Tower Ins. Co. of N.Y. v Barrera
2014 NY Slip Op 30509(U)
March 4, 2014
Supreme Court, New York County
Docket Number: 150362/12
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

Index No.

JOSE BARRERA and CARLOS A. INTRIAGO,

150362/12

Defendants.

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ANIL SINGH, J. :

Plaintiff moves for summary judgment on its declaratory judgment action, seeking an order declaring that plaintiff has no duty to defend or indemnify defendant Jose Barrera (Barrera) in an underlying action commenced against him by defendant Carlos A. Intriago (Intriago), entitled *Intriago v the City of New York, et al.*, Index No. 20263/06, pending in Supreme Court, Queens County (the underlying action).

In the underlying action, Intriago alleges that on March 13, 2005, he fell on the sidewalk abutting the premises owned by Barrera, located at 1663 Linden Street, Ridgewood, New York, and suffered serious injuries. The underlying action, which was commenced on May 3, 2006, alleges a cause of action in negligence against Barrera.

Plaintiff contends that it was not given notice of the occurrence, claim or suit from Barrera until January 27, 2012. Plaintiff states that the correspondence it received from Barrera was dated January 10, 2012. Plaintiff disclaimed coverage to Barrera by letters dated February 16, 2012 and March 1, 2012, both citing failure to provide timely notice as the ground.

Plaintiff issued a policy to Barrera, for the period of November 15, 2004 to November 15, 2005. With respect to liability coverage, the policy provided the following condition precedent

to coverage:

> "CONDITIONS
> 3. Duties After Loss. In case of an accident or 'occurrence,' the 'insured' or someone acting for the 'insured' will perform the following duties that apply. You will help us by seeing that these duties are performed. Any written notice given by any claimant to us or any of our agents in this state, containing particulars sufficient to identify the 'insured,' will be deemed notice to us.
>
> " a.. Give written notice to us or any of our agents in this state as soon as is practical, which sets forth:
> (1) the identity of the policy and 'insured';
> (2) Reasonably available information on the time, place and circumstances of the accident or 'occurrence'; and
> (3) Names and addresses of any claimants and witnesses:
> b. Promptly forward to us every notice, demand, summons or other process relating in the accident or 'occurrence.'"

Pg 6, Conditions, par. 3.

Plaintiff also states that, upon receiving the notification from Barrera, it hired Daniel J. Hannon & Associates (DJH) to further investigate the claim. DJH subsequently secured a signed statement from Barrera on March 1, 2012. In his statement, Barrera purportedly admitted that he did not reside at the premises at the time of Intriago's accident and was not aware of the incident and suit until November 2007, when he was served with legal documents related to the underlying suit. Plaintiff claims that it then served a supplemental disclaimer to Barrera, dated March 2, 2012. In addition to reiterating disclaimer due to untimely notice, plaintiff disclaimed on the ground that the premises where the accident occurred did not constitute an "insured location" pursuant to the policy, since Barrera failed to reside there when Intriago was injured.

As relevant to this ground for disclaimer, the policy describes "insured premises" as:

> "4. 'Insured location' means:
> a. the 'residence premises,'
> b. the part of other premises, other structures and grounds used by you as a resident and:
> (1) which is shown in the Declarations; or
> (2) which is acquired by you during the policy period for you as a residence;
> c. any premises used by you in connection with a premises in 4.a. and 4.b. above;
> d. any part of premises:
> (1) not owned by an 'insured;' and
> (2) where an 'insured' is temporarily residing;
> e. vacant land, other than farm land, owned by or rented to an 'insured;'
> f. land owned by or rented to an 'insured' on which a one to four family dwelling is being built as a residence for an 'insured;'
> g. individual or family cemetery plots or burial vaults of an 'insured;' or
> h. Any part of a premises occasionally rented to an 'insured' for other than 'business' use.
> * * *
> 8. 'Residence premises' is defined as:
> a. the one family dwelling, other structures, and grounds: or
> b. that part of any other building; where you reside and which is shown as the 'residence premises' in the Declarations.
>
> 'Residence premises' also means a two, three or four family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations.
>
> Pgs. 1-2, Definitions.

Plaintiff brings this declaratory judgment action to confirm the propriety of its disclaimer, naming Barrera and Intriago as defendants. Now, plaintiff moves for summary judgment on its

action. Plaintiff relies on its disclaimers based on timeliness, and the argument that Barrera is not entitled to coverage because the subject premises is not an "insured location" as defined in the policy. Due to the disclaimers, as well as the signed statement from Barrera, which allegedly constitutes an admission, plaintiff contends that it is entitled to judgment.

Opposition to this motion comes from Intriago. He submits an affirmation from his attorney, which allegedly raises issues of fact precluding the granting of summary judgment. The affirmation first contends that the motion is premature because discovery has not been completed. On June 6, 2013, the parties entered into a stipulation, each reserving the right to conduct party depositions. Intriago's counsel is seeking to depose some of plaintiff's employees and this motion allegedly undermines this procedure.

Additional grounds for denial are as follows: that the authenticity of the signed statement from Barrera is questionable, because it has not been verified or notarized. The person who submitted the statement, Yant Suarez, an employee of DJH, is not a notary.

The issue of whether or not the premises where the accident occurred is an insured location is in dispute. In his statement, Barrera admitted that he moved back and forth to the premises and left his wife Olga there. Olga is named as an insured in the policy and, thus, one insured allegedly lived on the premises.

In reply, plaintiff argues that the affirmation of Intriago's counsel is not based on personal knowledge and is not admissible. Plaintiff also argues that the opposition papers are full of misstatements of facts. Plaintiff contends that the subject premises were not the insured location as defined in the policy and the statement from Barrera confirms this. As for Olga, plaintiff states that Olga Rivers is not Barrera's wife, but a co-signer for the premises, whose name was

removed when he refinanced in 2002, and, according to Barrera, never resided at these premises. Plaintiff insists that since Barrera did not reside at the premises at the time of the accident, he is not entitled to coverage.

Plaintiff states that Barrera's statement was sworn to Suarez and that Suarez provided his own sworn affidavit. Plaintiff claims that this constitutes a party admission which is admissible evidence.

Plaintiff avers that the timeliness of its disclaimer is irrelevant, because the fact that Barrera did not reside in a insured location at the time of the accident is a sufficient reason to deny coverage. Nevertheless, plaintiff asserts that its disclaimer was timely, as it was issued within 20 days after receipt of the information concerning the underlying action.

Plaintiff argues that its motion is not premature and any further discovery here will have no effect on the outcome of its claims.

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut the showing" *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 (2010), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Plaintiff's initial disclaimers were based on untimely notice. Plaintiff states that it first received notice of the underlying action on January 27, 2012. This action had commenced almost six years earlier. Plaintiff asserts that it notified Barrera by letter dated February 16, 2012 of the disclaimer. A second letter of disclaimer, dated March 1, 2012 was sent to him, based on late notice as well.

"An insurer's 'notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated'" *Estee Lauder, Inc. v Onebeacon Ins. Group, LLC,* 62 AD3d 33, 35 (1st Dept 2009), quoting *General Acc. Ins. Group v Cirucci,* 46 NY2d 862, 864 (1979).

"Of course, an insurer may reserve the right to disclaim on such different or alternative grounds as it may later find to be applicable. However, '[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability and failure to do so precludes effective disclaimer'"

Estee Lauder, 62AD3d at 35, quoting *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins,* 88 NY2d 836, 837 (1996).

"'[T]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the ground for disclaimer of liability or denial of coverage'" *A.J. McNulty & Co. v Lloyds of London,* 306 AD2d 211, 212 (1st Dept 2003), quoting *Matter of Allcity Ins. Co. [Jimenez],* 78 NY2d 1054, 1056 (1991).

In the present matter, plaintiff received notice of the occurrence 20 days before its disclaimer. The courts have previously determined that a 30-day delay in disclaiming coverage was untimely as a matter of law. *See West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co,* 290 AD2d 278, 279 (1st Dept 2002). However, in this case, the period in which plaintiff served notice of disclaimer to Barrera was less than 30 days from the time plaintiff received notice of the claim and lawsuit. This court finds that plaintiff's disclaimer, sent less than three weeks after notification of the occurrence, was not so unreasonable as a matter of law as to disallow denial of coverage.

The subsequent letter of disclaimer, dated March 2, 2012, was based on an additional

ground, that of improper premises. It is held that disclaimers issued two months or longer after an insurer receives first notice are timely, when the insurer is performing an investigation into the claim. *See Stabules v Aetna Life & Cas. Co.*, 226 AD2d 138, 139 (1st Dept 1996). There was apparently a further investigation into this matter, which resulted in the written statement by Barrera, who admitted that he did not reside in the subject premises which were covered under his policy.

However, the court finds that the first two letters of disclaimer, based on untimely notice of the occurrence, are sufficient to disqualify coverage for Barrera. The validity of the third notice, and the disputed authenticity of Barrera's written statement need not be addressed here.

The court finds that there is enough evidence presented by plaintiff for the granting of its motion and Intriago has not raised a material issue of fact. Moreover, as plaintiff claims, the continuation of discovery would not alter the outcome of this matter.

Accordingly, it is

ORDERED that plaintiff Tower Insurance Company of New York's motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendant Jose Barrera in the underlying action entitled *Intriago v the City of New York, et al.*, Index No. 20263/06, pending in Supreme Court, Queens County.

DATED: 3/4/14

ENTER:

J.S.C. HON. ANIL C. SINGH
SUPREME COURT JUSTICE