

207 Sherman Assoc. v United States Liab. Ins. Co.

2019 NY Slip Op 32181(U)

July 23, 2019

Supreme Court, New York County

Docket Number: 450909/18

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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207 SHERMAN ASSOCIATES and SDG,
MANAGEMENT CORP.,

Index No. 450909/18
Motion Seq. No. 001

Plaintiff,

-against-

DECISION AND ORDER

UNITED STATES LIABILITY INSURANCE CO.,

Defendant.

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CAROL R. EDMED, J.S.C.:

In an insurance coverage action, plaintiffs 207 Sherman Associates LLC (Sherman) and SDG Management Corp. (SDG) (collectively, Plaintiffs) move, pursuant to CPLR 3212, for an order (1) directing defendant United States Liability Insurance Company (USLIC) to assume the defense of Sherman and SDG in an action before this court entitled *Vargas v 207 Sherman Associates LLC et al*, index NO. 162842/15 (the underlying action); and (2) directing USLIC to reimburse Sherman and SDG for the amount they have expended in defending themselves in the underlying matter. USLIC opposes the motion and cross-moves, pursuant to CPLR 3212, for a declaration that it has no duty to defend or indemnify Sherman and SDG in the underlying matter.

BACKGROUND

The plaintiff in the underlying action alleges that Sherman, SDG, and USLIC's insured, 24 Hours Fast Cash Pawn Shop Inc. (the Pawn Shop) are liable for injuries she sustained, on February 14, 2014, when she slipped and fell on a sidewalk. The complaint involves allegations of negligent snow removal. Sherman is the subject building owner, while SDG is the property manager in the subject building, and the Pawn Shop leases a storefront in the subject building.

The subject lease provides that “[Sherman] hereby leases to [Pawn Shop] and [Pawn Shop] hires from Owner Store #16 at 221 Sherman Avenue a/k/a 542 W. 207th Street” (NYSCEF doc No. 19). The Lease provides that the Pawn Shop was responsible for cleaning the sidewalk “on both sides of the Premises” (*id.*). The lease also contains an indemnification clause that provides the Pawn Shop will indemnify Sherman for:

“(a) all claims of whatever nature against Owner arising from any act, omission or negligence of Tenant ... (b) all claims against Owner arising from any accident, injury or damage occurring outside of the Premises but anywhere within or about the Property, where such accident, injury or damage results from an act or omission of Tenant ... (c) any breach, violation or non-performance of any covenant, condition or agreement in this Lease set forth and contained on the part of Tenant to be fulfilled, kept, observed and performed.”

(*id.*, ¶ 60 of Lease Rider).

The lease also provides that the Pawn Shop will

“maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises ... In case any action or proceeding is brought against Owner by reason of such claim, Tenant, upon written notice from Owner, will, at Tenant’s expense, resist or defend such action or proceeding by counsel approved by Owner in writing, such approval not to be unreasonably be withheld”

(*id.*, ¶ 8).

The Pawn Shop obtained an insurance policy from USLIC that covered the date of the accident in the underlying action (NYCEF doc No. 20). “Managers or Lessors of Premises” are listed as additional insureds on the policy (*id.*). Through what appears to be a scrivener’s error, SDG is listed on the policy as “SDC Management Corp” (*id.*).

By letter dated August 5, 2016, Sherman and SDG tendered the defense in the underlying action to the Pawn Shop and USLIC (NYSCEF doc No. 21). Neither the Pawn Shop nor USLIC accepted the tender. The present action began as a third-party action in the underlying action, but

the court granted a motion, made by USLIC to sever the third-party action (doc No. 58 under index No. 162842/2015).

DISCUSSION

A summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing. (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, regardless of the sufficiency of the opposing papers. (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Here, Sherman and SDG argue that the entitlement to additional insured coverage under the USLIC is plain. USLIC, in opposition and in support of its cross motion for a declaratory judgment make various arguments.

First, USLIC argues that Sherman is not specifically listed as an additional insured. However, the policy clearly states that the lessor and the managing agent of the building are additional insureds under the policy. Sherman and SDG have made an un rebutted showing that they are the lessor and managing agent. Accordingly, USLIC's first argument is unpersuasive (*see Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595 [2009] [rejecting the defendant insurer's argument that additional insurance coverage should be denied as the plaintiff lessor was not specifically listed as an additional insured]).

Next, USLIC argues that the policy does not cover the sidewalk abutting the leased premises. The subject policy contains a Premises Limitation Endorsement that provides: "This insurance applies to 'bodily injury' ... only if the bodily injury ... is caused by an 'occurrence'

that takes place on or within the perimeter of the premises, site(s) or location(s) scheduled above that are owned by, occupied by or leased to any 'insured.'

