Philadelphia Indem. Ins. Co. v Harleysville Preferred Ins. Co.
2017 NY Slip Op 33235(U)
May 2, 2017
Supreme Court, Orange County
Docket Number: EF001471-2016
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiff,

-against-

HARLEYSVILLE PREFERRED INSURANCE COMPANY,

Defendant.

----------X

DECISION AND ORDER

INDEX NO.: EF001471-2016
Motion Date: 4/6/17
Sequence No. 2

SCIORTINO, J.

The following papers numbered 1 through 10 were considered on defendant's electronically-filed motion for an order granting leave to amend its Answer in the within action to assert certain counterclaims against plaintiff:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Altman)/Exhibits A-E	1 - 7
Affirmation in Opposition (Cassidy)/Exhibit A	8 - 9
Reply Affirmation (Altman)	10[1]

Background and Procedural History

This is an action between two insurance companies for declaratory judgment regarding coverage in a related personal injury action entitled *Blake v. Nashopa House Crystal Run Village*, Index Number 0294/2015. (See Exhibit B to moving papers, E-document #25) This matter was

[1]The Court also received a letter and exhibits from plaintiff's counsel, dated April 10, 2017, subsequent to the return date of this motion, and containing facts upon which no party relied in the motion papers. The letter has thus been disregarded by the Court.

commenced by the electronic filing of a Summons and Complaint by Philadelphia Indemnity on March 3, 2016. (E-document #1). The Complaint asserts that the *Blake* action claims that plaintiff Ernest Blake was injured on three separate occasions from falls which took place in 2012 and 2013, while he was a resident of defendant Crystal Run's group home. His injuries were alleged to be the result of multiple violations of its duty of due care and negligence in the operation of the group home. A second and third cause of action assert violations of New York State Public Health Law and Federal Law, respectively.

Philadelphia Indemnity insured Crystal Run with a Commercial Lines policy (Exhibit D) effective January 1, 2002, and ending January 1, 2013. Thereafter, defendant Harleysville issued a Commercial Lines Policy (Exhibit D), effective January 1, 2013 through January 1, 2014. Philadelphia Indemnity's Complaint asserts that the injuries which resulted from the third fall, on March 7, 2013, should be covered by Harleysville's policy, but that Harleysville has refused to do so.

Harleysville's Answer (Exhibit C, E-document #3), asserting denials and eight separate affirmative defenses, was filed April 20, 2016.

Current Motion

By Notice of Motion originally e-filed January 20, 2017, and originally returnable on February 17, 2017, Harleysville seeks to amend its Answer, to assert four counterclaims against Philadelphia, which, it is claimed, will determine that coverage is owed solely by Philadelphia Indemnity. In support of its motion, Harleysville asserts that during discovery, it received pleadings and deposition transcripts from the *Blake* action which establish that Blake's injuries were the result of "an alleged inter-related series of acts that began before the Harleysville Policy came into effect."

Harleysville argues that the Philadelphia Indemnity policy covered "bodily injury," including any "continuation, change or resumption of the 'bodily injury'....after the end of the policy period", i.e., injuries which began during the policy period, but continued after its end. In contrast, Harleysville's policy provided coverage for "professional occurrences" (acts or omissions in the performance of professional services) by Crystal Run, but only if the act or omission first occurred during the Harleysville policy period. Coverage is precluded where the damage is the result of an "interrelated series of acts," the earliest of which took place before the effective date of their policy.

Specifically, Harleysville claims that, in 2012, Crystal Run agreed to provide Blake with one-to-one care in walking, and monitoring while he walked. Their failure to do so resulted in all three falls, beginning in 2012 and continuing into 2013. Harleysville concludes that the *Blake* action demonstrates that there was an "ongoing pattern of neglect and substandard care" at Crystal Run, which began in 2007 and continued through March 2013, the date of the last fall.

Based on that evidence, Harleysville moves to amend its Answer to assert counterclaims against Philadelphia Indemnity to declare that all claims and damages in the *Blake* action fall outside the ambit of the Harleysville policy and are solely covered by Philadelphia Indemnity. A copy of its proposed Amended Answer is appended to the moving papers as Exhibit E (E-document #29)

Harleysville argues that leave to amend should be freely given, unless the party opposing the motion has undergone a change in position, or foregone a right in reliance upon an omission in the pleading sought to be amended. Its proposed amendment is not devoid of merit as a matter of law, and cannot be claimed to have been surprising or prejudicial to Philadelphia Indemnity, as the counterclaims mirror the affirmative defenses first raised in the original Answer.

Its first proposed Counterclaim challenges Philadelphia Indemnity's standing, and denies

there is a justiciable controversy between the parties. Plaintiff's lack of standing was asserted by Harleysville in the original Answer as its Second Affirmative Defense.

The second proposed Counterclaim seeks a declaration that the Harleysville policy does not cover the *Blake* action, as all of the claims arose from an interrelated series of events beginning prior to the effective date of Harleysville's coverage. Harleysville asserts that this was the subject of the original Answer's Fourth Affirmative Defense.

The third proposed Counterclaim seeks a declaration that the claims in the *Blake* action which allege statutory violations are intentional acts, which do not constitute "professional occurrences" for which coverage is provided in the Harleysville policy. This was alleged to be the subject of the Sixth Affirmative Defense in the original Answer.

Finally, the fourth proposed Counterclaim seeks a declaration that only the Philadelphia Indemnity policy covers the alleged injuries of Blake as the falls were interrelated and the omissions which caused them began during the Philadelphia Indemnity policy period, and prior to Harleysville's coverage. This claim is also alleged to have been asserted in the Fourth Affirmative Defense of the original Answer.

Because there can be no showing of surprise or prejudice on the part of Philadelphia Indemnity, Harleysville asks the Court to permit amendment of its Answer, in conformance with the liberal policies of the Civil Practice Law & Rules.

Opposition

In opposition, Philadelphia Indemnity asserts that Harleysville has not met the requirements of Civil Practice Law & Rules §3025(b). Moreover, the proposed counterclaims are duplicative of Harleysville's affirmative defenses, and are not based on new facts.

Specifically, Philadelphia Indemnity asserts that section 3025(b) requires the movant to "clearly show the changes or additions to be made to the pleading." Harleysville's proposed amended Answer does not highlight the differences between its initial and proposed versions. Despite its counsel's affirming that the inclusion of the proposed Counterclaims are the only change, there are also differences between the admissions/denials in the initial Answer and the proposed amendment. Two affirmative defenses have been withdrawn. The failure to address and explain the changes should be fatal to its application.

The proposed counterclaims are also duplicative and unnecessary. Philadelphia Indemnity asserts that settlement of the underlying action will resolve this matter, or, if it does not, then summary judgment motions will. If, as Harleysville claims, the proposed Counterclaims are asserted as affirmative defenses, there is no need for them to be restated as counterclaims now.

In addition, Philadelphia Indemnity denies that there would be no surprise or prejudice by the amended pleading. The claims that the second and fourth proposed Counterclaims were raised in the Fourth Affirmative Defense is inaccurate. That defense merely alleged that Philadelphia Indemnity could not seek contribution from Harleysville, and included no reason why.

Finally, it is asserted that all of the facts which form the basis for the proposed Counterclaims were known from the beginning of the case, and, as such, cannot constitute new facts. The motion is in reality "an attempted strategic move to put pressure on Philadelphia in connection with the serious ongoing settlement negotiations" (in the *Blake* litigation).

Reply

Harleysville reiterates the New York policy that leave to amend should be "freely given." Philadelphia Indemnity did not allege, and certainly did not demonstrate, that the proposed

amendments are devoid of merit. Nor has it demonstrated surprise or prejudice. Discovery has only begun, and the fact that additional discovery might be needed (although Harleysville disputes this) is not a ground to deny the relief sought. It denies that it failed to outline the changes in the two pleadings, and points to its motion affirmation, which it asserts contains a full explanation. But even if it had failed to outline the changes, the same would not be grounds for denial.

Harleysville asserts that Philadelphia Indemnity's arguments in opposition are wholly contradictory in that Philadelphia Indemnity's claim that the counterclaim are duplicative contrasts with the claim that they bring surprise. In short, Harleysville argues that none of the affirmative defenses plead what the counterclaims do, specifically, that there should be a declaration that Harleysville's policy is not available in the *Blake* litigation.

The Court has fully considered the submissions of the parties.

Conclusion

The motion for leave to amend the Answer to assert counterclaims is granted in part, and denied in part, as follows:

It is well-established that leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. Civil Prac. Law & Rules §3025(b), (*Rodriguez v. Paramount Development Associates, LLC,* 67 AD3d 767 [2d Dept 2009]) The determination whether to grant such relief is within the Court's discretion, which will not be lightly disturbed. (*Sewkarran v. DeBellis*, 11 AD3d 445 [2d Dept 2004])

The Court has reviewed the proposed Amended Answer and Counterclaims and cannot, especially in the absence of any such claim on the part of Philadelphia Indemnity, find that they are

devoid of merit, as a matter of law. Nor is the Court convinced by Philadelphia Indemnity's complaint regarding the failure to highlight the differences, and finds that counsel's affirmation supporting the motion sufficiently outlines the substantive differences, except as provided below.

Philadelphia Indemnity will not be impermissibly prejudiced by the amendments, as they did not change position in reliance on the unamended complaint. (*Leiva v. Marietta Trucking Corp.*, 272 AD2d 209 [1st Dept 2000])

In making such a finding, the Court is constrained to address events subsequent to the return date of this motion. On March 2, 2017, this Court was advised of the settlement of the *Blake* action, with both parties to this litigation paying a share of such settlement. Anticipating the potential argument of Philadelphia Indemnity on a motion to renew, that it changed its position in reliance on the settlement resolving this action, the Court notes that nothing in the *Blake* settlement documents waives or releases Harleysville's claims, and the settlement post-dated the filing of this motion by several weeks. Thus, at the time it determined it would pay a portion of the *Blake* settlement proceeds, it did so with the full knowledge of the pendency of this motion, and the continued existence of Harleysville's claims. Consequently, there can be no claim of prejudice on that basis.

However, Harleysville's application to amend the Answer to include the proposed First Counterclaim is denied. The Second Affirmative Defense in both its original and proposed Amended Answer alleges a lack of standing (although the claim of a lack of justiciable controversy has been removed from the amended Second Affirmative Defense). Such a claim is more properly asserted as an affirmative defense. (*U.S. Underwriters, Inc. v. Greenwald*, 31 Misc. 3d 1206(A) [New York Co. 2010]) As Philadelphia Indemnity points out, the claim has been asserted in that fashion. It seeks no relief other than a denial of Philadelphia Indemnity's claims. The Court thus

agrees that the First Counterclaim is duplicative of the affirmative defense, and amendment is thus denied.

The application to amend to include what is now deemed the Second Counterclaim is granted. The Court agrees with Philadelphia Indemnity that the original Fourth Affirmative Defense does not raise the same allegations as the proposed Counterclaim, in that it merely alleges that the parties underwrote different policy terms, and independent risks. However, Harleysville's claims of an "inter-related" series of occurrences is not new. The proposed Counterclaim seeks a declaration that Harleysville has no obligation to defend or indemnify based on several distinct contractual claims. While the Court is not required to, and does not consider, the likelihood of success on the merits at this time, it may not be said that the claim is palpably devoid of merit.

For essentially the same reasons, the Court grants the application to amend to include what is now deemed the Third Counterclaim. This Counterclaim alleges that the alleged statutory violations are not contained within the covered acts under the terms of the Harleysville policy. This claim is neither duplicative nor surprising to Philadelphia Indemnity, which has had the *Blake* complaint for as long as Harleysville has had it.

The application to include what is now deemed the Fourth Counterclaim is denied. The claim that the omissions which are alleged to have caused Blake's injuries were not "professional occurrences" and the claim that there was a single occurrence which took place at the time of the first fall, were both raised in the Second Counterclaim. The Fourth Counterclaim is thus duplicative in all respects.

Finally, the Court notes, although barely addressed by counsel, the fact that there are other substantive differences in both the general admissions/denials and the wording of affirmative

defenses. Inasmuch as none of these were pointed out, much less outlined or explained by the affirmation of Harleysville in support of the motion, the application is denied with respect to any changes other than the inclusion of the two counterclaims.

In short, Harleysville is granted leave to amend to include the Counterclaims deemed Second and Third in the proposed Amended Answer appended to the motion papers, and to amend the original Answer in no other way.

Harleysville shall electronically file its Amended Answer and Counterclaims not later than May 12, 2017. Philadelphia Indemnity shall have until June 2, 2017 to interpose any Reply.

The parties shall appear for status conference on June 14, 2017 at 9:00 a.m.

The forgoing constitutes the Decision & Order of this court.

Dated: May 2, 2017
Goshen, New York

ENTER:

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