Tully Constr. Co., Inc. v Illinois Natl. Ins. Co.
2012 NY Slip Op 33822(U)
July 6, 2012
Supreme Court, Queens County
Docket Number: 11849/10
Judge: Valerie Brathwaite Nelson
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MEMORANDUM

SUPREME COURT QUEENS COUNTY
IA PART 7
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TULLY CONSTRUCTION CO., INC. and
ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs,

- against -

ILLINOIS NATIONAL INSURANCE COMPANY,

Defendant.

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Index No.: 11849/10
Motion Date: 4/24/12
Motion Seq. No.: 7 & 8
Cal. No.: 24 & 25

By: Brathwaite Nelson, J.

Dated: 7/6/12

This insurance coverage action arises from an accident in which Anthony Vinci was caused to sustain severe and permanent brain injuries. Mr. Vinci, an employee of Tully Construction Co. Inc. ("Tully"), was struck by a vehicle driven by Louis Pappas. The accident occurred on October 18, 2007 at a construction site located on the Grand Central Parkway at or near Union Turnpike in Queens, New York. At the time of the accident, the construction site was operated and controlled by Tully, pursuant to a contract with the State of New York, involving paving and road work in the area. Additionally, at the time of the accident, Tully was insured by both Zurich American Insurance Company ("Zurich") and Illinois National Insurance Company ("Illinois").

As a result of the aforementioned accident, Mr. Vinci commenced three separate actions seeking damages to compensate him for the injuries he sustained. The first action was commenced against Louis Pappas in Supreme Court, Richmond County on November 7, 2007. The second action was commenced against the State of New York in the Court of Claims on January 10, 2008. The third action was commenced against the City of New York in Supreme Court, Queens County on June 13, 2008. In October of 2009, after the Supreme Court actions were consolidated in Queens County, Louis Pappas commenced a third party action against Tully alleging that Vinci had sustained a grave injury as defined by New York Workers' Compensation Law and seeking common law contribution and indemnification based on Tully's alleged negligence in failing to properly control the work site. All three actions have since settled in the amount of $9 million, with the insurers, Illinois and Zurich, each agreeing to pay half of the monies paid in excess of the $4 million tendered by Zurich. The within action was commenced for the purpose of determining whether or not Tully was afforded coverage pursuant to the umbrella policy issued by Illinois.

Plaintiffs contend that the umbrella policy issued by Illinois on behalf of Tully was implicated by Mr. Vinci's claim and

that all monies expended in excess of the retained limits of the policies issued by Zurich should be reimbursed. Whereas defendant Illinois seeks reimbursement of the monies tendered in settlement of the underlying actions on the grounds that Mr. Vinci's claims did not exceed the retained limits of the policies issued by Zurich inasmuch as the Employer's Liability Policy provided unlimited coverage or, alternatively, on the grounds that the underlying claims are not covered pursuant to the umbrella policy's Employer's Liability Exclusion. Plaintiffs Tully and Zurich have both moved herein for summary judgment and defendant Illinois has cross-moved to dismiss the complaint and for summary judgment on the counterclaims interposed in its answer.

A court may grant summary judgment where there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The burden on the party moving for summary judgment is to demonstrate the absence of any material issue of fact (Ayote v Gervasio, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (Alvarez v Prospect Hosp., supra). However, once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form to create material issues of fact requiring a trial

(Id.). Mere conclusions and unsubstantiated allegations or assertions are insufficient (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

It is undisputed that Anthony Vinci suffered a grave injury. In view of the nature of his injury, it is also undisputed that the State of New York had a valid claim against Tully, Anthony Vinci's employer, for both contractual and common law indemnification but was unable to bring a third-party action in the Court of Claims. Nonetheless, monies were tendered to Anthony Vinci in satisfaction the State of New York's claims for common law and contractual indemnification. By letter dated December 8, 2009, Illinois disclaimed coverage under the umbrella policy it issued on behalf of Tully.

At issue is whether or not the umbrella policy issued by Illinois was triggered by the underlying actions. It is well settled that timely disclosure pursuant to Insurance Law §3420 is required when a claim falls within the coverage terms but is denied based upon a policy exclusion (Markevics v Liberty Mutual Ins. Co., 97 NY2d 646, 648-649 [2001]; City of New York v St. Paul Fore & Mar. Ins. Co., 21 AD3d 978, 980 [2005]). However, "[a] disclaimer is unnecessary when a claim falls outside the scope of the a policy's

coverage portion, since 'requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed'" (City of New York v St. Paul Fore & Mar. Ins. Co., 21 AD3d 978,980 quoting Matter of Worcester Ins., Co., v Bettenhauser, 5 NY2d 185, 188[2000]). Where a disclaimer is required, insurers must be held to a strict standard in measuring the timeliness of the same(First Financial Ins. Co v Jetco Contracting Corp., 1 NY3d 64 [2003]).

