

Nova Cas. Co. v Peter Thomas Roth Labs, LLC

2018 NY Slip Op 32565(U)

October 9, 2018

Supreme Court, New York County

Docket Number: 152807/14

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

-----X
NOVA CASUALTY COMPANY,

Plaintiff,

Index No.

-against-

152807/14

PETER THOMAS ROTH LABS, LLC,

Defendant.

-----X
ROBERT R. REED, J.:

Plaintiff Nova Casualty Company moves for summary judgment on its complaint.

This is an action where plaintiff, an insurance company, seeks a declaratory judgment, estoppel and/or reformation of an insurance policy issued to defendant Peter Thomas Roth Labs, LLC. The complaint alleges the following: Plaintiff issued a property insurance policy to defendant. The policy, issued as CIS-CL-0010067-2, was for the period beginning on May 31, 2012 and ending on May 31, 2013. The policy, which included a separate endorsement, limited coverage in the event of loss or damage due to flooding. The exclusion in the endorsement referred to property located in flood zones A and V as defined by the Federal Emergency Management Agency (FEMA). At the time the policy was issued, defendant operated its business from, among other locations, 46 Graphic Place, Moonachie, New Jersey and 50 Broad Street, Carlstadt, New Jersey. These locations are in flood zone AE, as determined by FEMA. These locations sustained significant damage as a result of Superstorm Sandy.

Defendant submitted a claim to plaintiff for the flood damage to these two locations. Upon review, plaintiff determined that the locations were in flood zone AE, which was deemed a sub-zone of A, and denied coverage based on the endorsement exclusion. Plaintiff brought this

suit to settle the dispute between the parties concerning the denial of coverage. Defendant thereafter filed a counterclaim, seeking damages under the policy. Plaintiff now seeks summary judgment declaring that the subject policy does not provide coverage for the two subject locations.

Plaintiff seeks summary judgment based on two grounds. First, plaintiff argues the policy clearly and expressly excludes coverage for flood damage located at flood zone AE, which FEMA has declared to be a sub-zone of zone A. Since the policy relies on the determination of FEMA in excluding such locations, plaintiff says it properly denied coverage to defendants. Plaintiff's second argument is that the parties, in the course of their negotiation of this policy, unambiguously understood and agreed that the policy, upon its issuance, would exclude coverage for flood damage for zone AE property. Plaintiff contends that the policy conforms to the parties' agreement. However, if the court determines that the policy as issued does not conform to that agreement, plaintiff requests that the policy be reformed to correctly state the parties' mutual agreement.

In opposition, defendant argues that the policy exclusion is ambiguous, as was determined by the Appellate Division, First Department in *Heartland Brewery Inc. v Nova Casualty Company*, 149 AD3d 522 (1st Dept 2017). In that case, also involving a claim based on damage caused by Superstorm Sandy, the court examined the same policy exclusion found in this case and found the exclusion ambiguous regarding property located in flood zone AE. Thus, defendant argues that the issue of ambiguity in a policy provision is subject to determination by a trier of fact. Defendant also argues that, due to its ambiguity, the exclusion should be construed in defendant's favor.

Defendant also argues that the issue of whether the parties agreed beforehand that the policy, when issued, would clearly exclude coverage to property in the AE flood zone, is subject to a trier of fact. Defendant contends that the extrinsic evidence submitted by plaintiff to affirm plaintiff's position is insufficient, one-sided and has not resolved all questions with respect to ambiguity. Defendant opposes reformation of the policy exclusion because there is no clear and convincing proof of a mutual mistake. Defendant asserts that there was probably a unilateral mistake on plaintiff's part, since it drafted the policy. According to defendant, in the absence of fraud allegations, a unilateral mistake is not a ground for reformation.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact [internal quotation marks and citation omitted]" (*Richardson v County of Nassau*, 156 AD3d 924, 925 [2d Dept 2017]). Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists a triable issue of fact (*Id.*).

Plaintiff brings this motion to have its declaratory judgment granted as a matter of law. "The primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary [citations omitted]"

(*Klosterman v Cuomo*, 61 NY2d 525, 538 [1984]). A declaratory judgment requires an actual controversy between parties having a stake in the outcome (see *Mt. McKinley Ins. Co. v Corning, Inc.*, 33 AD3d 51, 57 [1st Dept 2006]).

The controversy at bar involves the denial of an insurance claim pursuant to a policy that provided an exclusion which could be subject to conflicting interpretations. The ambiguity of the policy exclusion regarding property in a zone designated as AE by FEMA has been affirmed in an Appellate Division decision, which denied summary judgment to an insurer (indeed, the same insurer) which sought to uphold its denial of coverage under that exclusion. Plaintiff's argument that the subject exclusion provision is unambiguous has been denied by a higher court at this time. As defendant stated, when a provision is ambiguous, it is usually construed against the drafter of the provision (see *327 Realty, LLC v Nextal of New York, Inc.*, 150 AD3d 581, 582 [1st Dept 2017]). Plaintiff's alternative argument is subject to this court's determination. By submitting extrinsic evidence, primarily, deposition testimony of parties' witnesses, plaintiff seeks to demonstrate that the parties agreed to exclude coverage for flood damage to the subject locations.

"Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal quotation marks and citation omitted]" (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 84 [1st Dept 2013]). "If the court deems a contract ambiguous, it may consult extrinsic evidence to resolve the ambiguity; however, if the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences, then the issue is one of fact [internal quotation marks and citations omitted]" (*Chen v Yan*, 109 AD3d 727, 729 [1st Dept 2013]).

Plaintiff contends that the extrinsic evidence can only be interpreted in one way, which upholds the exclusion of coverage to defendant's locations. The evidence submitted is deposition testimony of Kenneth Hegel (Hegel), an executive employed by Cosmetic Insurance Services (CIS), a division of Frenkel & Company, defendant's insurance broker; Marie Haines (Haines), Hegel's assistant at CIS; and Steven LaColla (LaColla), defendant's then chief financial officer who was responsible for purchasing insurance for defendant. CIS also operated as an authorized agent for plaintiff.

According to plaintiff, Hegel was principally responsible for defendant's account, and because defendant satisfied certain underwriting criteria, CIS was able to quote, bind and issue the subject policy on its own, without seeking prior approval from plaintiff's underwriters. Hegel testified that he was responsible for the marketing of renewals, meeting with clients, evaluating pricing and meeting the insurance needs of said clients. He testified that Haines, as his assistant, handled defendant's daily needs and worked on policy renewals. Hegel stated that LaColla was CIS's principal point of contact at the time with respect to defendant's insurance needs. The discussions between these individuals included a review of defendant's existing coverage and recommendations for additional coverage. Hegel testified that he had numerous conversations with LaColla over flood coverage. Hegel referred to an email sent by Haines on December 15, 2011, which advised defendant that its location at Carlstadt, New Jersey was in flood zone AE, which was considered "high hazard" and uninsurable under a standard property policy. This email is attached to plaintiff's papers. During the discussions leading up to the renewal of defendant's policy, Hegel stated that he discussed flood coverage with LaColla, and that he sent an email, dated February 8, 2012, to LaColla confirming that defendant had secured

FEMA- administered NFIP coverage for the Carlstadt location, but not for the Moonachie, New Jersey location because coverage was too expensive.

Plaintiff submits LaColla's testimony which, it asserts, had acknowledged the email sent by Hegel, which also recommended that defendant purchase flood coverage through NFIP, because defendant lacked flood coverage under its regular policy for high-hazard flood zones. A later email, dated May 24, 2012, sent by Haines, reminded LaColla that defendant's current policy did not provide flood coverage for certain locations located in zone AE, which were excluded by operation of the endorsement that excluded coverage for property in zone A. The email is attached to plaintiff's papers.

The LaColla testimony submitted by plaintiff indicates that LaColla was aware of Hegel and Haines's remarks regarding the hazardous nature of the subject locations and the lack of coverage in the subject policy. The testimony provides that, upon this knowledge, LaColla advised Hegel to bind the renewed policy with the exclusions. In his testimony, LaColla confirmed that he approved the renewal of the policy, aware of the coverage exclusions for property in zone AE. Plaintiff also submits a copy of a Renewal Proposal sent to defendant in May 2012. The proposal specifically states in a footnote: "Flood Coverage excluded for High-Hazard Flood Zones (A & V). (Carlstadt, NJ: Located in an AE Flood Zone. Flood policy in place for this location [through NFIP]. Moonachie, NJ: Location is an AE Flood Zone. This location does not currently have a Flood Coverage)."

Plaintiff argues that based on the evidence submitted, there is no doubt that the parties had knowledge of the policy's flood coverage exclusion as applicable to the Carlstadt and Moonachie properties and the denial of coverage was valid. Therefore, plaintiff requests that its motion for

summary judgment be granted as a matter of law.

In opposition to the motion, defendant argues that the evidence is not conclusive and the issue of ambiguity has not been resolved. Defendant suggests some bias in the evidence as plaintiff has admitted that CIS is an agent of plaintiff. Defendant states that LaColla testified at one point that he had no knowledge of flood zones when questioned as to whether he understood whether zone AE was within zone A. Moreover, defendant disputes LaColla's alleged claim that he could enter into renewal negotiations with CIS without the approval of defendant's management. Defendant submits the deposition testimony of Matthew Silpe (Silpe), defendant's chief operating officer, who stated that LaColla was accountable to him and other members of the Management Team when dealing with insurance matters. Silpe also testified that, after the policy was renewed, he was under the impression that the subject locations were covered for flood damage. Defendant contends that the additional evidence raises an issue as to whether the parties actually agreed to the policy and its exclusions, precluding summary judgment.

Issues as to witness credibility are not appropriately resolved on a motion for summary judgment (*see Santos v Temco Service Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]). However, there are exceptions. The main issue is the testimony of LaColla and Silpe. Defendant contends that there is an inconsistency between the testimony of these then-principals of plaintiff. LaColla actually did not testify that he could act without the consent of the managers. Silpe testified that he was part of the management team overseeing LaColla while LaColla was in charge of the negotiations with the CIS people. Neither principal appears to possess the sharpest memory regarding the matter of renewing the subject policy. However, LaColla, upon seeing the aforesaid email, acknowledged its contents. LaColla admitted knowledge that the subject

locations were in high risk areas and would not be covered by the policy. He also admitted procuring alternative insurance for the Carlstadt property, namely the FEMA-administrated NFIP policy. This would indicate that defendant was aware that the subject policy alone would not cover defendant's properties. Thus, Silpe was partially right when he testified that he believed defendant was covered for flood damage. Nowhere in the opposition papers does defendant challenge or address the issuance of alternative insurance.

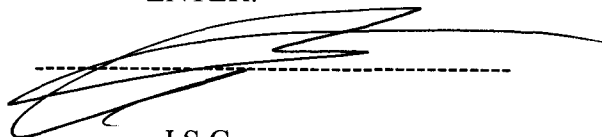
The court finds that plaintiff has demonstrated that, during negotiations leading up to the renewal of the subject policy, the parties were aware that the subject properties were not being covered for flood damage. Therefore, plaintiff's motion for summary judgment is granted with respect to the declaratory judgment that plaintiff is not obligated to provide defendant with flood coverage for its properties in Carlstadt and Moonachie, New Jersey.

Accordingly, it is

ORDERED and ADJUDGED that plaintiff Nova Casualty Company's motion for summary judgment is granted to the extent that, during the course of dealings leading to the renewal of the insurance policy to be issued to defendant Peter Thomas Roth Labs, LLC, the parties understood and agreed that said policy would exclude flood coverage to defendant's properties located in Carlstadt, New Jersey and Moonachie, New Jersey.

Dated: October 9, 2018

ENTER:

A handwritten signature in black ink, appearing to be "J.S.C.", is written over a horizontal dashed line. The signature is stylized and somewhat illegible.

J.S.C.