

Essex Ins. Co. v Mondone
2011 NY Slip Op 33396(U)
December 13, 2011
Sup Ct, Nassau County
Docket Number: 12466/09
Judge: Thomas P. Phelan
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK****Present:****HON. THOMAS P. PHELAN,***Justice*TRIAL/IAS PART 2
NASSAU COUNTY

ESSEX INSURANCE COMPANY,

ORIGINAL RETURN DATE: 08/29/11

Plaintiff(s),

SUBMISSION DATE: 10/12/11

INDEX No.: 12466/09

-against-

JOSEPH J. MONDONE, JR., CHRISTOPHER

P. LANE, JENNIFER A. LANE, TRUE

BUILDING CORP., and KEVIN BEVILACQUA, MOTION SEQUENCE #2

Defendant(s).

The following papers read on this motion:

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Motion by plaintiff Essex Insurance Company ("Essex") for an order pursuant to CPLR 3212 granting it summary judgment declaring that Essex has no duty to defend or indemnify its insured, True Building Corp. ("True") or its President, Kevin Bevilacqua ("Bevilacqua") with respect to the underlying personal injury lawsuit brought by Joseph J. Mondone, Jr. (the "Mondone lawsuit") or satisfy any judgment which Joseph J. Mondone, Jr. ("Mondone") may obtain against True, Bevilacqua or any other defendants in the Mondone lawsuit is denied.

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On or about February 24, 2009, defendant Mondone was allegedly injured while performing electrical work at the residence of Christopher P. Lane ("Lane") located at 60 Stevens Street, Oceanside, New York. Mondone Electric, Inc. was retained by defendant Lane as an electrical contractor or subcontractor to perform certain electrical work in connection with a home renovation at the premises.

Essex issued a commercial general liability insurance policy to True, policy number 3CY6997, for the policy period January 17, 2009, until January 17, 2010, which was in effect on the date of Mondone's accident.

Upon receipt of the Summons and Complaint in the Mondone lawsuit, Essex disclaimed coverage and commenced the instant declaratory judgment action seeking a declaration that: (1) it is not obligated to defend or indemnify True or Bevilacqua for the Mondone lawsuit; and (2) it is not obligated to pay any sums of money awarded to Mondone in the Mondone lawsuit.

In support of its motion for summary judgment, Essex relies upon the exclusion in Paragraph VII, sub-section "G", of the policy's Combination General Endorsement, Form ME-001(09/07), which states:

VII. This insurance does not apply to 'bodily injury', or 'property damage', 'personal injury', 'advertising injury', or any injury, loss or damages including consequential injury, loss or damage, **arising out of, caused or contributed to by:**

G. **any injury** sustained by any contractor, self-employed contractor, and/or subcontractor, or any employee, leased worker, temporary worker or volunteer help of same (emphasis added).

Essex asserts that the endorsement clearly states that the policy does not apply to any damage arising out of any injury sustained by any contractor or any contractor's employees and Mondone was an employee of a contractor or subcontractor at the subject site.

Further, the Essex policy contains an exclusion specifically stating that the Essex policy does not provide coverage for any injury or damage arising out of, caused by, or contributed to as a result of negligent hiring, training, placement, supervision or monitoring of others by insured at the worksite. Specifically, Paragraph VII, sub-section "C", of Combination General Endorsement ME-001 (09/07) states:

This insurance does not apply to 'bodily injury', 'property damage', 'personal injury', 'advertising injury' or any injury, loss or damages, including consequential injury, loss or damage, arising out of, caused by or contributed to by:

C. as a result of the alleged negligence or other wrongdoing in the hiring, training, placement, supervision, or monitoring of others by insured;

Essex contends that since the Mondone lawsuit alleges that Mondone suffered injury because True or Bevilacqua were negligent in failing to oversee plaintiff Mondone at the worksite, the exclusion contained in Paragraph VII, sub-section "C", of the policy's Combination General Endorsement ME-001 (09/07) applies, and there is no coverage for the Mondone lawsuit under the Essex policy.

Essex also relies upon the deposition testimony and affidavit of Rick Strickler, an Executive Claims Examiner with Market Service Incorporated, Claims Service Manager for Essex.

In opposition to the motion, counsel for True and Bevilacqua argue that the subject exclusion in effect renders the policy meaningless and tantamount to fraud and that it is violative of public policy and should be rendered void.

Counsel for Mondone contends that the provision at issue excludes coverage for an "injury" arising out of an "injury" and is ambiguous and that the policy provision in question is inapplicable since Mondone's injury was not caused by an injury but rather was caused by the negligence of True as already determined by Justice Woodard in her order dated August 16, 2011, and entered on August 23, 2011.

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"The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds" (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 306 [2009]). An exclusion must be specific and clear, and will be narrowly construed and enforced only when the insurer establishes that the pertinent language is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; see *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, *supra*; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 138 [2006]). If the language is ambiguous, the ambiguity will be construed in favor of the insured, and "the 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" (*Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996] (citations omitted); see *Villanueva v Preferred Mut. Ins. Co.*, 48 AD3d 1015, 1016 [3d Dept 2008]; *Essex Ins. Co. v Grande Stone Quarry, LLC*, 82 AD3d 1326 [3d Dept 2011]).

Further, the insurer bears the heavy burden of "establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 311; *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 88 NY2d at 307; *Insurance Co. of Greater New York v Clermont Armory, LLC*, 84 AD3d 1168 [2d Dept 2011]).

Indeed, the courts have enforced policy exclusions only where they have found them to "have a definite and precise meaning, unattended by danger or misconception . . . and concerning which there is no reasonable basis for a difference of opinion" (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, *supra*, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978]).

Applying these principles to the case at bar, we cannot say that the event that caused plaintiff's injury was unambiguously excluded from the coverage of this policy.

In view of the foregoing, the motion is denied.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 12-13-11**ENTERED**

J.S.C.

DEC 16 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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