

Economy Premier Assur. Co. v Kaye

2010 NY Slip Op 30509(U)

March 2, 2010

Supreme Court, Nassau County

Docket Number: 003874-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ECONOMY PREMIER ASSURANCE COMPANY,

Plaintiff,

-against-

**RICHARD KAYE, ELIZABETH KAYE, DAVID
KAYE and JASON DENOBRAGA,**

Defendants.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 003874-08
Motion Seq. Nos: 2 & 3
Submission Date: 1/6/10**

-----X

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Plaintiff's Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affirmation in Support and Exhibits.....X**
- Reply Affirmation.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Economy Premier Assurance Company ("MetLife") on December 1, 2009, and 2) the cross motion filed by Defendants Richard Kaye ("Richard"), Elizabeth Kaye ("Elizabeth") and David Kaye ("Kaye") (collectively "Kaye Defendants") on December 29, 2009, which were submitted on January 6, 2010. For the reasons set forth below, the Court denies the motion and the cross motion in their entireties.

BACKGROUND

A. Relief Sought

MetLife moves for an Order, pursuant to CPLR § 3212, declaring that 1) timely notice of the July 31, 2006 incident was not provided to MetLife; 2) because timely notice of the July 31,

2006 incident was not provided to MetLife, MetLife has no obligation to defend or indemnify the Kaye Defendants in a related action (“Related Action”); 3) timely notice of the Related Action was not provided to MetLife; and 4) because timely notice of the Related Action was not provided to MetLife, MetLife has no obligation to defend or indemnify Richard, Elizabeth and David in the Related Action. The Kaye Defendants oppose MetLife’s motion.

The Kaye Defendants cross move for summary judgment, pursuant to CPLR § 3212, and request an Order declaring that MetLife must provide the Kaye Defendants with coverage under the applicable insurance policy, as well as a defense in the Related Action.

B. The Parties’ History

The Related Action is titled *Jason Denobrega v. Dominick Melfi, Sylvana Melfi, Sabatino Melfi, Brian Stern, Mr. and Mrs. Stern (as Parents and/or Legal Guardians of Brian Stern), Joseph Nakashian, Mr. and Mrs. Nakashian (as Parents and/or Legal Guardians of Joseph Nakashian), David Kaye, Mr. and Mrs. Kaye (as Parents and/or Legal Guardians of David Kaye) and Does, 1-20*, Nassau County Supreme Court Index Number 22406-07.

In the Related Action, filed on or about November 28, 2007, plaintiff Jason Denobrega (“Denobrega”) alleges that on or about July 31, 2006, at a Dunkin Donuts located at 5 Brewster Street, Glen Cove, New York, defendants Sabatino Melfi, Brian Stern, Joseph Nakashian and David Kaye (collectively “Minor Defendants”) assaulted Denobrega by striking him repeatedly on the head and body causing injuries including a concussion, fractures to a finger and numerous abrasions. The complaint in the Related Action contains five (5) causes of action: 1) assault against the Minor Defendants, 2) battery against the Minor Defendants, 3) intentional infliction of emotional distress against the Minor Defendants, 4) negligent infliction of emotional distress against the Minor Defendants, and 5) negligent supervision of a minor against the parents/guardians of the Minor Defendants. Denobrega seeks special damages, general damages and punitive damages.

Richard and Elizabeth are the parents of David, one of the Minor Defendants in the Related Action. MetLife filed the instant action on or about February 29, 2008 seeking a declaration of its rights and obligations with respect to its defense of the Kaye Defendants in the Related Action. In their Verified Answer, the Kaye Defendants asserted an affirmative defense

that David's alleged actions fall within the scope of the coverage contracted for under the policy ("Policy") that MetLife issued to Richard and Elizabeth.

MetLife affirms as follows in support of its application:

Richard and Elizabeth are the named insureds on the Policy which is effective from June 13, 2006 through June 13, 2007. The Policy (Ex. D to Aff. in Support) includes five (5) standard coverages including Coverage F titled Personal Liability (p. I-1 of Policy). The address of the insureds on the Policy is 4 Maplewood, Glen Head, New York 11545 ("Kaye Residence").

The first paragraph of Coverage F provides, in pertinent part, as follows:

We will pay all sums for bodily injury and property damage to others for which the law holds you responsible because of an occurrence to which this coverage applies.

(Emphasis in original)

The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the term of the policy" (p. A-1 of Policy).

The Policy defines "You," as applicable to the instant matter, as:

1. the person or persons named in the Declarations and if a resident of the same Household:
 - A. the spouse of such person or persons;
 - B. the relatives of either; or
 - C. any other person under the age of twenty-one in the care of any of the above

(p. A-2 of Policy)

Plaintiff affirms that the definition of bodily injury in the standard policy is replaced by a definition specific to policies issued in New York. Under the New York Amendatory Endorsement ("Endorsement") (part of Ex. D to Aff. in Support), made part of the Policy, bodily injury is defined as "bodily harm, sickness or disease including required care, loss of services and death that results" (Aff. in Support at ¶ 45). In addition, pursuant to the Endorsement, the intentional acts exclusion contained in the standard policy form is replaced by the following language:

Intentional Loss. We do not cover **bodily injury or property damage** which is reasonably expected or intended by **you** or which is the result of **your** intentional

and criminal acts or omissions.

(emphasis in original)

The Policy also imposes certain obligations and dues on the insureds. Section II, titled “CONDITIONS,” provides as follows at paragraphs 1(A) and (B):

1. **Your Duties in the Event of an Accidental Loss.** In the event of an **occurrence** or **offense, we** have no obligation to provide coverage under this policy if **you** fail to comply with the following duties.
 - A. Promptly notify **us** or **our** representative, in writing, stating:
 1. **your** name and policy number;
 2. the date, place and circumstances of the accident;
 3. the name and address of anyone who might have a claim against **you**; and
 4. the names and addresses of any witnesses.
 - B. Immediately send **us** any legal papers relating to the accident.

(emphasis in original)

Plaintiff affirms that David was charged with Assault in the Third Degree as a result of his involvement in the incident (“Incident”) forming the basis of the Related Action. At his examination before trial (“EBT”) on January 14, 2009, David testified that he was sentenced to probation for his involvement in the Incident.¹ Richard testified at his EBT on July 30, 2009 that David was also required to pay restitution as part of the criminal disposition.

Plaintiff submits that Richard and Elizabeth were aware in June of 2007 that Jason Denobrega (“Denobrega”) claimed that he was injured during the Incident, but did not notify MetLife until 18 months after the Incident, when they received the Complaint in the instant matter. In support thereof, Plaintiff provides testimony by Richard at his EBT that he received a letter (“Letter”) from counsel for Denobrega dated June 8, 2007, in which Denobrega’s attorney advised Richard that he represented Denobrega in a potential civil action against Richard and David. Richard testified that he “would have to assume” that he received the Letter on or about

¹ At his EBT, Richard testified that David’s date of birth is February 26, 1989 and, therefore, David was 17 years old on the date of the Incident. In Defendants’ Affirmation in Support of their cross motion, counsel for Defendants affirms that David “was not convicted of any crime” as a result of the prosecution. Although the motion papers do not state so explicitly, the Court gleans that David may have been adjudicated a Youthful Offender in connection with the criminal matter (*see* CPL §§ 720.10 and 720.15) and, therefore, was not technically convicted of a crime.

June 8 (Ex. I at pp. 23-25).

The Letter (Ex. P to Aff. in Support) is addressed to Richard and Elizabeth, “Parents of David S. Kaye.” In the Letter, counsel for Denobrega advised Richard and Elizabeth that he was retained to represent Denobrega’s interest relating to the Incident, including any potential civil action that Denobrega might pursue against the Kaye Defendants. The Letter stated that Denobrega was “still undergoing medical treatment for the injuries he sustained from the attack and his predicted date is not currently known.” The Letter also advised Richard and Elizabeth to “Please forward this letter of representation to your attorney as well as your insurance company.”

