

Lincoln General Ins. Co. v Primo Suffolk Inc.

2013 NY Slip Op 31591(U)

July 11, 2013

Supreme Court, Suffolk County

Docket Number: 11-16680

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-27-12 (#001)
MOTION DATE 9-18-12 (#002)
MOTION DATE 10-23-12 (#003 & #004)
ADJ. DATE 3-21-13
Mot. Seq. # 001 - MotD
 # 002 - XMD
 # 003 - XMD
 # 004 - XMG

-----X
LINCOLN GENERAL INSURANCE COMPANY,

Plaintiff,

- against -

PRIMO SUFFOLK INC. d/b/a PRIMO PIZZA,
NICHOLAS ECONS, TIMOTHY ECONS,
DENNIS HARVEY and ANNA HARVEY,

Defendants.
-----X

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Upon the following papers numbered 1 to 38 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 16; 17 - 21; 22 - 28; Answering Affidavits and supporting papers 29 - 30; 31 - 34; Replying Affidavits and supporting papers 35 - 36; 37 - 38; Other Defendant's memoranda of law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

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ORDERED that the motion (#001) by plaintiff Lincoln General Insurance Company and the cross motions (#002, #003, and #004) by defendants Nicholas Econs and Timothy Econs, Primo Suffolk, Inc., and Dennis Harvey and Anna Harvey are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Lincoln General Insurance Company for, inter alia, an order granting it summary judgment on its complaint is granted to the extent indicated herein, and is otherwise denied; and it is further

ORDERED that the cross motion by defendants Nicholas Econs and Timothy Econs for summary judgment declaring that Lincoln General Insurance Company is obligated to defend and indemnify them in the underlying action is denied; and it is further

ORDERED that the cross motion by defendants Dennis Harvey and Anna Harvey for summary judgment declaring that Lincoln General Insurance Company is obligated to defend and indemnify defendants Nicholas Econs and Timothy Econs in the underlying action is denied; and it is further

ADJUDGED AND DECLARED that Lincoln General Insurance Company is not obligated to defend and indemnify defendants Nicholas Econs and Timothy Econs in the underlying action entitled *Dennis Harvey and Anna Harvey v Nicholas Econs, Timothy Econs, and Primo Suffolk, Inc. d/b/a Primo Pizza*, assigned index number 46154-09; and it is

ORDERED that the cross motion by defendant Primo Suffolk, Inc. d/b/a Primo Pizza for summary judgment declaring that Lincoln General Insurance Company is obligated to defend and indemnify it in the underlying action is granted; and it is

ADJUDGED AND DECLARED that Lincoln General Insurance Company is obligated to defend and indemnify defendant Primo Suffolk, Inc. in the underlying action entitled *Dennis Harvey and Anna Harvey v Nicholas Econs, Timothy Econs, and Primo Suffolk, Inc. d/b/a Primo Pizza*, assigned index number 46154-09.

This is a declaratory judgment action in which plaintiff Lincoln General Insurance Company (“Lincoln General”) seeks a judgment declaring that it is not obligated to defend and indemnify defendants Nicholas Econs, Timothy Econs, and Primo Suffolk, Inc., d/b/a Primo Pizza, in an underlying personal injury action entitled *Dennis Harvey and Anna Harvey v Nicholas Econs, Timothy Econs, and Primo Suffolk, Inc. d/b/a Primo Pizza* under index number 46154-09. The Harveys commenced the underlying action to recover damages for personal injuries they allegedly sustained on February 20, 2009, when a motor vehicle operated by defendant Nicholas Econs and owned by Timothy Econs collided with their motor vehicle at the intersection of Beach Avenue and Orchard Drive in Brookhaven, New York. The original complaint, which was filed in November 2009, did not name Primo Pizza as a defendant to the action. However, by way of an amended complaint filed February 25, 2011, the Harveys alleged, inter alia, that Nicholas Econs was an employee of Primo Pizza, and that it should be held vicariously liable for their injuries since Nicholas Econs was engaged in such employment at the time of the alleged accident and was operating a motor vehicle owned by another employee of Primo Pizza. As a result, Primo Pizza forwarded a notice of claim to Lincoln General on March 1, 2011.

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By correspondence dated May 9, 2011, Lincoln General sent a notice to the Econs disclaiming coverage on the basis that the policy specifically excludes motor vehicles leased, hired or borrowed from employees of Primo Pizza, such as the one driven by Nicholas Econs on the day of the accident. Lincoln General also sent a letter, bearing the same date, to Primo Pizza disclaiming coverage on the ground Primo Pizza failed to provide it prompt notice of the accident in accordance with the terms of the insurance agreement. Relying on the aforementioned disclaimers, Lincoln now moves for summary judgment on its complaint. The Econs oppose the motion and cross-move for summary judgment declaring that Lincoln General is obligated to defend and indemnify them in the underlying action. The Econs argue, inter alia, that Lincoln is estopped from denying coverage based on the “prompt notice” provision contained in the insurance agreement, as it failed to disclaim coverage for well over 60 days after its receipt of the underlying complaint. The Econs also argue that Nicholas Econs, who was an employee of Primo Pizza at the time of the accident, qualified as an “insured” and was operating a covered automobile. Adopting the arguments set forth in the Econs’ moving papers, the Harveys and Primo Pizza oppose Lincoln’s motion and cross-move for summary judgment declaring that Lincoln is obligated to defend and indemnify the Econs and Primo Pizza in the underlying action. Additionally, Primo Pizza asserts that the prompt notice provision of the insurance agreement was not violated, as its owner, Anthony Logiudice, did not become aware that there was a possibility of a claim against Primo Pizza until he received a copy of the Harveys’ amended complaint on February 25, 2011.

