

Parler v North Sea Ins. Co.

2013 NY Slip Op 33997(U)

July 2, 2013

Supreme Court, Nassau County

Docket Number: 6838-2012

Judge: Norman Janowitz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

MIAJA PARLER,

Plaintiff,

- against -

NORTH SEA INSURANCE COMPANY,

Defendant.

PRESENT: HON. NORMAN JANOWITZ, J.S.C.

IAS PART 21

Index No.: 6838-2012

Motion Seq.: 001

Submit Date: May 23, 2013

DECISION AND ORDER

The following papers having been read by plaintiff, Miaja Parler, for an order for a declaratory judgment and dismissing defendants counterclaim:

Notice of Motion, Affirmation and Exhibits.....	1
Notice of Cross-Motion, Affidavit and Exhibits.....	2
Affirmation in Opposition to Cross-Motion.....	3
Reply Affidavit.....	4

Motion by plaintiff, Miaja Parler, for an Order of this Court, pursuant to CPLR §3212, granting Summary Judgment for a declaratory judgment in her favor and dismissing the defendant's counterclaim against her, is **DENIED**.

Cross motion by defendant and third-party plaintiff, North Sea Insurance Company ("North Sea"), for an Order of this Court, pursuant to CPLR §3215 granting a default judgment against third-party defendants, Effie's Pub Corp. ("Effie's Pub") and 609 Montauk Corp ("609 Montauk"), (collectively, "Pub defendants"), and for an Order of this Court granting Summary Judgment in its favor and for judgment declaring that: the policy of insurance by North Sea to third-party defendants, Effie's Pub and 609 Montauk does not provide coverage for the claims by plaintiff against Effie's Pub, William Petropoulos and 609 Montauk in the underlying action; North Sea is not obligated to defend Effie's Pub and 609 Montauk in the underlying action and Effie's Pub and 609 Montauk will be bound by the decision of this Court in the instant action, is **GRANTED IN PART**.

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The instant motions arise from a personal injury action where the plaintiff sustained injury when she, as an unintended target, was struck in the face by a chair during an altercation in a drinking establishment.

PROCEDURE

Plaintiff commenced the underlying action in this Court against North Sea in May, 2012, seeking a declaration that North Sea is required to indemnify the Pub defendants. The plaintiff alleged various acts of negligence against the Pub defendants, including, inter alia, failure to provide adequate security, failing to maintain the premises in a safe manner, and furnishing alcoholic beverages to intoxicated patrons.

North Sea appeared and counterclaimed against the plaintiff, seeking a judgment declaring that it is not obligated to provide coverage under the policy issued to Effie's Pub and Montauk 609, and dismissing the plaintiff's complaint against it. It is noted that the plaintiff has a related action pending in this Court, captioned *Parler v. Effie's Pub and William Petropoulos, 609 Montauk Crop. and John Doe*, under Index No. 012263/09.

North Sea commenced a third-party action against the Pub defendants in September 2012 seeking a declaratory judgment that North Sea is not obligated to provide coverage to those defendants. Montauk 609 was served on September 27, 2012, and Effie's Pub was served on September 27, 2012. As these defendants have now appeared in the action, North Sea has withdrawn its branch of the motion seeking a default judgment against them.

FACTS

On March 12, 2009 at 1:00 a.m., the plaintiff patronized a drinking establishment and/or bar known as 609 W. Montauk Highway in Suffolk County, and owned by Effie's Pub Corp., at all relevant times herein. According to the plaintiff, the Pub defendants' manager, William Petropoulos, continued to serve alcohol to visibly intoxicated patrons. The patrons then engaged in a bar fight where a "John Doe" threw a chair which struck the plaintiff in the face, causing her to sustain serious and permanent injuries. Plaintiff was not directly involved in the altercation.

North Sea issued a commercial insurance policy to the Pub defendants, which was in full force and effect at all relevant times herein. The Pub defendants brought a claim under the policy relative to the accident and/or incident, and North Sea disclaimed coverage under its "assault and battery exclusion" and the liquor liability exclusion. The exclusionary provisions are set

forth in relevant part herein:

“...This insurance does not apply to any claims, demands, suits and defense of claims, demands or suits for Bodily Injury, Medical Payments, Property Damage, Personal Injury or Advertising Injury claimed to arise out of any assault, battery, corporal punishment, actual or threatened mental or physical assault, actual...whether caused by, or at the instructions, instigation or direction of the Insured, or by reason of the negligence or culpability of the Insured, or as a result of any act or omission of the Insured including, but not limited to acts and omissions in connection with the prevention or suppression of such acts by the Insured, the Insured’s employees, patrons, agents, representatives or any other person or as a result of any claimed negligent acts, errors or omissions in connection with the hiring, retention, supervision or control of employees, patrons, agents or representatives by the Insured...”

...

2. Exclusions

This insurance does not apply to:

c. Liquor Liability

‘Bodily Injury’ or ‘property damage’ for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages...” (see Cross Motion, Exhibit K).

ARGUMENTS

Plaintiff argues that the exclusions do not apply as the allegations in the complaint are brought under the legal theory of negligence, and North Sea can only escape liability if the physical act is one that falls within the specific acts as cited in the exclusion, particularly assault and battery. As the legal definition of assault and battery requires intent, the criteria was not met because the plaintiff was an innocent bystander who was struck by an unknown person.

North Sea contends that the plaintiff’s own words in her affidavit and pleadings, describe

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the patron's throwing of the chair as an intentional act within the legal definition of assault and battery. Further, the plaintiff did not oppose its argument that the liquor liability exclusion also applies, as she conceded that North Sea is not obligated to provide coverage for injuries to customers resulting from sale to intoxicated persons.

DISCUSSION

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Rebecchi v. Whitmore*, 172 AD2d 600 [2nd Dept.1991]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Frank Corp. v. Federal Ins. Co.*, supra, at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965 [1985]).

To defeat a motion for Summary Judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to Summary Judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action(see *Forrest v. Jewish Guild for the Blind*, 309 AD2d 546[1st Dept 2003]).

An insurer can be relieved of its duty to defend by establishing, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify the insured. If the allegations, on their face, do not bring the case within the coverage of the policy, there is no duty to defend or indemnify (see *Tartaglia v. Home Ins. Co.*, 240 AD2d 396[2nd Dept 1997], *Sears, Roebuck and Co. v. Reliance Ins. Co.* 654 F2d 494[7th Cir 1981], *Campoverde v. Fabian Builders, LLC*, 83 AD3d 986 [2nd Dept 2011]).

Generally, as with the construction of contracts, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. A policy is read as a whole and in construing an endorsement to an insurance policy, the endorsement, its exclusions and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]). An insurance contract should not be read so that some provisions are rendered meaningless (see also

Golden v. Tower, 1 AD3d 586 [2nd Dept 2003]).

An exclusion from coverage must be specific and clear in order to be enforced and an ambiguity in an exclusionary clause must be construed most strongly against the insurer. It is noted that the plaintiff does not argue that the exclusionary language is ambiguous.

The underlying complaint sets forth allegations that plaintiff sustained bodily injuries arising out of the Pub defendants' negligence in, inter alia, failing to provide security, failure to maintain the premises in safe manner and furnishing alcohol to intoxicated patrons. Plaintiff is ostensibly claiming that had the Pub defendants performed their duty, she would not have been injured. The negligent acts that she alleges against the Pub defendants arose out the intentional act of an unknown patron.

The Court notes the plaintiff's own language in her Bill of Particulars: "...the defendants...were negligent...in causing plaintiff to be wantonly, recklessly *intentionally*, and maliciously" to be struck about her face (see Cross Motion, Exhibit J). In addition, the Court also notes the wording of plaintiff's affidavit:

"...I am not sure whether he was *intending* to strike one of the other individuals, or whether he was *intending* to throw it someone, or whether he was planning to simply wave it around in an attempt to frighten the others, I have no way of knowing what his exact intent was...Based on everything I had witnessed up to that point, I believe there is no other conclusion other than that this unknown individual was attempting to use his bar stool as a weapon against one of the other individuals when he accidentally struck me with it instead..." (see Cross Motion, Exhibit C, Maler affidavit, ¶ 6).

The plaintiff's argument that the act of the "John Doe" was an accident, and therefore does not have the requisite intent criteria, is undermined by her own description of the incident. Further, the fact that the plaintiff was not the intended target does not negate that the conduct was intentional.

The Court is guided by *Mark Mc Nichol Enterprises, Inc. v. First Financial Ins. Co.*, 284 AD2d 964 (4th Dept 2001) where the tavern owner sought indemnification and defense from his insurance carrier when an injured plaintiff patron, an uninvolved bystander, brought negligence claims against the owner after sustaining injury by being hit in face with a bottle during a fight among several other patrons. That court determined that the patron's claims were claims arising out of assault or battery, or out of any act or omission in connection with the prevention or

suppression of an assault or battery. As such, such acts were specifically excluded by the commercial general liability policy, when no cause of action existed but for the assault.

In the case at bar, plaintiff's claims of negligence in the underlying action, including those for negligent supervision, are all claims arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery, and thus fall within the exclusions of the commercial general liability policy (see *Mark Mc Nichol Enterprises, Inc. v. First Financial Ins. Co.*, supra).

The plaintiff's reliance on *Anastasis v American Safety Indem. Co.*, 12 AD3d 628 (2nd Dept 2004), is misplaced and distinguishable from the case at bar. There, the plaintiff alleged that his injuries may have resulted from "unintentional acts" such as allegations that a bouncer "negligently and carelessly escorted" a patron from the premises. Further, the *Anastasis* plaintiff's pleadings allege that he was struck or stepped on but those pleadings do not allege he was struck or stepped on intentionally. Here, the plaintiff, in her Bill of Particulars, which amplifies her pleadings and/or complaint (see *Sentowski v. Boulevard Hosp.* 109 AD2d 878 [2nd Dept 1985]), and in her supporting affidavit to her motion, alleges that her injuries were the result of "John Doe's" intentional conduct (*Anastasis v American Safety Indem. Co.*, supra at 630).

As already stated herein, an insurance carrier can be relieved of its duty to defend if it establishes, as a matter of law, that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision. An insurer may also disclaim coverage on the basis of a policy exclusion by demonstrating that the allegations of the complaint cast that pleading solely and entirely within the exclusion (see *Burgund v. ESP Café, Inc.* 84 AD3d 849 [2nd Dept 2011]).

The plaintiff does not oppose the exclusionary impact under the liquor liability exclusion; "...this provision allows defendant North Sea to escape liability for paying for injuries that might result to customers..stemming from the sale of alcohol to intoxicated persons..." However, her arguments that her claims arise in negligence, rendering the liquor liability exclusion inapplicable, is without merit.

In construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement. The indivisibility endorsement in the subject policy expressly

provides that all subsequent endorsements to the policy shall merge with the policy. Pursuant to the clear and unambiguous terms of the policy and endorsement, the assault and battery exclusion applies to the liquor liability endorsement. Consequently, the defendant has no duty to defend or indemnify the plaintiff. (see *Shanna Golden, Ltd. v. Tower Ins. Co. of New York*, 1 AD3d 586 [2nd Dept 2003]).

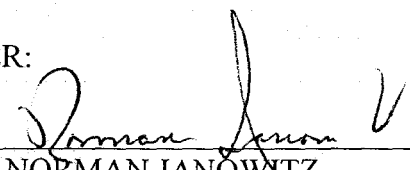
Accordingly, North Sea has established, as a matter of law, that the policy does not provide coverage for the claims of the plaintiff against Effie's Pub, William Petropoulos, and 609 Montauk, and it is not obligated to defend and indemnify the Pub defendants, Effie's Pub, and 609 Montauk Corp in the underlying action pending before this Court, *Parler v. Effie's Pub and William Petropoulos, 609 Montauk Crop. and John Doe*, under Index No. 012263/09.

Accordingly, plaintiff's motion is **DENIED** in its entirety, and the defendant's motion is **GRANTED IN PART** as the branch seeking a default judgment against the Pub defendants, although withdrawn, is rendered moot.

Settle Judgment on Notice.

DATED: July 2, 2013
Mineola, NY

ENTER:


HON. NORMAN JANOWITZ
J.S.C.

ENTERED

JUL 10 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE