

State Farm Fire & Cas. Co. v Hoey
2017 NY Slip Op 32292(U)
October 30, 2017
Supreme Court, New York County
Docket Number: 152312/2016
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

STATE FARM FIRE AND CASUALTY COMPANY,

INDEX NO. 152312/2016

Plaintiff,

MOTION DATE

- v -

THOMAS J. HOEY, JR., CAROL SAYRE, JAMES SAYRE, as
Co-Executors of the Estate of KIM ANN CALO, and KITANO
ARMS CORPORATION, individually and doing business as
KITANO HOTEL,

MOTION SEQ. NO. 002

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 34, 35, 36, 37, 38, 39, 40, 41,
42, 44, 45, 46, 47

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is ordered that the motion is granted.

In this declaratory judgment action relating to insurance coverage in an underlying
wrongful death action, plaintiff State Farm Fire and Casualty Company moves, pursuant to CPLR
3025, for an order granting it leave to amend its Summons and Complaint. Defendant pro se
Thomas Hoey, Jr. opposes the motion. After a review of the parties' motion papers and a review
of the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

This declaratory judgment action arises from an underlying wrongful death action ("the
underlying action") commenced by Carol Sayre and James Sayre as Co-Executors of the Estate of
Kim Ann Calo ("the Calo Estate") against defendants Thomas Hoey, Jr. ("Hoey") and Kitano

Arms Corporation (“Kitano”), individually and doing business as the Kitano Hotel (“the Kitano Hotel”), pending in this Court under Index Number 118231/09. In the underlying action, the Calo Estate alleged, inter alia, that Kim Ann Calo died as a result of certain negligent and intentional acts committed by Hoey and Kitano at the Kitano Hotel in Manhattan on January 10, 2009. Docs. 2, 3.

On March 17, 2016, plaintiff State Farm Fire and Casualty Company (“State Farm”) commenced the captioned action seeking, inter alia, a declaration that it was not required to defend or indemnify Hoey pursuant to policy number 56-EF-8012-1 (“the policy”), a homeowners policy which it issued to Hoey insuring the latter’s property located at 176 Brixton Road, Garden City, New York, because “any damages sustained by [Kim Ann Calo] did not arise due to an occurrence or accident [as defined by the policy] but rather, were as a result of the intentional acts of Hoey.” Doc. 1, at par. 19. State Farm further alleged that:

Due to the fact that the underlying action arose out of bodily injury and death which was either expected or intended by Hoey and/or resulted from the willful and malicious acts of Hoey, the State Farm policy does not provide coverage to Hoey, nor is State Farm required to defend or indemnify Hoey in the underlying action, based on the policy exclusion excluding coverage for bodily injury which is either expected or intended or the result of wilfull [sic] and malicious acts.

Id., at par. 20.

Kitano subsequently moved, inter alia, for partial summary judgment seeking a declaration that State Farm had a duty to defend Hoey. Doc. 30. By order entered March 6, 2017, this Court, in denying the motion as premature, noted that State Farm had conceded that the amended complaint in the underlying action contained causes of action sounding in negligence and that it had “essentially conceded that it [was] obligated to defend [Hoey] while [his] rights [were] being

adjudicated [in this action].” Id. This Court further stated that “[State Farm] has already undertaken to represent [Hoey] under a reservation of rights.” Id.

On April 11, 2017, State Farm filed the instant motion to amend the complaint, pursuant to CPLR 3025, within 30 days after Hoey “made a claim under a second homeowners policy [State Farm policy number 56-EL-2023-1] issued in connection with property located at 9 Quarter Court, Westhampton, [New York]” (“the Westhampton policy”). Doc. 35; at pars. 8, 10. Specifically, State Farm seeks to amend the complaint to allege that it does not have a duty to defend or indemnify Hoey in the underlying action under either the policy or the Westhampton policy, which contain virtually identical language. Id., at pars. 9, 11. State Farm also seeks permission to serve its amended complaint on the attorneys for those parties which have appeared by counsel. In support of the motion, State Farm annexes, inter alia, a proposed supplemental summons and amended complaint. Doc. 40.

