

Chiarello v Rio

2014 NY Slip Op 32212(U)

July 29, 2014

Sup Ct, Suffolk County

Docket Number: 10-20512

Judge: Denise F. Molia

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INDEX No. 10-20512
CAL No. 13-01612-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 1/23/14
ADJ. DATE 3/14/14
Mot. Seq. #005 - MotD

-----X
MICHAEL CHIARELLO, an infant, by his
Mother and Natural Guardian, MARIANNE
CHIARELLO and MARIANNE CHIARELLO,
Individually,

DEVITT SPELLMAN BARRETT, LLP
Attorney for Plaintiffs
50 Route 111
Smithtown, New York 11787

Plaintiffs,

DANDENEAU & LOTT
Attorney for Defendants/Third-Party Plaintiffs
425 Broadhollow Road, Suite 418
Melville, New York 11747

- against -

FRANK RIO and LORI RIO,

THE FEENEY LAW OFFICES, PLLC
Attorney for Third-Party Defendant
503 Route 111
Hauppauge, New York 11788

Defendants.

-----X
FRANK RIO and LORI RIO,

Third-Party Plaintiffs,

- against -

ENCOMPASS INSURANCE COMPANY OF
AMERICA,

Third-Party Defendant.
-----X

Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17-23; 24-26; Replying Affidavits and supporting papers 27-30; Other third-party plaintiff's memorandum of law; letter dated March 13, 2014 from John Denby of Devitt Spellman Barrett, LLP to the court; (and after hearing counsel in support and opposed to the motion) it is,

RST

ORDERED that the motion by the third-party defendant, Encompass Insurance Company of America, for an order (i) pursuant to CPLR 3212, granting summary judgment in its favor, or, in the alternative, (ii) striking the jury demand, is granted to the extent of granting summary judgment declaring that Encompass owes no duty to defend or indemnify any of the plaintiffs or defendants in connection with the claims asserted in this action, and is otherwise denied.

This action arises from a July 18, 2007 accident in which plaintiff Michael Chiarello (“the plaintiff”), who was then 14 years old, was injured while operating an ATV owned by the defendants. At the time of the accident, the plaintiff was a guest of the defendants’ teenage son, Frank Jr., at the defendants’ vacation home located at 201 Prah Road, Galway, New York. The accident took place as the plaintiff was attempting to traverse a “sand pit” located off the defendants’ property. According to the defendants, the plaintiff had previously been instructed not to leave the property while operating any of the defendants’ ATVs and not to use the particular ATV in which he was injured.

It appears that sometime prior to the accident, Encompass issued to defendant Frank Rio a homeowners’ policy covering four parcels of improved real estate, including the Prah Road property, with effective dates of March 13, 2007 through March 13, 2008. The policy provided, in relevant part, as follows:

DEFINITIONS

In this “HOME” Segment, certain words and phrases are italicized, which identifies them as having specific meaning for this “HOME” segment. The meaning of each italicized word or phrase is provided in the Definitions below.

* * *

2. Bodily Injury means physical bodily harm * * *.

* * *

4. Covered Person(s) means you and the following residents of your household:

* * *

Under Liability Coverage – Home, *covered person* also means

d. With respect to an motor vehicle to which this “HOME” Segment applies:

(1) Persons while engaged in your employ or that of any person included in 4.a. or 4.b. above; or

(2) Other persons using the vehicle on an *insured location* with your permission.

* * *

6. Insured Location means:

a. Your *residence premises*;

b. The part of any other premises, other structures and grounds used by you as a residence that is shown in the Coverage Summary, or acquired by you during the policy period for your use as a residence; provided you ask us to insure it within 30 days after you become the owner and coverage is agreed to by us;

c. Any premises used by you in connection with the premises included in 6.a. or 6.b. above;

* * *

7. Medical Expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services.

* * *

10. Occurrence means:

a. An event, or a series of related events resulting from continuous or repeated exposure to the same general conditions, that causes *bodily injury* * * * during the policy period * * *.

* * *

14. Residence Premises means:

a. A dwelling, condominium, co-operative unit or apartment, other structures and grounds; or

b. That part of any other building;

where you reside and which is shown as your residence in the Coverage Summary.

