

Greater N.Y. Mut. Ins. Co. v Hanover Ins. Co.,

2019 NY Slip Op 33061(U)

October 7, 2019

Supreme Court, New York County

Docket Number: 159420/2017

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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GREATER NEW YORK MUTUAL INSURANCE
COMPANY,

Index No. 159420/2017

Plaintiff,

-against-

HANOVER INSURANCE COMPANY,

Defendant.

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David B. Cohen, J.S.C.:

Plaintiff seeks partial summary judgment against defendant declaring that defendant has a duty to defend plaintiff's insureds, 212 W 22 Realty, LLC and SW Management, LLC, in the underlying personal injury action, *Forkin v 212 W 22 Realty, LLC*, Index No. 160599/2016. Defendant cross-moves to compel plaintiff to comply with its discovery demands.

Factual and Procedural Background

In 2016, Rosemary Forkin commenced a person injury action (Index No. 160599/2016) against 212 W. 22 Realty, LLC (212), S.W. Management, LLC (SWM), and Fancie Nail & Beauty Spa, Inc. (FNB), alleging that she fell on the sidewalk in front of FNB's storefront located at 196 7th Avenue, New York, New York (the Underlying Action). 212 and SWM are the owners of the premises. FNB leases the premises from them. Plaintiff Greater New York Mutual Insurance Company (GNY) issued a general liability policy to 212 and SWM. Defendant Hanover Insurance Company (Hanover) issued a liability policy to FNB.

GNY filed this action on October 24, 2017, seeking a judgment declaring that Hanover has a duty to defend and indemnify 212 and SMW in connection with the Underlying Action. GNY

also seeks reimbursement and equitable contribution.

GNY now moves for partial summary judgment declaring that Hanover has a primary, noncontributory duty to defend 212 and SWM in the Underlying Action. GNY argues that the commercial general liability coverage of policy OHY-A853956-00 issued by Hanover (Hanover Policy) and the complaint filed in the Underlying Action establish a duty to defend on the part of Hanover. GNY contends that form BP 04 02 07 02 of the Hanover Policy identifies 212 and SWM as additional insureds. GNY also argues that form BP 04 02 07 02 affords coverage for 212 and SWM, pursuant to the following language: “with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you [FNB] and shown in the Schedule.” GNY notes that form BP 04 02 07 02 identifies FNB's premises as 196 7th Avenue in New York, New York. FNB leased the premises from 212 and SWM, and Forkin fell in front of FNB's storefront. GNY argues that such allegations fall within the scope of the Hanover additional insured coverage available to 212 and SWM. Therefore, Hanover has a duty to defend 212 and SWM in connection with the Underlying Action. GNY contends that the Hanover Policy applies before its policy on a primary basis for 212 and SWM, while its policy applies on an excess basis.

GNY contends that copies of pleadings filed in the Underlying Action, including Ms. Forkin's complaint, are available via the court's electronic docket. Further, the parties have exchanged the Hanover Policy and GNY policy. Therefore, this motion can be resolved by reviewing the policies issued by Hanover and GNY and the complaint filed in the Underlying Action. GNY states that it reserves its right to move at a later time as to the duty to indemnify under the Hanover Policy.

In opposition, Hanover argues that this motion is premature because discovery has just

commenced. Hanover argues that it has no information regarding the Underlying Action. Hanover contends that it needs to review the deposition transcripts in the Underlying Action as well as photos or any other information regarding where Forkin fell. Hanover also argues that, while Forkin has alleged that the accident occurred on a part of the sidewalk leased to FNB, that has not yet been conclusively established in the Underlying Action. Hanover also argues that Forkin, 212, SWM and FBN should have been named as parties to this action.

Hanover cross-moves to compel GNY to comply with its discovery demands.

On April 25, 2019 in the Underlying Action, this court granted, among other things, 212's motion for summary judgment on its cross claims for contractual indemnification against FNB on the condition that there is a finding that the accident occurred on property owned by 212 and located on the sidewalk portion in front of FBN. The court held that paragraph 30 of the lease unequivocally provides that FNB was responsible for keeping the sidewalk in good repair, and the lease had a valid and enforceable indemnification clause.

Discussion

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd [b], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b]” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition

papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Partial summary judgment should be granted to GNY and Hanover's cross motion shall be denied.

An insurance carrier's duty to defend arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action (see *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]; *Scottsdale Indem. Co. v Beckerman*, 120 AD3d 1215 [2d Dept 2014]; *Salt Constr. Corp. v Farm Family Cas. Ins. Co.*, 120 AD3d 568 [2d Dept 2014]). If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend (see *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002]; *Natural Organics, Inc. v OneBeacon Am. Ins. Co.*, 102 AD3d 756, 758 [2d Dept 2013]; *City of New York v Safeco Ins. Co. of Am.*, 31 AD3d 478, 480 [2d Dept 2006]).

Here, 212 and SWM qualify as insureds under form BP 04 02 07 02 of the Hanover Policy. That form identifies as additional insureds "[t]he person or organization shown in the Schedule. The Schedule of form BP 04 02 07 02 identifies 212 and SWM as additional insureds. Further, the allegations in the Underlying Action fall within form BP 04 02 07 02, which afford 212 and SWM coverage "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [FBN] and shown in Schedule" (see GNY memo of law, exhibit D). Forkin's claim that she fell on a defective sidewalk in front of FBN fall within this coverage. Notably, in *Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510 [1st Dept 2015]), the First Department found that even if a lease is silent on a tenant's use of an abutting sidewalk,

“the additional insured endorsement would give the landlords coverage for accidents occurring outside the demised premises, including on abutting sidewalks” (*id.*).

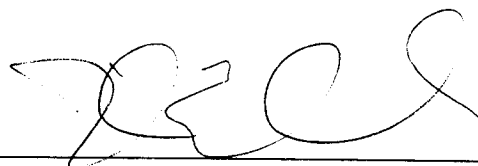
Moreover, the Hanover Policy is primary. Form 391-1003 06/09 of the Hanover Policy provides, "This insurance is primary except when Paragraph b. below applies" (see GNY memo of law, exhibit C at 65). None of the exceptions identified in paragraph "b" apply. Likewise, policy 1131Y88172 issued by GNY contains form CGU 00 05 02 06. Form CGU 00 05 02 06 provides in relevant part, "This insurance is excess over: . . . (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or products or completed operations, for which you have been added as an additional insured by attachment of an endorsement" (see GNY memo of law, exhibit E). Since 212 and SWM have been added as additional insureds by attachment of an endorsement in the Hanover Policy, form CGU 00 05 02 06 requires that the GNY policy apply on a secondary excess basis. Therefore, with respect to the availability of coverage for 212 and SWM in connection with the Underlying Action, the Hanover Policy applies on a primary, noncontributory basis and the GNY policy applies on an excess basis.

Accordingly, it is

ORDERED that plaintiff Greater New York Mutual Insurance Company's motion for partial summary judgment declaring that Hanover Insurance Company owes it a duty to defend is granted and defendant Hanover Insurance Company's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 7, 2019



DAVID B. COHEN, J.S.C.

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HON. DAVID B. COHEN
J.S.C.