Lincoln General opposes the motions by the Econs and Primo Pizza, arguing, inter alia, that once Logiudice became aware of the alleged accident, such knowledge triggered his obligation to conduct further investigations and promptly report the loss to his insurer. Lincoln General also avers that its disclaimer was not untimely, as it was entitled to conduct a reasonable investigation into whether it was obligated to provide coverage for the accident after it received notice of the claim. Additionally, Lincoln General concedes that the subject motor vehicle qualifies as a covered “auto.” However, it asserts that neither Nicholas Econs or Timothy Econs qualified as “insureds” under the terms of the agreement, since the insurance agreement excludes coverage for employees using a vehicle owned by them or members of their household.

Section II A (1) of the insurance agreement, entitled “Who is an Insured,” defines insureds, in relevant part, as follows:

(a) You for any covered “auto”

(b) Anyone else while using with your permission a covered “auto” you own, hire, or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered “auto.” This exception does not apply if the covered “auto” is a trailer connected to an “auto” you own.

(2) Your “employee” if the covered “auto” is owned by that “employee” or a member of his or her household.

(3) Someone using a covered “auto” while he or she is working in a business of selling, servicing, repairing, parking or storing “autos” unless that business is yours.

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Initially, the Court notes that a timely disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary when a claim does not fall within the coverage terms of an insurance policy (see *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649, 735 NYS2d 865 [2001]). Moreover, courts bear the responsibility of determining the rights and obligations of parties to an insurance contract based on the specific language used in the policy (*State of New York v Home Indemn. Co.*, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). Where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (see *White v Continental Cas. Co.*, 9 NY3d 264, 848 NYS2d 603 [2007]; *NIACC, LLC v Greenwich Ins. Co.*, 51 AD3d 883, 857 NYS2d 723 [2d Dept 2008]; *Hiraldo v Allstate Ins. Co.*, 8 AD3d 230, 778 NYS2d 50 [2d Dept 2004], *affd* 5 NY3d 508, 806 NYS2d 451 [2005]). Furthermore, courts may not vary the terms of an insurance contract to accomplish their notions “of abstract justice or moral obligation, since ‘equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against’” (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], quoting *Weinberg & Holman v Providence Washington Ins. Co.*, 254 NY 387, 391, 173 NE 556 [1930]).

Here, Lincoln General established its prima facie entitlement to summary judgment on the branch of its motion seeking an order declaring that it is not obligated to defend or indemnify the Econs in the underlying action (see *White v Continental Cas. Co.*, *supra*; *Zappone v Home Ins. Co.*, 55 NY2d 131, 447 NYS2d 911 [1982]; *York Restoration Corp. v Soly's Constr., Inc.*, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; *Matter of Atlantic Mut. Cos. v Ceserano*, 5 AD3d 382, 773 NYS2d 80 [2d Dept 2004]; *Mead v Fidelity & Casualty Co.*, 155 AD2d 896, 547 NYS2d 491 [4th Dept 1989]). Significantly, a review of the subject insurance agreement reveals that it does not extend coverage to either Timothy Econs or Nicholas Econs in relation to the subject motor vehicle accident. Although Section II A(1)(a) of the insurance agreement defines the word “You” as referring to Primo Pizza and other listed insureds, including Primo Pizza’s employees, clause (1)(b)(1) of the same section specifically limits coverage where the employee is “[t]he owner or anyone else from whom [Primo Pizza] hire[s] or borrow[s] a covered ‘auto.’” Clause (1)(b)(2) further provides that coverage will be extended to employees using a covered auto for business purposes unless the “‘auto’ is owned by that ‘employee’ or a member of his or her household.” Therefore, the insurance policy cannot be fairly read to include coverage to Timothy Econs or Nicholas Econs, where, as here, Timothy Econs was the owner of the subject vehicle, and Nicholas Econs, from whom Primo Pizza borrowed/or hired said vehicle, was a member of his household.

In opposition, the Econs failed to raise a triable issue warranting denial of the motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Contrary to the Econs’ assertion, the case of *United Food Serv., Inc. v Fidelity & Casualty Co.*, 189 AD2d 74, 594 NYS2d 887 (3d Dept 1993) is distinguishable, as unlike the subject insurance agreement, the general liability policy at issue in that case broadly expanded the term “You” to include “the named insured’s employees (with respect to acts performed within the scope of employment)” (*United Food Serv., Inc. v Fidelity & Casualty Co.*, 189 AD2d 74, 78, 594 NYS2d 887 [3d Dept 1993]; compare *Kuhn v Auto Cab Mut. Indem. Co.*, 244 AD 272, 279 NYS 60 [1935]). Moreover, a disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary where, as here, the claim does not fall within the coverage terms of an insurance policy, as an insurer is not required to deny coverage where none exists (see *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188, 712 NYS2d 433 [2000]; *Hargob Realty Assoc., Inc. v Fireman's Fund Ins.*

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Co., 73 AD3d 856, 858, 901 NYS2d 657 [2010]). Therefore, the branch of Lincoln General's motion for summary judgment declaring that it is not obligated to defend or indemnify the Econs in the underlying action is granted.

As to the branch of Lincoln General's motion seeking an order declaring that it is not obligated to defend or indemnify Primo Pizza, where, as here, an insurer seeks to disclaim coverage based on the violation of a policy condition, it is required to provide the insured with timely notice of such disclaimer (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649, 735 NYS2d 865 [2001]). An insurer will be estopped from disclaiming liability or denying coverage if it fails to do so (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 769 NYS2d 459 [2003]; *Brighton Cent. School Dist. v American Cas. Co. of Reading, Pa.*, 19 AD3d 528, 529, 800 NYS2d 415 [2d Dept 2005]; *Moore v Ewing*, 9 AD3d 484, 487, 781 NYS2d 51 [2d Dept 2004]), regardless of whether the insured failed in the first instance to give timely notice of its claim (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 769 NYS2d 459 [2003]; *Magistro v Buttered Bagel, Inc.*, 79 AD3d 822, 914 NYS2d 192 [2d Dept 2010]). The reasonableness of a delay in issuing a disclaimer must be determined from the time the insurer was aware of facts sufficient to disclaim (*see Pawley Interior Contr. Inc. v Harleysville Ins. Cos.*, 11 AD3d 595, 782 NYS2d 660 [2d Dept 2004]), and it is the insurer's burden to demonstrate a reasonable excuse for its delay (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, *supra*). An insurer's explanation will be "insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, *supra* at 69, 769 NYS2d 459; *Tully Constr. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150, 842 NYS2d 528 [2d Dept 2007]). Furthermore, even where the basis for disclaimer is not apparent, an explanation will be inadequate as a matter of law "unless the delay is excused by the insurer's showing that its delay was reasonably related to its completion of a thorough and diligent investigation into issues affecting its decision whether to disclaim coverage" (*Magistro v Buttered Bagel, Inc.*, *supra* at 824-825, 914 NYS2d 192; *see First Fin. Ins. Co. v Jetco Contr. Corp.*, *supra*; *New York City Hous. Auth. v Underwriters at Lloyd's, London*, 61 AD3d 726, 727, 877 NYS2d 193 [2d Dept 2009]).

Here, it is undisputed that Lincoln General failed to disclaim coverage until approximately 68 days after its receipt of the Harveys' amended complaint naming Primo Pizza as a defendant to the underlying action. Such failure requires that Lincoln General be estopped from disclaiming liability or denying coverage to Primo Pizza, unless it can demonstrate a reasonable excuse for its delay (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, *supra*; *Magistro v Buttered Bagel, Inc.*, *supra*). Lincoln General failed to establish a reasonable excuse for its delay, as the basis for its disclaimer, Primo Pizza's purported failure to give it timely notice of the claim, was apparent from the face of the Harveys' amended complaint, and readily ascertainable upon the performance of a cursory investigation of the accident (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, *supra*; *Matter of Country-Wide Ins. Co. v Ramirez*, 104 AD3d 850, 961 NYS2d 511 [2d Dept 2013]; *City of New York v Greenwich Ins. Co.*, 95 AD3d 732, 733, 945 NYS2d 83 [1st Dept 2012]; *Fish King Enters. v Countrywide Ins. Co.*, 88 AD3d 639, 930 NYS2d 256 [2d Dept 2011]; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 904 NYS2d 52 [1st Dept 2010]). Even assuming arguendo, that the basis for the disclaimer necessitated an investigation, the disclaimer is late as a matter of law, since Lincoln General failed to provide any details as to the nature and length of such investigation (*see Matter of Country-Wide Ins. Co. v Ramirez*, *supra*; *Progressive Northeastern Ins. Co.*

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v *Lamba*, 79 AD3d 719, 913 NYS2d 278 [2d Dept 2010]; *New York City Hous. Auth. v Underwriters at Lloyd's, London*, *supra*). Accordingly, Lincoln General is estopped from disclaiming or denying coverage of the underlying claims for liability against Primo Pizza.

Inasmuch as Lincoln General is estopped from disclaiming or denying coverage of the claims made against the defendants in the underlying action, the cross motion by Primo Pizza for summary judgment declaring that Lincoln General is obligated to defend and indemnify it against such claims is granted. However, having granted Lincoln General's motion declaring that it is not obligated to defend or indemnify the Econs, the cross motions by the Econs and the Harveys for summary judgment declaring that Lincoln General is obligated to defend and indemnify Timothy Econs and Nicholas Econs in the underlying action are denied, as moot.

Dated:

July 11, 2013

W. Gerard Asher
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION