

Essex Ins. Co. v Bossart Bldrs. Inc.

2010 NY Slip Op 31142(U)

May 3, 2010

Supreme Court, Queens County

Docket Number: 9241/2008

Judge: James J. Golia

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

ESSEX INSURANCE COMPANY, x

- against -

BOSSART BUILDERS INC., et al.

x

Index
Number 9241 2008

Motion
Date March 4, 2010

Motion
Cal. Number 7

Motion Seq. No. 2

The following papers numbered 1 to 6 read on this motion by plaintiff Essex Insurance Company for summary judgment on its complaint, on this cross motion by defendant Assembly of Christian Churches Rock of Salvation (Rock of Salvation) for summary judgment, and on this cross motion by defendant Bossart Builders, Inc. for summary judgment.

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Upon the foregoing papers it is ordered that: The motion by plaintiff Essex is granted. The cross motions are denied. The court declares that Essex has no duty to defend and indemnify in the underlying personal injury action. (See the accompanying memorandum.)

Dated: May 3, 2010

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 33

	<u>X</u>	INDEX NO. 9241/08
ESSEX INSURANCE COMPANY,		MOTION SEQ. NO. 2
- against -		BY: J. GOLIA
BOSSART BUILDERS INC., et al.	<u>X</u>	DATED: May 3, 2010

Plaintiff Essex Insurance Company has moved for summary judgment on its complaint. Defendant Assembly of Christian Churches Rock of Salvation (Rock of Salvation) has cross moved for summary judgment. Defendant Bossart Builders, Inc. has cross moved for summary judgment.

On or about August 30, 2007, plaintiff Essex Insurance Company issued a commercial general liability insurance policy to defendant Bossart Builders, Inc. The policy generally obligated the insurer to indemnify Bossart for all sums which the insured became legally obligated to pay as damages because of bodily injury or property loss caused by an "occurrence." However, the Additional Conditions Endorsement to the policy provided in relevant part: "This insurance does not apply to 'bodily injury' *** or any injury, loss, or damages *** arising out of, caused by or contributed to or as a result of : 1. *** (D) If contractors or subcontractors are used, it is a condition of coverage that you use only those

that are insured *** Further, there is no coverage under this policy for ‘bodily injury,’ ‘personal injury,’ or ‘property damage’ sustained by *any* contractor, self-employed contractor,’ and/or subcontractor, or *any* employee, leased worker, temporary worker or volunteer help of same.” (Italics added.) (The part of section 1 (D) that begins with the word “Further” will sometimes be referred to herein as the employee exclusion clause.)

Defendant Assembly of Christian Churches Rock of Salvation (Rock of Salvation) hired defendant Bossart Builders, Inc. to act as the construction manager for a project involving the erection of a new church at 368 American Boulevard, Brentwood, New York. Defendant Rock of Salvation also hired all the other contractors on the project itself and not through Bossart.

On January 25, 2008, Oscar Valdez, an employee of a subcontractor doing drywall work, allegedly sustained personal injury (a fractured wrist) while working at the construction site. On or about February 15, 2008, Valdez brought an action for personal injury against Bossart and Rock of Salvation, among others, in the New York State Supreme Court, County of Queens (*Valdez v Assembly of Christian Churches Rock of Salvation* , Index No. 4143/08).

On or about April 10, 2008, Essex brought the instant action for a judgment declaring that it has no duty to defend or indemnify Bossart and Rock of Salvation in the underlying personal injury action. The dispute between the parties concerns whether the employee exclusion clause applies to contractors and subcontractors which are not Bossart’s own.

Plaintiff Essex and defendant Bossart have stipulated that New Jersey law applies to this action since the insurer issued the policy in New Jersey to a New Jersey insured.

Turning first to the motion brought by plaintiff Essex, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***.” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Plaintiff Essex successfully carried this burden. Under both New York and New Jersey law, Essex had to demonstrate on its motion that the case falls within the policy exclusion that it relies upon. (*See, Continental Cas. Co. v Rapid-American Corp.* 80 NY2d 640; *Burd v Sussex Mut. Ins. Co.*, 56 N.J. 383; *Princeton Ins. Co. v Chunmuang*, 151 N.J. 80; *Homesite Ins. Co. v Hindman*, --- A 2d ---, 2010 WL 1628068.) “To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case ***.” (*Continental Cas. Co. v Rapid-American Corp.* 80 NY2d 640, 652; *see, Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377; *Tanzer v Health Ins. Plan of Greater New York*, 91 NY2d 850.) Similarly, under New Jersey law, while “exclusions are presumptively valid,” they will only be given effect where the insurer establishes that they are “specific, plain, clear, prominent, and not contrary to public policy.” (*Doto v Russo*, 140 N.J. 544, 559; *see, Princeton Ins. Co. v Chunmuang, supra.*) In the case at bar, where public policy is not in issue, plaintiff Essex demonstrated prima facie that the employee exclusion is “specific, plain, clear, [and] prominent” and that

it applies to the injury sustained by Oscar Valdez, the employee of a subcontractor. Essex “met its prima facie burden on its motion for summary judgment *** of establishing that the exclusion was specific, clear, and unambiguous, and that it should apply in this case ***.” (*Makan Exports, Inc. v U.S. Underwriters Ins. Co.*, 43 AD3d 883, 885.) The Essex policy provides in a full separate paragraph “there is no coverage under this policy for ‘bodily injury,’ ‘personal injury,’ or ‘property damage’ sustained by *any* contractor, self-employed contractor,’ and/or subcontractor, or *any* employee, leased worker, temporary worker or volunteer help of same.” (Italics added.) Plaintiff Essex demonstrated prima facie that the exclusion is not ambiguous and that it does not thereby require interpretation in favor of the insured and against the insurer. (See, *Westview Assocs. v Guar. Nat’l Ins. Co.*, 95 NY2d 334; *Handelsman v Sea Ins. Co. Ltd.*, 85 NY2d 96; *President v Jenkins*, 180 N.J. 550; *Homesite Ins. Co. v Hindman, supra.*) Insurers have successfully disclaimed coverage under similar employee exclusions in their policies. (See, e.g., *Makan Exports, Inc. v U.S. Underwriters Ins. Co., supra* [subcontractor;’s insurance policy did not provide coverage to employees of subcontractor for claims of bodily injury sustained in the course of employment]; *Moleon v Kreislser Borg Florman General Const. Co., Inc.*, 304 AD2d 337 [no coverage for additional insured sued by employee of a named insured; “New York courts have held that employee exclusionary clauses containing the same or similar language are plain and unambiguous”].) Indeed, in *Essex Ins. Co. v Bickford & Sons, L.P.* (2007 WL 2903850 [n.o.r.] [S.D.Tex]),

Essex successfully obtained summary judgment on the basis of the same employee exclusion clause found in the policy issued to defendant Bossart.

The burden on this motion shifted to the defendants to show that plaintiff Essex is not entitled to summary judgment. (*See, Alvarez v Prospect Hospital, supra.*) They failed to carry this burden. Defendant Bossart's opposition to the instant motion rests on *Gabriele v Lyndhurst Residential Community, LLC* (2008 WL 588543 [n.o.r.]), a case decided in 2008 by the New Jersey Superior Court, Appellate Division, an intermediate appellate court. The *Gabriele* opinion warns: "UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING." 1 N.J. Prac., Court Rules Annotated R1:36-3 (2009 supp.), "Unpublished Opinions," provides: "*No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.*" (Italics added.) (*See, Higgins v Swiecicki, 719 A.2d 166.*) An unpublished opinion of the New Jersey Superior Court, Appellate Division, has no stare decisis effect. (*See, Higgins v Swiecicki, supra.*) Indeed, an unpublished decision of the New Jersey Superior Court Appellate Division should not even

be cited by any court. (*See, Newark Ins. Co. v Acupac Packaging, Inc.*, 746 A.2d 47.) Even if *Gabriele* had been published, this court is not bound to follow the decisions of the appellate courts of New Jersey. (*See*, 28 NY Jur 2d, “ Courts and Judges,” § 226.) While the doctrine of stare decisis requires a New York trial court to follow an Appellate Division precedent set in any department in New York State until its own Appellate Division decides the issue (*see, Mohen v Stepanov*, 59 AD3d 502; *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663), *Gabriele* was not decided by a New York appellate court, and pursuant to the Court Rules of New Jersey, the unpublished decision does not even “constitute precedent.” Although *Gabriele* is the only appellate opinion squarely on point, this court will discuss it without being bound to follow it.

In *Gabriele*, Essex insured Pyramid Construction & Engineering, LLC under a commercial general liability policy. While Pyramid acted as the prime contractor on a construction project in New Jersey, Salvatore Gabriele sustained fatal injury when he was struck by falling debris. Gabriele had been employed by Bravante Automatic Sprinkler Co., a subcontractor on the project but not a subcontractor of Pyramid, as, in the case at bar, Valdez’s employer was not Bossart’s own subcontractor. Essex received notice that the administrator of Gabriele’s estate had brought a wrongful death action naming Pyramid as a defendant, but the insurer disclaimed coverage of the contractor. Pyramid then brought an action for a judgment declaring its rights under the policy, and the action was consolidated with the wrongful death suit. Essex relied on the same employee exclusion clause that it

relies on in the case at bar: “there is no coverage under this policy for ‘bodily injury’, ‘personal injury’ or ‘property damage’ sustained by any contractor, self-employed contractor, and/or subcontractor, or any employee, leased worker, temporary worker or volunteer help of the same.”

In finding that the Essex policy did not effectively exclude coverage for the employee of a subcontractor hired by a contractor other than the insured itself, the New Jersey court stated: “The language in question is the concluding paragraph to a section which clearly deals with Pyramid’s own subcontractors, requiring Pyramid to use only subcontractors who are insured under policies naming Pyramid as an additional insured and providing a level of coverage equal to that afforded to Pyramid under the Essex policy. There is no indication to the insured that Essex intended that language to have any application beyond that limited context and we decline to give it the broader scope for which Essex urges. *** The words of an insurance policy should be given their plain meaning, but when the language used creates an ambiguity, the policy should be interpreted to conform to the reasonable expectations of the insured.” (*Gabriele v Lyndhurst Residential Community, LLC, supra, 2.*)

This court respectfully disagrees with the decision reached in New Jersey. Under New Jersey Law, as the *Gabriele* court itself noted, “[a] policy is not ambiguous, *** merely because two parties can offer conflicting interpretations of the language.” (*Gabriele v Lyndhurst Residential Community, LLC, supra, 2.*) New York decisions are in agreement: “the terms of an insurance contract are not considered ambiguous merely because the parties

interpret the language differently ***.” (*Commercial Union Ins. Co. v Liberty Mut. Ins. Co.*, 36 AD3d 645, 646; *see, Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347.) “The ambiguity must be genuine, that is, one which prevents the average policyholder from determining the boundaries of his coverage.” (*Gabriele v Lyndhurst Residential Community, LLC*, 2.)

The Essex policy uses the terms “you” and “your” throughout the policy, and those terms are given a definite reference at its beginning: “Throughout this policy the words ‘you’ and ‘your’ refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” The first part of Section 1(D) of the Additional Conditions Endorsement, which requires contractors and subcontractors to carry insurance, repeatedly uses the words “you” and “your”: “If contractors or subcontractors are used, it is a condition of coverage that *you* use only those that are insured ***name *you* as an additional insured on their policy, and *you* require and secure certificates of insurance confirming same. Failure to comply with this condition does not void *your* coverage ***” (Italics added.) The employee exclusion clause which follows in the same section just two paragraphs later does not use the terms “you” and “your” in connection with contractors, subcontractors, and their employees. Nor does the employee exclusion clause even use the indefinite article “a” in connection with contractors, subcontractors, and their employees. Instead, the word “any,” the broadest possible adjective and a term whose meaning includes “without specification,” is chosen and used twice: “Further, there is no

coverage under this policy for ‘bodily injury,’ ‘personal injury,’ or ‘property damage’ sustained by *any* contractor ***or *any* employee ***.’ (Italics added.) The very use of the word “any” in the employee exclusion clause informs the insured that no specific reference is being made to only the contractors and subcontractors hired by the insured itself and required to carry insurance by the first part of section 1(d). Contrary to the finding of the *Gabriele* court that “[t]here is no indication to the insured that Essex intended that language to have any application beyond that limited context.” i.e., the context of the insured’s own contractors and subcontractors, the shift from the use of the terms “you” and “your” to the twice used term “any” is a clear signal that a change in reference has been made.

The American Heritage On-Line Dictionary defines “any” to mean: “One, some, every, or all *without specification*.” (Italics added.) “[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability.” (*Longobardi v Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537; *American Wrecking Corp. v Burlington Ins. Co.*, 946 A.2d 1084 [“ ‘any’ does not mean ‘the’ insured, it means ‘any’ insured, which, of course, is its ordinary meaning”].)

The term “any” used in the employee exclusion clause is not ambiguous merely because it is found in a section of the policy which deals elsewhere with contractors and subcontractors hired by the insured. The requirement that such contractors and subcontractors carry insurance naming Bossart as an additional insured – an attempt to shift

risk onto co-insurers – is one matter. A clearly distinguishable matter is a limitation on the coverage afforded by Essex where other contractors and subcontractors are concerned.

“The test for ambiguity is whether the language in the insurance contract is ‘susceptible of two reasonable interpretations’ ***.” (*MDW Enterprises, Inc. v CNA Ins. Co.*, 4 AD3d 338, 340-341, quoting *State of New York v Home Indem. Co.*, 66 NY2d 669, 671; see, *NIACC, LLC v Greenwich Ins. Co.*, 51 AD3d 883.) Bossart did not offer a reasonable interpretation of the employee exclusion clause. The insured did not offer a reasonable explanation about why Essex would have eliminated coverage for Bossart’s own contractors and subcontractors and yet would have placed no restrictions on coverage for any other contractor or subcontractor whatsoever.

Finally, it is true that under both New York and New Jersey law, as the *Gabriele* court stated, “the policy should be interpreted to conform to the reasonable expectations of the insured.” (*Gabriele v Lyndhurst Residential Community, LLC, supra*, 2; see, *NIACC, LLC v Greenwich Ins. Co., supra*.) It is also true that under New Jersey law, “if an insured’s ‘reasonable expectations’ contravene the plain meaning of a policy, even its plain meaning can be overcome.” (*Werner Voorhees v Preferred Mut. Ins. Co.* 128 N.J. 165, 175.) This court finds that Bossart could not have had a reasonable expectation of coverage in view of the use of the broad term “any” in the employee exclusion clause coupled with the insured’s lack of any reasonable explanation of why the policy would limit coverage only for its own subcontractors. Moreover, Bossart cannot successfully argue that the employee exclusion

clause took it by surprise since employee exclusion clauses in insurance policies are common and have been repeatedly upheld by the courts (*see, e.g., Moleon v Kreisler Borg Florman General Const. Co., Inc., supra*), and, moreover, an insured is obligated to read the insurance policy. (*See, Jakobson Shipyard, Inc. v Aetna Cas. and Sur. Co.*, 775 F.Supp. 606, *affd*, 961 F2d 387 [applying New York law]; *Sears Mortg. Corp. v Rose*, 134 N.J. 326.) “Normally, insurance purchasers are expected to read their policies and ‘the law may fairly impose upon [them] such restrictions, conditions and limitations as the average insured would ascertain from such reading.’ ” (*Sears Mortg. Corp. v Rose, supra*, 348, quoting *Bauman v Royal Indem. Co.*, 36 N.J. 12, 25.)

Accordingly, the motion by plaintiff Essex is granted. The cross motions are denied. The court declares that Essex has no duty to defend and indemnify in the underlying personal injury action.

Short form order signed herewith.

J.S.C.