

**Automobile Ins. Co. of Hartford, Connecticut v
Damadian**

2018 NY Slip Op 32112(U)

August 24, 2018

Supreme Court, New York County

Docket Number: 160743/15

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X
THE AUTOMOBILE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT,

INDEX NO. 160743/15

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 2, 3

JEVAN DAMADIAN, *et al.*,

DECISION AND ORDER

Defendants.

-----X
By notice of motion, defendant/third-party plaintiff Damadian moves pursuant to CPLR 3212 for an order granting him partial summary judgment against third-party defendant North Country Insurance Company (NCIC) (mot. seq. two). NCIC opposes, while defendant Tang supports the motion.

By notice of motion, NCIC moves for an order declaring that it has no duty to defend or indemnify Damadian in an underlying action (mot. seq. three). Damadian opposes.

By notice of cross motion, defendant Tang moves for an order compelling NCIC to respond to certain discovery and for depositions of it and Damadian.

The motions are consolidated for disposition.

I. FACTUAL BACKGROUND

A. Underlying action

This action and the underlying action arise out of the tragic death of Jonathan Tang, a young medical student. In September 2014, Tang and several of his fellow students rented Damadian's house in Saratoga, New York. Damadian did not live in the house but rented it to others. It was located near a lake called Stewart Pond, and as part of the rental, Damadian provided the renters with a kayak for use on it.

On September 21, 2014, Tang took the kayak on the lake, and ultimately fell in the water and drowned. In 2015, Tang's administrator commenced a lawsuit against Damadian in Supreme Court, Kings County (Index No. 6926/15). (NYSCEF 65).

B. Instant action

By amended complaint dated March 13, 2017, plaintiff (Traveler's) seeks to recover past costs from NCIC to the extent that it is determined that NCIC had a duty to defend Damadian in the underlying action. (NYSCEF 53). Before plaintiff amended the complaint, Damadian settled the claims between them and agreed that Traveler's did not owe him a defense or indemnity in the underlying action. (NYSCEF 48).

C. NCIC's insurance policy

By a property insurance policy effective from March 2014 to March 2017, NCIC insured Damadian's house. Pursuant to the bodily injury and property damage coverage provisions, NCIC agreed to pay for Damadian's liability for bodily injury or property coverage "caused by an occurrence to which this coverage applies," and which "must result from the ownership, maintenance or use of the insured premises and operations necessary or incidental to the insured premises." (NYSCEF 69).

The “insured premises” is defined as Damadian’s house and “related private structures, and grounds at that location,” as well as “any premises used by [Damadian] in connection with [the house].” The policy also covers bodily injury or property damage “resulting from the ownership or maintenance of watercraft, while ashore on the insured premises,” but excludes from coverage liability “resulting from the ownership, operation, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading by any insured of motorized vehicles or watercraft, except as provided [under other coverages].” (*Id.*).

II. DECLARATORY JUDGMENT MOTIONS

A. Contentions

Damadian asserts that the lake is included within the definition of “insured premises,” and submits in support a map that reflects that the driveway leading from the house becomes a path to the lake. He observes that kayaks are stored next to the garage which is adjacent to the driveway, and that the distance from the garage to the lake is approximately 500 feet. (NYSCEF 67). He argues that as the definition of insured premises includes any premises used by him in connection with the house, and as the lake is used by him and his renters, and its proximity and availability is one of the primary reasons for its rental, the lake must be included within the definition of insured premises. Damadian also contends that as it is alleged in the underlying action that he failed to check properly, inspect, repair, and maintain the kayak at issue, he is also covered under the provision dealing with the ownership or maintenance of watercraft, thereby triggering NCIC’s duty to defend him. He denies that the watercraft exclusion applies, as the provision relating to the maintenance of watercraft while ashore is expressly carved out of the exclusion. (NYSCEF 76).

NCIC maintains that the insured premises does not and cannot include the lake, observing that the lake is a body of water that is separated from the house by a municipal road and real property which is not owned by Damadian and is not part of the deeded property or tract of land, that it contains no buildings, and does not constitute “grounds.” It also asserts that the watercraft exclusion applies as the incident occurred while on land and not ashore on the insured premises. (NYSCEF 84).

B. Applicable law

The terms of an insurance contract must be afforded their “plain and ordinary meaning,” and the interpretation of an insurance policy poses a question of law. (*U.S. Fidelity & Guar. Co. v Annunziata*, 67 NY2d 229 [1986]; *Broad Street, LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006]).

“Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage” (*Consol. Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *see also Platek v Town of Hamburg*, 23 NY3d 688 [2015] [although insurer has burden of proving applicability of exclusion, insured has burden to establish existence of coverage]). To rely on an exclusion to deny coverage, an insurer must demonstrate that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. (*J.P. Morgan Securities Inc. v Vigilant Ins. Co.*, 126 AD3d 76 [1st Dept 2015]).

An insurer’s duty to defend an insured is exceedingly broad, and is triggered by allegations in the complaint suggesting a reasonable possibility of coverage irrespective of the apparent lack of merit of the supporting allegations (*Stout v I E. 66th St. Corp.*, 90 AD3d 898 [2d Dept 2011]), although not where the underlying complaint contains “no possible factual or legal

basis on which the insurer might eventually be held to be obligated to indemnify” (*Greenwich Ins. Co. v City of N.Y.*, 122 AD3d 470, 471 (1st Dept 2014), quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

C. Analysis

At issue is whether the lake may be considered as the insured premises or part thereof. Under no analysis may the lake be deemed “a related private structure or ground at the premises location.” It must thus then be determined whether the lake may be defined as “any premises used by” Damadian in connection with house.

Although there is no dispute that Damadian and his renters used the lake in connection with the house, it is disputed whether the lake may be deemed “premises.” As defined in Black’s Law Dictionary, the term premises is “a house or building along with its grounds; esp., the buildings and land that a shop, restaurant, company, etc uses.” Consequently, absent any other applicable definition, the lake is not part of the grounds of the house, nor is it a house or building.

Damadian cites no authority for the proposition that the fact that the primary purpose of the house was related to the ability to use and access the lake suffices to deem the lake a part of the insured premises. *McLaughlin v Midrox Ins. Co.*, is inapposite as there, the issue was whether the public roadway located between the insured’s two tracts of insured land was included within the insured premises, which was defined as including the approaches and access ways immediately adjoining the insured premises. (70 AD3d 1463 [4th Dept 2010], *lv denied*, 72 AD3d 1658). *Nationwide Mut. Ins. Co. v Erie and Niagara Ins. Assn.*, 249 AD2d 898 (4th Dept 1998), is also inapposite.

In *Waters of White Lake, Inc. v Fricke*, the Court addressed whether the plaintiff's ownership of land under a lake gave it the exclusive right to use the water, where the deed and map of the land showed that in some parts of the lake, the property line extended into the water. (282 AD333 [3d Dept 1953], *affd*, 308 NY 899 [1955]). The Court thus held that "a conveyance of land bounded by a small inbound lake or pond usually carries title to the center" of the lake or pond. Here, by contrast, there is no claim that Damadian owns the land under the lake, or that his deed includes any portion of the lake or abuts it.

Damadian therefore fails to meet his burden of establishing the existence of coverage for the accident in the underlying action. (*See e.g., Corbel Constr. Co. v Arch Specialty Ins. Co.*, 160 AD3d 703 [2d Dept 2018] [insured bears burden of establishing existence of coverage]; *Chase Manhattan Bank, N.A. v Travelers Group, Inc.*, 269 AD2d 107 [1st Dept 2000] [insured did not meet burden of showing that loss was covered by policy]).

Conversely, NCIC establishes that the insured premises does not include the lake, and that it thus has no obligation to provide coverage to Damadian. In light of this result, I need not consider the parties' arguments regarding the watercraft exclusion. In any event, absent a dispute that Tang's death occurred in the lake and not ashore on the premises, the exclusion applies.

Tang's argument that NCIC's 28-day delay in disclaiming coverage is untimely as a matter of law is meritless. NCIC submitted proof that it commenced an investigation into Tang's claim the day that it received notice of the claim, that the investigation took approximately 13 days, and that its disclaimer was issued 16 days thereafter. (*See Quincy Mut. Fire Ins. Co. v Enoe*, 107 AD3d 775 [2d Dept 2013] [where insurer disclaimed coverage 21 days after receiving investigator's information, disclaimer was timely as a matter of law]; *Magistro v Buttered Bagel, Inc.*, 79 AD3d 822 [2d Dept 2010] [denial of coverage three weeks after receipt of investigator's

report timely as matter of law]; *Pub. Svce. Mut. Ins. Co. v Harlen Housing Assocs.*, 7 AD3d 421 [1st Dept 2004] [disclaimer timely as matter of law as it was issued 27 days after insurer received investigation report]).

Travelers, in its amended complaint, solely advances a claim against NCIC and asks that if “this Court determines that NCIC had a duty to defend [Damadian] in the underlying action,” then it should be awarded a judgment directing NCIC to reimburse it for past costs and expenses incurred in defending Damadian in the underlying action. Given my finding that NCIC had no duty to defendant Damadian, upon searching the record (CPLR 3212[c]), the complaint is dismissed in its entirety.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff’s motion for an order granting him partial summary judgment against third-party defendant North Country Insurance Company (sequence two) is denied; it is further

ORDERED, that the motion of third-party defendant North Country Insurance Company for an order declaring that it has no duty to defendant or indemnify Damadian in the underlying action (sequence three) is granted; it is further

ADJUDGED and DECLARED, that third-party defendant North Country Insurance Company is not obliged to provide a defense to, and provide coverage for, the defendant Jevan Damadian in the action *Tang v Damadian*, index no. 6926/15 pending in Supreme Court, Kings County; it is further

ORDERED, that the third-party complaint is dismissed in its entirety; and it is further

ORDERED, that pursuant to CPLR 3212(c), the complaint is dismissed in its entirety,
and the clerk of the court is directed to enter judgment accordingly.

8/24/2018



BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

DATE							
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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							REFERENCE