

Nationwide Prop. & Cas. Ins. Co. v Albrecht
2013 NY Slip Op 31962(U)
August 21, 2013
Supreme Court, Seneca County
Docket Number: 46214
Judge: Dennis F. Bender
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

NATIONWIDE PROPERTY & CASUALTY
INSURANCE CO.,

Plaintiff

DECISION

-against-

Index No. 46214

BILLI JO ALBRECHT, RICHARD ALBRECHT,
JACOB ALBRECHT and KELLY KISNER,
individually and as parent and natural guardian
of ALLIE DAVID, an infant,

Defendants

APPEARANCES: EPSTEIN, GIALLEONARDO & RAYHILL
By: Jeffrey T. Culkin, Esq.
On behalf of Nationwide Property & Casualty Insurance Co.

HOLMBERG, GALBRAITH, VAN HOUTON & MILLER
By: Dirk A. Galbraith, Esq.
On behalf of Billi Jo Albrecht and Richard Albrecht, Jacob Albrecht

CELLINO & BARNES
by: Scott D. Carlton, Esq.
On behalf of Kelly Kisner, individually & as parent and natural
guardian of Allie David, a infant

BENDER, Acting J.

The Plaintiff, Nationwide Property & Casualty Insurance, moves the Court for summary judgment in favor of the Plaintiff declaring that the Plaintiff has no obligation under its insurance policy issued to Defendants Albrecht to defend or indemnify the Defendants for any judgments, claims or suits arising out of an incident or incidents involving Allie David, a minor, occurring on or about July 1, 2011 and discharging the Plaintiff from any and all liability for said incidents under the policy. The Defendants Albrecht, through their attorney, have cross-moved for an

order granting summary judgment in favor of the Defendants Albrecht, declaring that the Plaintiff is obligated to defend and indemnify Billi Jo Albrecht with respect to the claims alleged in the Complaint in the action entitled "*Kelly Kisner, Individually and as parent and natural guardian of Allie David, an infant, Plaintiff versus Billi Jo Albrecht, Defendant*", together with attorney's fees. The underlying lawsuit in the affiliated case of Kisner, et al. v. Albrecht, Index No. 45772, relates to purported sexual abuse by the Defendant Jacob Albrecht, son of Billi Jo and Richard Albrecht, of a infant daughter of Plaintiff Kisner. Oral argument was heard on the motions on July 30, 2013 and counsel was given an opportunity to provide supplemental memoranda of law if they wished. Both attorneys did so, and the Court has reviewed the same. Counsel for the Kisner/David parties are on notice of this motion but are not participating in the same.

On September 12, 2011, Plaintiff sent a letter to Defendants Albrecht disclaiming coverage due to exclusions in the policy as more specifically outlined in paragraph 7 of the Robert Macaluso Affidavit, Claims Manager for the Plaintiff Nationwide. Thereafter, the Kisner lawsuit was brought and Nationwide wrote the Albrechts again on February 17, 2012, reiterating a disclaimer of coverage but further noting "Accordingly, Nationwide will not indemnify you for the allegations in the Complaint. However, we will defend you until there is a judicial determination of Nationwide's rights and obligations under the policy. Nationwide does not waive or limit any of its rights under the subject policy by citing the specific reasons for this disclaimer."

Nationwide requests that the Court issue a judgment declaring that the policy issued by Nationwide does not provide coverage for the incident of July 1, 2011 and that it has no duty to defend or indemnify Defendants Albrecht with respect to the allegations brought by Defendant Kisner. In response thereto, the Defendants Albrecht allege that Nationwide should be estopped by disclaiming coverage because the Kisner action has proceeded to depositions and they would be unduly prejudiced by allowing Nationwide to step out of litigation at this time. The Defendants also argue the Kisner action does not name Defendant Jacob Albrecht specifically but rather alleges that the infant Plaintiff was subject to repeated incidents of sexual abuse by a member of Defendants' household, a male minor.

The Court rejects the argument that the failure to specify Jacob Albrecht's name in the Kisner action is fatal to Nationwide's position that there is no coverage under the policy. The Kisner complaint does state that the repeated incidents of sexual abuse were "by a member of Defendant's household, a male minor" and the Nationwide policy specifically describes an insured as "...you, and the following if residents of your household at the resident's premises...(b) any other person under age 21 in the care of you or your relatives." The policy goes on to exclude coverage for intentional acts by the insureds which are criminal in nature and committed by an insured and further excludes acts or omissions relating directly or indirectly to sexual molestation, physical or mental abuse. Accordingly, the only issue for the Court to determine is whether or not Nationwide is estopped from disclaiming coverage.

In O'Dowd v. American Surety Co. of NY, 3 NY 2d 347, 355 (1957), the Court of

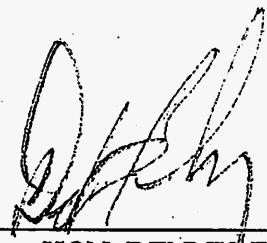
Appeals stated “It is clear that when an insured defends an action on behalf of an insured, in his stead, with knowledge of facts constituting a defense to the coverage of the policy, it is thereafter estopped from asserting that the policy does not cover the claim (citations omitted). However, it is also well established that an insured may, by timely notice to the insured, reserve its rights to claim that the policy does not cover the situation at issue, while defending the action (citations omitted).”

The assertion of estoppel requires the insured to show factually that it has been prejudiced by the insurer’s delay in asserting the defense of late notice, or that the insured had irrevocably changed its position. (4A NY Practice - Commercial Litigation in NYS Courts, § 67:11). Here however, there are no specifics to support the Defendants Albrecht’s claims of prejudice. In conclusory fashion rather, it is alleged that because 18 months have elapsed since the action was commenced and depositions have been completed, that prejudice exists. Because Defendants Albrecht’s submissions are insufficient to demonstrate they were prejudiced by the conduct of the litigation to date, or that the defense is of such that the character and strategy of the lawsuit can no longer be altered, the Court finds that summary judgment on behalf of the Plaintiff Nationwide Property and Casualty Insurance should be granted. 206-208 Main St. Associates Inc. v Arch Insurance Co., 106 AD 3d 403 (1st Dept., 2013), see also, Williams v. NY Central Mutual Fire Insurance Co., 108 AD3d 1112 (4th Dept. 2013). The cross motion of the Defendants should likewise be denied.

THIS CONSTITUTES THE DECISION OF THE COURT. Counsel for Plaintiff to

submit judgment in accordance herewith.

DATED: 8/21/13



HON. DENNIS F. BENDER
Acting J.S.C.