

Nels v New York Cent. Mut. Fire Ins., Inc.
2019 NY Slip Op 34675(U)
October 3, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 009272/2018
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on September 24, 2019.

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

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

SETH T. NELS,

Plaintiff,

v.

**NEW YORK CENTRAL MUTUAL FIRE
INSURANCE, INC.,**

Defendant.

**DECISION AND ORDER
ON MOTIONS**

**Index No.: 009272/2018
RJI No.: 33-19-2086**

ACTION #1

**APPEARANCES: JANET D. CALLAHAN, ESQ. and TOMAS C. CAMBIER, ESQ., OF
HANCOCK ESTABROOK, LLP
For Plaintiff Seth T. Nels**

**EDWARD B. FLINK, ESQ., OF FLINK MASWICK LAW, PLLC
For Defendant New York Central Mutual Fire Insurance, Inc.**

**NEW YORK CENTRAL MUTUAL FIRE
INSURANCE, INC.,**

Plaintiff,

v.

**SCOTT C. SHUTE, MICHAEL D. KREWSON,
PYROTECNICO FIREWORKS, INC.**

**Index No.: 005899/2019
RJI No.: 33-19-2476**

ACTION #2

**APPEARANCES: EDWARD B. FLINK, ESQ., OF FLINK MASWICK LAW, PLLC
For Plaintiff**

**MICHELLE RUDDEROW, ESQ., OF WILLIAMS & RUDDEROW, PLLC
For Defendant Scott C. Shute**

**KEVIN P. KUEHNER, ESQ., OF KUEHNER LAW FIRM, PLLC
For Defendant Michael D. Krewson**

**SANJEEV DEVABHAKTHUNI, ESQ., OF BARCLAY DAMON, LLP
For Defendant Pyrotecnico Fireworks, Inc.**

There are two summary judgment motions concerning the respective declaratory judgment actions before the Court. These actions stem from New York Central Mutual Fire Insurance, Inc.'s (NYCM) denial of the tender of defense of Seth Nels under his homeowner's insurance policy for two personal injury actions where Nels is a named defendant. Under the terms of the this policy, NYCM agreed to provide defense and indemnification up to the policy limits for any claim made or suit brought against Nels. The coverage issue concerns an incident that occurred on August 7, 2015 at a camp in Tully, New York rented by Scott Shute and his wife, where both Shute and Michael Krewson were injured. Both Krewson and Shute have commenced personal injury actions. As alleged in the personal injury complaints, Nels, a licensed pyrotechnician who worked as an independent contractor for Pyrotecnico Fireworks, Inc, provided three "onion bombs" or "salutes" from inventory at his home in Lafayette, New York, to Timothy Thorpe through an intermediary, Oliver Knapp. Thorpe and Knapp attended a cookout at the camp and Thorpe brought two of the fireworks to the back of the camp and ignited one, which he then dropped on the deck. Shute picked it up to throw it off the deck and it exploded in his hand, resulting in the loss of his left hand and loss of hearing to Krewson. The complaints also allege that Nels placed the dangerous instrumentality, i.e. a "salute bomb"

“onion bomb” into the stream of commerce by giving the firework to an untrained member of the public, and that he is an individual with full knowledge and understanding that the placement would constitute an immediate danger of explosion and injury to innocent bystanders.

The record shows that after the August 7, 2015 incident Nels’ wife received a call from the New York State Police to speak with him. He subsequently met with the investigator and provided a written statement. NYCM alleged that Nels did not provide it with notice of the incident after the interview or after he received a letter from the injured parties’ attorney. It claimed that the first notice was received was 14 months after the incident when Nels was served with the summons and complaint, where Shute initially brought an action against Nels and Thorpe on September 23, 2016. NYCM’s counsel subsequently withdrew this argument.¹