Hoey opposes the motion.¹ He asserts that, although he did not notify State Farm that he had two policies until early 2017, the company should have known about them and, because it failed to commence a declaratory judgment action in connection with the Westhampton policy within the six-year statute of limitations, its motion must be denied. He further asserts that, since each count of the amended complaint asserts a claim of negligence, the exclusions alleged by State Farm arising from intentional acts are inapplicable herein. Thus, urges Hoey, State Farm has “at the least, a duty to defend [him] throughout the wrongful death action and will almost certainly have the duty to indemnify [him] as well.” Hoey Memo of Law in Opp., at p. 3.

¹ Although Hoey submits an affidavit in opposition to the motion, it is not sworn and, therefore, has not been considered on this motion. See CPLR 2106. However, this Court has considered the memorandum of law submitted by Hoey, who is incarcerated, despite the fact that it was not efiled.

CONCLUSIONS OF LAW:

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40th Street, LLC*, 43 AD3d 82 (1st Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1st Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007); *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). A court should also consider whether any prejudice would result from allowing an amendment. *See Lanpoint v Savvas Cab Corp., Inc.*, 244 AD2d 208, 2090-210 (1st Dept 1997).

This Court, in its discretion, grants State Farm's motion to amend the complaint. State Farm seeks to amend the complaint only to seek a declaration that it has no duty under the Westhampton policy to defend or indemnify Hoey in the underlying action. State Farm asserts, and Hoey does not dispute, that Hoey did not assert a claim under the Westhampton policy until early 2017. Indeed, Hoey admits that "[i]n early 2017, [he] alerted State Farm that he had two homeowners policies." Memo. Of Law in Opp., at p. 2. State Farm filed this motion in April of 2017, thereby acting promptly to amend the complaint once it learned that Hoey was claiming under the Westhampton policy. Hoey's argument that State Farm should have known about the Westhampton policy is of no moment herein, since State Farm could not have been expected to take any action in connection with that policy until Hoey made a claim in connection therewith.

Similarly unavailing is Hoey's argument that a declaratory judgment action by State Farm arising from the Westhampton policy is time-barred. Since Hoey alerted State Farm to a claim

arising from the Westhampton policy in early 2017, it strains credulity for him to assert that State Farm should have commenced a declaratory judgment action in connection with that policy in 2010.

Further, although Hoey maintains that State Farm "has, at the least, a duty to defend [him]", State Farm has already agreed to defend him in the underlying action under a reservation of rights. Doc. 30. Therefore, Hoey's reliance on *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131 (2006) is misplaced. In that case, the Court of Appeals, in deciding motions for summary judgment in a declaratory judgment action, held that the insurer had a duty to defend the insured in an underlying wrongful death action where the insured was sued for negligence, but facts not included in the complaint indicated that the insured acted intentionally. 7 NY3d at 135-137. The Court of Appeals held that the insurer was obligated to defend the insured, despite a "wrongful act exclusion," which excluded coverage for intentional acts, because the insurer "failed to demonstrate that the allegations of the complaint [were] subject to no other interpretation than that" the insured acted intentionally. *Id.* at 138. Here, however, there is no motion for summary judgment before this Court and, given that discovery is in its nascent stage, no declaration regarding coverage can be made at this juncture.

Finally, given that Hoey does not even assert that he would be prejudiced by the proposed amendment, this Court has no reason to believe that any such prejudice will result from granting this motion.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for leave to amend the summons and complaint is granted; and it is further,

ORDERED that the supplemental summons and amended complaint, in the proposed form annexed to the moving papers as Exhibit E (NYSCEF Doc. 40), shall be deemed served upon service of a copy of this order with notice of entry upon the attorneys for all parties who have appeared by counsel in this action; and it is further,

ORDERED that the supplemental summons and amended complaint, in the proposed form annexed to the moving papers as Exhibit E (NYSCEF Doc. 40), shall be served pursuant to the CPLR on defendant Thomas J. Hoey, Jr. within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's counsel is to serve this order, with notice of entry, upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that the parties shall serve their respective answers to the amended complaint as per the requirements of the CPLR; and it is further

ORDERED that courtesy copies of this order shall be served by regular mail on the parties to the action currently pending in this Court under Index Number 118231/09, styled *Carol Sayre and James Sayre as Co-Executors of the Estate of Kim Ann Calo v Thomas Hoey, Jr. and Kitano Arms Corporation, individually and doing business as the Kitano Hotel*; and it is further

ORDERED that this constitutes the decision and order of this Court.

10/30/2017
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE