

Majority Media Inc. v Hermitage Ins. Co.

2014 NY Slip Op 32419(U)

September 11, 2014

Supreme Court, Kings County

Docket Number: 17021/2012

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Majority Media Inc.,

Hon. Edgar Walker
PART: IA 90

Plaintiff,

-against-

Index No. 17021/2012

Hermitage Insurance Company,
Robert Skeete, Skeete Agency,

Defendants.

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Defendant Hermitage Insurance Company ("Hermitage")'s motion for summary judgment, pursuant to CPLR §3212, for an order dismissing the complaint and declaring that it has no duty to defendant or indemnify plaintiff, is granted. Plaintiff's motion to amend the complaint, pursuant to CPLR §3025, is also denied.

This declaratory judgment action arises from an underlying personal injury action wherein Kim Richardson seeks recovery for injuries she allegedly sustained on October 20, 2007 when she slipped and fell at premises owned by plaintiff Majority Media Inc. ("Majority Media") at 328 Chauncey Street in Brooklyn, New York. In the instant action, Majority Media seeks a declaration that it is entitled to a defense and indemnification for the Richardson claim under a general liability insurance policy issued by Hermitage ("the Policy"). Also, Majority Media asserts claims against its broker, Robert Skeete and Skeete Agency ("Skeete"), for malpractice.

In support of its motion for summary judgment, Hermitage asserts that it has no duty to defend or indemnify Majority Media in the underlying action because: (1) Majority Media is not an insured under the Policy and (2) Majority Media did not provide timely notice of the occurrence.

The Policy lists Golding & Associates P.L.L.C. ("Golding & Associates") as the named insured, with a mailing address of "C/O Mr. Kevin S. Golding, 299 Broadway, Suite 710, New York, NY 10007," and a six-unit apartment building located at 328 Chauncey Street, Brooklyn,

NY as the description of the insured premises. Kevin Golding is a principal of both Golding & Associates and Majority Media. Under the terms of the Policy, the insured must provide notice of the occurrence, offense, claim or lawsuit "as soon as practicable."

Trans World, Hermitage's agent, first received notice of the accident on December 27, 2007 when it received a facsimile from Skeete concerning the subject claim. While the fax coversheet indicated that a notice of claim and two additional pages were included, Trans World only received a letter of representation from Ms. Richardson's counsel. That letter, dated December 21, 2007, was addressed to Majority Media at 328 Chauncey Street and referenced an accident at that location, on October 20, 2007, involving Ms. Richardson. In that letter, counsel requested that Majority Media "refer this letter immediately to your liability carrier for its prompt consideration and attention." By facsimile dated January 1, 2008, Trans World requested the notice of claim form referenced on Skeete's December 27, 2007 fax coversheet. On January 10, 2008, Trans World received a fax coversheet from Skeete, the body of which stated "PLEASE IGNORE THE CLAIM FOR THE ABOVE. THANKS." The coversheet referenced Majority Media and included a "cc:" to Kevin S. Golding. At that time, Trans World did not forward any of the above-referenced documents to Hermitage. Trans World received no other correspondence from Skeete until November 15, 2008, when it received, by fax, a notice of claim concerning Ms. Richardson's accident as well as the summons and complaint in the underlying action. On November 18, 2008, by fax, Trans World notified Skeete that it had used an incorrect notice of claim form. On that same date, Skeete forwarded the correct form, by fax, to Trans World and Trans World forwarded the notice of claim to Hermitage.

Hermitage contends that Majority Media is not covered under the Policy because, at the time of the accident, it was not listed as an insured under the Policy. In support of its position, Hermitage submitted, *inter alia*, a copy of the Policy listing Golding & Associates as the insured and a copy of a "Commercial Insurance Application," dated September 25, 2007, listing both Golding & Associates and Kevin S. Golding as insureds.

In opposition to the motion, both Majority Media and Skeete contend that the failure to

list Majority Media as an insured on the policy declarations is the result of an inadvertent error and that the parties clearly intended that the property's owner would be covered under the Policy. In support of its contention, Majority Media submitted, *inter alia*, the affidavit of Kevin S. Golding wherein he states that "it was the intent of the parties to insure and name the subject premises" and that "[s]omehow either defendant must have placed the law office, Golding & Associates (which has the mailing address for the subject premises) instead of Majority Media Inc." Majority Media also submitted a copy of an "Insurance Binder," dated September 27, 2007, which lists Majority Media Inc. as the insured, with respect to the subject premises, with an address of "Mr. Kevin Golding, 299 Broadway, Suite 701, New York 10007." Majority Media also submitted a copy of an "Insurance Binder," dated October 23, 2009, which also lists Majority Media as the insured with respect to the subject premises. In addition, Majority Media submitted a notice of claim form, dated December 27, 2007, with Majority Media Inc. handwritten above Kevin Golding's name and address in the "Insured" box.

"The name of the insured in a policy is not always important if the intent to cover the risk is clear." *See Anand v. GA Ins. Co. of N.Y.*, 228 A.D.2d 397, 399 quoting *Matter of Lipshitz v. Hotel Charles*, 226 A.D. 839, 840. Further, a third party may enforce a policy of insurance if it demonstrates that the parties intended to insure the interest of the third party who seeks to recover on the policy. *See State of New York v. Liberty Mutual Ins. Co.*, 23 A.D.3d 1084. Here, it strains credulity to think that Hermitage intended to provide coverage for the subject premises without providing any coverage to the owner of the property. At the very least, the conflicting insurance documentation and the affidavit of Mr. Golding raise issues of fact as to the intent of the parties. Therefore, Hermitage's motion for summary judgment on the ground that Majority Media is not a covered party under the Policy is denied.

However, the Court finds that Hermitage properly disclaimed coverage due to late notice. According to Hermitage, it first received notice of the accident in November of 2008, eleven months after the accident. However, Skeete and Majority Media contend that the December 27, 2007 correspondence from Skeete to Trans World was sufficient to establish notice of the alleged

October 20, 2007 occurrence.

The purpose of prompt notice is to give the insurer an early opportunity to investigate the claim when the information is fresh and set proper reserves. *See Briggs Avenue LLC v. Insurance Corp. of Hanover*, 11 N.Y.3d 377. Where, as here, a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be given to the carrier within a reasonable period of time. *See Columbia Univ. Press, Inc. v. Travelers Indem. Co. of Am.*, 89 A.D.3d 667. With respect to policies issued before January 17, 2009, as the subject policy was, an insurer could disclaim coverage when the insured failed to satisfy the notice condition, without regard to whether the insurer was prejudiced by the insured's failure to satisfy such condition. *See Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021, 1023. The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. *See Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339.

While notice of Majority Media's claim was initially provided to Trans World in December of 2007, such notice was expressly withdrawn within two weeks thereafter. Even if Trans World had immediately forwarded the letter of representation to Hermitage, at the time Steele instructed Hermitage to "ignore the claim," Hermitage had not had sufficient time to conduct any meaningful investigation. Nor has the Court found or the parties cited any legal authority for the proposition that an insurer remains on notice after a claim has been withdrawn before any meaningful investigation could have been undertaken. Rather, it is this court's view that the notice provided by facsimile on December 27, 2007 was vitiated when Transworld received the instruction to ignore the claim. To find otherwise would unduly burden insurers by requiring them to investigate all claims, including those that have been withdrawn, in order to protect themselves in the event that a subsequent claim by the same party regarding the same occurrence is made.

As Mr. Golding was informed of the accident, including Ms. Richardson's emergency treatment, on the date it occurred, October 20, 2007, the notice provided in mid-November of

2008, thirteen months after the accident, is untimely as a matter of law. *See Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748; *Guideone Ins. Co. v. Darkei Noam Rabbinical College*, 2014 WL 4086672 (N.Y.A.D. 2 Dept.). As such, the court finds that the disclaimer issued by Hermitage by letter dated December 11, 2008 was timely and proper. Accordingly, the Court hereby declares that Hermitage has no duty to defend or indemnify plaintiff with respect to the underlying action.

For the same reasons, Majority Media's motion to amend the complaint to add Trans World as a defendant is also denied.

Dated : 9-11-14



Hon: Edgar G. Walker, J.S.C.

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