Portnoy v Allstate Indem. Co.
2010 NY Slip Op 34033(U)
February 24, 2010
Supreme Court, Nassau County
Docket Number: 012011/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

TANCHUM PORTNOY, SARA KATZ a/k/a SARA PORTNOY and SUTTON PARK CONSULTING GROUP, INC.,

Plaintiff,

-against-

ALLSTATE INDEMNITY COMPANY and JOHN RICCIO AGENCY, INC.,

Defendants.

X

Index No.: 012011/08
Motion Sequence...04
Motion Date... 01/06/10
XXX

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant Allstate Indemnity Company ("Allstate"), seeking an order pursuant to CPLR § 3212, dismissing the complaint of Sutton Park Consulting Group, Inc. ("Sutton Park"), is determined as hereinafter provided.

The Court notes that the Defendants Portnoy and Katz's complaint has already been dismissed by the Court (see the reply affirmation of Allstate, para. 7; Exhibit D annexed

to its motion).

This matter is a declaratory judgment action wherein the Plaintiff Sutton Park seeks to have the Defendant Allstate provide coverage, etc. to Sutton Park in an underlying personal injury action commenced by Eric Kupferberg, who was allegedly injured in an accident that occurred on November 13, 2007 at 148 Sutton Place South, Lawrence, New York. The Plaintiff Sutton Park sought to avail itself of a homeowner's policy with Allstate. Allstate denied the claim.

In June, 2001, the former Plaintiff Sara Katz, a/k/a Sara Portnoy ("Katz") purchased property known as 149 Lakeside Drive, Lawrence, New York. In August, 2001, Ms. Katz sought to purchase an adjoining premises to the 149 Lake Drive property, 148 Sutton Place South, Lawrence (the "premises"). Apparently, to avoid the provisions of the Village of Lawrence code restricting common ownership of adjoining premises as separate lots (see Exhibit H, pg. 57 annexed to Allstate's motion), Katz founded the corporate entity, Sutton Park to own the 148 Sutton Place South. Sutton Park took title to the property at 148 Sutton Place South (see Exhibit 4 annexed to Allstate's motion). About eight (8) months after its purchase, former Co-Plaintiff Tanchum Portnoy ("Portnoy") met with John Riccio of the John Riccio Agency, in order to obtain insurance coverage. Allstate issued a deluxe homeowner's policy to Portnoy (see Exhibit I annexed to Allstate's motion) that was effective March 23, 2002 (see Exhibit J, p. 94 annexed to Allstate's motion). John Riccio has testified at his deposition that when the policy was being written, Portnoy told him that

he owned the premises (see Exhibit J, pg. 93 annexed to Allstate's motion). Riccio further testified that if he had known that the property was owned by a corporation, the policy would never have been written since Allstate does not insure corporations for home insurance (see Exhibit J, p. 95 annexed to Allstate's motion).

Allstate contends that from the date of its issuance of the policy in March, 2002 until November, 2007 the date of the Kupferberg incident, Portnoy never advised Riccio that Sutton Park, a corporation, held title to the subject property (see Exhibit K annexed to Allstate's motion).

When notified of the Kupferberg underlying action, Allstate denied coverage on the grounds that the owner of the property, Sutton Park, was not an insured and did not qualify as an insured entity since the policy was issued to Portnoy, the only named insured, and not the actual owner of the premises.

Allstate also notes that the premises is a business address of Ms. Katz and business activities preclude coverage for bodily injury in the policy (see Exhibit I, pg. 23, para. 9 annexed to Allstate's motion).

Allstate contends it owes no duty to defend or expend funds for Sutton Park since it is not an "insured" under the policy.

Allstate points to the fact that Portnoy, after receiving the policy or the declaration sheets later received, never discussed it with Riccio (see Exhibit H, pg. 42), and Allstate notes Portnoy did not give accurate information to Riccio, i.e., that Sutton Park was

the its actual owner, not Portnoy.

John Riccio stated in his affirmation (see Exhibit K, pgs. 2-3, para. 5 annexed to Allstate's motion) that Allstate does not insure residential properties owned by corporations. This is set out in the language in the policy (see Exhibit I, pg. 23, para. 9 annexed to Allstate's motion).

Sutton Park argues that Portnoy told Riccio Sutton Park actually owned the premises and Riccio told Portnoy to put the subject premises in Portnoy's name and the home would be covered anyway (see Exhibit H, pg. 22 annexed to Allstate's motion).

Portnoy contends that Sutton Park is listed as an "interested party" or someone who has an interest in the subject premises. Portnoy argues Sutton Park's status as an "interested party" can be equated to an "additional insured." The Plaintiff contends Sutton Park's status as an "interested party" on the policy was an acknowledgment that Sutton Park owned the subject premises. Thus, Sutton Park contends that the policy should be reformed to include Sutton Park as an insured or additional insured as it was the negligence of John Riccio that resulted in Sutton Park not being named as the insured.

Portnoy disagrees that he ever told John Riccio that he was the owner of the subject premises.

A party seeking reformation of a contract is required to demonstrate its intentions to such relief by clear and convincing evidence. *Judge v Travelers Insurance Co.*, 262 A.D.2d 983 (4th Dept. 1999). Thus, he argues, the intent was executed under mutual

mistake or intentional mistake coupled with fraud. *Chimart Assoc. v Paul*, 66 N.Y.2d 570 (1986); *Greater New York Mutual Insurance Co. v U.S. Underwriters Ins. Co.*, 36 A.D.3d 441 (1st Dept. 2007).

A bare conclusory claim of unintentional mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation. *Barclay Arms v Barclay Arms Assoc.*, 74 N.Y.2d 644 (1989).

Here, the record does not reflect the homeowner's policy issued to Sutton Park by Allstate is at variance with the interests of both parties or the product of a fraudulent misrepresentation on the part of Allstate. Also, Portnoy never objected to the policy's coverage, i.e., Portnoy as owner, when the policy was renewed several times. Additional, there is no evidence of a very high order herein to support reformation. *George Backer Management Corp. v Acme Quilting Co. Inc.,* 46 N.Y.2d 211 (1978).

In a declaratory judgment action to declare the parties' right under an insurance policy, the party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the naming of the policy when the matter has been put in issue by the pleadings. *See Pattengell v. Welsh,* 81 A.D.2d 831 (2d Dept. 1981), *Affd.* 54 N.Y.2d 917 (1981).

Courts bear the responsibility of determining the rights and obligations of the parties under common contracts based on the specific language of its policies (*State of New*

York v Home Indemnity Co., 66 N.Y.2d 669 (1985). Ambiguous provisions must be given their plain and ordinary meaning. *United States Fidelty & Guarantee Co. v Annunziata*, 67 N.Y.2d 229 (1986).

Insurance policies involve different risks and, sometimes, additional interested parties, and losses can represent different sets of questions regarding who is covered, who is entitled to policy proceeds, and how the facts of a given event may impact the rights of the various parties. "Additional interested party" cannot be equated to "insured" or "additional insured."

Here, Sutton Park is not a named insured or an additional insured under the Allstate policy at issue. Thus, Allstate's obligation to defend or indemnify does not extend to Sutton Park. See *Seavey v James Kendrick Trucking, Inc.*, 4 AD3d 119 (1st Dept. 2004)

Portnoy and Katz contend that Allstate not making the homeowner, Sutton Park, as the insured of the property did not embody the real understanding of Portnoy and Riccio.

The court must disagree.

As noted, the policy doesn't name, describe or otherwise refer to Sutton Park as an "insured" or "additional insured." Allstate argues there is no obligation to defend or indemnify Sutton Park. This is negligence, argues Sutton Park.

To constitute a tort, the act or commission must be relatively independent of contractual rights. *Stella Flour & Feed Corp. v. National City Bank of New York*, 285 A.D.

182 (1st Dept. 1954).

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.,* 70 N.Y.2d 382 (1987).

Here, Sutton Park alleges Allstate's "negligence" constitutes not properly listing Sutton Park as an "insured" or "additional insured." This Court contends such an alleged failure would be contractual in nature and such obligations do not constitute an independent act, omission, etc. independent from the insurance contract herein.

A simple breach of a contract is not considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to and not constituting elements of the contract. *Clark-Fitzpatrick v. Long Island Railroad Co., supra*

When it is established that, through an innocent mistake of an applicant for insurance, the nature of the property to be insured, whether individual or corporate, is misdescribed, the error is mutual for purposes of reformation, even though the insurer is not aware of the error. *Court Tobacco Stores, Inc., v. Great Eastern Insurance Co.,* 43 A.D.2d 561 (2d Dept. 1973).

Without proof of concealment by the plaintiff or its broker with the intent to deceive the defendants, or proof the defendants for good and sufficient reason would not have accepted the risk, the plaintiff would be entitled to reformation or the showing of

mistake by both parties in the description of the owner in the policy. *Court Tobacco Stores, Inc. v. Great Eastern Insurance Co., supra.*

Here, the record is clear that Allstate would not issue a deluxe homeowner's policy to a corporate entity. This was told to Portnoy in no uncertain terms, and it is stated in the policy.

All the evidence suggests the conclusions that the only agreement reached between the parties was that which was reflected in the policy, i.e., Portnoy was the only party listed as "insured," not Sutton Park.

In unilateral mistake cases, where the final written instrument does not reflect one party's understanding of the arguments but does reflect the other party's understanding thereof, the mistaken party's failure to read the contract before signing it precludes him from arguing that the instrument does not reflect the parties' actual agreement. *Metzger v Atena Ins. Co.*, 227 N.Y. 411 (1920).

Here, Portnoy admitted that he never read the deluxe homeowner's policy on the subject premises. *See Exhibit H, pgs. 40-42* annexed to Allstate's motion.

For reformation of a contract to be successful, one party did not have to read the policy. However, the party seeking reformation has to present evidence that the parties had revoked an agreement prior to its execution of the policy that was different from the agreement contained in the policy. *Metzger v. Atena Ins. Co., supra.*

It is well settled that equity will reform an instrument that, by mistake, does not

reflect the agreement reached between the parties. *Lent v Cea,* 209 A.D.2d 820 (3d Dept. 1994) lv. to appl den. 86 N.Y.2d 703.

Additionally, no important issues were excluded by scrivener's error. As such, where there is no mistake about the agreement and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. See *Lent v Cea, supra.*

Here, the record is devoid of evidence of mutual mistake or fraud, much less such evidence as would even begin to overcome the heavy presumption that the policy as issued by Allstate reflected the true intent of the parties. *Chimart Assoc. v. Paul*, 66 N.Y.2d 570 (1986).

Any allegation of fraud to support intentional mistake must be alleged with the requisite particularity. *Barclay Arms Inc., v. Barclay Arms Assoc.* 74 N.Y.2d 644 (1989).

There are no such requisite allegations of fraud set forth herein.

Portnoy is the only party listed as the "name insured" (see Exhibit I, p. 1 annexed to Allstate's motion). There is no indication as to how Sutton Park could have been included as an "insured person" under the definition of the policy ("definition," sub 3, pg. 2 annexed to Allstate's motion).

As to the fourth cause of action, Sutton Park requests that the cross-claim initiated against it in Portnoy and Katz's answer in the underlying Kupferberg action be withdrawn. Such relief should be requested of the Court entertaining the underlying action

by the counsel representing Portnoy and Katz therein.

Here, Sutton Park failed to show Allstate intended to have Sutton Park, a corporate entity, listed as an insured on a residential homeowner's deluxe policy.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *Miller v Journal News*, 211 A.D.2d 626 (2d Dept. 1995). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Ayotte v. Gervasio*, 81 N.Y.2d 1062 (1993).

Here, Allstate has met its burden.

Accordingly, it is hereby

ORDERED, that the Defendant's motion for an order granting summary judgment pursuant to CPLR § 3212 is **GRANTED** and the complaint is dismissed without costs.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
February 24, 2010

Hon. Randy Sue Marber, J.S.C.
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