

2445 Creston Ave., LLC v Gold Star Gift Shop

2014 NY Slip Op 3131 Í (U)

April 14, 2014

Supreme Court, Bronx County

Docket Number: 307323/2012

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

2445 CRESTON AVENUE, LLC,

INDEX NUMBER: 307323/2012

Plaintiff,

-against-

GOLD STAR GIFT SHOP and LEADING INSURANCE GROUP INSURANCE COMPANY, LTD,

Present: HON. ALISON Y. TUITT Justice

The following papers numbered 1 to 6,

Read on this Plaintiff's Motions to Reargue

On Calendar of 12/9/13

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Upon the foregoing papers, plaintiff 2445 Creston Avenue LLC's (hereinafter "Creston") motion to reargue its motion for summary judgment and declaratory judgment against defendant Leading Insurance Group Insurance Co. Ltd. (hereinafter "Leading") or, in the alternative, granting leave to amend Creston's complaint to include a cause of action for reformation and Creston's motion to reargue its motion for summary judgment against defendant Gold Star Gift Shop (hereinafter "Gold Star") are consolidated for purposes of this decision. For the reasons set forth herein, the motions to reargue are granted and, upon reargument, plaintiff Creston's motions are granted and defendant Leading's motion to dismiss the complaint is denied.

This declaratory judgment action arises out of an underlying personal injury action entitled Jennifer Guzman v. The City of New York, 2445 Creston Avenue, LLC and Gold Star Gift Shop filed in Supreme Court Bronx County on July 21, 2011, under Index No. 306486/2011 (hereinafter "the underlying action"). Plaintiff in the underlying action claims that she sustained personal injuries when she was caused to

fall as a result of a dangerous condition on the sidewalk abutting 124 East 188th Street, Bronx, New York on February 7, 2011 (hereinafter "the premises"). Plaintiff claims she was injured when she slipped and fell on black ice on the sidewalk in front of the "Gold Star" gift shop. Plaintiff Creston owned and managed the premises, and the premises was leased to defendant Gold Star Gift Shop (hereinafter "Gold Star").

On September 5, 2012, plaintiff Creston commenced this action seeking a declaration that defendant Leading is obligated to provide Creston with a defense and indemnity in the underlying action. Creston alleges that it is an insured under the Leading policy which had been issued to Leading's named insured, defendant Gold Star, and that the claims in the underlying action trigger Leading's duty to defend Creston. Alternatively, Creston seeks a declaration that Gold Star must defend, indemnify and insure Creston for any and all liability in the underlying action, and that Gold Star's failure to provide a defense, indemnity and insurance coverage renders it in breach of contract and liable for the amount of settlement or judgment incurred by Guzman.

Leading moved to dismiss the complaint pursuant to C.P.L.R. §3211(a) arguing that plaintiff Creston failed to state a cause of action upon which relief may be granted. Creston cross-moved for summary judgment and declaratory judgment or, in the alternative, to amend the complaint to add a cause of action for reformation against Leading. Creston argued that notwithstanding that it was not named in the subject insurance policy, it is still an insured under the policy and that the Court should allow an amendment of the complaint to reform the policy to reflect the parties' true intentions. Creston also moved for summary judgment against defendant Gold Star. Gold Star moved to dismiss Creston's complaint on the grounds that a currently pending action seeks identical relief against Gold Star, in that Creston has asserted cross-claims in the underlying personal injury action.

Leading's motion to dismiss the action was granted and Creston's cross-motion for summary judgment was denied by this Court in its decision and Order dated August 2, 2013. This Court held, in relevant part, that

The complaint alleges that Creston is an insured under the subject insurance policy and that Leading is obligated to provide it with a defense and indemnity in the underlying claim. However, the documentary evidence establishes that Creston is not an insured under the policy.

The policy established that Creston is not a named insured or additional insured. The declarations page only list defendant Gold Star as the named insured under the policy. Similarly, there are no endorsements which extend coverage to Creston as an additional insured. There are no other provisions in the policy which confer named insured status to Creston. Although Gold Star and Creston had a relationship, as evidenced by the lease, that relationship does not confer on Creston any rights under the insurance policy.

C.P.L.R. Rule 2221 permits a party to move for reargument where it is shown that the court overlooked or misapprehended any matters of fact or law in issuing the underlying Order. Plaintiff has demonstrated that this Court overlooked or misapprehended matters of law or fact in deciding the underlying motions. Reargument of a motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Massey v. City of New York, 672 N.Y.S.2d 679 (1st Dept. 1998); Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992). This Court agrees that it overlooked matters of law in issuing the underlying decision and Order with respect to Leading's pre-answer motion to dismiss the complaint and Creston's motion for summary judgment against Leading. The Court also failed to specifically address Creston's motion for summary judgment against Gold Star. It should be noted that Gold Star had previously made a pre-answer motion to dismiss the complaint which was denied by this Court by decision and Order dated December 20, 2012. Gold Star subsequently moved to reargue their motion to dismiss which was denied by this Court by decision and Order dated July 26, 2013.

Leading issued a Businessowners Insurance Policy to Gold Star bearing Policy No. 01 BPS 003514 (hereinafter "the policy"). The policy included coverage parts for commercial general liability. In support of its motion for dismissal, Leading argued that the policy's declaration page only lists Gold Star as a named insured. Leading further argued that the policy does not contain a general blanket additional insured endorsement. Additionally, Leading contended that the policy does not contain a specific additional insured endorsement which extends additional insured coverage to Creston and there are no other provisions in the policy which confer named insured status to Creston.

Leading referenced the following relevant coverage terms, conditions and exclusions of the policy:

Section II - "LIABILITY" provides in relevant part:

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and the duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or fraudulent. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

* * *

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Paragraph f. Coverage Extension - Supplementary Payments

* * *

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

In opposition to Leading's motion and in support of its own motion, Creston argued that the documentary evidence, namely Leading's insurance policy, conclusively established Creston's claim for coverage. Creston contended that a simple reading of the policy reveals it explicitly provides coverage to its primary insured Gold Star for liability assumed by Gold Star as the result of a written lease for the premises. Creston argued that contrary to Leading's contention, the language of the policy itself specifically extends coverage for any liability assumed by Gold Star in a contract or agreement such as a lease of the premises. Creston further argued that although Leading's policy incorrectly identified the name of the additional insured landlord that was supposed to be named in the policy, the issue is moot to the extent that Leading's policy provides for contractual liability coverage. Creston contended that whether it be due to the contractual liability coverage explicitly provided by the policy by way of the lease between Creston and Gold Star or the additional

insured coverage that all parties intended for Creston, there is no doubt that Leading has failed to afford the coverage for which it contracted.

Creston referenced Section II - Liability, subsection A - Coverages, subsection 1 - Business Liability, subsection (f)(2) of the policy which provides as follows:

If we defend an insured against a suit and an indemnitee of the insured is also named as a party to the suit, we will defend that indemnitee if the following conditions are met [including] (a) the suit against the indemnity seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract."

Creston further referenced where the policy specifically defines the term "insured contract" and states in subsection 9(a) that: Insured Contract means a contract for a lease of premises. Creston argues that although the policy provides for exclusions to coverage including damages by reason of the assumption of liability in a contract or agreement, (B)(1)(b)(2) provides that

This exclusion does not apply to liability for damages: (2) assumed in a contract or agreement that is an "insured contract", provided the bodily injury occurs subsequent to the execution of the contract or agreement.

As for the specific lease terms by which Gold Star had assumed liability to Creston for the underlying alleged damages, the lease provides, in relevant parts, as follows:

Second - Tenant will take good care of the demised premises, fixtures and appurtenances, and... make all repairs in and about the same necessary to preserve them in good order and condition; [and] forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks, or vaults adjacent thereto.

Thirteenth - The Landlord shall not be liable for any... injury or damage to person or property caused by the elements or by other tenants or patrons in said building, or resulting from... water, rain or snow, which may leak or flow from any part of the buildings... or from the street or subsurface...

Lease rider page 1, paragraph 1 - Tenant agrees to Exonerate, save harmless, protect, defend and indemnify the Landlord or any owner of the demised premises for any and all losses, damages, claims, suits or actions, judgment and costs, which may arise or grow out of any injury or death of persons or damage to property in any manner whatsoever arising out of the acts or omissions of, or use by Tenant..."

Defendant Leading moved, pre-answer, to dismiss the plaintiff's complaint on the grounds that it fails to state a cause of action upon which relief may be granted. Plaintiff Creston cross-moved for summary judgment arguing that there are no questions of fact that it was an insured under the subject policy. It is well settled law that it is the Court's obligation to determine the rights and obligations of parties under insurance contracts based on the specific language of the policy. State v. Home Indemnification Co., 66 N.Y.2d 669 (1985). Where the provisions of an insurance policy are clear, the contract must be enforced as written. See, Moshiko, Inc. v. Seiger v. Smith, Inc., 529 N.Y.S.2d 284 (1st Dept. 1988). It is also well established that a party not named as an insured or additional insured on the face of the policy is not entitled to insurance coverage. Tower Insurance of New York v. Amsterdam Apartments, LLC, 918 N.Y.S.2d 106 (1st Dept. 2011); Sixty Sutton Corp. v. Illinois Union Ins. Co., 825 N.Y.S.2d 46 (1st Dept. 2006); Moleon v. Kreisler Borg Florman General Construction, 758 N.Y.S.2d 621 (1st Dept. 2003). The party claiming insurance coverage has the burden of proving entitlement. Moleon ; Plotkin v. Disability and Casualty Inter-Insurance Exchange, 277 N.Y.S.2d 464 (1st Dept. 1967).

In the instant action, Leading's motion to dismiss the complaint should have been denied and Creston's cross-motion for summary judgment should have been granted. A careful reading of Leading's insurance policy reveals that it explicitly provides coverage to its primary insured Gold Star for liability assumed by Gold Star as the result of a written contract, including a lease for the premises. As referenced above, the policy specifically provides that Leading will defend an insured if "the suit against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an 'insured contract.'" The policy further provides that "Insured Contract means a contract for a lease of premises." Moreover, the policy states that the exclusions to coverage including damages by reason of the assumption of liability in a contract or agreement "does not apply to liability for damages... assumed in a contract or agreement that is an 'insured contract', provided the bodily injury occurs subsequent to the execution of the contract or agreement." The lease for the premises between Creston and Gold Star specifically provided

that Gold Star “will take good care of the demised premises, fixtures and appurtenances, and... make all repairs in and about the same necessary to preserve them in good order and condition; [and] forever indemnify and save harmless the Landlord for and against any and all liability... arising from injury... to person... occasioned wholly or in part by the acts... or omissions... of the Tenant... for any matter or thing growing out of the occupations of the demised premises or of the streets, sidewalks...” Additionally, the lease specifically provides that “The Landlord shall not be liable for any... injury... to person... caused by the elements... or resulting from... water, rain, snow...”. The lease rider provides that the “Tenant agrees to Exonerate, save harmless, protect, defend and indemnify the Landlord... from any and all losses, damages, claims, suits or actions, judgments and costs, which may arise out of any injury... in any manner whatsoever arising out of the acts or omissions of, or use by Tenant...”. Finally, the lease provides that “the Tenant will keep the sidewalk and curb in front hereof clean at all times and free from snow and ice, and keep insur[ance] in favor of the Landlord...” and that “Tenant agrees that Tenant shall keep the sidewalk adjacent to the demised premises clean at all times and shall remove therefrom all rubbish, snow and ice whenever same is present, it being understood that the same is not the obligation of the Landlord.”

Here, a careful and plain reading of the subject policy and the lease agreement establishes that defendant Gold Star is an “insured contract” whereby Gold Star assumed liability for the dangerous/defective condition that allegedly caused plaintiff Jennifer Guzman’s accident, i.e., ice on the sidewalk which resulted from a snow fall. In the lease, Gold Star specifically assumes the responsibility for keeping the sidewalk in a safe condition and for the snow and ice removal on the sidewalk. Moreover, the policy clearly states that it covers any liability assumed by Gold Star in a contract or agreement such as a lease of the premises. Based upon the four corners of the policy, a plain reading establishes that Leading is obligated to provide coverage for Creston notwithstanding that Creston was not named as an additional insured.

This Court’s holding that the facts herein are similar to Sixty Sutton Corp., *supra* was inaccurate and the facts of Sixty Sutton Corp. are clearly distinguishable from the facts in this matter. In Sixty Sutton Corp., Illinois Union Insurance Company sought a declaration that its insured, Tower Building Services, Inc., was also an insured under an insurance policy issued by Utica First Insurance Company. Utica moved to dismiss the action on two grounds: it argued that it was not required to provide coverage in the underlying matter due to an “Employee Exclusion” provision in the policy (plaintiff in the underlying action was an

employee); and it also argued that coverage did not extend to Tower under one of the blanket additional insured provisions contained in the policy because Tower did not have a written contract or agreement with Utica's insured which required Tower to be named as an additional insured. The First Department held as follows:

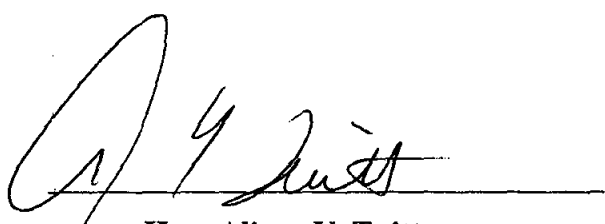
The four corners of an insurance agreement govern who is covered and the extent of coverage. In addition, where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent. Here, the unambiguous language of the Utica policy comports with Utica's position that Tower is not covered, either as a named or additional insured under the policy. Given that the employee exclusion exempts Utica from providing coverage to Jerez for Mr. Yadaicela's accident, Utica could not have been required to defend or indemnify Tower for that same claim.

Thus, the Court held that the Employee Exclusion provision in the policy and the failure to procure a written agreement entitling them to the status of an additional insured required a finding against Tower. As argued by Creston, in the instant matter there is no Employee Exclusion and the policy at issue here contains contractual liability provisions which extend coverage to Creston based on the lease between it and Gold Star.

Accordingly, for the reasons stated, upon reargument, Leading's motion to dismiss the complaint for failure to state a cause of action is denied and Creston's motion for summary judgment and declaratory judgment against Leading is granted. With respect to Creston's motion against Gold Star, this Court correctly held that Creston may maintain an action against Gold Star for its failure to procure insurance on its behalf and its motion for summary judgment against Gold Star is granted. Defendant Gold Star's argument that the plaintiff in the underlying action fell on a pedestrian ramp as opposed to the sidewalk is without merit.

This constitutes the decision and Order of this Court.

Dated: 4/14/2014



Hon. Alison Y. Tuitt