

Kensington Ins. Co. v Nationwide Mgt. of NY, Inc.

2011 NY Slip Op 30310(U)

January 19, 2011

Sup Ct, Queens County

Docket Number: 27718/08

Judge: James J. Golia

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable JAMES J. GOLIA
Justice

IAS TERM, PART 33

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KENSINGTON INSURANCE COMPANY,

Plaintiff(s),

-- against --

Index No: 27718/08
Motion Date: 10/07/10
Cal. No: 18

NATIONWIDE MANAGEMENT OF NY, INC.,
JULIANN LEBRON, HADAS ASSOCIATES LLC,
AND ALLBOROUGH MEDICAL CENTER,

Sequence No. 1

Defendant(s).

-----x

The following papers numbered 1 to 9 read on this motion by plaintiff Kensington Insurance Company for summary judgment on its complaint and for summary judgment dismissing the counterclaims asserted against it and on the cross motion by defendant Nationwide Management of NY, Inc. and defendant Patient Focus Medical Examinations, PC. d/b/a and s/h/a Allborough Medical Center (Allborough) for partial summary judgment dismissing that part of plaintiff Kensington's complaint which rests on allegations concerning late notice.

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Upon the foregoing papers it is ordered that this motion and cross motion are denied without prejudice to renewal. (See the accompanying memorandum.)

Dated: January 19, 2011

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JAMES J. GOLIA, J.S.C.

Memorandum

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable JAMES J. GOLIA
Justice

IAS TERM, PART 33

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JULIANN LEBRON, HADAS ASSOCIATES LLC,
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Sequence No. 1

Defendant(s).
-----x

Plaintiff Kensington Insurance Company has moved for summary judgment on its complaint and for summary judgment dismissing the counterclaims asserted against it. Defendant Nationwide Management of NY, Inc. and defendant Patient Focus Medical Examinations, PC. d/b/a and s/h/a Allborough Medical Center (Allborough) have cross moved for partial summary judgment dismissing that part of plaintiff Kensington's complaint which rests on allegations concerning late notice.

The plaintiff insurer issued a policy of insurance to defendant Nationwide Management with a term from April 20, 2007 to April 20, 2008. The policy contained a clause excluding liability for bodily injury suffered by an employee of Nationwide Management. The policy also contained a clause requiring the insured to give notice of an occurrence as soon as practicable.

Defendant Hadas Associates, the owner of premises located at 117-12 Myrtle Avenue, Richmond Hill, New York, leased the premises to BAB Management for the period from June 17, 2004 to June 30, 2009. Defendant Hadas Associates alleges that BAB Management is also known as Nationwide Management of New York and Allborough Medial Center. The three entities allegedly all have the same principals and officers. The lease required the tenant "to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury***."

Juliann Lebron alleges that on December 19, 2007, she was an employee of defendant Allborough, which conducted a medical practice at 117-12 Myrtle Avenue, Richmond Hill, New York. After she completed her medical transcription work, Lebron stopped to use a restroom in the building used by the public and by employees before going home. She allegedly fell and broke her right arm upon entering the restroom. A supervisor for Nationwide Management came to her aid, and she allegedly informed him that she had fallen and could not get up. A few days later, her employer terminated her job. Lebron filed a claim for worker's compensation benefits.

On or about September 24, 2008, Lebron also brought an action for personal injury in the New York State Supreme Court, County of Queens against Hadas Associates, LLC., the owner of the building, Nationwide Management, the alleged lessee of the building, and Allborough Medical Center (*Lebron v Hadas Associates, LLC.*, Index

No. 23709-08). Allborough moved for an order pursuant to CPLR 3211 dismissing the complaint, and, by decision and order dated July 1, 2009 (one paper), the Honorable Augustus C. Agate granted the motion except for the cause of action based on negligence. The court found that there was an issue of fact pertaining to whether Allborough was a tenant at the premises. However, on September 14, 2010, Allborough submitted a motion for summary judgment dismissing the negligence cause of action, and, by decision and order dated December 13, 2010 (one paper), Justice Agate granted the motion, dismissed Lebron's complaint against Allborough, and severed the action against the remaining defendants. Justice Agate found that the named tenant on the lease was BAB Management and that was insufficient proof that Allborough had any relation to that company which would obligate Allborough to perform the tenant's responsibilities under the lease.

