

K-Sea Transp., Inc. v St. Paul Fire & Mar. Ins. Co.

2009 NY Slip Op 32601(U)

November 2, 2009

Supreme Court, New York County

Docket Number: 603520/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 603520/2007
K-SEA TRANSPORTATION
 vs.
ST. PAUL FIRE
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 10/5/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-7
4-9
10


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 by D St Paul Inc L
is decided in accordance with the annexed Memorandum
decision, order and declaratory judgment.

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: 11/2/09


JANE S. SOLOMON J.S.C.

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 STATE OF NEW YORK
COUNTY OF NEW YORK

K-SEA TRANSPORTATION, INC.,

Index No. 603520/07

Plaintiff,

-against-

DECISION, ORDER and
DECLARATORY JUDGMENT

THE ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, THE ST. PAUL
TRAVELERS COMPANIES, INC.,
COMMERCE AND INDUSTRY INSURANCE
COMPANY and AMERICAN INTERNATIONAL
GROUP, INC.,

Defendants.

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).

JANE S. SOLOMON, J.S.C.

This action arises from an alleged slip and fall accident that occurred at a Staten Island facility owned by plaintiff K-Sea Transportation, Inc. (K-Sea), a maritime shipping company. K-Sea seeks judgment declaring its entitlement to insurance coverage for the claim pressed by the injured person. Coverage was disclaimed by K-Sea's general liability carrier, defendants The St. Paul Fire and Marine Insurance Company and The St. Paul Travelers Companies, Inc. (together referred to as St. Paul), and by K-Sea's workers compensation carrier, Commerce and Industry Insurance Company (Commerce). Defendant American International Group, Inc. (AIG) is a holding company associated with Commerce; it did not issue a policy to K-Sea.

Phillip Oduro worked for K-Sea as a deck hand until July 5, 2006, when his employment was suspended pending a company

investigation into his part in an identity theft ring, and he was told by his superior to leave the premises and not to return unless invited. Oduro's last pay check was delivered on July 20, 2006. Although he was no longer working, Oduro was not discharged at this time. On August 28, 2006, Oduro filed for unemployment benefits. On September 5, 2006, he visited the Staten Island facility to inquire into the status of K-Sea's investigation into his conduct. Oduro alleged that as he left the facility, he fell and sustained personal injuries. K-Sea reported the accident to St. Paul the next day.

Oduro filed a claim with the workers compensation board. A hearing was directed, but Oduro did not appear, and the workers compensation board dismissed his claim on default. By a letter dated October 13, 2006, K-Sea formally terminated Oduro's employment because he filed an inappropriate workers compensation claim (Letter, annexed as Ex. 16 to Aff. of Adam Kaminsky, Esq., In Support of Motion for Summary Judgment).

In May 2007, Oduro filed a summons and complaint against K-Sea and the property owner, Egret Realty Corp., in Supreme Court, Bronx County (the Oduro Action), alleging that K-Sea was negligent in maintaining the Staten Island premises. The complaint did not mention that Oduro was an employee, or that he had filed for workers compensation benefits. K-Sea tendered the summons and complaint to St. Paul via an email message dated June

7, 2007, which included copies of the summons and complaint and the Egret Realty lease, and requested that St. Paul "immediately handle this matter and protect the interests of K-Sea Transportation" (Affirmation of Mark R. Zancolli, Esq. in Support of K-Sea Motion for Summary Judgment, Ex. R). St. Paul disclaimed coverage and refused to provide a defense on the ground that the policy has an exclusion for claims by employees injured while "performing services" for K-Sea, and Oduro's claim fell in this exclusion. K-Sea then tendered the claim to Commerce, which denied coverage because it provides workers compensation insurance and is not a general liability carrier. Under K-Sea's lease, it was obligated to indemnify the property owner, Egret Realty Corp., for all personal injury claims arising from its use of the property. K-Sea hired its own counsel to defend the lawsuit (there is no claim by Egret Realty against K-Sea for defense costs), and it settled the Oduro Action for \$90,000 after these motions were made.

St. Paul's Motion

St. Paul provided K-Sea with general liability coverage for personal injury claims, subject to certain exclusions (St. Paul Marine General Liability Policy No. OLO900085, annexed to Kaminsky Aff. at Ex. 1, Section II: General Liability Coverages, p 20). The policy has an exclusion for any claim that K-Sea may be liable under the Workers Compensation Law (*Id.*, § 16, p 25),

and for a claim for bodily injury to an employee "performing duties related to the conduct of the insured's business" (*Id.*, § 17 [2]). The latter exclusion does not apply to liability assumed by K-Sea under an "insured contract" (*Id.*, § 2 [b] and § 17). An "insured contract" is defined as any oral or written contract relating to the conduct of K-Sea's business, subject to exceptions not relevant here (*Id.*, p 13).

St. Paul contends that K-Sea's claim is excluded because K-Sea could have been liable under the Workers Compensation Law, and because Oduro was an employee at the time of his accident. It is undisputed that but for these exclusions, St. Paul would be obligated to defend and indemnify K-Sea from Oduro's claim.

St. Paul further argues that it is not obligated to indemnify K-Sea for damages arising under the lease with Egret Realty because no demand for that claim was served on St. Paul. This argument is rebutted by the June 7, 2007 tender to St. Paul, which included a copy of the lease and requested that St. Paul protect K-Sea's interests, and is fairly read as a tender of all claims arising in the action, including those arising from the lease. Since K-Sea defended and settled the Oduro Action, however, it appears that Egret Realty did not incur any expense under the lease; but this issue is not dispositive of the claims in this lawsuit.

On its face, the Oduro complaint makes no mention of his former status as an employee, and alleges a standard negligence claim for premises liability against an owner and tenant in possession. St. Paul contends that it properly disclaimed any obligation to defend the Oduro Action because it learned from K-Sea, when initially reporting the accident, that Oduro had been an employee.

"It is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (Fitzpatrick v American Honda Motor Co., 78 NY2d 61 [1991], [citation omitted]). There is no dispute that the Oduro complaint alleges an occurrence covered under the St. Paul policy. St. Paul's disclaimer arose from its having learned facts from its insured that could have been used to present a legal defense to Oduro's lawsuit. This, however, is not a valid basis to refuse to defend a lawsuit. Accordingly, those parts of St. Paul's and K-Sea's motions that seek summary judgment with respect to a declaration that St. Paul had a duty to defend the Oduro Action are decided in K-Sea's favor.

With respect to St. Paul's obligation to indemnify K-Sea, St. Paul argues that its policy excludes claims for which K-Sea may have been liable under the Workers Compensation Law, and

K-Sea could have made a motion to dismiss in the underlying action under the exclusive remedy provision of Workers Compensation Law § 11. "[P]rimary jurisdiction with respect to determinations as to applicability of the Workers Compensation Law has been vested in the Worker's Compensation Board and it is therefore inappropriate for the courts to express views with respect thereto pending determination by the Board" (Botwinick v Ogden, 59 NY2d 909, 911 [1983]). While a motion to remand Oduro's claim to the Workers Compensation Board to determine in the underlying action may have been appropriate, it was not made. It cannot be said, however, that the record establishes that K-Sea would have been liable for Oduro's claim under the Workers Compensation Law because the Workers Compensation Board dismissed the claim, and this court is not empowered to determine that the Workers Compensation Law governs Oduro's claim (*id.*).

Where, as here, the insured has established that it had coverage at the time the claim arose, the insurer bears the burden of showing that the claim is excluded from coverage (see, *Schulman v Group Health, Inc.*, 39 AD3d 223 [1st Dept 2007], citing *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). St. Paul has not met its burden. Therefore, K-Sea is entitled to summary judgment as to indemnification as well.

THE COMMERCE MOTION

Commerce issued to K-Sea an employer liability policy (designated Compensation Policy Number WC 594-64-78). The policy did not furnish general liability coverage, but only coverage for claims of accidental bodily injury arising in the course of the injured employee's employment by K-Sea. As with the St. Paul motion, this requires a determination of the applicability of the Workers Compensation Law. K-Sea has the burden of showing that Oduro's claim falls within the coverage afforded by the Commerce policy, and for reasons articulated above, K-Sea has not met its burden, so Commerce's motion is granted and K-Sea's is denied as to Commerce.

Finally, AIG's motion for summary judgment, made on the ground that it did not issue an insurance policy to K-Sea, is granted. Accordingly, it hereby is

ORDERED, DECLARED and ADJUDGED that

1. The motion for summary judgment by defendant St. Paul (motion sequence 01) is denied.

2. The motion for summary judgment by defendants Commerce and AIG (motion sequence 02) is granted, and the complaint is severed and dismissed as against each Commerce and AIG, with costs and disbursements to each as taxed by the Clerk of the Court, and it is declared that Commerce and AIG had no duty to defend or indemnify K-Sea in connection with the Oduro

Action, and Commerce and AIG have no duty to reimburse K-Sea for legal fees and expenses incurred in defense of the Oduro Action.

3. The motion for summary judgment by K-Sea (motion sequence 03) is granted to the extent that it is declared that St. Paul had a duty to defend and indemnify K-Sea in connection with the Oduro Action, and that St. Paul has a duty to reimburse K-Sea for legal fees and expenses incurred in defense of the Oduro Action.

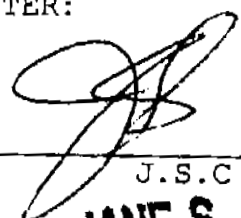
4. It is further ORDERED that the issue of the amount of damages K-Sea is entitled to receive for indemnification and reimbursement of reasonable legal fees and expenses incurred in the Oduro Action, plus interest, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue.

5. Judgment hereon is held in abeyance with respect to St. Paul pending the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee.

6. A copy of this decision, order and declaratory judgment with notice of entry shall be served by hand within 45 days on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

Dated: November 2, 2009

ENTER:



J.S.C
JANE S. SOLOMON

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).