

Sperling v Burlington Ins. Co.
2018 NY Slip Op 34214(U)
June 4, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 17-604934
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 17-604934
CAL. No. 17-01498OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 12-19-17
ADJ. DATE 05-29-18
Mot. Seq. # 001 - MD
002 - XMD

-----X
JONATHAN SPERLING,

Plaintiff,

- against -

THE BURLINGTON INSURANCE
COMPANY, NEEFUS-STYPE AGENCY, INC
and JOSEPH L. TOWNSEND, INC.,

Defendants.
-----X

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Upon the following papers numbered read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers by defendant The Burlington Insurance Company, dated November 28, 2017; Notice of Cross Motion and supporting papers by plaintiff, dated November 30, 2017; Answering Affidavits and supporting papers by defendants Neefus-Stype, Agency, Inc. and Joseph Townsend, Inc., dated January 9, 2018; Replying Affidavits and supporting papers by plaintiff, dated January 24, 2018; by The Burlington Insurance Company, dated January 23, 2018; Other ___; and after hearing counsel in support and opposed to the motion it is,

ORDERED that the motion by the defendant The Burlington Insurance Company for an Order granting summary judgment declaring that it has no duty to defend or indemnify plaintiff is denied, and it is further

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ORDERED that the cross-motion by the plaintiff for, *inter alia*, an Order granting him summary judgment declaring that the disclaimer of coverage by the defendant The Burlington Insurance Company is null and void and that it is required to defend and indemnify the plaintiff in the underlying actions is denied.

This is an action in which the plaintiff seeks, *inter alia*, a declaratory judgment against the defendant The Burlington Insurance Company (hereinafter "Burlington") declaring that a disclaimer letter issued by Burlington on December 10, 2013 is null and void. The disclaimer letter purports to deny coverage under a commercial general liability policy effective September 26, 2006 to September 26, 2007 issued by Burlington to plaintiff. The underlying action involves a claim sounding in negligence, wherein plaintiff's tenant, Ms. Cecilia Stepnoski, fell through a trapdoor. The trapdoor had been opened by an oil repair mechanic who was fixing the furnace. After jury trial, verdict was rendered in favor of the oil company, Burt's Reliable, Inc. On appeal, the Appellate Division, Second Department, set aside the jury verdict, finding that the jury could not have reached the verdict by any fair interpretation of the evidence, "since a reasonable person should have been aware that leaving a trapdoor open created an unsafe condition" (*see Cooper v Burt's Reliable, Inc.*, 105 AD3d 886, 964 NYS2d 195 [2d Dept 2013]). Upon remand, Burt's Reliable filed, for the first time, a third-party summons and complaint, dated November 8, 2013, against the homeowner, plaintiff herein, Jonathan Sperling. On November 27, 2013, Sperling received notice of the suit, and on December 5, 2013, Burlington was notified of the third-party action. Issue has been joined.

Burlington now moves to dismiss the complaint asserted against it and seeks an Order declaring that it has no duty to defend or indemnify plaintiff. In support of the motion, Burlington submits, among other things, copies of the pleadings, a copy of the insurance policy, a copy of the declination letter, and the deposition transcripts of plaintiff and Gary A. Lillis. Plaintiff opposes Burlington's motion and cross-moves for an Order granting summary judgment on its cause of action for a declaratory judgment. Plaintiff also seeks summary judgment against defendant Joseph L. Townsend, Inc. and its successor defendant Neefus-Stype Agency, Inc. (collectively "Townsend"). In opposition and in support of the cross-motion, plaintiff submits copies of the pleadings, his own deposition transcript and the deposition transcripts of Leroy E. Fitting and Peter L. Williams, and various letters and emails.

The disclaimer letter issued by Burlington is dated December 10, 2013, and reveals that the sole rationale for Burlington's decision to disclaim coverage is that plaintiff failed to provide timely notice of the underlying occurrence, in violation of plaintiff's policy with Burlington. The commercial general liability policy provides under the "Insuring Agreement" of coverage at subsection "a" that Burlington will pay sums Sperling becomes legally obligated to pay because of bodily injury or property damage caused by an occurrence as defined by the policy. The agreement is subject to a notice condition, which provides:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence or offense.

