

Essex Ins. Co. v Barillaro

2010 NY Slip Op 33111(U)

October 22, 2010

Supreme Court, Queens County

Docket Number: 965/2009

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

ESSEX INSURANCE COMPANY X

- against -

JOSEPH BARILLARO, et al.

X

INDEX NO. 965/2009

MOTION DATE: JULY 21, 2010

MOTION CAL. NO. 15

MOTION SEQ. NO. 3

BY: KITZES

DATED: OCTOBER 22, 2010

Plaintiff Essex Insurance Company has moved for summary judgment declaring, inter alia, that it is not obligated to defend or indemnify DMP Contracting, Inc. in an underlying action pending in the New York State Supreme Court, County of Queens captioned *Barillaro v Beechwood RB Shorehaven, LLC*, Index No. 558/07).

Beechwood RB Shorehaven, LLC, apparently the owner and the general contractor on a construction project located in the Bronx, New York subcontracted plumbing and other work to Bass Mechanical Plumbing. On December 7, 2005, Joseph Barillaro, an employee of Bass Mechanical Plumbing, allegedly sustained personal injury caused by a collapsing trench. On or about January 8, 2007, Barillaro brought a personal injury action against Beechwood RB Shorehaven, LLC in the New York State Supreme Court, County of Queens (*Barillaro v Beechwood RB Shorehaven, LLC*, Index No. 558/07). Beechwood RB Shorehaven subsequently brought a third-party action for indemnification against DMP Contracting Corp., allegedly a subcontractor responsible for excavation work on the project. Daniel M. Pirraglia, the President of DMP swears that his company first learned of

Barillaro's accident on December 1, 2008 when Beechwood RB Shorehaven served it with the summons and complaint in the third party action.

Essex had issued a general liability policy to DMP with an effective term of August 20, 2005 through August 20, 2006. The Essex policy contained the standard clauses requiring the insured to give notice of an occurrence and/or of a lawsuit to the insurer "as soon as practicable." The Essex policy also contained the following exclusion: "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."

Essex first received notice of Barillaro's accident on December 16, 2008, more than three years after it occurred. The insurer disclaimed coverage on several grounds, including late notice of an occurrence, and began the instant action for a judgment declaring that it had no duty to defend and indemnify in the underlying lawsuit. Barillaro and Jessica Raffinello, his wife and another plaintiff in the underlying action, failed to appear in this action, and plaintiff Essex obtained an order dated April 5, 2010 from this court granting a default judgment against them.

The court notes initially that despite the three year delay in providing Essex with notice of the occurrence, the affidavit of Daniel M. Pirraglia alleging that his company first learned of Barillaro's accident on December 1, 2008 creates an issue of fact concerning whether the insured has a reasonable excuse for the delay. (See, *Security Mut. Ins. Co. v Acker-Fitzsimons Corp*, 31 NY2d 436.) However, summary judgment in this case is not precluded by that issue of fact because it need not be tried. (See, *Alvarez v Prospect Hospital*, 68 NY2d 320.)

"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.) Defendant Essex successfully carried this burden through its reliance on the contractor/subcontractor exclusion. This court finds no merit in DMP's argument that the exclusion applies only to contractors and subcontractors hired by DMP itself. First, the Essex policy states "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.) There is a definite and significant shift within section 1(D) of the endorsement from the use of the terms "you" and "your" to the use of the term "any" in the contractor/subcontractor exclusion located in section 1(D). Second, the term "any" is not ambiguous in itself or in context as it used in a full separate paragraph within section 1(D), a section that has several provisions dealing with different matters. "Courts must determine the rights and obligations of parties under an insurance contract based on the policy's specific language," and "[u]nambiguous provisions must be given their plain and ordinary meaning ." (*State Farm Mut. Auto. Ins. Co. v. Glinbizzi* 9 AD3d 756, 757.) Third, DMP did not show that the contractor/subcontractor exclusion is ambiguous because it is subject to different reasonable interpretations. (*See, State Farm Mut. Auto. Ins. Co. v. Glinbizzi, supra.*) DMP's own interpretation of the contractor/subcontractor exclusion does not make sense. Essex would not have excluded liability for DMP's own contractors and subcontractors and yet allowed coverage for all other contractors and subcontractors.

Accordingly, the plaintiff's motion for summary judgment is granted. The court declares that Essex Insurance Company has no duty to defend or indemnify the defendants in the underlying action.

Short form order signed herewith.

J.S.C.

