Brands Cycles v Great Am. E&S Ins. Co.

2011 NY Slip Op 30317(U)

January 27, 2011

Sup Ct, Nassau County

Docket Number: 006546/09

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 18

______________________________________X

BRANDS CYCLES and NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 006546/09
Motion Sequence...02
Motion Date...11/01/10

GREAT AMERICAN E&S INSURANCE COMPANY d/b/a/ GREAT AMERICAN E&S INSURANCE COMPANY and GREAT AMERICAN INSURANCE COMPANY d/b/a GREAT AMERICAN CUSTOM INSURANCE SERVICES, INC., ORBEA U.S.A. and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

______________________________________X

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

Upon the foregoing papers, the Defendants, Orbea U.S.A., LLC ("Orbea") and Zurich American Insurance Company ("Zurich") seek an Order pursuant to CPLR § 3212

granting Summary Judgment against Co-Defendant, Great American E & S Insurance Company ("Great American"), declaring that Great American is obligated to defend the Defendant, Orbea in the underlying negligence and product liability action entitled, Suslan v. Orbea USA, under Index No. 000713/08; that Great American is obligated to reimburse the Defendant, Orbea for costs incurred its defense in the underlying negligence and product liability action; and that a hearing be scheduled to determine such costs, is determined as hereinafter provided.

The Plaintiffs, Brands Cycles ("Brands") and Nationwide Property and Casualty Company ("Nationwide") commenced the instant action by filing a summons and complaint in May, 2009, alleging that Great American failed to comply with its obligation to provide insurance coverage of or indemnify Brands as an insured pursuant to the provisions of a liability insurance policy issued by Great American to Brands.

In January, 2008, Barbara Suslan and Jennifer Suslan Budiansky, on behalf of the decedent, Jules Suslan, who died as a result of the injuries sustained while riding the allegedly defective bicycle; the subject of the underlying litigation, filed an action sounding in negligence, breach of warranty, wrongful death, and strict product liability against Orbea and Brands Cycles.

On or about May 1, 2007, Jules Suslan was seriously injured while riding an Orbea Orca brand bicycle, purchased from Brands in October, 2006. While riding his bicycle on Sea Cliff and DeBois Avenues, in Sea Cliff, New York, the bicycle frame allegedly

"suddenly and unexpectantly fractured" in the course of normal, reasonable and foreseeable operation of the bicycle. Mr. Suslan was hospitalized for his injuries and remained hospitalized until his death in August, 2007. Mr. Suslan's widow, Barbara Suslan, alleges, inter alia, that Orbea and Brands were negligent in the designing, manufacturing, assembling, inspecting, testing, labeling, monitoring, promoting, distributing, and selling of the subject bicycle.

The bicycle fork and frame were manufactured by Martec and sold to Zurich's insured, Orbea. Orbea assembled the bicycle, added additional parts to the frame and fork, and labeled it with its own brand name. Orbea then sold the bicycle to Brands.

Upon receipt of the Summons and Complaint in the underlying action, Brands and its liability insurer, Nationwide, tendered their claim to Great American for coverage as an additional insured under the insurance policy. Upon its refusal to provide coverage, Brands and Nationwide commenced the instant insurance coverage declaratory judgment action. Orbea tendered its claim to Great American under its policy's vendor endorsement. Great American, after conducting an investigation of the facts and circumstances of Mr. Suslan's accident, concluded that a foreign object became lodged in the front wheel of the bicycle and consequently caused the frame and fork to break. Great American determined that the frame and fork were not defective and denied Orbea's claim, giving rise to the instant motion. All referenced polices were in full force and effect at all relevant times.

Orbea argues that the plain meaning of policy provides that the vendor's

endorsement is limited to claims arising out of defects in the products sold by the named insured, and such coverage is to be provided even when the vendor modifies the product, incorporates it into a larger product, or relabels and/or repackages it before sale. Orbea further argues that regardless of its entitlement to indemnification from Great American, it is entitled to an immediate defense by Great American regarding the underlying cause of action and Great American's conclusion regarding the defect in the frame, does not relieve it of its obligation.

