

Selective Ins. Co. of Am. v Erie Ins. Co.

2010 NY Slip Op 32940(U)

October 13, 2010

Sup Ct, NY County

Docket Number: 602625/2008

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Reliance Ins. Co. of America

INDEX NO. 602625/08

MOTION DATE _____

- v -

Ernie Insurance Company

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

OCT 19 2010

NEW YORK COUNTY CLERK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 10/13/10

[Signature]
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 2

-----X
SELECTIVE INSURANCE COMPANY OF AMERICA and
MORRISVILLE AUXILLARY CORPORATION,

Plaintiffs,

-against-

ERIE INSURANCE COMPANY and SCHWEINFURTH
MEMORIAL ART CENTER d/b/a QUILTING BY THE LAKE,

Defendants.
-----X

Index No. 602625/2008

FILED
OCT 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

Defendant Erie Insurance Company ("Erie") issued an insurance policy ("the Erie Policy") which paid for general liability coverage from December 1, 2004 to December 1, 2005. While the policy only named Defendant Schweinfurth Memorial Art Center ("Schweinfurth") as an insured party, it also contained an "AI Endorsement." The AI Endorsement allowed Schweinfurth to add another party as an additional insured but only with respect to liability arising out of the other party's ongoing operations for Schweinfurth. No parties were specifically listed in the endorsement. However, the Erie Policy's declarations pages contained the following notation: RECORD OF ADDITIONAL INSUREDS – DESIGNATED PERSON/ORGANIZATION – MORRISVILLE AUXILIARY CORP – C/O SUNY COLLEGE/RE CG2010, CG2010 being another term for the AI Endorsement.

On July 22, 2005, Plaintiff Morrisville Auxiliary Corporation ("Morrisville") and Defendant Schweinfurth entered into a contract (the "Contract") for Schweinfurth's quilting seminar ("Seminar") which was to take place from July 22, 2005 to August 6, 2005 at a college operated by Morrisville. The contract provided that all meals for Seminar participants were to be served at the college's dining hall. Additionally, pursuant to the contract, Schweinfurth agreed to defend, indemnify and hold Morrisville harmless for bodily harm, death or property damage arising out of any act or omission associated with the

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contract performance. Schweinfurth also was required to name Morrisville as an additional insured party and to get \$1,000,000 in insurance.

During breakfast on July 26, 2005, Seminar participant Judith Hoffman Corwin ("Corwin") fell in the dining hall. Corwin asserted that she slipped on a puddle as she was walking to the conveyer belt to return dirty dishes. She claimed that the puddle on the cafeteria floor was due to improperly stored water and ice. As a result of the accident, Corwin alleges she has suffered various personal injuries. Corwin filed an action for personal injuries against the State of New York (the "Underlying State Claim") on September 23, 2005. This was dismissed on October 5, 2006 pursuant to 22 NYCRR 206.10(g) because Corwin failed to appear for trial on September 21, 2005.

According to Morrisville's insurance company Plaintiff Selective Insurance Company of America ("Selective"), Selective only learned of the accident on October 21, 2005. On October 27, 2005 and on November 30, 2005 respectively, the State of New York and Selective requested that Defendant Erie provide them with defense and indemnification with respect to the accident. Erie denied the request by correspondence to Selective dated December 14, 2005, claiming that Morrisville was not covered under the Erie Policy since the slip and fall did not arise out of Defendant Schweinfurth's operations or its performance of the Contract.

Corwin filed a separate suit for personal injury against Plaintiff Morrisville on May 11, 2006 (the "Underlying Action") and alleged that Morrisville's employees created or had knowledge of the dangerous condition caused by the improperly stored water and ice. Although it raised affirmative defenses in its answer, Morrisville conceded liability for the accident during the trial for the Underlying Action. The jury rendered a judgment in Corwin's favor for \$1,450,000 on October 11, 2007 (the "Judgment").