Illinois contends that Tully is not entitled to coverage with regard to Mr. Vinci's claim. More particularly, Illinois argues that its denial of coverage was appropriate given that Mr. Vinci's claims fall outside the scope of coverage afforded by the subject policy and, alternatively, on the grounds that policy contained an Employer's Liability Exclusion. As previously noted, the timeliness requirements of Insurance Law §3420 are not applicable to claims falling outside scope of coverage(City of New York v St. Paul Fore & Mar. Ins. Co., supra). The Court will therefore begin by examining the merits of Illinois' disclaimer based upon a lack of coverage inasmuch as it may render the remaining issues moot.

It is undisputed that New York does not recognize limits in workers' compensation and employer's liability policies. Nevertheless, plaintiffs argue that Zurich's obligation to pay stopped upon its tender of payment of the stated limit of the

employer's liability policy, at which time the Illinois umbrella policy took over. Plaintiffs assert that where an umbrella policy lists the employer's Liability coverage in its schedule of underlying coverage and sets forth the underlying limits, the umbrella policy applies immediately above such scheduled limits (Liberty Mut. Ins. Co v Ins. Co. of State of Pa., 43 AD3d 666 [2007]; State Ins. Fund v international Ins. Co., 251 AD2d 86 [1998]). Plaintiffs further assert that if the Court were to find that the umbrella policy was not implicated by Mr. Vinci's claims, the coverage afforded by the umbrella policy would be rendered illusory and therefore contrary to public policy (e.g. Wright v Evanston Ins. Co., 14 AD3d 505 [2005]).

Although the Schedule of Underlying Insurance herein lists the Employer's Liability Policy as having a retained policy limit of $1 million per occurrence, the Court notes that the umbrella policy contains a provision with regard to the availability of insurance in excess of the limits set forth in the schedule. Section IV.F of the umbrella policy provides as follows:

> "This policy applies only in excess of the Retained Limit. If, however, a policy shown in the Schedule of Underlying Insurance forming a part of this policy has a limit of insurance:
>
> 1. greater than the amount shown in

> such schedule, this policy will apply in excess of the amount of valid and collectible insurance; or
>
> 2.less than the amount shown in such schedule, this policy will apply in excess of the amount shown in the Schedule of underlying Insurance forming part of this policy.

In view of the unambiguous terms of the contract requiring Tully to exhaust insurance available, in amounts greater than the amounts reflected in the schedule, the umbrella policy issued by Zurich was never triggered(see generally, Merchant's Mut. Ins. Co. v New York State Fund Ins Fund; see also, Commissioners of the State Ins. Fund v Aetna cas. & Sur. Co., 283 AD2d 335[2001]). Where, as here, a claim falls outside the scope of a policy's coverage, it cannot be said that the grounds for disclaimer were waived on timeliness grounds.

The Court further finds that the protections provided by the umbrella policy are not illusory. The Court notes that the Workers' Compensation Law is remedial in nature and is intended to provide an injured employee with compensation without regard to fault (Holcomb v Daily News, 45 NY2d 602, 667-668 [1978]. So as to allow workers to be compensated without regard to fault, New York State requires employers to provide unlimited coverage for injuries that arose in the course of the worker's employment. Nevertheless, there are occasions where a worker's injuries are not compensable under

the Workers' Compensation Law. In those instances, umbrella policies serve as a means of providing protections to the employer. Realizing that employers are subject to risks which are not covered by the Workers' Compensation Law, the Superintendent of Insurance did not proscribe the inclusion of Workers' Compensation and Employer's Liability insurance coverage in the writing of umbrella policies for employers with identifiable exposure to losses that would fall outside the scope of the unlimited coverage provided by the New York Workers' Compensation Policy (Superintendent of Insurance's First Supplement to Circular Letter No. 17(1987)). The Superintendent of Insurance did, however, note that commercial umbrella policies should not contemplate coverage for injured employees whose injuries are subject to New York Compensation Law (Superintendent of Insurance Circular Letter No. 17 (1987).[1]

The umbrella policy in this case was intended to protect employers, such as Tully, against risks for injuries to workers who are not within the scope of the Workers' Compensation Law. Inasmuch as it is undisputed that Mr. Vinci's claims fall within the purview of Workers' Compensation Law §11 it cannot be said that the

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[1]Although these letters serve no regulatory role, they are useful in assisting the industry in comprehending and implementing legislative directives and the reasonable interpretations of the Superintendent of Insurance (Downey v Allstate Ins. Co., 638 F. Supp 322,326 [1986] citing Ostrer v Schenck, 41 NY2d 782, 786 [1977]).

umbrella policy was intended to cover his claims.

In view of the foregoing, the plaintiffs' motions are denied in their entirety. Defendant's cross-motion is granted insofar as it seeks to dismiss the complaint and seeks summary judgment with regard to its second counterclaim. The Court declares that defendant Illinois National Insurance Company was not obligated to defend and indemnify Tully Construction Co. Inc. in the underlying actions. The Court further declares that Illinois National Insurance Company is entitled to be reimbursed $2,500,000.00 reflecting the amount it contributed to the settlement of the underlying actions.

Settle Order.

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VALERIE BRATHWAITE NELSON, J.S.C.