The lease contemplates the sidewalks abutting the commercial space as within the purview tenant's responsibilities. Paragraph 46.4 of the lease, for example, provides:

"Tenant shall, at its own cost and expense, keep the sidewalks, curbs, entrances, passageways and areas adjoining or appurtenant to the Premises in a clean and orderly condition, free of snow, ice rubbish and obstructions ... Tenant hereby agrees that it is solely liable for any accidents occurring on said outside areas due to tenant's failure to comply with this Section."

It is well established that ambiguity in contractual terms should be interpreted against the drafter (*Cheng v Madansky Leasing Co. Inc.*, 73 NY2d 454 [1898]). Here, the ambiguity in the phrase "premises, site(s) and location(s)" in the premises limitation must be interpreted to include the abutting sidewalk, especially since that area was contemplated by the lease as being within the ambit of rights and responsibilities that the Pawn Shop took on through that agreement.

USLIC argues that the issuance of a disclaimer is unnecessary when a claim falls outside the scope of coverage. This argument is moot since ^{as discussed above,} the court ~~has just found~~ ^{FINDS} that the claim falls within the scope of coverage. ✓

USLIC also argues that the moving papers are technically defective, as Sherman and SDG support their motion with an affidavit from Alex Bonnet, SDG's property manager. As SDG was not a signatory to the lease, USLIC argues that Bonnet cannot testify as to the provisions of the lease. However, the court is not relying on Bonnet's statements ^{CONCERNING} ~~about~~ the lease, but the lease itself (NYSCEF doc No. 19), which is fully executed and has been authenticated in the underlying matter. Accordingly, the court rejects USLIC's technical argument regarding Bonnet's affidavit. ✓

USLIC also argues that the claims in this action are barred by the “prior-action pending” doctrine. “Where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211 (a) (4) on the ground that there is another action pending” (*Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110 AD3d 783 [2d Dep’t 2013]). Here, this doctrine is plainly inapplicable, as the court has granted a motion, made by USLIC, to sever this action from the underlying action.

USLIC argues, additionally, that Sherman and SDG have no standing to bring this action pursuant to Insurance Law § 3420 (b) (1). Section 3420 is entitled “Liability insurance; standard provisions; right of injured person” and its subsection (b) (1) provides:

“Subject to the limitations and conditions of paragraph two of subsection (a) of this section, an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance that is governed by such paragraph, to recover the amount of a judgment against the insured or his personal representative:

- (1) any person who, or the personal representative of any person who, has obtained a judgment against the insured or the insured’s personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract;
- (2) any person who, or the personal representative of any person who, has obtained a judgment against the insured or the insured’s personal representative to enforce a right of contribution or indemnity, or any person subrogated to the judgment creditor’s rights under such judgment; and
- (3) any assignee of a judgment obtained as specified in paragraph one or paragraph two of this subsection, subject further to the limitation contained in section 13-103 of the general obligations law”

USLIC cites to *Lang v Hanover Ins. Co.* (3 NY3d 350 [2004]) to support its argument that Sherman and SDG do not have standing pursuant to this provision. The Court of Appeals, in *Sherman* ^{*italicize*} noted that “Insurance Law § 3420 grants an injured plaintiff the right to sue a tortfeasor’s insurance company to satisfy a judgment obtained

against the tortfeasor” (*id.* at 352). Thus, section 3420 is inapplicable to the present action and the language that USLIC relies on, suggesting that the statute is only applicable “under limited circumstances” is not germane to question Plaintiffs’ standing in this action. Accordingly, the court rejects USLIC’s argument pursuant to section 3420 of the Insurance Law.

Finally, USLIC argues that Sherman and SDG are not entitled to additional insured coverage, as the accident did not arise out of its use of the sidewalk area. Here, the lease clearly states that the Pawn Shop is responsible for cleaning the sidewalk abutting the leased space. This is consistent with the testimony of SDG’s Luis Ventura in the underlying action (NYSCEF doc No. 36 at 21). Thus, Plaintiff’s allegations, that there was slippery condition present at the time of her accident satisfies the coverage requirement that the allegations “arise out” of the Pawn Shop’s use of leased premises and locations. Accordingly, the court rejects USLIC’s argument the underlying matter does not arise out of the Pawn Shop’s use of the abutting sidewalk.

CONCLUSION

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that defendant United States Liability Insurance Company (USLIC) is to assume the defense of plaintiffs 207 Sherman Associates LLC (Sherman) and SDG Management Corp. (SDG) in an action before this court entitled *Vargas v 207 Sherman Associates LLC et al*, index NO. 162842/15 (the underlying action); and it is further


ORDERED, ADJUDGED and DECLARED that Sherman and SDG are entitled to reimbursement from USLIC for the reasonable amount of attorney's fees they have expended in defending themselves in the underlying matter; and it is further

ORDERED that the issue of attorney's fees is referred to a Special Referee to **hear and determine**. And it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry on defendant and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

Dated: July 23, 2019

ENTER:



Hon. CAROL R. EDMEAD, JSC

**HON. CAROL R. EDMEAD
J.S.C.**