Great American argues that Orbea's motion is premature as there has been no discovery in the underlying action. Great American further contends that Orbea's actions preclude coverage pursuant to the exclusionary clauses in the policy endorsement. It alleges that Orbea not only relabeled the bicycle, it was actively involved in the frame and fork's creation as Orbea designed and tested them. Great American submits the deposition testimony of Orbea representative, Xabier Irizar, as an exhibit in its opposition papers.[1]

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966 [1988]; *Rebecchi v. Whitmore,* 172 A.D.2d 600 [2nd Dept.1991]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues

[1]It is noted that the movant is Orbea USA, LLC, and Great American's evidence is, in actuality, the testimony of a representative of Orbea S. Coop, Ltd. It is alleged in the record that Orbea S. Coop, Ltd is the parent company of Orbea USA, LLC and such has not been disputed by the movant.

of fact" (*Frank Corp. v. Federal Ins. Co., supra,* at 967; *GTF Mktg. v. Colonial Aluminum Sales,* 66 N.Y.2d 965 [1985]; *Rebecchi v. Whitmore, supra* at 601). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Barr v. County of Albany,* 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson,* 147 AD2d 312, 317 [2nd Dept.1987]).

CPLR § 3212 (e) provides for partial summary judgment, that is, summary judgment "as to one or more causes of action, or part thereof, in favor of any one or more parties". Where partial summary judgment is granted, a court may sever the cause of action for which summary judgment has been granted from any remaining cause(s) of action. Alternatively, a court may direct that the entry of partial summary judgment be held in abeyance pending the determination of the remaining cause(s) of action.

In considering the movant's argument that it is entitled to immediate defense by Great American, it is noted that there is a plethora of authority indicating that an insurer's duty to defend is broader than its duty to indemnify and such duty arises whenever the allegations of the complaint suggest a reasonable possibility of coverage (*Automobile Ins. Co. of Hartford v. Cook,* 7 NY3d 131[2006]). Further, if any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action (see *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 [2002], *Bravo*

Realty Corp. v. Mt. Hawley Ins. Co., 33 A.D.3d 447 [1st Dept. 2006]).

Through its submissions, Orbea has established that the claims asserted against it in the *Suslan* action fall within the scope of the insurance coverage that Great American agreed to provide under the insurance policy. Orbea has met its *prima facie* burden in demonstrating its entitlement to a declaration that Great American is required to defend it in the *Suslan* action.

The burden now shifts to Great American, as the opponent of the motion, to submit proof of a triable issue of fact. Although the causes of action in the Suslan complaint fall within the scope of Great American's obligation under the vendor's endorsement to the subject policy, thereby invoking the duty to defend, such obligation will not apply if the exclusions in the endorsement apply. An insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the allegations fall wholly within a policy exclusion (*City of New York v. Insurance Corp. of New York* 305 A.D.2d 443 [2nd Dept. 2003]).

The relevant provisions of the subject policy are as follows:

"...**WHO IS AN INSURED...**is amended to include as insured any person or organization...shown in the Schedule, but only with respect to 'bodily injury' or 'property damage' arising out of 'your products' shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to following exclusions:

1. The insurance afforded the vendor does not apply to:

a. 'Bodily injury' or 'property damage' for which the vendor is obligated

to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement.

g. Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.

2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products..." (Emphasis added)

It is noted that there is a paucity of authority regarding exclusionary clauses containing the specific or similar language as cited herein. However, an analysis of persuasive authority of other jurisdictions regarding similar exclusionary provisions is appropriate. In a seminal case on which Orbea relies, *Mattocks v. Daylin, Inc.* 452 F.Supp. 512 (D.C.Pa.,1978), the insurer alleged that the vendor intentionally made a change in the form of the product and relabeled the product before putting it into the stream of commerce. The Court determined that there must be a causal nexus between the conduct of the vendor and the injury sustained before the labeling exclusion in the policy can be invoked.

However, the court in *American White Cross Laboratories, Inc. v. The Continental Insurance Company*, 495 A2d 152, (N.J. Super. 1985), distinguished the facts before it, from *Mattocks*. There, it noted that the vendor made the product its own by reducing the bulk product as supplied by the manufacturer, repackaging it, and then labeling it with its own brand name. As such, the vendor's actions fell within the express exclusions of the policy endorsement.

Both cases indicate that the vendor's role has to be more than that of a passive participant. Here, the uncontroverted evidence submitted by Great American indicates that Orbea participated in the creation and design of the subject bicycle frame and fork and such conduct arose prior to its labeling and/or relabeling of the bicycle. Further, Orbea submitted no evidence to the contrary.

Finally, where an exclusionary clause is unambiguous, it must be given its plain and ordinary meaning. *(Duncan Petroleum Transport, Inc. v. Aetna Ins. Co.* 96 A.D.2d 942 [2nd Dept. 1983]; *Pennsylvania Gen. Ins. Co. v. Kielon,* 112 A.D.2d 709, 4th Dept 1985]). Because the policy excludes coverage in this instance, this Court granting summary judgment would not be appropriate.

Accordingly, the Defendants, Orbea U.S.A., LLC and Zurich American Insurance Company's motion for partial summary judgment is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
January 27, 2011

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

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE