Bungalow 8, LLC v QBE Ins. Corp.

2009 NY Slip Op 32895(U)

December 7, 2009

Supreme Court, New York County

Docket Number: 604038/04

Judge: Michael D. Stallman

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SCANNED ON 12/10/2009

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7
Justice

BUNGALOW 8, LLC

INDEX NO. 604038/04
MOTION DATE 9/1/09
MOTION SEQ. NO. 03
MOTION CAL. NO. 7

- v -

QBE Insurance Corp. et al.

The following papers, numbered 1 to 9 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-K	1-3
Answering Affidavits — Exhibits AK; Aff - Exs 1-4	4-6
Replying Affidavits	7-8
	9

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision, order and 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).

MICHAEL D. STALLMAN

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

Dated: 12/7/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7

BUNGALOW 8, LLC,

Plaintiff,

INDEX NO. 604038/04

MOTION SEQ. NO. 003

-against-

Decision, Order and Judgment

QBE INSURANCE CORPORATION, RSI SERVICES INC., and DWAYNE RODGERS,

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).

HON. MICHAEL D. STALLMAN, J.:

In this declaratory judgment action, plaintiff Bungalow 8, LLC (Bungalow 8) seeks a declaration that defendant QBE Insurance Corporation (QBE) is obligated to provide a defense and insurance coverage for Bungalow 8 in connection with the underlying personal injury action entitled *Dwayne Rodgers v Bungalow 8, LLC and "John Doe," The name "John Doe" being fictitious and unknown to Plaintiff* (index No. 104416/04, Supreme Court, New York County) (the Rodgers Action).

Bungalow 8 moves for summary judgment for an order directing defendant QBE to (1) defend Bungalow 8 in the Rodgers Action, (2) reimburse Bungalow 8 for defense costs already incurred, and (3) indemnify Bungalow 8 for any verdict, judgment or settlement in the Rodgers Action. QBE cross-moves, pursuant to CPLR 3212, for an order dismissing all causes of action of Bungalow 8's amended complaint and declaring that it has no duty defend or indemnify Bungalow 8, or any party, with respect to any cause of action alleged in the Rodgers Action. In the alternative, QBE seeks a declaration that it has no duty to indemnify or defend Bungalow 8 in the Rodgers

Action with respect to the first cause of action for assault and second and third causes of action for discrimination.

BACKGROUND

Bungalow 8 operates a bar (the bar), located at 515 West 27th Street, New York, New York. Bungalow 8, via its insurance broker, defendant RSI Services Inc. (RSI), obtained commercial general liability insurance from QBE. QBE's policy, SIM 101215-03, was in effect from April 30, 2003 through April 30, 2004 (05/13/09 Groves Aff., exhibit B).

In March 2004, Dwayne Rodgers (Rodgers) commenced the Rodgers Action for compensatory and punitive damages (*see id.* exhibit C1). Rodgers, who is African American, alleges that on January 1, 2004, he was a patron at the bar, where co-defendant "John Doe," an employee of Bungalow 8, worked as a bartender (the bartender) that night. Rodgers alleges that he ordered a drink, handed the bartender a credit card, and asked him to keep a running tab of his drinks, the bartender asked Rodgers for a form of identification, and Rodgers provided his driver's license, which the bartender allegedly maintained in his custody, along with Rodgers's credit card.

Rodgers alleges that he remained at the bar and saw several Caucasian patrons order drinks from the bartender and pay with credit cards. The bartender allegedly did not ask them for identification. Rodgers allegedly shared his observation with the bartender, and inquired why he asked Rodgers, but not the Caucasian patrons, for identification. In response, the bartender allegedly ran to Rodgers and began shoving and pushing him, causing him to fall onto a banquette and to suffer bodily injuries (the incident). Bungalow 8's employees then allegedly asked Rodgers to leave the bar, refusing to listen to his explanation of the incident.

On these allegations, in his original complaint, Rodgers alleged three causes of action

against both Bungalow 8 and "John Doe": (1) assault; (2) discrimination in violation of federal law; and (3) discrimination in violation of New York State law. In his amended complaint, Rodgers alleges that Christian Gutkowski was the bartender involved in the incident. Rodgers asserts the aforementioned causes of action, as well as three additional causes of action against Bungalow 8: (1) liability under the theory of respondeat superior; (2) negligent failure to supervise its employees; and (3) negligent hiring and retention of Gutkowski (*see* 05/13/09 Groves Aff., exhibit C2).

Testimony of Bungalow 8's Witness

In the Rodgers Action, Bungalow 8's owner and managing member, Amy Sacco (Sacco), testified that she was in the bar at the time of the incident and observed Rodgers arguing with Gutkowski about Gutkowski's request for Rodgers's identification (*see* 05/13/09 Groves Aff., exhibit I, Sacco Dep. Tr., at 25, 31-33, 35, 41-42). She further testified that it was Rodgers who approached Gutkowski, grabbed him and punched him with his fist in the head and face multiple times, causing Gutkowski to fall on the floor (*id.*, 38-39, 43-44). Sacco testified that she then pulled Rodgers off Gutkowski (*id.*, 42-43; *see also* exhibit J, 05/11/09 Sacco Aff., ¶ 11), that a security guard escorted Rodgers outside (Sacco Dep. Tr., 46-47), and that Gutkowski's head was treated with ice (*id.*, 47).

Denial of Coverage

Bungalow 8 did not notify QBE of the incident until March 2004, when it was served with the summons and complaint in the Rodgers Action, which it forwarded to QBE. By letter dated April 29, 2004 (the April 29, 2004 Letter), non-party Security Indemnity Insurance Company (SIIC), QBE's claims administrator, advised Bungalow 8 that its claim "was being handled under a strict Reservation of Rights to deny coverage due to possible violations of the policy conditions"

(05/13/09 Groves Aff., exhibit D, at 1). By letter dated July 16, 2004 (the July 16, 2004 Letter), SIIC disclaimed coverage on the grounds of the policy exclusions for intentional acts, "knowing violation of rights of another," and punitive damages, as well as absence of timely notification (*see id.*, exhibit E).

In this action, commenced in December 2004, Bungalow 8 alleges three causes of action: (1) QBE's breach of the terms of the policy, seeking a declaration that QBE is to defend and indemnify Bungalow 8 in the Rodgers Action; (2) RSI's breach of an agreement to obtain a comprehensive general liability policy; and (3) RSI's negligence in failing to obtain proper insurance (*see id.*, exhibit G).

By Stipulation dated November 25, 2008, Bungalow 8 discontinued this action as against RSI with prejudice (*see id.*, exhibit K). Defendant Dwayne Rodgers has not interposed an answer in this action.

Bungalow 8 moves, and QBE cross-moves, for summary judgment.

ARGUMENT

To obtain summary judgment, the movant must tender evidentiary proof that can establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

Timeliness of Bungalow 8's Notice and QBE's Disclaimer

Bungalow 8 argues that QBE's disclaimer was untimely as a matter of law and that, hence, QBE is bound to provide coverage and defense to Bungalow 8. QBE, in turn, contends that

Bungalow 8 gave it a late notice of the incident, which either relieves QBE of its obligations toward Bungalow 8 altogether or, at the very least, creates an issue of fact as to whether Bungalow 8 had a valid excuse for doing so. QBE claims that its lateness in disclaiming coverage was due to an investigation that it conducted and that, in general, timeliness of a disclaimer is an issue of fact.

New York Insurance Law § 3420 (d) (2), provides:

> [i]f under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident *or any other type of accident* occurring within this state, it shall give written notice *as soon as is reasonably possible* of such disclaimer of liability or denial of coverage to the insured ...

(emphases added).

"An insurer may not disclaim liability if it fails to give the insured timely notice of disclaimer" (*Generali-U.S. Branch v Rothschild*, 295 AD2d 236, 237 [1st Dept 2002]). "[I]t is the responsibility of the insurer to explain its delay" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70 [2003]). "'[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage'" (*id.* at 68-69 [citation omitted]). Although "cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional ..." (*Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]), where delay is unexcused or unexplained, courts have held that the delay is unreasonable as a matter of law (*see e.g. First Fin. Ins. Co.*, 1 NY3d at 66 ["an unexcused 48-day delay is unreasonable as a matter of law"]; *see also Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029-1030 [1979] [delay was unreasonable as a matter of law, where an insurer provided no explanation for a two-month delay in disclaiming coverage]).

"[T]he insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even though the policyholder's own notice of the incident to its insurer is untimely" (*First Fin. Ins. Co.*, 1 NY3d at 67; *see also West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept 2002] [an insurer's 30-day delay in disclaiming coverage was unreasonable as a matter of law, where the sole ground for disclaimer was an insured's five-month delay in notifying the insurer of the claim, which "was obvious from the face of the notice of claim and the accompanying complaint"]; *All City Ins. Co. v Pioneer Ins. Co.*, 194 AD2d 424, 424 [1st Dept 1993]).

Here, QBE's general liability policy issued to Bungalow 8 was in effect on the day of the incident (*see* 05/13/09 Groves Aff., exhibit B). In his original complaint, Rodgers alleged, among other causes of action, assault by Bungalow 8 and "John Doe," causing him bodily injury (*see id.*, exhibit C1, ¶¶ 21-24). Accordingly, the requirement of Insurance Law § 3420 (d) (2), to provide a written notice of disclaimer "as soon as is reasonably possible," applies.

In its April 29, 2004 letter, SIIC, QBE's agent, informed Bungalow 8 that, based on the allegations in the original complaint in the Rodgers Action of assault and discrimination, it might disclaim coverage on the ground that the policy does not cover the so-called expected and intended bodily injury (*see id.*, exhibit D) (*Hartford Ins. Co.*, 46 NY2d at 1029 ["(a) reservation of rights letter has no relevance to the question whether the insurer has timely" disclaimed coverage]). In its July 16, 2004 Letter, SIIC actually disclaimed coverage on the grounds that the policy excludes (1) expected or intended bodily injury and (2) "knowing violation of rights of another" under "personal and advertising injury liability" coverage (*id.*, exhibit E). Additionally, QBE disclaimed on the grounds of late notice of the "occurrence" by Bungalow 8 and that the policy does not cover

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punitive damages (*see id.*).

QBE contends that its two-and-a-half-month delay was due to an investigation of the claim. George R. Stickle, SIIC claims manager, states in his affidavit that SIIC "undertook to investigate the claim and obtain the coverage opinion of its principals at QBE" (Stickle Aff., ¶ 16). However, neither SIIC nor QBE provide any detail as to what the alleged investigation exactly entailed. The grounds for the disclaimer appear to be obvious from the face of Rodgers's original complaint. Accordingly, QBE's approximately 79-day delay in disclaiming coverage is unreasonable as a matter of law (*see First Fin. Ins. Co.*, 1 NY3d at 66; *see also West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d at 279; *City of New York v Northern Ins. Co. of New York*, 284 AD2d 291, 292 [2d Dept 2001]). Therefore, Bungalow 8's delay in notifying QBE of the incident is irrelevant (*see First Fin. Ins. Co.*, 1 NY3d at 67; *see also West 16th St. Tenants Corp.*, 290 AD2d at 279).

Even if the court were to consider the reason for Bungalow 8's delay, it would hold that Bungalow 8's belief that no lawsuit would be brought against it was reasonable. Bungalow 8's owner testified that Rodgers was the instigator and perpetrator of the incident and that he did not sustain any injuries (*see* Sacco Dep. Tr., at 31-47; *see also* 05/11/09 Sacco Aff., ¶ 11). Gutkowski apparently sustained no serious injury, as well (*see* Sacco Dep. Tr., at 46-47) (*cf. QBE Ins. Corp. v D. Gangi Contr. Corp.*, 66 AD3d 593, 593 [1st Dept 2009]). Accordingly, Bungalow 8's duty to notify QBE of the incident was not triggered until it was served with the complaint in the Rodgers Action (*see e.g. M.J. Frenzy, LLC v Utica Natl. Ins. Group*, 309 AD2d 566, 567 [1st Dept 2003]).

QBE argues that the policy in question never created coverage in the first place for the acts alleged in Rodgers's original complaint and that, hence, the notice requirement of Insurance Law §

3420 (d) does not apply. In his original complaint, Rodgers alleged assault and discrimination. Even if QBE is correct that in New York no coverage is afforded for the claims of discrimination, liability based on assault was excluded only based on the policy exclusion. The policy in question does not contain a specific "assault" exclusion (*cf. U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 822-823 [1995]). Accordingly, with respect to liability premised on assault in the Rodgers Action, QBE was required to provide a timely disclaimer (*see e.g. Osohowsky v Romaniello*, 201 AD2d 473, 474-475 [2d Dept 1994]).

QBE further argues that the policy in question covers only "bodily injury" that is caused by an "occurrence" (*see* Stickle Aff., exhibit 1, § I [1] [b] [1] ["(t)his Insurance applies to 'bodily injury' ... only if ... (it) is caused by an 'occurrence'..."]). The policy defines "occurrence" as an "accident" (*see id.*, § V [13]). QBE argues that the incident was not an "accident," but an intentional assault.

"[I]n deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen" (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]). As Bungalow 8 argues, from its point of view, the incident and Rodgers's alleged injuries were unexpected, unusual and unforeseen (*see e.g.* 08/17/09 Sacco Aff., ¶ 14; Sacco Dep. Tr., at 31-47). Accordingly, Rodgers's claim for assault is only excluded based on the policy exclusion for intentional acts (*see* Stickle Aff., exhibit 1, § I [2] [a]). Since QBE failed to timely disclaim coverage, it is obligated to defend Bungalow 8 in the Rodgers Action and reimburse it for all defense costs thus far incurred (*see M.J. Frenzy, LLC*, 309 AD2d at 567; *see also West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d at 279).

The determination of the issue of indemnification is held in abeyance pending the outcome of the Rodgers Action. Unless Bungalow 8 is found to have been culpable of an intentional tort and discrimination at trial in the Rodgers Action, Bungalow 8 is entitled to indemnification from QBE.

Given that Bungalow 8's motion is granted, QBE's cross motion is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Bungalow 8, LLC for summary judgment is granted; and it is further

ADJUDGED and DECLARED that the defendant QBE Insurance Corporation (QBE) must defend plaintiff Bungalow 8, LLC and reimburse it for all past defense costs in the underlying action entitled *Dwayne Rodgers v Bungalow 8, LLC and "John Doe," The name "John Doe" being fictitious and unknown to Plaintiff* (index No. 104416/04, Supreme Court, New York County) (Rodgers Action); and it is further

ORDERED that the determination of Bungalow 8's entitlement to indemnification from QBE is severed and held in abeyance pending service of a new motion after final determination of the Rodgers Action; and it is further

ORDERED that the cross motion of defendant QBE Insurance Corporation is denied.

Dated: December 7, 2009

New York, NY

ENTER:

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).