurance policy issued to P & S. Under the plain language of the insurance policy, general liability coverage extended only to the named insureds and their employees (*see Catholic Health Serv. of Long Is., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., supra; State of New York v Liberty Mut. Ins. Co.*, 23 AD3d 1084, 803 NYS2d 865 [4th Dept 2005]). The burden of proof, therefore, shifted to plaintiffs to come forward with evidentiary proof sufficient to raise a material issue of fact as to whether coverage extends to Joseph Picone III or 1637 Leasing, Inc. (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Contrary to the conclusory assertions by plaintiffs' counsel, the July 7, 2005 written statement of Joseph Picone, Jr., which was provided in connection with General Star's investigation of plaintiffs' claim, is insufficient to raise a question as to whether Joseph Picone III is an employee of P & S. In addition to being unsworn, the statement merely says that on the morning of the accident, Joseph Picone III and Daniel Flynn "helped do some work around the house including changing some lights and helping repair a broken water pipe," and that the ATVs kept at the Ridge Road premises are used "for business purposes." There is no admissible evidence that Joseph Picone, Jr.'s teenage son was an employee of P & S, Little Joseph Realty or of any of the corporations named as insureds on the General Changes Endorsement, or that the subject accident occurred during the scope of any employment (*cf. Nick's Brick Oven Pizza, Inc. v Excelsior Ins. Co.*, 61 AD3d 655, 877 NYS2d 359 [2d Dept 2009]). Furthermore, 1637 Leasing, Inc., the alleged owner of the ATVs, was not named or referred to in the subject commercial general liability policy as an insured (*see Sanabria v American Home Assur. Co., supra; Catholic Health Serv. of Long Is., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., supra*). "[W]here the insurance contract does not name, describe or otherwise refer to the entity or individual seeking the benefit thereof as an insured, there is no obligation to defend or indemnify" (*State of New York v American Mfs. Mut. Ins. Co.*, 188 AD2d 152, 155, 593 NYS2d 885 [3d Dept 1993]). Accordingly, summary judgment in favor of General Star is granted.

Submit judgment declaring General Star has no duty to indemnify plaintiffs for the settlement paid to Daniel Flynn.

Dated: \_\_\_\_\_

9/23/09

  
 PETER H. MAYER, J.S.C.

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