In Action 1, Nels sought a declaratory judgment against NYCM seeking a determination that it was obligated to defend him in the underlying tort actions. NYCM served an answer and counterclaim for declaratory judgment seeking a determination that due to the business exclusion Nels had no coverage under the policy. NYCM then commenced its own action for declaratory judgment in Action 2, which seeks a declaration that it has no obligations under the subject policy to provide defense and/or indemnification to Nels in connection with the personal injury actions. Nels has moved for summary judgment in Action 1 and NYCM has opposed, cross-moving on its counterclaim that there is no coverage due to the business exclusion. NYCM also moves for summary judgment on its complaint in Action 2. In the alternative, NYCM argues that

¹ NYCM argued in both its cross-motion in Action 1 and motion in Action 2 that Nels failed to give timely notice under the policy terms. NYCM’s counsel conceded at oral argument that the notice issue constitutes a question of fact. Therefore, this Court will not address the argument here.

Actions 1 and 2 should be consolidated if NYCM's motions are not granted, as they involve common questions of law and fact. *See, CPLR § 602.*

The relevant provisions of the subject policy are as follows:

Section II: Liability Coverages

A. Coverage E- Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" ... caused by an "occurrence" to which this coverage applies, we will

2. Provide a defense at our expense by counsel of our choice even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate.

Policy, Section II (A)(2), p. 15.

Section II- Exclusions

E. Coverage E- Personal Liability and Coverage F- Medical Payments to Others

Coverages E and F do not apply to the following:

2. "Business"

"Bodily injury" ... arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured" whether or not the "business" is owned or operated by an "insured" or employs and "insured". This exclusion E.2 applies but is not limited to an act or omission regardless of its nature or circumstance involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the "business."

Id., Section II (E)(2), p. 17.

"Business" is defined as

(a) a trade, profession or occupation engaged in on a full- time, part- time or occasional basis or (b) any other activity engaged in for money or other compensation except the following:
(1) one or more activities not described in (2) through (4) below for which no "insured" receives more than \$2,000 in total compensation for the twelve months before the beginning of the policy period; (2) volunteer activities for which no money is received other than payment for expenses incurred to perform the activity; (3) providing home day care services for which no

compensation is received other than mutual exchange of such services; or (4) the rendering of home day care services to a relative of an insured.

Id., *Definitions, (B)(3) at p.1.*

The policy further provides that “this exclusion ... applies but is not limited to an act or omission regardless of its nature or circumstance involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the “business.” *Id at Section II(E)(2), p. 17.*

The first cause of action in the Shute complaint alleges that Nels, a food chef by profession, who also has employment as a licensed pyrotechnician, placed a dangerous instrumentality into the stream of commerce by giving the fireworks to Thorpe, an unsophisticated untrained member of the public, with full knowledge and understanding that the placement would constitute an immediate danger of explosion and injury. It is also alleged that Nels knew or should have known, by the nature of his professional pyrotechnics training and federal and New York State licensures, that he was not allowed to possess those fireworks for personal use, sale or distribution nor was he allowed to donate the explosives. The second cause of action alleges that the firework was a “dangerous instrumentality” and that providing same to Thorpe constituted gross negligence and reckless disregard to others. The third cause of action alleges joint and several liability against S. Vitale Pyrotechnic Industries, Inc. d/b/a Pyrotecnico and Nels. The Krewson complaint contains essentially identical causes of action, including the one for negligence.

The parties agree that the subject homeowner’s policy provides coverage to Nels in the two personal injury actions and the only issue before the Court is whether the business exclusion

contained therein precludes coverage. Nels argues that the personal injury complaints allege his negligence in giving the fireworks to Thorpe, regardless of how he obtained them. NYCM, on the other hand, argues that allegations in the personal injury complaints fall squarely within the language of the business exclusion, with Nels' liability being predicated upon his licensure and employment as a pyrotechnician. NYCM concedes that but for the business exclusion, it is obligated to defend Nels. This Court agrees with Nels' interpretation and finds that the business exclusion does not apply to bar coverage.