Richard testified at his EBT that he never contacted MetLife before the filing of the Related Action (Ex. I at p. 35). Richard also admitted receiving a second letter (“Second Letter”) from Denobrega’s counsel dated July 2, 2007 that contained additional details regarding Mr. Denobrega’s injuries (*Id.* at pp. 35-37). In the Second Letter (Ex. R to Affirmation in Support), counsel for Denobrega provided the following information regarding Denobrega’s alleged injuries: 1) Denobrega was treated in the emergency room for multiple abrasions, bruises, pain and bleeding to his head, face, jaw, hands, arms, knees and body; 2) a radiologist had concluded that Denobrega suffered a hematoma to his scalp, a fracture to his left pinky finger, a strained left wrist and a concussion to his head; 3) since his release from the hospital, Denobrega had been treated by several doctors for headaches and pain; 4) one week after the Incident, a doctor concluded that Denobrega had suffered a nondisplaced fracture to his pinky finger; and 5) as a result of his injuries, Denobrega had lost his job as a delivery driver and was having trouble performing in his current employment as a mechanic’s apprentice. Richard, while conceding that he understood that the Letter and Second Letter raised the possibility that Denobrega would sue him, testified that he did not contact MetLife until he received the summons and complaint in the Related Action (Ex. I at p. 37).

Plaintiff affirms that the Kayes were served with the summons and complaint in the Related Action on January 8, 2008, and provides a statement of Richard (Ex. Q to Aff. in Support) in which he confirms that service. Plaintiff provides an Affidavit in Support of Alicia LaRonca (“LaRonca”), a Claims Adjuster with MetLife, in which she affirms that MetLife first received notice of the Related Action on February 1, 2008. LaRonca avers, further, that MetLife first received a copy of the summons and complaint in the Related Action on February 7, 2008.

By letter (“Coverage Letter”) dated February 25, 2008 to David at the Kaye Residence, with copies to counsel for Denobrega and the other parties in the Related Action, MetLife advised David that 1) MetLife acknowledged receipt of a lawsuit in the Related Action; 2) coverage did not exist for David under the Policy; 3) MetLife would not pay any award of damages entered against David in connection with the Related Action; and 4) MetLife would provide David with a conditional defense while it pursued a declaration from the courts that it is not obligated to defend or indemnify David.

In the Coverage Letter, MetLife outlined the grounds for its position, including that 1) the Kaye Defendants failed to advise MetLife of the Incident in a timely manner; and 2) even if the Kaye Defendants had properly provided MetLife with notice of the Incident, MetLife would not be obligated to defend or indemnify David because a) the Incident did not constitute an “occurrence” covered by the Policy; and b) even if the Incident was an “occurrence” under the Policy, the applicable Policy exclusions for intentional losses and punitive damages relieved MetLife of any obligation to defend or indemnify David. MetLife reiterated that it would provide David with a conditional defense while it pursued a declaration from the court that it had no obligation to defend or indemnify David and, upon receipt of such a declaration, would immediately cease providing David with a defense.

The Kaye Defendants oppose MetLife’s motion, submitting that they complied with the terms and conditions of the Policy and, therefore, Plaintiff is required to defend the Kaye Defendants. In his Affirmation in Support/Opposition, Defendants’ counsel (“Counsel”) submits that “the facts and circumstances of this incident as [David] was concerned was involved was somewhat murky” (Aff. in Support/Opp. at ¶).

Counsel makes reference to Richard’s testimony, *inter alia*, that 1) Richard was not initially convinced that Denobrega would file a lawsuit, based on Richard’s understanding that Denobrega’s injuries were minor; and 2) Richard spoke to a MetLife representative within days of receiving the Letter. Counsel submits that Richard’s belief that Denobrega’s injuries were minor was reasonable in light of the fact that Richard paid total restitution of only \$578.88 in connection with David’s criminal case. Counsel provides copies of the two restitution checks (“Restitution”) (Ex. A to Aff. in Support/Opp.) in the amounts of \$366.67 and \$208.21, which are dated August 10, 2007 and September 10, 2007 respectively. Thus, Counsel submits, the

Kaye Defendants were not aware of any incident that would require coverage under the Policy until their receipt of the Letter.

In its Reply Affirmation, MetLife submits that, upon their receipt of the Letter, the Kaye Defendants were aware that the Related Action might be filed and were aware of the nature and extent of Denobrega's claimed injuries. Thus, MetLife submits, the Kaye Defendants have not demonstrated a reasonable excuse for their failure to notify MetLife of the Incident. MetLife notes, further, that the Kaye Defendants have only provided an affirmation of counsel, and have not provided a supporting affidavit of someone with personal knowledge of the critical facts.

C. The Parties' Positions

MetLife submits that 1) MetLife has no duty to defend and indemnify the Kaye Defendants because they failed to provide prompt and timely notice of the Incident, as required by the Policy; 2) the Kaye Defendants did not have a reasonable good faith belief in nonliability as a matter of law; and 3) assuming, *arguendo*, that the Kaye Defendants reasonably believed there was no liability, they failed to exercise due diligence to determine whether there was coverage under the Policy as demonstrated by their failure, *e.g.*, to forward the Letter and Second Letter to MetLife.

The Kaye Defendants submit that 1) they reasonably believed they had no liability for the Incident, for which the Policy would provide coverage, until they received the summons and complaint in the Related Action; and 2) they provided the required notice by providing MetLife with a copy of the summons and complaint in the Related Action.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. There are Triable Issues of Fact Precluding Summary Judgment

Where a policy of liability insurance requires that notice of an occurrence be given promptly, as the Policy at issue requires, notice must be given within a reasonable time in view of all the facts and circumstances. *Sputnik Restaurant v. United National Ins. Co.*, 62 A.D.3d 689 (2d Dept. 2009), citing *Zeldin v. Interboro Mut. Indem. Ins. Co.*, 44 A.D.3d 652 (2d Dept. 2007), quoting *Eagle Ins. Co. v. Zuckerman*, 301 A.D.2d 493, 495 (2d Dept. 2003). The requirement that an insured comply with the notice provision of an insurance policy operates as a condition precedent to coverage. *Sputnik*, 62 A.D.3d at 689, citing, *inter alia*, *Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 (1972).

Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage. *Sputnik, supra*. There may, however, be circumstances where the insured's failure to give timely notice is excusable, such as where the insured has a good-faith belief in nonliability. *Bauerschmidt & Sons, Inc. v. Nova Casualty Co.*, 893 N.Y.S.2d 181 (2d Dept. 2010), citing *Security Mut. Ins., supra*, at 441. The insured bears the burden of establishing the reasonableness of the proffered excuse. *Id.*, citing *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 744 (2005). Ordinarily, the question of whether the insured had a good faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law. *Id.*, citing *St. James Mech., Inc. v. Royal & Sunalliance*, 44 A.D.3d 1030, 1031 (2d Dept. 2007).

In the matter *sub judice*, Richard paid the Restitution after he received the Letter and the Second Letter. Thus, he may have reasonably believed that the Restitution payments satisfied his obligation to Denobrega and, therefore, that Denobrega would not proceed with a civil action against him and/or his son. Moreover, the criminal case involved the charge of assault, an intentional act, which would appear to be excluded from coverage pursuant to the terms of the Policy. The complaint in the Related Action, however, included two causes of action sounding in negligence, which Richard may have reasonably concluded would be covered under the terms of the Policy.

The Court concludes that there are issues of fact as to 1) whether the Kaye Defendants had a valid excuse for their delay in notifying MetLife of the Incident and the Related Action until their receipt of the complaint in the Related Action; 2) whether the conduct of the Kaye

Defendants was intentional or negligent; and, therefore, 3) whether MetLife is obligated to defend and/or indemnify the Kaye Defendants pursuant to the Policy. In light of these issues of fact, summary judgment is inappropriate. Moreover, these factual issues prevent the Court from issuing a declaratory judgment with respect to MetLife's obligations towards the Kaye Defendants. Accordingly, the Court denies the motion and cross motion in their entireties.

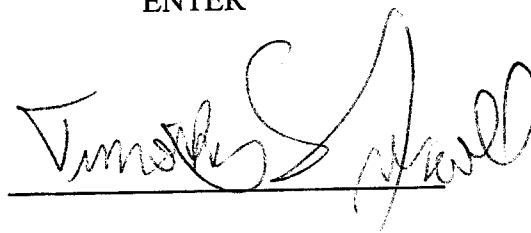
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on March 24, 2010 at 9:30 a.m.

DATED: Mineola, NY
March 2, 2010

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE