

218 LaFayette St. Rest. Corp. v Durkin Agency, Inc.

2010 NY Slip Op 31979(U)

July 23, 2010

Supreme Court, New York County

Docket Number: 108897/2009

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 : 102665/2008
218 LAFAYETTE
 VS.
DURKIN AGENCY
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 2/8/10
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-7

8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

*NS In Trial Conf for 2/10
7/23/10 set at and*

FILED
 JUL 27 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 7/23/10

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

218 LAFAYETTE ST. REST. CORP.,

Plaintiff,

-against-

DURKIN AGENCY, INC.,

Defendant.

-----X

Index No. 108897/2009
DECISION and ORDER

FILED
JUL 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

SOLOMON, J.:

Plaintiff 218 Lafayette St. Rest. Corp. (218 Lafayette) sues Durkin Agency, Inc. (Durkin), an insurance broker, for negligence in the handling of an insurance renewal form. 218 Lafayette seeks recovery of expenses incurred in defending two lawsuits that, but for Durkin's negligence, would not have occurred. 218 Lafayette moves for summary judgment on the complaint. The motion is denied as follows.

FACTS

218 Lafayette owned and operated The Falls, a restaurant located at 218 Lafayette Street, in Manhattan. In 2004, 218 Lafayette engaged Durkin to procure insurance for The Falls. Durkin and 218 Lafayette's principal, Michael Dorrian (Dorrian) filled out a policy questionnaire regarding The Falls, including whether it would utilize bouncers, door persons or security. Dorrian asserted that none would be used. Durkin prepared an Insurance Application to National Specialty Insurance Co. (NSIC) that did not include security coverage (see 2004

Insurance Application, attached to Fried Affidavit, Ex. 6, p. 3). Dorrian signed the application and NSIC issued a 1 year, \$1 Million policy for 2004.

Shortly after opening The Falls, and well before the 2004 policy was due to be renewed, 218 Lafayette hired "ID checkers" to protect against underage drinking.¹ The NSIC policy was not updated.²

At the end of the 2004 policy period, instead of sending 218 Lafayette a new questionnaire, an agent of Durkin whited out the date next to Dorrian's signature on the 2004 application, applied a new date, and faxed the application to NSIC for renewal of the policy. NSIC issued a policy for 2005 in accordance with the information provided, namely that The Falls had no security personnel.

In 2005, Darryl Littlejohn, one of The Falls's "ID checkers," was charged with murdering Imette Saint-Guillen (Guillen), who was last seen alive at The Falls. As soon as Dorrian learned of the event, he gave notice to NSIC. NSIC initiated a declaratory judgment action against 218 Lafayette,

¹ Durkin introduced evidence at oral argument on February 8, 2010, that 218 Lafayette was instructed by the New York City Police Department to hire security to assist in protecting against underage drinking, else The Falls would be shut down.

² Notably, engaging security personnel raises insurance premiums. Apparently, though not shown through evidence, NCIS adds an assault and battery exclusion to any policy that includes security.

[* 4]

NSIC v. 218 Lafayette, 2008 WL 629994 (SDNY) (the NSIC Action), for rescission of the 2005 NSIC policy *ab initio* on the ground that it was issued on a material misrepresentation regarding security at The Falls. Around the same time, Guillen's estate brought a wrongful death action against 218 Lafayette (the Guillen Action). Under a reservation of rights, NSIC defended 218 Lafayette in the Guillen Action.

On November 7, 2008, 218 Lafayette settled both the NSIC Action and the Guillen Action. In the settlement, NSIC agreed to pay \$300,000 to Guillen's family and 218 Lafayette agreed to pay \$75,000. NSIC also released 218 Lafayette from liability for defense costs in the Guillen action.

218 Lafayette seeks to recover the amount it paid to Guillen's family and its defense costs in the NSIC Action, for an aggregate amount of approximately \$225,000.

DISCUSSION

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty on the defendant, a breach of that duty, and that the breach was a substantial cause of the resulting injury (*Chunjye Kang-Kim v. City of New York*, 29 AD3d 57 [1st Dept, 2006]). An insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction (*Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 AD3d 865 (1st Dept, 2009)).

218 Lafayette argues that Durkin failed to exercise due care by submitting to NSIC the 2005 application with the whited out date. It contends that Durkin's conduct was not that of a reasonably prudent insurance broker, who would have foreseen that a material misrepresentation on an application could lead to rescission of the policy (see, e.g., *Kiss Construction NY, Inc. v. Rutgers Cas. Ins. Co.*, 61 AD3d 412 [1st dept, 2009]), which, in turn would lead to foreseeable damages to the insured.

Durkin counters that the NSIC policy was not rescinded, that NSIC paid 218 Lafayette's defense costs in the Guillen Action and, therefore, 218 Lafayette did not suffer any recoverable damages due to Durkin's alleged negligence. It also argues that Daniel Dorrian, Dorrian's brother and the manager of The Falls, signed and dated a "No Fraud" statement attached to the end of the renewal application, which raises a question of fact regarding 218 Lafayette's acknowledgment of the information present within the 2005 questionnaire.

218 Lafayette responds that Daniel Dorrian had no standing to bind 218 Lafayette with his signature, as he is not an officer, director or shareholder of 218 Lafayette. Regarding recoverable damages, 218 Lafayette contends that it would have acted differently had Durkin sent Dorrian the renewal application. Specifically it argues that if Dorrian had known that his ID checkers would have caused NSIC to include the assault and battery exclusion in the renewal policy, he would

have eliminated those employees to maintain his exclusion-free policy; thus, it contends that all the expenses it incurred were, as a matter of law, proximately caused by Durkin.

It is undisputed that Durkin did not procure a new application for the 2005 year. However, even if that is a breach of the duty of care, as a matter of law, 218 Lafayette has not established that the same proximately caused its damages.

In support of a finding of proximate cause, Dorrian affirms that, had the Durkin Agency sent him the 2005 application, he would have answered the "Security" question in the affirmative (i.e., that The Falls had ID checkers), and that had NSIC issued a policy with an exclusion, he would have eliminated the ID checkers (Dorrian Affidavit, ¶ 11).

That Dorrian's hypothetical actions would have occurred as he explains them is the linchpin to 218 Lafayette's claim. Dorrian's contentions as to his probable conduct and its outcome present an issue of credibility requiring trial (see, e.g., *Taylor v. Lehr Const. Corp.*, 57 AD3d 214 [1st Dept, 2008]). Similarly, the No Fraud letter raises a question of fact regarding plaintiff's knowledge of the 2005 application.

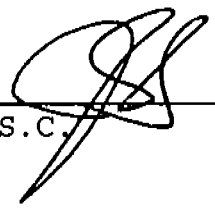
Accordingly, it hereby is

ORDERED that Plaintiff 218 Lafayette St. Rest. Corp.'s motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on August 23, 2010 at 2 PM.

Dated: 7/23/10

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
JUL 27 2010
NEW YORK
COUNTY CLERKS OFFICE