* * *

LIABILITY COVERAGE – HOME

PERSONAL LIABILITY – INSURING AGREEMENT

If a claim or suit is brought against you or any *covered person* for [*bodily injury*] caused by an *occurrence* to which this coverage applies, we will:

1. Pay on your behalf claims for which you or any *covered person* are legally liable, including pre-judgment interest awarded against you or any *covered person*, up to our limit of liability; except as excluded by the provisions listed in the Liability Coverage – Losses We Do Not Cover;

* * *

MEDICAL EXPENSE – INSURING AGREEMENT

We will pay *medical expenses* that are incurred or medically ascertained within three years from the date of the *occurrence* causing *bodily injury*.

This coverage applies:

1. To anyone on an *insured location* with the permission of a *covered person*; or
2. To anyone off an *insured location*, if the *bodily injury*
 - a. Arises out of a condition on the *insured location* or the ways immediately adjoining;

* * *

LOSSES WE DO NOT COVER

1. Personal Liability and Medical Expense coverages do not apply to *bodily injury* * * *:

* * *

c. Arising out of the ownership, maintenance, occupancy, renting, loaning, use, entrusting, loading or unloading of any motor vehicles, other than:

* * *

(2) A motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and

(a) Not owned by a *covered person*; or

(b) Owned by a *covered person* and being used on an *insured location* at the time of the accident.

According to Encompass, it was first notified of the plaintiff's injuries arising from the accident and of the defendants' loss when it received a copy of the summons and complaint filed in this action on July 23, 2010. By letter dated August 5, 2010, Encompass denied any duty to defend or indemnify the defendants and disclaimed coverage for the loss on the grounds (i) that the injury arises out of the ownership, maintenance, occupancy, use or entrusting of a motor vehicle which does not qualify for coverage under the policy and which is specifically excluded by the policy, (ii) that the loss location does not constitute an "insured location" within the meaning of the policy, and (iii) that the defendant failed to notify it of the incident in a timely manner.

On January 13, 2011, the defendants commenced a third-party action against Encompass seeking indemnification and coverage. The defendants pleaded two causes of action in the third-party complaint: the first, based on breach of contract and alleging that Encompass violated its obligations under the policy by refusing to provide the required defense and indemnification, and the second, based on negligence and alleging that Encompass exposed the defendants to a potential default judgment by failing to advise them of the need to address the summons and complaint or to retain an attorney to do so. Encompass subsequently moved for summary judgment dismissing the third-party complaint or, in the alternative, for severance of the third-party action. By order dated January 6, 2012, this court denied the motion in its entirety, with leave to renew upon the completion of discovery. The Appellate Division, by decision and order (one paper) dated December 12, 2012, subsequently modified the January 6 order by granting summary judgment dismissing the second cause of action in the third-party complaint (101 AD3d 793, 957 NYS2d 133).

Now, discovery having been completed, Encompass again moves for summary judgment. In support of its motion, Encompass claims to have discovered, since the time of its first motion, that the policy, insofar as it provided coverage with respect to the Prah Road property, had been canceled for nonpayment of premium on April 25, 2007 and that there was no coverage in effect on the date of the accident. In any event, Encompass claims, *inter alia*, that the ATV which the plaintiff was using at the time of the accident is not covered by the policy and, even if it were, that there is no coverage because it was not being used on an insured location at the time of the accident.

On a motion for summary judgment, a liability insurer denying the duty to defend and indemnify has the burden "to establish that the injury complained of falls outside the coverage of the policy or is exempted by reason of an exclusionary clause * * *. If the insurer can establish, as a matter of law, that the claims against the assured are unambiguously excepted from coverage, summary judgment in favor of the insurer is proper" (*Smith Jean, Inc. v Royal Globe Ins. Cos.*, 139 AD2d 503, 504, 526 NYS2d 604, 605 [1988]). Once the insurer shows that an exclusion applies, the burden shifts to the insured to establish that an exception to the exclusion applies (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 657 NYS2d 564 [1997]). "Where the existence of coverage depends entirely on the applicability of an exception to an exclusion, as here, the insured has the duty of demonstrating that the exception governs" (*State of New York v Schenectady Hardware & Elec. Co.*, 223 AD2d 783, 785, 636 NYS2d 861, 863 [1996]; accord *Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 577 NYS2d 953, *lv denied* 80 NY2d 753, 587 NYS2d 905 [1992]). Shifting the burden to establish the exception conforms with an insured's general duty to establish coverage, whereas it is an insurer's general duty to establish the absence of coverage (*Northville Indus. Corp. v National*

