General Star Indem. Co. v Telomerase Activation Sciences, Inc.
2015 NY Slip Op 31850(U)
October 1, 2015
Supreme Court, New York County
Docket Number: 651628/2014
Judge: Eileen Bransten

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

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GENERAL STAR INDEMNITY COMPANY,

Plaintiff,

-against-

TELOMERASE ACTIVATION SCIENCES, INC., and NOEL THOMAS PATTON,

Defendants.

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Index No. 651628/2014
Motion Date: 9/9/2015
Motion Seq. No. 001

BRANSTEN, J.

In this action for declaratory relief, Plaintiff General Star Indemnity Company ("General Star") asserts that it does not owe a duty to defend or indemnify Defendants Telomerase Activation Sciences, Inc. ("TASI") and its founder, Noel Thomas Patton ("Patton") (collectively, the "TASI Parties"), under a commercial lines insurance policy for claims based on Defendants' allegedly deceptive acts and practices in marketing and promoting TASI's anti-aging product, "TA-65." Plaintiff also seeks permission to withdraw representation of the TASI Parties in the underlying action, *Brian Egan, et al. v. Telomerase Activation Sciences, et al.*, New York County Index No. 652533/2012.

Plaintiff and Defendants have filed cross-motions for summary judgment. Both cross-motions are opposed. For the reasons that follow, Plaintiff's motion is denied, and Defendant's cross-motion is granted.

I. Background

1. The Policy

General Star issued a Commercial Lines Policy, Policy No. IYG405543C, to the TASI Parties for the period from October 3, 2010 to October 3, 2011 (the "Policy"). *See* Affirmation of Vincent J. Proto ("Proto Affirm.") Ex. A. The Policy provides an "each occurrence" limit of $2 million for "bodily injury," under Coverage A and "personal and advertising injury" claims, under Coverage B, among other things.

a. Coverage A

Under Coverage A, the Policy provides Commercial General Liability ("CGL") coverage for "bodily injury" claims. (Proto Affirm. Ex. A) "Bodily injury" is defined as "bodily injury sustained by a person, including death resulting from any of these at any time." *Id.* at Sec. V.

Coverage A's Insuring Agreement, provides, in relevant part:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury"… to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury"…to which this insurance does not apply.
>
> b. This insurance applies to "bodily injury" …only if:
>
> …

> (3) A claim for damages because of the "bodily injury"… is first made against any insured, in accordance with Paragraph (c) below, during the policy period or any Extending Reporting Period we provided under Section V- Extended Reporting Periods.

Id. at Sec. I. Pursuant to the Policy, a claim by a person or organization seeking damages will be deemed to have been made at the earlier of when the insured receives notice of such claim or when the Insurer settles the action. *Id.* at Sec. I.

b. Coverage B

Under Coverage B, the Policy provides CGL coverage for "personal and advertising injury" liability. *Id.* at Sec. I. "Personal and advertising injury" is defined as injury arising out of one or more of the following offenses:

> a. False arrest, detention, or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord, or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; or
>
> e. Oral or written publication of material, in any manner, that violates a person's right of privacy.

Id. at Sec. V. Coverage B's Insuring Agreement stipulates as follows:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury"… to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty

> to defend the insured against any "suit" seeking damages for "personal and advertising injury"…to which this insurance does not apply.
>
> b. This insurance applies to "personal and advertising injury" …only if:
>
> …
>
> (3) A claim for damages because of the "personal and advertising injury"… is first made against any insured, in accordance with Paragraph (c) below, during the policy period or any Extending Reporting Period we provided under Section V- Extended Reporting Periods.

Id. at Sec. I. Again, as noted above, a claim is deemed to have been made at the earlier of when the insured receives notice of the claim or when the Insurer settles the action. *Id.*

c. Extended Reporting Period

Pursuant to the Policy, "Extended Reporting Periods do not extend the policy period or change the scope of coverage provided." *Id.* at Sec. V. The Extended Reporting Period applies to claims made under Coverage A and Coverage B so long as the "occurrence" takes place before the end of the policy period but after the retroactive date, if any. *Id.* "Occurrence" is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. *Id.* A "Basic Extended Reporting Period" is automatically provided, beginning at the end of the policy period and extending:

> a. Five years with respect to claims because of "bodily injury" …arising out of an "occurrence" reported to us, not later than 60 days after the end of the policy period…

b. Five years with respect to claims because of "personal and advertising injury" arising out of an offense reported to us, not later than 60 days after the end of the policy period…

c. Sixty days with respect to claims arising from "occurrences" or offenses not previously reported to us.