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- b. If a claim is made or "suit" is brought against any insured, you must:
- (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) notify us as soon as practicable.
- You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

The policy also defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The accident involving Ms. Stepnoski occurred on December 21, 2006 and Sperling was advised of it on December 22, 2006. Sperling testified that he instructed his property manager, Gary Lillis, to advise Townsend that an accident occurred. Lillis testified that he advised Townsend, Sperling's retail broker, on December 23, 2006. Burlington maintains that neither Sperling nor Townsend notified it until October 5, 2009 and, therefore, its disclaimer of October 27, 2009 must be enforced. This, despite the fact that Sperling was not named as a party defendant in the underlying action.

On a motion for summary judgment, the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]).

Here, Burlington has failed to establish a prima facie entitlement to summary judgment. Lee Fitting, an insurance broker and partner in the Townsend Agency, testified that he was advised by Gary Lillis of the December 21, 2006 accident. He explained that the policy at issue was placed by Townsend Insurance Company on the "wholesale market" and the risk was placed with Burlington through CSEI (also known as All Risk), which is a larger broker referred to as a wholesaler. Fitting testified that a claim under a policy that had been placed with a carrier through CSEI would not be reported directly through the carrier by Townsend Insurance Company, but through CSEI. Fitting testified that he did not recall if he had reported the accident through CSEI. He also testified that he did not recall if he filed an Accord Loss Notice regarding the December 21, 2006 accident. Significantly, Peter Williams, a regional claims manager for the Guiford Specialty Group, which owns Burlington and manages its claims, testified that an email dated January 14, 2014 noted:

TRW (Tom Wilkerson) advises he has had several communications w/ wholesale broker (All Risk / CSEI) who continues looking thru archive files and electronic records to determine whether they rec'd notice of the loss back in 2006. After discussion with HO (Home Office) Claim, agreed we go forward and issue a response to the pushback, and maintain our position.

Williams testified that even though All Risk was still actively investigating whether or not they received notice in 2006, Burlington's home office decided to deny the claim without knowing whether they were

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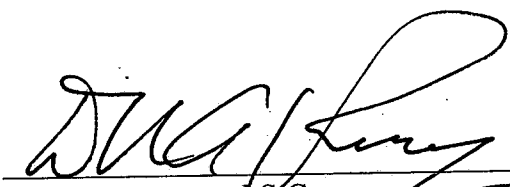
notified of the claim or not. On this record, Burlington has not established that it did not receive notice of the accident in 2006.

Moreover, on the proof adduced upon the respective motions, an issue of fact exists as to whether Sperling reasonably believed, under all the circumstances, he was not liable for the underlying incident (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 631 NYS2d 125 [1995]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 416 NYS2d 559 [1979]; *Hermitage Ins. Co. v Arm-ing, Inc.*, 46 AD3d 620, 847 NYS2d 628 [2d Dept 2007]; *Morris Park Contracting Corp. v National Union Fire Ins. Co. of Pittsburgh*, 33 AD3d 763, 822 NYS2d 616 [2d Dept 2006]; *Genova v Regal Mar. Indus.*, 309 AD2d 733, 765 NYS2d 266 [2d Dept 2003]; “Generally, questions of the insured’s good faith and reasonableness in believing that he or she would not be sued and in delaying notification to the insurer are issues to be resolved by the trier of fact [citations omitted]” (*Kim v Maher*, 226 AD2d 350, 640 NYS2d 579 [2d Dept 1996]; *see also Collins v J. Isaksen*, 221 AD2d 403, 633 NYS2d 539 [2d Dept 1995]; *Kreger Truck Renting Co., Inc. v American Guarantee & Liability Ins. Co.*, 213 AD2d 453, 623 NYS2d 623 [2d Dept 1995]; *Winstead v Uniondale School Dist.*, 170 AD2d 500, 565 NYS2d 84565 [2d Dept 1991]; *cf. Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 800 NYS2d 521 [2005]).

Construing all inferences in favor of the insured, it cannot be said that the evidence establishes, as a matter of law, that the insured’s belief in nonliability was unreasonable or in bad faith (*see Ponok Realty Corp. v United Nat’l Specialty Ins. Co.*, 69 AD3d 596, 893 NYS2d 125 [2d Dept 2010]; *120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co.*, 40 AD3d 719, 835 NYS2d 715 [2d Dept 2007]; *Genova v Regal Mar. Indus.*, *supra*).

These issues of fact mandate the denial of the Burlington’s motion, and also require a finding on the cross motion, that the plaintiff failed to establish his entitlement to summary judgment. Accordingly, Burlington’s motion for summary judgement and plaintiff’s cross-motion for summary judgment are denied.

Dated: June 4, 2018


HON. DAVID T. REILLY

___ FINAL DISPOSITION X NON-FINAL DISPOSITION