

**Raner v Security Mut. Ins. Co.**

2011 NY Slip Op 30369(U)

February 14, 2011

Supreme Court, New York County

Docket Number: 601409/2009

Judge: O. Peter Sherwood

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

PRESENT: Q. PETER SHERWOOD  
*Justice*

PART 61

SUSAN RANER,

Plaintiff,

-against-

SECURITY MUTUAL INSURANCE COMPANY  
and E. PATRICIA DOLAN,

Defendants.

INDEX NO. 601409/2009

MOTION DATE Nov. 3, 2010

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, the motion of defendant Security Mutual Insurance Company for summary judgment is decided in accordance with the accompanying decision, order and judgment. **FILED JUDGMENT**

This judgment is to be filed by the County Clerk and notice of entry is to be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/14/11

O. Peter Sherwood  
O. PETER SHERWOOD, 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  
NEW YORK COUNTY: IAS PART 61

-----X  
SUSAN RANER,

Plaintiff,

-against-

DECISION, ORDER  
AND JUDGMENT

Index No. 601409/2009

SECURITY MUTUAL INSURANCE COMPANY  
and E. PATRICIA DOLAN,

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
Defendants notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X  
O. PETER SHERWOOD, J.:

In this declaratory judgment action, defendant Security Mutual Insurance Company ("Security Mutual") moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

***Background***

Defendant E. Patricia Dolan ("Dolan"), via Security Mutual's agent, non-party P. Turim Insurance Agency ("P. Turim"), obtained a homeowner's insurance policy from Security Mutual. Security Mutual's policy, HO 0496138 (the "Policy"), which was in effect from April 13, 2005 to April 13, 2008 (*see* Affirmation of Renee A. Breitner, Esq. in Support of Motion [Breitner Affirm.], Exhibit "C", the Policy). The Policy provides that it covers premises located at 197 Kildare Road, Garden City, New York 11530 (the "Garden City Residence") (*see id.*, Declarations Page).

In the summer of 2005, Dolan was renting a beach cabana number C23 (the "Cabana") from the Sun and Surf Beach Club (the "Beach Club"), located at 2191 Bay Boulevard, Atlantic Beach, New York. On September 10, 2005, upon Dolan's invitation, plaintiff Susan Raner ("Raner" or "plaintiff") was at the Cabana, where she fell and suffered bodily injuries (the "Accident").

**Denial of Coverage**

The parties dispute when Dolan first notified Security Mutual about the Accident and Raner's claims. Security Mutual claims that it was first notified only in December 2005, when it received a fax from P. Turim, whereas Dolan claims that she called Security Mutual shortly after the Accident and was instructed to contact her insurance agent, which she allegedly did eight to ten days after the Accident.

After it received the fax from P. Turim, Security Mutual sent a reservation of rights letter, dated December 13, 2005, to Dolan. It then assigned non-party Great Wave Investigation Co. ("Great Wave") to investigate the issues of coverage and liability. In February 2006, following its investigation, Great Wave submitted a report to Security Mutual. By letter dated February 14, 2006, Security Mutual disclaimed coverage for the Accident on the grounds of the Policy exclusions for liability resulting from premises other than the insured premises, as well as Dolan's failure to give Security Mutual timely notice of the Accident.

### **Personal Injury Action**

In December 2007, Raner commenced a lawsuit against Dolan in the Supreme Court, Nassau County, titled *Susan Raner v E. Patricia Dolan* (Index No. 21909/2007), alleging that Dolan's negligence caused her injury (the "Personal Injury Action") (*see* Breitner Affirm., Exhibit "C"). By order dated June 26, 2008, and entered July 11, 2008, the court in the Personal Injury Action granted Raner's motion for partial summary judgment on default on the issue of liability. On March 4, 2009, following an inquest on the issue of damages, a judgment was entered in favor of Raner and against Dolan in the amount of \$359,313.24 (the "Amount of Judgment").

### **This Action**

In this action, Raner alleges that Security Mutual (1) insured Dolan "for liability concerning the occupancy of the" Cabana (Complaint, ¶ 7); (2) improperly and untimely disclaimed coverage (*id.*, ¶¶ 8, 14-15); and (3) failed to defend and indemnify Dolan (*id.*, ¶ 14). Raner seeks a judgment (1) declaring that Security Mutual had a duty to defend and indemnify Dolan in the Personal Injury Action and (2) awarding the Amount of Judgment in favor of Raner, plus interest. Defendant E. Patricia Dolan ("Dolan") has not interposed an answer.

Security Mutual now moves for summary judgment dismissing the complaint.

### ***Discussion***

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'" (*id.*, quoting CPLR 3212 [b]).

The first issue for the court's consideration is whether the premises where the Accident occurred is covered by the Policy. In determining this issue, the court looks to general principles governing the interpretation of insurance policies. "The interpretation of [an insurance] policy's terms is a question of law for the court" (*Seaport Park Condominium v Greater N.Y. Mut. Ins. Co.*, 39 AD3d 51, 54 [1st Dept 2007]). "An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy . . . The touchstone for interpreting insurance contracts, as with other contracts, is the reasonable expectation of the parties [citations omitted] (*Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 [1st Dept 1998]). "As with the interpretation of any contract, the unambiguous terms of an insurance policy must be accorded their plain and ordinary meaning" (*Seaport Park Condominium*, 39 AD3d at 54).

"Where the contract at issue is an insurance policy, any exclusion from coverage must be stated unambiguously, and any ambiguity must be resolved against the insurer as drafter of the policy's language" (*Matter of Reliance Ins. Co.*, 55 AD3d 43, 46 [1st Dept 2008], *aff'd* 12 NY3d 725 [2009]). "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 [1993]).

Here, coverage under the Policy is divided into six categories: "Residence," "Related Private Structures on the Premises," "Personal Property," "Additional Living Expense and Loss of Rent," "Personal Liability," and "Medical Payments to Others" (*see* Policy, Declarations Page).

As to the category of "Personal Liability," with policy limits of \$300,000 per each occurrence, the Policy, in relevant part, provides: "[w]e pay, up to *our* limit of liability, all sums for which any *insured* is legally liable because of *bodily injury or property damage* caused by an *occurrence* to which this coverage applies" (emphasis in the original)(Policy, at L-1).

As to the category of "Medical Payments to Others," with policy limits of \$1,000, the Policy, in relevant part, provides: "[w]e pay the necessary *medical expenses* incurred or medically determined within three years from the date of an accident causing *bodily injury* to which this coverage applies" (*id.*).

The Policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially similar conditions” (*id.* at 2, § 10) and “bodily injury” as “bodily harm, sickness or disease to a person including required care, loss of services and death resulting therefrom” (*id.* at 1, § 2).

Under the “Personal Liability” and “Medical Payments to Others” categories, the Policy excludes coverage if, among other things, liability “result[ed] from premises owned, rented or controlled by an *insured* other than the *insured premises* ...”(emphasis in the original) (Policy, at L-3, § 1 [g]).

The Policy defines “insured premises,” in relevant part, as follows: “[i]f *you* own the one to four family house described in the Declarations, the *insured premises* means that house, related private structures and grounds at that location” (Policy, at 1, § 7 [a] [1]). The Declarations Page provides that the Garden City Residence is the house covered by the Policy (*see* Policy, Declarations Page).

Security Mutual contends that the Cabana is not “the insured premises” within the meaning of the Policy and that, therefore, the Policy does not provide coverage for the Accident.

In opposition, Raner points out that the Cabana is “the insured premises” under the following clause in the Policy: “[f]or Personal Liability and Medical Payments to Others coverages, only, *insured premises* also include the following: ... that part of any premises occasionally rented to an *insured* for other than business purposes (Policy, at 1-2, § 7 [b] [8]).

The issue then becomes whether “premises occasionally rented to an insured”, language which is contained in the Policy, is an ambiguous term. “[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech [citations omitted]” (*Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]). “The test for ambiguity is whether the language in the insurance contract is ‘susceptible of two reasonable interpretations’” (*MDW Enters. v CNA Ins. Co.*, 4 AD3d 338, 340-341 [2d Dept 2004], quoting *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

The court finds that the term “premises occasionally rented to an insured” is not ambiguous, and its plain and ordinary meaning refers to episodic, non-systematic rentals (*see Seaport Park*

*Condominium*, 39 AD3d at 54). It is undisputed that Dolan has been renting the same Cabana every summer for over 20 years (see Breitner Affirm., Exhibit "K", Dolan's Written Statement to Great Wave; Exhibit "F", Dolan Dep. Tr., at 33). She has decorated it and stored items in it during the winter (see Dolan's Written Statement to Great Wave). This type of systematic rental spanning decades cannot be characterized as "occasional" (cf. *Villanueva v Preferred Mutual Ins. Co.*, 48 AD3d 1015, 1017 [3d Dept 2008] [the term "occasional rental for residential purposes," used in a homeowner's policy for a summer house, was deemed to be ambiguous, where a one-time rental of the home for five months was at issue]). Dolan could not reasonably expect that her Cabana, which she had been renting every summer for over 20 years from the Beach Club, was an occasional rental covered by the Policy. Accordingly, the Cabana is not "the insured premises" within the meaning of the Policy and the unambiguous exclusion of coverage, where liability results from premises other than the insured premises, applies (Policy, at L-3, § 1 [g]) (see *Continental Cas. Co.*, 80 NY2d at 652). The court concludes, therefore, that Security Mutual was not obligated to defend or indemnify Dolan in the Personal Injury Action.

In light of this determination, the issue of whether Security Mutual timely disclaimed coverage is rendered academic.

**Conclusion**

For the foregoing reasons, it is hereby

**ORDERED** that the motion of defendant Security Mutual Insurance Company for summary judgment is granted and the complaint is dismissed without costs and disbursements; and it is further

**ADJUDGED and DECLARED** that the defendant Security Mutual Insurance Company did not have a duty to defend or indemnify defendant E. Patricia Dolan in the underlying action titled *Susan Raner v E. Patricia Dolan* (Index No. 21909/07, Supreme Court, Nassau County), and it is not obligated to pay the judgment entered in that action on March 4, 2009.

This constitutes the decision, order and judgment of the court.

DATED: 2/14/11

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418) to

O. P. Sherwood  
**O. PETER SHERWOOD**  
 J.S.C.

NOTICE OF ENTRY  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418) to