Id.

2. *General Star's Disclaimer*

On or about October 18, 2011, TASI notified General Star of a potential wrongful termination claim and bodily injury claim brought by Brian Egan. Proto Affirm. Ex. B. Egan alleged that TASI's product, TA-65, "caused or acerbated his cancer." *Id.* Egan was diagnosed with prostate cancer in September 2011. (Proto Affirm. Ex. C)

By letter dated October 24, 2011, General Star notified TASI that there was "no potential for coverage" under the Policy for Egan's wrongful termination and bodily injury claims. *Id.* TASI did not respond to General Star's disclaimer.

3. *The Class Action*

On July 16, 2012, Egan and Ed Murray, another TASI employee, filed the complaint in the Underlying Action against TASI, Patton and Joseph Raffaele, M.D., a trained licensee of TASI who was authorized to market and sell TA-65. The action seeks "monetary relief and redress for the unfair and deceptive business acts and practices by Defendants" in connection with the sale of TA-65. *See Brian Egan, et al. v. Telomerase*

Activation Sciences, et al., New York County Index No. 652533/2012 (the "Underlying Action" or "*Egan* Complaint"). (Proto Affirm. Ex. D)

The *Egan* Complaint asserts two causes of action: (1) Defendants engaged in deceptive acts and practices in the conduct of their business, in violation of New York General Business Law Section 349; and (2) a class claim asserting the same. *Id.* Specifically, Egan and Murray allege that the TASI Parties knowingly misled consumers by marketing TA-65 as an anti-aging product. The *Egan* Complaint also alleges that TASI and Patton failed to inform consumers that use of TA-65 was associated with malignant tumor formation. Egan and Murray, on their own behalf and on behalf of the putative class, seek all statutory damages provided by New York General Business Law Section 349.

4. *General Star's Coverage*

General Star received a copy of the *Egan* Complaint on July 30, 2012. (Proto Affirm. Ex. E) On August 3, 2012, General Star sent the TASI Parties a letter stating stated that based on its initial review of the complaint and subject to a reservation of rights, it would defend TASI and Patton against all of the claims—the individual claims brought by Egan and Murray, as well as the class claims. *Id.* General Star informed the TASI Parties that it had assigned Wright & Wolf, L.L.C., to represent them. *Id.* General Star also reserved the right to assert additional grounds to deny coverage. *Id.*

Specifically, General Star reserved to the right to deny coverage based on the terms, conditions and exclusions of the Policy. *Id.* General Star additionally reserved the right to deny coverage "in light of any additional information developed." *Id.* Finally, General Star reserved its right to file a declaratory relief action to have its rights and duties under the Policy defined, or to recoup any monies paid out for defense of indemnification of the TASI Parties. *Id.*

On September 11, 2012, General Star informed TASI that it would not defend against Murray's individual claim. (Proto Affirm. Ex. F) General Star explained that since Murray was not sold TA-65 until April 2012, his claim fell outside the Policy Period and the Extended Reporting Period. *Id.*

On October 5, 2012, General Star informed TASI that it was denying coverage under the Policy for Dr. Raffaele based on the fact Dr. Raffaele was not an "insured" under the Policy. (Proto Affirm. Ex. G) General Star reaffirmed this coverage denial by letter dated November 12, 2012. (Proto Affirm. Ex. I) Pursuant to a Stipulation of Discontinuance, Plaintiffs withdrew their claims against Dr. Raffaele on December 10, 2012. (Proto Affirm. Ex. J)

5. The Underlying Action

On December 23, 2013, Egan and Murray moved for class certification on the *Egan* Complaint and for appointment as class representatives. (Proto Affirm. Ex. K) This Court denied the motion for class certification and the decision was affirmed by the First Department on April 28, 2015. (Proto Affirm. Ex. L)

6. The Instant Action

On May 28, 2014, General Star filed the complaint in this action for declaratory relief. General Star seeks a declaration that it has no duty to defend or indemnify the TASI Parties with respect to the Underlying Action and that it may withdraw the defense in the Underlying Action.