The law is well settled that an insurer's duty to furnish a defense is broader than the duty to indemnify. *See, Servidone Construction Corp. v. Security Insurance Co.*, 64 NY2d 419 (1985). The duty to defend is "exceedingly broad" and an insurer is required to provide a defense where the allegations of the complaint "suggest a reasonable possibility of coverage." *Automobile Insurance Co. Of Hartford v. Cook*, 7 NY3d 131 (2006). Thus, if the complaint contains any facts or allegations that arguably bring the claim even potentially within the coverage terms of the policy, the insurer is required to defend its insured. *See, Automobile Insurance Co., supra; see also, Town of Messina v. Healthcare Underwriters Mutual Insurance Co.*, 98 NY2d 435 (2002). Any doubt as to whether the allegations of the underlying complaint state a claim within coverage of the policy must be resolved in favor of the insured and against the insurer. *See, Brook Shopping Center, Inc. v. Liberty Mutual Insurance Co.*, 80 AD2d 292 (1st Dept. 1981). The very heavy burden of proving that its interpretation of the business exclusion is the only possible reasonable interpretation rests upon NYCM. *See, Messina, supra; see also, Frontier Insulation Contractors v. Merchant Mutual Insurance Co.*, 91 NY2d 169 (1997). It must prove as a matter of law that every single cause of action in the underlying complaint falls wholly

within that exclusion and that there is no possible way any of the causes of action could be established without falling under the exclusion. *See, National Union Fire Insurance Co. Of Pittsburgh, PA v. City of Oswego*, 295 AD2d 905 (4th Dept. 2002); *see also, Essex Insurance Co. v. T-Birds Nightclub and Restaurant, Inc.*, 229 AD2d 919 (4th Dept. 1996). It cannot do so here. Nor can it demonstrate that the allegations of the personal injury underlying complaints place the complaint solely and entirely within the policy exclusions, with those obligations not being subject to any other interpretation. *See, Technicon Electronics Corp v. American Home Assurance Co.*, 74 NY2d 66 (1991). The business exclusion clause here does not bar coverage in this instance in the requisite “clear and unmistakable language.” *Seaboard Surety v. Gillette*, 64 NY2d 304 (1984). The ambiguity contained therein is strictly construed against NYCM as the insurer and according to its plain meaning. *See, Oot v. Home Insurance Co. Of Indiana*, 244 AD2d 62 (4th Dept. 1998).

Nels is correct that the business exclusion does not apply as both complaints clearly contain an action sounding in negligence. While the complaints allege that Nels had certain knowledge by reason of holding a professional pyrotechnic license, there is no allegation he was engaged in any professional activity at the time he is alleged to have committed the negligent acts. Instead, it is alleged that Nels gave the fireworks to Knapp to deliver to Thorpe after the two had bailed hay on Nels’ property and the complaints are devoid of any allegation that Nels was financially compensated for providing the fireworks. Neither complaint alleges that Nels’ negligence in providing the fireworks to Thorpe arose out of or in connection with Nels’ business or within the scope of his license. As NYCM concedes, Nels’ Pyrotechnic license does not permit him to give away or sell explosives to third parties, yet it conflates Nels’ background and

expertise with the claim that he was conducting his business at the time in question. Therefore, NYCM cannot meet its burden as a matter of law that the facts as alleged in the complaint fall under the business exclusion. While the first cause of action in both complaints alleges that Nels was negligent in placing the fireworks into public use with Thorpe at a private cookout, despite having full knowledge that such device could only be used at a professional pyrotechnic display show, they do not allege that Nels' negligence arose out of any business that he conducted to cast the pleadings solely and entirely within the business exclusion. NYCM's argument that the exclusion completely vitiates coverage in opposition to the Nels motion and in support of its own motion fails. In addition, the Nels' motion seeks only a declaration as to NYCM's obligation to provide a defense in the underlying tort actions and not NYCM's duty to indemnify. To the extent that NYCM seeks a declaration that it owes no duty to indemnify, that request is premature as no determination has been made in the underlying actions as to Nels' liability. *See, Hout v. Coffman*, 126 AD2d 973 (4th Dept. 1987). NYCM's assertions that Nels engaged in the business of pyrotechnics, did so for money, obtained and possessed the fireworks in connection with his business and used his home to store fireworks owned by Pyrotecnico does not establish that the injury for which the damages are sought in the underlying action arose out of or in connection with the business. Thus, the allegations that Nels' possessed certain knowledge by reason of his professional license and came into possession of the firework by virtue of his Pyrotecnico contract does not cast either complaint solely and entirely within the provisions of the policy's business exclusion, as required for a valid disclaimer. *See, Seaboard Surety Co., supra.*

Nels is therefore entitled to summary judgment on his complaint in Action 1 while NYCM's cross-motion for summary judgment on its counterclaim in Action 1 is denied as is its motion for summary judgment on its complaint in Action 2. NYCM's alternative argument for consolidation is therefore moot.

NOW, therefore, for the foregoing reasons, it is

ORDERED, ADJUDGED AND DECLARED, that New York Central Mutual Fire Insurance Company, Inc. is obligated to provide a defense to Seth T. Nels for the claims asserted in the following actions: Scott C. Shute v. S. Vitale Pyrotechnic Industries, Inc. d/b/a Pyrotecnico and Seth T. Nels, Index No.: 006040/2018 and Michael D. Krewson v. S. Vitale Pyrotechnic Industries, Inc. d/b/a Pyrotecnico and Seth T. Nels, Index No.: 006071/2018, and it is further

ORDERED, that New York Central Mutual Fire Insurance Company, Inc.'s cross-motion for summary judgment on its counterclaim in Action 1 is denied, and it is further

ORDERED, that New York Central Mutual Fire Insurance Company, Inc.'s motion for summary judgment on its complaint in Action 2 is denied.

Dated: October 3, 2019
Syracuse, New York

ENTER


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion in Action 1 for Summary Judgment, dated June, 24, 2019.
2. Affirmation of Thomas C. Cambier, Esq. in support of plaintiff's motion for summary judgment, dated June 24, 2019, and attached exhibits.
3. Affidavit of Seth T. Nels in support of plaintiff's motion for summary judgment, dated May 3, 2019, and attached exhibits.
4. Plaintiff's Memorandum of Law in support of motion for summary judgment, dated June 24, 2019.
5. Defendant's Notice of Cross-Motion in Action 1 for summary judgment, dated September 7, 2019.
6. Affirmation of Edward B. Flink, Esq. in support of defendant's cross-motion for summary judgment, dated September 7, 2019, and attached exhibits.
7. Affidavit of Carolyn B. Pritchard, dated September 6, 2019, and attached exhibits.
8. Defendant's Memorandum of Law in Opposition to plaintiff's motion and in support of defendant's cross-motion, dated September 7, 2019.
9. Reply Attorney Affirmation of Thomas C. Cambier, Esq., dated September 17, 2019, and attached exhibits.
10. Plaintiff's Memorandum of Law in opposition to defendant's motion and in further support of plaintiff's motion, dated September 17, 2019.
11. Reply Affirmation of Edward B. Flink, Esq., dated September 19, 2019, and attached exhibits.
12. Defendant's Memorandum of Law in further support of cross-motion, dated September 19, 2019.
13. Plaintiff's Notice of Motion/Cross-Motion in Action 2 for Summary Judgment, dated September 7, 2019.
14. Affirmation of Edward B. Flink, Esq. in opposition to plaintiff's motion in Action #1 and in support of plaintiff's cross-motion in Action 2, dated September 7, 2019, and attached exhibits.

15. Affidavit of Carolyn B. Pritchard, dated September 6, 2019, and attached exhibits.
16. Plaintiff's (NYCM) Memorandum of Law in opposition to plaintiff's motion in Action #1 and in support of plaintiff's motion/cross-motion in Action 2, dated September 7, 2019.
17. Affirmation of Sanjeev Devabhakthuni, Esq., dated September 17, 2019.
18. Affirmation of Michelle Rudderow, Esq., dated September 17, 2019, and attached exhibits.
19. Affirmation of Kevin P. Kuehner, Esq., dated September 17, 2019, and attached exhibits.
20. Reply Affirmation of Edward B. Flink, Esq., dated September 19, 2019, and attached exhibits.
21. Plaintiff's (NYCM) Reply Memorandum of Law, dated September 19, 2019.