On February 2, 2010, Hadas Associates submitted a motion for summary judgement dismissing Lebron's complaint against it, but Justice Agate denied the motion by decision and order (one paper) dated April 16, 2010. Justice Agate found that while Hadas Associates, the owner of the building located at 117-12 Myrtle Avenue, Richmond Hill, New York, had leased it to BAB Management, Inc., issues of fact pertaining to the former's defense as out-of-possession landlord precluded summary judgment.

Nationwide Management learned of Lebron's accident no later

than December 25, 2007, but the insured did not provide notice to the insurer until October 16, 2008. Nationwide Management initially noticed its Worker's Compensation carrier of Lebron's accident, not Kensington, its general liability insurer. Svetlana Osiashvili, the President of Nationwide Management, swears that on the day of the accident, Lebron was an employee of her company. Nationwide Management allegedly did not give immediate notice of the accident to Kensington because the former believed that the matter would be covered by Worker's Compensation, but when Lebron brought the underlying action, Nationwide Management gave prompt notice to the insurer.

By letter dated November 3, 2008, plaintiff Kensington disclaimed coverage for Lebron's accident because of, inter alia, the employer exclusion clause, although the insurer promised to provide Nationwide Management with a defense in the underlying action until a court issued a declaration regarding the rights and obligations of the parties under the insurance policy. The plaintiff insurer also disclaimed liability on the ground that the defendant insured had breached the insurance contract by not providing notice of an occurrence as soon practicable. On or about November 14, 2008, plaintiff Kensington began this action for a judgment declaring, inter alia, that it has no duty to defend or indemnify Nationwide Management in the underlying action.

On February 2, 2010, Nationwide Management submitted a motion

for summary judgment dismissing Lebron's complaint against it, but by decision and order dated April 16, 2010 (one paper), Justice Agate denied that branch of the motion which pertained to the cause of action based on negligence without prejudice to renewal and denied the remaining branches of the motion as moot. Nationwide Management asserted in its motion papers that it had employed Lebron and that, therefore, Worker's Compensation Law § 11 barred the maintenance of the action against it. Lebron asserted that she had been an employee of Allborough. In denying Nationwide Management summary judgment, Justice Agate stated: "The Workers' Compensation Board has primary jurisdiction to determine factual issues regarding the applicability of the Workers' Compensation Law, and it is, therefore, inappropriate for the courts to express views with respect thereto pending the determination of the issue by the Board. [Citations omitted.]" Justice Agate directed the parties to make a prompt application to the Workers' Compensation Board for a determination as to Lebron's rights under the statute, and he denied the motion as it pertained to the negligence cause of action without prejudice to renewal after the administrative determination.

The employer exclusion clause in the insurance policy purportedly supplies plaintiff Kensington with a ground for seeking a judgment declaring that it has no duty to defend or indemnify defendant Nationwide Management on the cause of action for

negligence asserted in the underlying action. Although plaintiff Kensington's notice of motion for summary judgment is dated June 25, 2010, the supporting papers do not mention Justice Agate's decision and order dated April 16, 2010 rendered in the underlying action in which he noted that the Workers' Compensation Board has primary jurisdiction to determine issue relating to worker's employment. No party has informed this court of the outcome of the proceeding pending before the Workers' Compensation Board.

As Justice Agate observed, it is improper for a court to determine factual issues regarding the applicability of the Workers' Compensation Law pending before the Workers' Compensation Board. (See, *Rosario v Montalvo & Son Auto Repair Center, Ltd.*, 76 AD3d 963; *Dunn v American Transit Ins. Co.*, 71 AD3d 629.) The issue of whether Nationwide Management was Lebron's employer on the date of her accident is relevant to both the applicability of the employer exclusion clause relied on by Kensington and the reasonableness of Nationwide Management's delay in giving notice to an occurrence. (See, *D'Aloia v Traveler's Inc. Co.*, 85 NY2d 825, 826; *Merchants Mut. Ins. Co. v Hoffman*, 56 NY2d 799.) The parties may renew their motion and cross motion for summary judgment upon a showing that the Workers' Compensation Board has rendered its determination on Lebron's application for benefits.

Accordingly, the motion and the cross motion are denied without prejudice to renewal.

Short form order signed herewith.

James J Golia, JSC