II. Discussion

Presently before the Court are the parties' cross-motions for summary judgment in this action for declaratory relief. Plaintiff contends that it is entitled to declarations that it has no duty to defend or indemnify Defendants in the Underlying Action and that it may withdraw the representation it is currently providing. Defendants disagree, arguing that the contrary is true—General Star has a duty to defend and indemnify the TASI Parties in the Underlying Action and is not entitled to withdraw representation. Defendants further

contend that Plaintiff's two-year delay in disclaiming coverage is unreasonable and bars the recovery sought in this action.

A. Summary Judgment Standard

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative

that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

B. Duty to Defend

"An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, in order to ensure an adequate defense of the insured." *Savik, Murray & Aurora Const. Management Co., LLC v. ITT Hartford Ins. Group*, 86 A.D.3d 490, 494 (1st Dep't 2011) (internal citations omitted). An insurer has an obligation to defend "whenever the allegations of the complaint suggest a reasonable possibility of coverage" or "if facts outside the complaint suggest that the claim is within the scope of the relevant issuance policy." *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y. 2d 61, 65-66 (1991); *see Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981) (noting that "[i]f, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be."). Thus, an insurer can avoid its obligation to defend "only where there is 'no possible factual or legal basis' on which an insurer's duty to indemnify under any provision of the policy could be held to attach." *Century 21, Inc. v. Diamond State Ins. Co.*, 442 F.3d 79, 83 (2d Cir. 2006) (citing *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 424 (1985)).

Moreover, "if any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action." *Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264 (2011) (citing *Town of Massena v. Healthcare Underwriters Mutual Ins. Co.*, 98 N.Y.2d 435, 443-44 (2007)) (internal citations omitted). "It is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage." *Id.* at 265 (internal citations omitted).

Here, General Star argues that it does not owe the TASI Parties a duty to defend or indemnify because the claims brought in the Underlying Action are not for "bodily injury," so they are not covered by the Policy.[1] Instead, General Star argues, the Underlying Action is solely for violations of New York General Business Law Section 349. General Star maintains that Egan's cancer diagnosis was disclosed to demonstrate that the TASI Parties deceptively failed to disclose TA-65's cancer side-effects, not to show that Egan suffered "bodily injury." General Star's reliance on the legal assertions made the *Egan* Complaint is, however, misplaced.

An insurer can avoid its obligation to defend "only where there is 'no possible factual or legal basis' on which an insurer's duty to indemnify under any provision of the

[1] The TASI Parties do not contend that the underlying claims are for "personal and advertising injury."

policy could be held to attach." *Century 21, Inc. v. Diamond State Ins. Co.*, 442 F.3d 79, 83 (2d Cir. 2006) (citing *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 424 (1985)). The *Egan* Complaint alleges that Egan was diagnosed with prostate cancer in September 2011, sometime after he started using TA-65. (Proto Affirm. Ex. D at ¶ 58) The *Egan* Complaint also alleges that TASI failed to warn consumers that malignant tumor formation may be a side-effect of using TA-65. (Proto Affirm. Ex. D at ¶¶ 59-61)

In New York, courts may also consider facts outside of the complaint to determine whether an insurer has a duty to defend. *Fitzpatrick*, 78 N.Y.2d at 65-66. In this case, the facts suggest Egan is claiming "bodily injury." For example, the claim form TASI sent to General Star on October 18, 2011 states that "the claimant is alleging that the product 'TA-65' caused or acerbated his cancer." (Proto Affirm. Ex. B) Not only does this suggest "bodily injury," it suggests General Star had actual knowledge of the fact. Further, during his deposition, Egan was asked, "What are your claims as to your actual damage in this lawsuit, this lawsuit that we're here for today?" Def. Ex. 6 at 190-91. Egan responded, in part, "My damages are TA-65 exacerbated my cancer…" *Id.* Such statements create more than a reasonable possibility that Egan's claim is for "bodily injury." *Fitzpatrick*, 78 N.Y. 2d at 65-66.

General Star maintains that the Underlying Action is purely for statutory violations and asks the Court to consider *Crawford Laboratories, Inc. v. St. Paul Ins. Co. of Illinois* as persuasive authority. 306 Ill.App.3d 538 (1999). There, the Appellate Court of Illinois was asked to determine whether an insurer had a duty to defend a pharmaceutical company, where the underlying complaint sought damages for an alleged statutory violation and injunctive relief. *Id.* at 540-41. The plaintiff, Crawford Laboratories, insisted that the underlying complaint alleged "bodily injury," and was therefore covered by the company's commercial general liability policy with St. Paul Insurance. *Id.* at 544. The Appellate Court held that although the underlying complaint alleged bodily injury to individuals, the allegations were made "not for the recovery of the injured," but to demonstrate the consequences of Crawford's statutory violations. *Id.* at 543.

Unfortunately for General Star, *Crawford Laboratories* is neither controlling nor on point. First, in assessing the scope of an insurer's duty to defend, Illinois courts are bound by allegations made in the complaint. *Id.* at 541. In New York, as explained above, courts may consider facts outside of the complaint to determine whether an insurer has a duty to defend. *See Fitzpatrick*, 78 N.Y.2d at 69-70. To that end, New York policy favors a finding that the insurer has a duty to defend, a duty much broader than a duty to indemnify. *See Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91

N.Y.2d 169, 178 (1997); *see also Savik, Murray & Aurora Const. Management Co., LLC v. ITT Hartford Ins. Group*, 86 A.D.3d 490, 494 (1st Dep't 2011). As the Court explained in *Fitzpatrick*, "an insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage." 78 N.Y.2d at 65.

For the aforementioned reasons, General Star has not met its burden in showing that there is "no possible factual or legal basis" on which its duty to indemnify under the Policy could be held to attach. *Century 21, Inc. v. Diamond State Ins. Co.*, 442 F.3d 79, 83 (2d Cir. 2006) (citing *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 424 (1985)). Therefore, General Star is not entitled to declaratory relief and must continue to provide legal representation for the TASI Parties in the Underlying Action. Insofar as the *Egan* Complaint asserts numerous claims, General Star's duty to defend extends to each one.[2] *See Fieldston Property Owners Ass'n, Inc*, 16 N.Y.3d at 264-65 (explaining that if there is a duty to defend against any of the claims, the insurer must defend against the entire action).

[2] The motion with respect to the Second Cause of Action, the class claims, is moot because certification was denied and affirmed on appeal.

General Star also asks the Court to declare that it does not have a duty to indemnify the TASI Parties in the Underlying Action. Though the question of General Star's duty to defend has been answered in the affirmative, any ruling on its duty to indemnify awaits disposition of the Underlying Action. *See Frontier*, 91 N.Y.2d at 178 (noting that the duty to indemnify turns on the "ultimate determination" of the insurer's liability).

Although Defendants' final argument, that Plaintiffs' unreasonable delay in disclaiming coverage is a bar to recovery, is rendered moot by the determination of this Court, it is important to note a distinction between bodily injury claims that fall under policy exclusions and those that fall outside of the scope of coverage. *See, e.g., Matter of Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185 (2000) (outlining the differences between the two types of claims). Where a claim falls under a policy exclusion, "an insurer must serve written notice on the insured of its intent to disclaim coverage under its policy 'as soon as is reasonably possible.'" *Those Certain Underwriters at Lloyds, London v. Gray*, 49 A.D.3d 1, 2 (1st Dep't 2007) (citing New York Insurance Law Section 3420(d)). While there is no objective standard as to what constitutes an unreasonable delay, "there is no doubt that the insurer has an obligation to expedite the process and act promptly, and bears the burden of justifying the ensuing delay." *Id.*

Where, as General Star argued here, the claim falls outside of the scope of coverage, an insurer may disclaim coverage and withdraw a defense at any time. *See Worcester Ins. Co.*, 95 N.Y.2d at 188. "Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where none existed." *Id.* So here, had the Court agreed that Defendants' claims fell outside the scope of coverage, General Star could, at any time, disclaim coverage. Contrary to Defendants' arguments, there is no timeliness requirement where coverage never existed in the first place. *Id.*

Notwithstanding the above observation, Plaintiff's motion for summary judgment in this action for declaratory relief is denied. Defendant's cross-motion for summary judgment, requesting reciprocal declarations, is granted.

(Order on the following page)

III. Conclusion

For the foregoing reasons, it is

ORDERED that Plaintiff General Star Indemnity's motion for summary judgment is denied; and it is further

ORDERED that Defendants TASI and Patton's cross-motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
October 1, 2015

ENTER

Hon. Eileen Bransten, J.S.C.