

Town of Southampton v Washington Tit. Ins. Co.

2010 NY Slip Op 32228(U)

August 18, 2010

Supreme Court, Suffolk County

Docket Number: 39119/2009

Judge: William B. Rebolini

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Town of Southampton,

Plaintiff,

-against-

Washington Title Insurance Company,

Defendants.

Index No.: 39119/2009Motion Sequence No.: 001; MDMotion Date: 5/7/10Submitted: 6/23/10Motion Sequence No.: 002; XMD

CDISPO

Motion Date: 5/14/10Submitted: 6/23/10Attorney for Plaintiff:

Devitt Spellman Barrett, LLP
50 Route 111
Smithtown, NY 11787

Attorney for Defendant:

Delbello, Donnellan, Weingarten,
Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, NY 10601

Upon the following papers numbered 1 to 29 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 7; Notice of Cross Motion and supporting papers, 8 - 23; Replying Affidavits and supporting papers, 24 - 25, 26 - 27.

This declaratory judgment action seeks to determine the duties of the defendant insurer with regard to a hybrid CPLR Article 78 proceeding and action for declaratory relief, *Sommer v. Town of Southampton*, Index No. 23761/2009, filed in the Supreme Court, Suffolk County. In the underlying action, the petitioners seek, *inter alia*, to preclude the plaintiff herein from developing an unimproved easement/right of way (Bicycle Path) as a public road for access to a racetrack to be built by Pine Barrens B.M.X., Inc. (BMX) and declaring that BMX has no rights over Bicycle Path.

Southampton v. Washington Title

Index No.: 39119/2009

Page 2

By deed dated September 11, 2008, Frank Grausso, Jr. conveyed title to a parcel of land (Grausso Parcel) to the plaintiff Town of Southampton (Town). In connection with the purchase, the defendant Washington Title Insurance Company (Washington) issued a fee policy of title insurance under Policy Serial No. 0-2100-01623 (Policy). Pursuant to an earlier deed in the chain of title, the Policy affirmatively insures the Town's "Right to use 16.5 foot right of way Bicycle Path in common with others as same exists on 'Map of the Several Properties of John M. Edwards, James W. Kirby and Margarita Kirby' filed in the Suffolk County Clerk's office on August 21, 1926 as Map No. 815 and shown on a survey entitled 'Map of Bicycle Path' by Pat T. Seccafico dated 5/5/99."

In April, 2009, the Town entered into two agreements with BMX permitting BMX to build a motocross racetrack on a parcel of property previously used by the Town as a yard-waste dump (Dump Parcel). The Dump Parcel lies beyond the Grausso Parcel on Bicycle Path and the Town intends to use Bicycle Path as a means for the public to access the racetrack after it is built. However, the Dump Parcel is not contiguous with the Grausso Parcel. The petitioners in the underlying action allege that Bicycle Path has historically been a narrow unimproved dirt path used primarily by farm vehicles and that hundreds of spectators and participants of the racetrack will access the site by driving over their properties. After the underlying action was commenced, by letter dated June 23, 2009, the Town made a claim under the Policy demanding that Washington defend and indemnify it in connection with the petitioners' action. In a letter dated July 21, 2009, Washington denied coverage under the Policy (Denial Letter). The Town then commenced the instant action.

The Town moves for summary judgement seeking a declaration that Washington is obligated to defend and indemnify it regarding the underlying action. As the movant, the Town bears the burden of establishing that the allegations in the complaint in the underlying action give rise to a claim that is covered by the Policy (see, Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 98 NY2d 208 [2002]; Rhodes v. Liberty Mut. Ins. Co., 67 AD3d 881 [2nd Dept., 2009]; Serrano v. Republic Ins., 48 AD3d 665 [2nd Dept., 2008]). The Town, in support of its motion, submits the pleadings, the underlying action complaint, the Denial Letter and the Policy. The Policy provides in pertinent part, in the section entitled "Covered Risks" (page 1), as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, WASHINGTON TITLE INSURANCE COMPANY, ... insures ... against loss or damage ... incurred by the Insured by reason of:

4. No right of access to or from the Land.

The Town asserts that the underlying action complaint seeks "a declaration that the Town of Southampton has no rights over a certain right of way known as Bicycle Path" and, because the Policy insures the right to use the right of way, Washington must defend and indemnify the Town

Southampton v. Washington Title

Index No.: 39119/2009

Page 3

in the petitioner's action. In determining the issue of coverage, the Court's duty is to "compare the allegations of the complaint to the terms of the policy" (A. Meyers & Sons Corp. v. Zurich Am. Ins. Group, 74 NY2d 298 [1989]).

A review of the complaint in the underlying action reveals that the petitioners therein have asserted seven causes of action against the Town. Initially, it is evident that causes of action one, two, three, four, and seven do not in any respect involve the issue of the Town's ingress and egress from either the Grausso Parcel or the Dump Parcel. In reviewing the fifth cause of action, the Court notes that it is titled "AS A FIFTH CAUSE OF ACTION - DECLARING THAT THE TOWN, AS OWNER OF THE TOWN DUMP PARCEL, HAS NO RIGHTS TO USE THE PORTION OF BICYCLE PATH THAT TRAVERSES THE PLAINTIFFS (sic) PROPERTY." The allegations therein clearly reflect the petitioners claim that the Town cannot grant BMX the right to traverse their property based on its ownership of the Dump Parcel. The fifth cause of action does not in any respect involve the issue of the Town's access to or from the insured property, the Grausso Parcel, and the Court rejects the Town's implied argument that the Policy covers its access to or from all of its properties. The express terms of the Policy limit coverage to the Grausso Parcel.

