

**Graphic Arts Mut. Ins. Co. v Pine Bush Cent. Sch.  
Dist.**

2015 NY Slip Op 32867(U)

October 15, 2015

Supreme Court, Orange County

Docket Number: 6304/2015

Judge: Elaine Slobod

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ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----x  
GRAPHIC ARTS MUTUAL INSURANCE COMPANY,

DECISION & ORDER

Plaintiff,

INDEX NO. 6304/2015

-against-

PINE BUSH CENTRAL SCHOOL DISTRICT;  
PINE BUSH CENTRAL SCHOOL DISTRICT  
BOARD OF EDUCATION; PHILIP G. STEINBERG;  
ERIC WINTER; STEVE FISCH; and ROBERT  
PETERS,

Defendant.

-----x  
P R E S E N T: HON. ELAINE SLOBOD, JSC

In this action by the plaintiff insurance company for judgment declaring that it has no duty to indemnify the defendants in connection with the settlement of a religious discrimination case brought by five Jewish students of the Pine Bush Central School District ("the Eccleston plaintiffs"), the following sets of papers numbered 1 to 7 were considered on the defendants' motion to dismiss:

- Notice of motion; Edwards affirmation and exhibits A-H; memorandum of law 1-3
- Portuguese affirmation in opposition and exhibits 1-4; memorandum of law 4,5
- Michaeli reply affirmation and exhibit A; reply memorandum of law 6,7

Upon review of the foregoing, it is ORDERED that the defendants' motion is granted with respect to the plaintiff's first, second, third, and fourth causes of action, but denied with respect to the fifth cause of action. The defendants are

entitled to judgment declaring that the plaintiff has an obligation to indemnify them for any reasonable amount expended by the defendants to settle the underlying action. The defendants shall also be entitled to attorneys' fees for the defense of this action.

Citing the Eccleston plaintiffs' pleadings in the underlying case and various provisions of the insurance policies issued to the defendants, the plaintiff contends that there is no coverage for the defendants in the underlying case because the Eccleston plaintiffs alleged that the defendants acted with "deliberate indifference" to the harassment which the students suffered. The plaintiff contends that deliberate indifference "is merely a legal standard adopted by the Courts to allow the jury to infer discriminatory intent." Portuguese affirmation in opposition, paragraph 3. In other words, the plaintiff equates deliberate indifference with intentional conduct. The Court disagrees.

While deliberate indifference is something more than negligence, "deliberate indifference is also satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result" (*Tesoriero v Syosset Central School District*, 382 F Supp2d 387, 398 [EDNY 2005]), that is, something less than intentional conduct. Ultimately, a determination with respect to deliberate indifference turns on the reasonableness of the defendants' response, not whether they intended the result. See generally

*Tesoriero v Syosset Central School District, supra.*

In construing policy provisions defining the scope of coverage, courts first look to the language of the policy, reading it in light of common speech and the reasonable expectations of a businessperson.

[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning, but where there is ambiguity as to the existence of coverage, doubt must be resolved in favor of the insured and against the insurer (citations omitted).

*Shants, Inc. v Capital One, N.A.*,  
124 AD3d 755, 759 (2d Dept 2015).

There is coverage under Coverage A of the CGL policy for "bodily injury" caused by an "occurrence." Section I, Coverage B, paragraph 1(B)(1). "Bodily injury" in an insurance policy includes purely emotional distress. *Tortoso v MetLife Auto & Home Insurance Co.*, 21 AD3d 276 (2d Dept 2005). An "occurrence" means an "accident." Section IV, paragraph 13.

"[I]n deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen (citation omitted)." *Agoado Realty Corp. v United International Insurance Co.*, 95 NY2d 141, 145 (2000); see also Section I, Coverage A, paragraph 2(a). A finding of deliberate indifference would not preclude the injury having been "unexpected, unusual and unforeseen." See *Continental Casualty Co. v Rapid-American Corp.*, 80 NY2d 640 (1993). Had the plaintiff wished to withhold coverage for deliberate indifference to discrimination, it could

[\* 4]  
have expressly done so.

The Court having determined that the harm for which the Eccleston plaintiffs sued the defendants constitutes an "accident," the construction of the other provisions in issue (Coverage B of the CGL policy, the SDELL policy, and the umbrella policies) is moot because Insurance Law §3420 applies. Under Insurance Law §3420(d)(2),

[i]f under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

The original Eccleston complaint was received by the plaintiff on March 30, 2012. The plaintiff's letters of April 26, 2012, and April 3, 2013, did not disclaim coverage, but merely reserved the right to do so in the future. See *Hartford Insurance Co. v County of Nassau*, 46 NY2d 1028 (1979). The plaintiff did not effectively disclaim coverage until February 2, 2015. In *First Financial Insurance Co. v Jetco Contracting Corp.* (1 NY3d 64 [2003]), the Court of Appeals stated that the

timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Moreover, an insurer's explanation [for delay] is insufficient as a matter of law where the basis for denying coverage was

[\* 5]  
or should have been readily apparent before the onset of the delay (citations and internal quotation marks omitted).

*Supra* at 68-69.

By any standard the plaintiff's three-year delay in disclaiming was unreasonable, and therefore ineffective. See *Sirius America Insurance Co. v Vigo Construction Corp.*, 48 AD3d 450 (2d Dept 2008).

On the issue of whether the defendants are entitled to attorneys' fees for the defense of this action,

an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured (citation omitted).

*State Farm Fire & Casualty Co. v Ricci*, 96 AD3d 1571, 1574 (4<sup>th</sup> Dept 2012).

However, the plaintiff is entitled to a determination of whether the amount of the defendants' settlement of the Eccleston case was reasonable. See *Horn Construction Co., Inc. v MT Security Service Corp.*, 111 AD2d 220 (2d Dept 1985).

The defendants shall serve their answer to the plaintiff's fifth cause of action within ten days of receipt of this decision. This matter is hereby scheduled for a preliminary conference on October 27, 2015, at 9:15 a.m., at the Orange County Courthouse, 285 Main Street, Goshen, New York.

[\* 6]  
This decision constitutes the order of the Court.

E N T E R

Dated: October 15, 2015  
Goshen, New York

*Elaine Slobod*

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HON. ELAINE SLOBOD, JSC

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