Tower Ins. Co. of N.Y. v NHT Owners LLC
2013 NY Slip Op 33712(U)
June 20, 2013
Supreme Court, New York County
Docket Number: 113336/2008
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58
---X
TOWER INSURANCE COMPANY OF
NEW YORK,

Plaintiff,

Index Number:

-against-

113336/2008

NHT OWNERS LLC, MALLORY
MANAGEMENT CORP., and ROBERT
RICCIO,

Defendants.
---X

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NEW YORK
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Donna M. Mills, J.:

Defendants NHT Owners LLC and Mallory Management Corp. ('insureds") seek an order awarding them attorney's fees arising from the dismissal of plaintiff Tower Insurance Company of New York's ("Tower") declaratory judgment action and/or, in the alternative granting it leave to amend its pleading in order to assert a counterclaim for the payment of attorney's fees.

Tower commenced the underlying declaratory judgment action in October 2008 seeking an order that it had no duty to defend, nor obligation to indemnify the insureds in connection with a 2004 personal injury action in the Kings County Supreme Court, entitled Riccio v NHT Owners LLC, Index No. 32163/04. By order of this Court entered on June 24, 2010, the Honorable Marcy S. Friedman, granted the insureds' cross-motion for summary judgment to the extent of declaring that Tower has the affirmative obligation to defend and indemnify the insureds. In her decision, the insureds' cross-motion to dismiss the complaint was also granted, and the insureds' counterclaim for punitive damages based on Tower's bad faith was denied.

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Tower appealed the decision to the Appellate Division First Department. By decision dated December 20, 2011, the First Department affirmed the decision of

Justice Friedman, with costs. Additionally, the underlying 2004 action was recently fully settled during trial.

It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule (see Chapel v. Mitchell, 84 N.Y.2d 345, 349 [1994], quoting Hooper Assoc., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 [1989]; Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 21–22 [1979]). However, an insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (Mighty Midgets, 47 N.Y.2d at 21). The reasoning behind Mighty Midgets is that an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action.

In the instant case, it is undisputed that NHT Owners LLC and Mallory Management Corp, the named insureds under the policy, were cast in a defensive posture by Tower in their dispute over whether Tower had a duty to defend and indemnify them in the underlying personal injury action. Further, it is undisputed that the insureds successfully defended against the insurer's summary judgment motion and thereby prevailed in the matter.

Contrary to Tower's contention, the decision by Justice Friedman which dismissed the declaratory judgment action and awarded summary judgment in favor of the insureds, her decision did not address the attorney's fees that is now being sought, so res judicata is not applicable. Based on Mighty Midgets, the insureds herein are

entitled to recover attorney's fees, given that the expenses incurred by the insureds in defending against the declaratory judgment action arose as a direct consequence of Tower's unsuccessful attempt to free itself of its policy obligations. As such, the insureds are entitled to recover those expenses from the insurer.

Lastly, pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, which is "freely given upon such terms as may be just including the granting of costs and continuances." (Murray v. City of New York, 43 N.Y.2d 400, 404–405 [1977]; Lanpont v. Savvas Cab Corp., Inc., 244 A.D.2d 208, 209, [1st Dept. 1997]). The factors the court must consider in exercising its discretion are whether the proposed amendment would "surprise or prejudice" the opposing party (Murray, 43 N.Y.2d at 405,; Lanpont, 244 A.D.2d at 209, 211; Norwood v. City of New York, 203 A.D.2d 147, 148, [1st Dept. 1994], lv. dismissed 84 N.Y.2d 849, 617 N.Y.S.2d 139, 641 N.E.2d 160), and whether such amendment is meritorious (Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 N.Y.2d 166, 170 [1989] ["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied."]; Ancrum v. St. Barnabas Hosp., 301 A.D.2d 474, 475, [1st Dept. 2003] [same]).

In the case at bar, defendants proposed Amended Answer with Counterclaim is meritorious and does not prejudice Tower.

Accordingly, it is

ORDERED that defendants' motion to amend its pleading is granted and the amended answer in the proposed form annexed to the moving papers shall be deemed

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served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants' motion for attorney's fees is granted; and it is further

ORDERED that counsel are directed to appear for an attorney's fee hearing in Room 574, 111 Centre Street, on 7/30, 2013, at 10:30 AM.

Dated: 6/20/2013

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

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