The sixth cause of action in the underlying action, seeks a declaration that the Town's intended development of the right of way will unduly and illegally burden the petitioner's properties and will adversely and irreparably interfere with the use and enjoyment of their properties. A review of the record reveals that the Town has a common law right to use Bicycle Path to the extent that it is depicted on Map No. 815 filed in the Suffolk County Clerk's office on August 21, 1926. When a deed makes reference to a filed map depicting a right of way, an easement by implication is found to arise (see, Weil v. Atlantic Beach Holding Corp., 1 NY2d 20 [1956]; Iovine v. Caldwell, 256 AD2d 974 [3rd Dept., 1998]; Fischer v. Liebman, 137 AD2d 485 [2nd Dept., 1988]). Such an easement, not specifically defined, is deemed to include such rights as are reasonably necessary and convenient for the purposes for which it was created (see, Hopper v. Friery, 260 AD2d 964 [3rd Dept., 1999]; Town of Ulster v. Massa, 144 AD2d 726 [3rd Dept., 1988]). The record reveals that the subject easement was created in 1926 as a means for ingress and egress to agricultural lands, that Washington issued its title policy based on the circumstances existing on the date of the conveyance into the Town, and that there is no evidence that Washington had notice of the intended development of Bicycle Path.

The Town has failed to meet its burden requiring it to establish that the allegations in this sixth cause of action give rise to a claim that is covered by the Policy. The express language of the Policy establishes that it provides coverage for "access to or from the Land." The Policy defines the Land to mean "the land described in Schedule A," which is a metes and bounds description of the Grausso Parcel. There is no indication that the petitioners are challenging the Town's vested rights of access to or from the Grausso Parcel. Where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (see, White v. Continental Cas. Co., 9 NY3d 264 [2007]; Marshall v. Tower Ins. Co. of N.Y., 44 AD3d 1014 [2nd Dept., 2007]; Hiraldo v. Allstate Ins. Co., 8 AD3d 230 [2nd Dept., 2004], *aff'd* 5 NY3d 508 [2005]). Courts may not vary the terms of an insurance contract to accomplish their notions "of abstract justice or moral

Southampton v. Washington Title

Index No.: 39119/2009

Page 4

obligation, since ‘equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against’” (Breed v Insurance Co. of N.Am., 46 NY2d 351 [1978], *quoting Weinberg & Holman, Inc. v. Providence Washington Ins. Co.*, 254 NY 387 [1930]; *see, Government Empls. Ins. Co. v. Kligler*, 42 NY2d 863 [1977]).

Irrespective of the Court’s finding that the Town failed to establish *prima facie* that the allegations in the sixth cause of action in the underlying action give rise to a claim that is covered by the Policy, it is clear that Washington’s opposition papers establish that the cause of action is excluded under the terms of the Policy. Under “Exclusions from Coverage,” paragraph 3(a) excludes “Defects, liens, encumbrances, adverse claims or other matters - created, suffered, assumed, or agreed to by the Insured Claimant.” It is clear that the Town’s subsequent actions have created the underlying dispute with the petitioners in the *Sommer* action.

Nonetheless, the Town argues that the grounds set forth in Washington’s Denial Letter do not entitle it to disclaim coverage and that the grounds cited cannot be supplemented in any fashion. The Court finds this argument to be without merit. Unlike matters involving questions of disclaimer or denial letters pursuant to Insurance Law 3420, the issue herein requires the insured to establish that the insurer is estopped from asserting additional grounds for a denial of coverage (*see, Doyle v. Siddo*, 54 AD3d 988 [2nd Dept., 2008]; Ward v. County of Alleghany, 34 AD3d 1288 [4th Dept., 2006]; Charlestowne Floors, Inc. v. Fidelity & Guar. Ins. Underwriters, Inc., 16 AD3d 1026 [4th Dept., 2005]). The Town has not submitted any evidence that it was prejudiced or inconvenienced by the allegedly insufficient denial of coverage herein, that Washington waived any claimed defense, or that Washington should be estopped from asserting said defenses. In addition, it has been held that an insufficient or improper denial letter cannot create coverage where none exists (*see, New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]).

Summarizing, the Court finds that the seven causes of action in the complaint in the underlying action are not claims covered by the Policy. Accordingly, the Town’s motion for summary judgment is denied.

Washington cross-moves for summary judgment dismissing the complaint upon a declaration that it has no duty to afford coverage, defend or indemnify the plaintiff. Based on the Court’s findings herein, the cross motion by the defendant Washington Title Insurance Company is granted. Accordingly, Washington is entitled to enter of judgment declaring that it has no obligation to afford coverage, defend or indemnify the defendant Town of Southampton in the underlying action.

Based on the foregoing, it is

ORDERED that the motion by the plaintiff for an order pursuant to CPLR §3212 granting summary judgment on its claim for a declaration that the defendant Washington Title Insurance Company is obligated to defend and indemnify the plaintiff in the underlying action is denied; and it is further

Southampton v. Washington Title

Index No.: 39119/2009

Page 5

ORDERED that the cross motion by the defendant Washington Title Insurance Company for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint and declaring that it has no duty to afford coverage, defend or indemnify the plaintiff, is granted; and it is further

ORDERED that defendant shall settle judgment (see, 22 NYCRR §202.48).

Dated: August 18, 2010



HON. WILLIAM B. REBOLINI, J.S.C.