

20-35 86th St. Realty LLC v Tower Ins. Co. of N.Y.

2013 NY Slip Op 31890(U)

April 12, 2013

Supreme Court, New York County

Docket Number:

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

20-35 86th Street Realty LLC,
Plaintiff,

Index No.: 600805/10

Motion Date: 12/23/11

- v -

Motion Seq. No.: 01

Tower Insurance Company of New York,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 7 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4 - 7

FILED

APR 17 2012

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Cross-Motion: Yes No

Upon the foregoing papers,

Defendant moves to dismiss this action, pursuant to CPLR 3211 (a) (7) or, alternatively, to extend its time to move for summary judgment pursuant to CPLR 3212 (a) until 60 days after disposition of a related criminal action (the Criminal Action) entitled People of the State of New York v Daniel Ignacio (Ignacio), Supreme Court, Kings County, indictment number 1084/2010. Plaintiff cross-moves to dismiss the second through sixth affirmative defenses.

This declaratory judgment action involves an insurance

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

policy, number CPP2413380 (the Policy) issued by defendant to plaintiff, initially for the period from May 12, 2004 through May 12, 2005 and continuously renewed on the same terms. Plaintiff owned the building (the Building) located at 20-35 86th Street, Brooklyn, New York and, on January 30, 2010, a fire was intentionally set at the Building, leading to death, personal injury and property damage. After being notified of this occurrence by plaintiff's insurance broker, defendant commenced an investigation, including inquiries of the New York City Police Department (NYPD) and the Fire Department of the City of New York (FDNY). The investigation revealed that the NYPD and FDNY would not release records pending prosecution of the Criminal Action. It also revealed that a suspect, Ignacio, had admitted committing the crime and that Ignacio had been indicted in the Criminal Action as a result of the fire. The Criminal Action is still pending.

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Tower's investigator issued a report on February 11, 2010, and on February 25, 2010, defendant sent a letter (the Disclaimer Letter) to plaintiff, disclaiming coverage based upon policy provisions excluding coverage for bodily injury and property damage arising from an assault or battery.

On March 10, 2010, an indictment was returned against Ignacio in the Criminal Action, charging him with 5 counts of murder in the second degree, assault in the first degree, arson

in the fourth degree and 12 counts of assault in second degree for his actions in allegedly causing the fire at the Building on January 30, 2010. On March 30, 2010, plaintiff commenced this declaratory judgment action seeking a determination that defendant was obligated to defend and indemnify it in any personal injury, wrongful death or property damage action brought against it as a result of the fire. On April 30, 2010, defendant interposed an answer with affirmative defenses that assert that there is no coverage based upon exclusion provisions of the Policy.

On October 13, 2010, an action was commenced entitled Massa v. Gerazounis, Civil Court, Kings County, index number 93869/2010 (the Underlying Property Damage Action) seeking \$18,000 for alleged property damage. On August 16, 2011, an action was commenced entitled Perez et al. v 88 on 86th St. LLC et al., Supreme Court, Kings County, index number 18691/2011 (the Underlying Personal Injury Action). The Underlying Personal Injury Action alleges that Gerazounis and/or affiliated limited liability companies owned, managed and maintained the Building, that they were negligent in their control of the premises and that, due to this purported negligence, plaintiffs suffered physical injury, property damage and certain plaintiffs suffered as a result of the wrongful deaths of their decedents, due to the fire at the Building on January 30, 2010.

The complaint in this declaratory judgment action seeks a declaration that defendant is obligated to defend and indemnify plaintiff in any and all personal injury, wrongful death and property damage actions arising out of the fire at the Building, up to the Policy's limits. This would encompass the Underlying Personal Injury Action and the Underlying Property Damage Action. Defendant is providing coverage under a reservation of rights.

Plaintiff has stated that it accepts defendant's factual assertions and the authenticity of defendant's exhibits and it does not dispute defendant's investigation as to the fire and the Criminal Action. It contends that the Policy's Assault and Battery exclusion is not applicable and that, therefore, defendant is obligated to provide it coverage under the Policy.

The Policy states (Section I, Clause 1 [a]) that:

"[Defendant] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'."

The Policy contains an assault and Battery exclusion (the Assault and battery Exclusion) that provides that:

"[The Policy] does not apply to Bodily Injury or Property Damage arising from, due to or caused by: a. Assault and/or Battery committed by any insured, any employee of any insured, any patron or customer of the insured, or any other person; or b. The failure to suppress or prevent any Assault and/or Battery or any act or omission in connection with any Assault and/or Battery; or c. The negligent hiring, supervision or training of any employee or agent of the

insured with respect the [above described events]."

An insurance policy is a contract and, where provisions of a policy are clear and unambiguous, they should be given their plain and ordinary meaning (United States Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232 [1986]). Additionally, an ambiguity in an insurance policy will be construed in favor of the insured, particularly when the ambiguity is in an exclusionary clause (Cragg v Allstate Indemn. Corp., 17 NY3d 118, 122 [2011]). However, while ambiguities are construed against the insurer, the court should not disregard the plain meaning to create an ambiguity, since this improperly rewrites the parties' agreement (United States Fid., 67 NY2d at 232; Catucci v Greenwich Ins. Co., 37 AD3d 513, 514 [2d Dept 2007]).

Plaintiff contends that there is coverage since "the rule for determining whether a loss is the result of an accident or intentional act [and, therefore, is a covered occurrence] ... [is whether] the incident was unexpected, unusual and unforeseeable from the insureds' standpoint" (Agoado Realty Corp v United Intl. Ins. Co., 95 NY2d 141, 145 [2000] [italics in original]). However, determining whether there is coverage as an occurrence is the first step and the court must next turn to whether or not an exclusion applies (id. at 146).

The court notes that the Policy is a general liability policy, rather than a fire insurance policy where "[a]ny [such]

policy ... must incorporate 'terms and provisions no less favorable to the insured than those contained in the [standard policy]'" (Lane v Security Mut. Ins. Co., 96 NY2d 1, 5 [2001] [quoting Insurance Law § 3404 (f) (1) (A)]; see also TAG 380, LLC v ComMet 380, Inc., 10 NY3d 507, 514, rearg denied 11 NY3d 753 [2008]). Since the Policy is a general liability Policy and not a fire insurance policy, the minimum requirements for standard fire insurance policies are not applicable in this action.

The respective plaintiffs' claims in both the Underlying Personal Injury Action and the Underlying Property Damage Action are "based upon an assault for which coverage is excluded" (Mount Vernon Fire Ins. Co. v Creative Hous., 88 NY2d 347, 352 [1996]). Where "the complaint's negligence allegations could not survive except for the assault, those claims are deemed to have arisen from the assault and are thus subject to the assault and battery exclusion" (Metalios v Tower Ins. Co. of N.Y., 77 AD3d 471, 472 [1st Dept 2010]; McGinley v Odyssey Re. (London), 15 AD3d 218 [1st Dept 2005]).

In this case, the determination of the Criminal Action in which Ignacio is charged with intentionally causing the fire and is therefore facing murder, arson and assault charges is necessary to determine the applicability of the Assault and Battery Exclusion. Consequently, the action should be stayed pending resolution of the Criminal Action. Plaintiff's cross

motion is denied as premature, since it, too, is dependent upon resolution of the Criminal Action.

It is, therefore,

ORDERED that defendant's motion to dismiss is granted to the extent of staying further proceedings in this action, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application to vacate or modify this stay upon final determination of the action entitled People of the State of New York v Daniel Ignacio, indictment number 1084/2010 pending before the Supreme Court of the State of New York, Kings County; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on the Trial Support Office (Room 119 60 Centre Street).

This is the decision and order of the court.

FILED

Dated: April 12, 2012

APR 17 2012

ENTER:

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[Signature]
DEBRA A. JAMES J.S.C.