On September 13, 2007, Morrisville filed a third-party action in the Underlying Complaint against Defendant Schweinfurth for contractual and common law indemnification, contribution and breach of contract (the "Third Party Complaint"). Schweinfurth claims that it was not served with the

Third Party Complaint until November 2, 2007, nearly one month after Morrisville had conceded liability for the accident. Additionally, Schweinfurth alleges that it had no knowledge that a trial had been held in connection with the Underlying Action until Corwin's counsel demanded payment of the Judgment.

Selective commenced this action on September 9, 2008, claiming that because Morrisville is a named additional insured under the AI Endorsement, Morrisville is entitled to defense, indemnification and additional insured status under the Erie Policy with respect to the Accident and Underlying Action. Defendants, however, argue that Morrisville does not need any further defense since it already has conceded liability and the Underlying Judgment already has been rendered. Defendants filed a motion for summary judgment. Plaintiffs filed a cross-motion to seek leave of the court to serve a Supplemental Complaint pursuant to CPLR 3025(b) to assert a cause of action against Schweinfurth for commercial indemnification and for summary judgment pursuant to CPLR 3212 for contractual defense and indemnification costs. For the reasons below, the Court denies Defendants' motion for summary judgment, grants Plaintiffs' motion for summary judgment and denies Plaintiff's motion for leave to serve a supplemental complaint.

ANALYSIS

Summary Judgment

To prevail on summary judgment, the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. N.Y. Cty. 2008]). If the moving party has made a prima facie showing of entitlement to judgment, the burden shifts to the opposing party to provide evidence of material issues of fact. (*see Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y. 3d 316, 320, 880 NYS2d 869, 871 [2009]). Therefore, to prevail here, Defendants Erie and Schweinfurth must establish a prima facie case that they did not have a duty to indemnify and defend

Morrisville. (*see Allstate Ins. Co. v. Zuk*, 78 NY2d 41, 45, 571 NYS2d 429, 430 [Ct App 1991], *Santiago v. Filstein*, 35 AD3d 184, 185-186, 826 NYS2d 216, 217 [1st Dept 2006]).

Erie and Policy Indemnification

Defendant Erie has not established a prima facie case that it was relieved of its duty to indemnify Plaintiff Morrisville. Defendants first allege that Morrisville is not covered by the Erie Policy outside of the AI Endorsement. Although an insurer's duty to defend "arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim," an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision. (*see Frontler Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 667 NYS2d 982, 984 [Ct App 1997], *Allstate Ins. Co.*, 78 NY2d at 45, 571 NYS2d at 430 [Ct App 1991]). However, Morrisville is an additional insured and therefore "enjoys the same protections as the named insured" (*Pecker Iron Works v. Travelers Ins. Co.*, 99 NY2d 391, 393, 756 NYS2d 822, 823 [Ct App 2003]). Furthermore, as Plaintiffs note, according to the Selective policy issued to Morrisville, Selective's policy is excess over "any other primary insurance available to you covering liability for damages arising out of the ... operations for which you have been added as an additional insured by attachment of an endorsement." (Commercial General Liability Coverage Form, p. 12).

Defendants' second argument is that the AI Endorsement which grants Morrisville additional insured coverage does not apply here. According to Defendants, there was no connection between Corwin's slip and fall and Defendant Schweinfurth's negligence or operations. However, this argument is also without merit. As Plaintiffs correctly note, there only needs to be "some casual relationship between the injury and the risk for which coverage is provided." (*Worth Construction Co., Inc. v. Admiral Insurance Co.*, 10 NY3d 411, 415, 888 NE2d 1043, 1045 [Ct App 2008]). The fact that the incident arose out of Schweinfurth's seminar is sufficient since the "general nature" of Schweinfurth's operation was to provide a quilting seminar and the accident took place in the cafeteria where seminar participants were required to take their meals. Thus, even though Schweinfurth did not have any

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personnel in the dining hall and Morrisville has admitted liability for the accident, Erie is still required to defend and indemnify Morrisville even though Morrisville was responsible for keeping the cafeteria safe.

Defendants' third claim is that there was no basis upon which the Erie Policy was triggered. Defendants point to the fact that Erie received the tender demanding defense and indemnification when there was only a Notice of Claim against the State of New York, not Morrisville. Therefore, since Morrisville was not a named party when Erie received the tender, Morrisville had no reason to request defense and indemnification from Erie. An insurer, however, still has a duty to defend even if the insurer has knowledge of the facts and events not alleged within the complaint that reveal the claim to be meritless or outside the scope of coverage. (*see Fitzpatrick v. American Honda Motor Co.*, 78 NY2d 61, 66 575 NE2d 90, 92 [Ct App 1991]). Therefore, Erie's duty to defend was triggered once Corwin filed a claim against Morrisville; it does not matter whether or not Schweinfurth and Morrisville were named parties.

Defendants' final claim is that Erie timely denied Morrisville's demand for defense and indemnification. Where a claim seeks damages for death or bodily injury, Insurance Law 3420(d) requires an insurer to give "prompt notice" of a disclaimer for said claim. The insurer must disclaim coverage as soon as reasonably possible after the insurer learns of the grounds to disclaim. (*see Estee Lauder, Inc. v. One Beacon Insurance Group, LLC*, 873 NYS2d 592, 594, 62 AD3d 33, 35 [1st Dept 2009]). According to Defendants, since Erie denied the tender within two weeks, it has no further obligation to indemnify. An insurer's duty to defend, however, is exceedingly broad, including when a complaint contains any allegations which suggest a reasonable possibility of coverage under the insurance agreement. (*see Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38, 904 NYS2d 338, 338 [Ct. App. 2010]). Morrisville's coverage under the Erie Policy was triggered once Corwin filed suit against Morrisville because Corwin's complaint alleged facts which would suggest a reasonable possibility of being covered under the Policy. Thus the Court finds Defendants' arguments to be meritless.

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Schweinfurth and Contractual Indemnification

Plaintiff has also established a prima facie case for summary judgment pursuant to CPLR 3212 that Schweinfurth is required to indemnify Morrisville for contractual defense and indemnification costs. Plaintiffs point to the Contract, which expressly specifies that Schweinfurth was to defend and indemnify Morrisville for "any and all claims" arising out of "any act or omission associated with the performance." (Conference Service Agreement, p. 1)

Defendants, who have the burden to show evidence of material issues of fact, have not done so. They claim that requiring Schweinfurth to indemnify Morrisville for Morrisville's own negligent acts violates public policy. Under NY General Obligations Law § 5-321, any lease of real property excepting the lessor from liability caused by the lessor's negligence is void and not enforceable. According to Defendants, the Contract essentially leased portions of the college to Schweinfurth for the quilting seminar. But as Plaintiffs correctly point out, the Contract is not a lease. A lease requires that the lessee maintain exclusive possession of a designated portion of the premises. (*see Theatre Row Phase II Assocs. v. Nat'l Recording Studios*, 291 AD2d 172, 175, 739 NYS2d 671, 673 [1st Dept. 2002]; *Layton v. A.I. Namm & Sons, Inc.*, 275 AD 246, 249-250, 89 NYS2d 72, 74-76 [1st Dept. 1949]). In contrast, the Contract merely allowed Schweinfurth to use the building for a designated time. Schweinfurth did not maintain exclusive possession of the building, as there were some summer school programs and other groups meeting at the area when the quilting seminar took place.

Selective and the Voluntary Payment Doctrine

Defendants argue that Plaintiff Selective's claim for defense and indemnification costs is merely a subrogation action to defer its defense and indemnification costs for the Underlying Action. Defendants allege that Selective "voluntarily" defended and indemnified Morrisville even though neither Selective nor Morrisville were liable in the Underlying Action. Under the Voluntary Payment Doctrine, a party is barred from recovering payments if it made those payments voluntarily with full knowledge of the facts and in absence of fraud or mistake of material fact or law." (*Sillon v. U-A Columbia Cablevision of*

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Westchester, Inc., 100 NY2d 525, 526, 760 NYS2d 726, 727 [Ct App 2003]). However, Selective's payment of Morrisville's defense and indemnity costs were not voluntary. As Morrisville's insurer, Selective was obligated to insure Morrisville once Erie denied Morrisville additional insured coverage under the Erie Policy. Furthermore, as Plaintiff correctly argues, Defendants cannot claim that Morrisville was not liable in the Underlying Claim at the same time that they allege that Morrisville was negligent with regard to the slip and fall. Therefore, the Court finds this argument unpersuasive.

Discovery and Entitlement to Summary Judgment

Plaintiff alleges that Defendant Erie has failed to establish their entitlement to summary judgment because a question of fact exists as to the Erie Policy. During discovery, Plaintiffs demanded a full copy of the Erie Policy, including any additional insured endorsements, from Defendant Erie. Erie provided Plaintiffs with a copy of the AI Endorsement, which references another endorsement CG 2011 "Additional Insured-Managers or Lessors of Premises." Erie did not give Plaintiffs a copy of CG 2011 but instead gave Plaintiffs a copy of CG 2010, "Additional Insured-Owners, Lessees or Contractors." Thus, Plaintiffs allege that there are questions of fact as to whether or not Morrisville was covered under CG 2011 and whether the CG 2011 "endorsement" was in effect at the time of the accident. Because there is a discrepancy as a matter of fact as to whether or not Morrisville was covered under another endorsement under the Erie Policy, Defendant Erie's motion for summary judgment should be denied.

Leave to Amend

Plaintiffs move for leave to file a supplemental complaint in order to assert a cause of action against Schweinfurth for commercial indemnification. Under CPLR § 3025(b), "a party may amend his pleading, or supplement it, by setting forth additional or subsequent transactions or occurrences at any time by leave of court or by stipulation of all parties." Additionally, "leave shall be freely given upon such terms as may be just including the granting of costs and continuances" so long as the proposed amendment is not improper as a matter of law or prejudices or surprises the opposing party. (*see* CPLR § 3025(b); *Aetna Casualty & Sur. Co. v. LFO Constr. Corp.*, 207 AD2d 274, 276; 615 NYS2d 389, 390 [1st Dept 1994]). Defendants, however, allege that Plaintiff's motion for leave to serve a Supplemental Complaint

is prejudicial. According to Defendants, Plaintiffs did not seek to amend the complaint until after discovery even though they allegedly knew of the facts giving rise to the contractual indemnification claim in 2006. Additionally, they allege that Plaintiffs have not offered a reasonable excuse for the delay. However, Defendants have not presented an argument as to why the delay would be prejudicial; they have not shown that they have been hindered in preparing its case or have been prevented from taking measures in support of its position. (see *Valdes v. Marbrose Realty Inc.*, 289 AD2d 28, 29, 734 NYS2d 24, 25 [1st Dep't 2001]). However, as Plaintiff's motion for summary judgment has been granted, additional claims against Defendant Schweinfurth relating to the same set of facts would be moot or superfluous. Therefore, Plaintiff's motion for leave to serve a Supplemental Complaint is denied.

Based on the above, therefore it is

ORDERED that the prong of Plaintiff's motion seeking leave to serve a supplemental complaint is denied; and it is further

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that the prong of Plaintiffs' motion for summary judgment is granted against Defendant Schweinfurth as to liability; and it is further

ORDERED that the complaint as against the remaining defendant, Erie Insurance Company, shall continue; and it is further

ORDERED that, as plaintiff does not request an immediate trial on damages as against Schweinfurth, in the interest of judicial economy and convenience to the parties, the Court directs that the inquest shall be held at the time of trial or resolution of the case as against Erie.

Dated: 10/13/10

FILED
OCT 19 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

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LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.