Union Fire Ins. Co. of Pittsburgh, Pa., supra). If any one exclusion applies, there can be no coverage (*Monteleone v Crow Constr. Co.*, 242 AD2d 135, 673 NYS2d 408, *lv denied* 92 NY2d 818, 684 NYS2d 489 [1998]).

Even assuming, for purposes of this determination, that the policy was in effect on the date of the accident, the court finds that Encompass is entitled to summary judgment. Upon review of the policy terms, the loss is clearly excluded from coverage under the policy exclusion for bodily injury arising out of the use of a motor vehicle. Although both the defendants and the plaintiffs, in opposition, cite the exception to the exclusion for motor vehicles “designed for recreational use off public roads, not subject to motor vehicle registration and * * * [o]wned by a *covered person* and being used on an *insured location* at the time of the accident,” they failed to show that the exception applies. Whether, as the defendants claim, the deposition testimony of Lynne Seymour, a claims adjuster employed by Encompass, was equivocal as to whether the ATV was subject to motor vehicle registration, ignores that it is the defendants who have the burden of establishing the applicability of an exception to a policy exclusion; the court notes, in any event, that ATVs are, in fact, generally subject to laws, rules, and regulations of this State requiring such registration (*see* Vehicle and Traffic Law art 48-B; 15 NYCRR part 103; *see also* CPLR 4511 [a]).

While the failure to establish that the ATV is not subject to motor vehicle registration suffices to defeat the applicability of the exception, the court finds some words as to the parties’ arguments regarding the definition of “insured location” to be in order. As the defendants and the plaintiffs correctly recognize, the policy definition extends to premises used “in connection with” the residence premises. However, this does not support their arguments that the area where the accident occurred is an “insured location.” Based on the deposition testimony of the defendants and of their son, Frank Jr., it appears that the property on which the “sand pit” was located was not owned by the defendants and was located approximately one-half mile from the defendants’ property; that the owner of the property had come by the defendants’ house several weeks before the accident to tell Lori Rio to keep the boys off his property because they had been shooting a pellet gun and riding on the property, and that he had threatened to shoot them if he discovered them on the property again; that he had erected “No Trespassing” signs on the property; that the defendants had warned the boys to stay off the property; and that the boys were aware of the owner’s threats but disregarded the warnings. While it is beyond dispute that the phrase “in connection with” may be susceptible to varying interpretations and that ambiguities in exclusionary clauses are to be construed most strongly against the insurer (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 469 NYS2d 655 [1983]), the court cannot conceive of an interpretation of the phrase so broad as to include, under the circumstances presented, the area of the accident (*see generally American Nat. Prop. & Cas. Co. v Sorensen*, ___ P3d ___, 2013 WL 6503310, 2013 Utah App LEXIS 295 [Utah App 2013]; *Elliott v State Farm Fla. Ins. Co.*, 61 So 3d 502 [Fla App 2011]; *Mason v Allstate Ins. Co.*, 298 Ga App 308, 680 SE2d 168 [2009]; *Massachusetts Prop. Ins. Underwriting Assn. v Wynn*, 60 Mass App Ct 824, 806 NE2d 447 [2004]).¹

Accordingly, the court finds that Encompass is entitled to the entry of judgment declaring that it

¹ The court is not aware of any published decisions in New York addressing the issue.

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owes no duty to defend or indemnify any of the plaintiffs or defendants in connection with the claims asserted in this action.

The court directs that the claim as to which summary judgment was granted is hereby severed and that the parties' remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 7-29-14

Hon. Denise R. Molis
A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION