

Greater N.Y. Mut. Ins. Co. v Utica First Ins. Co.

2020 NY Slip Op 30058(U)

January 3, 2020

Supreme Court, New York County

Docket Number: 159305/2016

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM
Justice
INDEX NO. 159305/2016
GREATER NEW YORK MUTUAL INSURANCE COMPANY, MOTION DATE 03/28/2019
Plaintiff, MOTION SEQ. NO. 001

- v -

UTICA FIRST INSURANCE COMPANY, DECISION, ORDER, AND JUDGMENT
Defendant.

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is determined that plaintiff's motion for partial summary judgment is granted for the reasons set forth below.

THE INSURANCE POLICIES

This action was commenced by plaintiff Greater New York Mutual Insurance Company seeking a declaratory judgment to the effect that defendant Utica First Insurance Company bears a duty to defend and indemnify an entity known as 1395 Rockaway Parkway, LLC, in connection with a trip-and-fall personal injury lawsuit titled Anthony Simon v 1395 Rockaway Parkway, LLC; Tasty Delicious Restaurant, Inc.; and Tasty Delicious Bakery & Restaurant, Inc. (index No. 000244/2016 [Sup Ct Kings County]). In that lawsuit, an individual named Anthony Simon alleges that he tripped and fell in front of 13 Rockaway Parkway, Brooklyn, New York, which is owned by 1395 Rockaway Parkway, LLC (the "Property Owner"), and leased by it to a restaurant known as Tasty Delicious Restaurant, Inc. That restaurant (the "Property Tenant") is the insured of defendant pursuant to a business liability policy of insurance issued by defendant

to that restaurant (Utica First Ins. Co. Policy # BOP 4424340-00). That policy also covers the Property Owner as an additional insured (pursuant to Utica First Ins. Co. Form # BP 0845 10 05).

Plaintiff, in turn, issued a policy of insurance to the Property Owner (Greater NY Mut. Ins. Co. Policy # 1131M90538). Plaintiff has been undertaking the defense of the Property Owner in the *Anthony Simon* lawsuit; but asserts in this lawsuit that, in reality, it is defendant which bears primary, noncontributory, responsibility to provide such defense, and to indemnify with respect to any ultimate liability determined in the *Anthony Simon* lawsuit. Plaintiff is now moving for partial summary judgment only as to its claim that defendant bears the duty to defend the Property Owner in the *Anthony Simon* lawsuit, reserving its right to move again, at a more advanced stage of that lawsuit, as to its claim that defendant bears the ultimate duty to indemnify.

Summary judgment “shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212 [b]). Summary judgment is appropriate where there are no material, triable, issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Once the movant has made its *prima facie* showing, the burden then shifts to the party opposing the motion to show the existence of any material, triable, issue of fact (*id.*).

THE INSURANCE COVERAGE ANALYSIS

An insurance agreement is subject to principles of contract interpretation. Therefore, as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.

(*Burlington Ins. Co. v New York City Transit Auth.*, 29 NY3d 313, 321 [2017] [internal quotation marks, brackets, and citations omitted].) It is the plaintiff’s burden to show its entitlement to

additional insured coverage by establishing the satisfaction of any and all conditions precedent to such coverage (*Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 NY2d 208 [2002]).

Defendant's policy includes an endorsement titled "Additional Insured Lessor of Premises," Form BP 0845 10 05, which provides, in pertinent part, that additional insured coverage will exist in connection with liability for bodily injury for which the Property Tenant is "legally liable" "and caused, in whole or in part, by [Property Tenant's] acts or omissions . . . in connection with that part of the premises . . . that is leased to [Property Tenant] from the" additional insured [i.e., the Property Owner]. Under the Court of Appeals' relatively recent policy stated in *Burlington Ins. Co. v New York City Transit Auth.* (29 NY3d 313 [2017]), plaintiff, in order to succeed on a motion for summary judgment as to indemnification, would have to demonstrate that acts or omissions of the Property Tenant were, in whole or in part, the proximate cause of Anthony Simon's injuries. (See also, *Hanover Ins. Co. v Philadelphia Indemnity Ins. Co.*, 159 AD3d 587, 588 [1st Dept 2018] ["Accordingly, when a policy limits coverage to an injury 'caused, in whole or in part' by the 'acts or omissions' of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission"] [citing *Burlington*].)

Plaintiff's evidentiary submissions on this motion consist primarily of the insurance policies and their several appended forms, and the complaint in the *Anthony Simon* lawsuit. Plaintiff essentially concedes that additional evidentiary development in the course of the *Anthony Simon* lawsuit is necessary before it can be determined whether Mr. Simon's injuries were proximately caused by the Property Tenant, bearing on the duty to indemnify per *Burlington*. This is precisely why plaintiff has not moved at this time for summary judgment as to indemnification, limiting its instant motion solely to the duty to defend. Those two duties are

treated differently by our insurance law jurisprudence, even post-*Burlington*. While the Court of Appeals in *Burlington* made no express distinction between coverage for defense and coverage as to indemnification, the Appellate Division, First Department, in a case decided subsequent to *Burlington*, and citing *Burlington*, has. That case is *Vargas v City of N.Y.* (158 AD3d 523 [1st Dept 2018]). In *Vargas*, the relevant policy also contained an additional insured endorsement that employed causation verbiage that was so seminal to the *Burlington* Court (*see, id.*, at 524). Yet, the First Department held that that linguistic limitation did “not vitiate [the defendant insurer’s] duty to defend” because the complaint in the underlying lawsuit “alleges that all defendants . . . operated, maintained, managed, and controlled the . . . site” and that “all defendants were negligent and failed to provide a safe . . . site” (*id.*, at 524-25). That reasoning was premised on the well-established principle of insurance law jurisprudence that “[t]he duty to defend is broader than the duty to indemnify” (*id.*, at 525, citing *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Similar to the underlying complaint involved in *Vargas*, the complaint in the *Anthony Simon* lawsuit alleges that the Property Owner “maintained, managed and controlled the premises” but that it failed to keep it safe, causing Mr. Simon’s injuries (NYSCEF Doc. No. 12 ¶ 12; *see, id.*, ¶¶ 15, 18-19, 21-25, 28).

It is indisputable that the Property Owner is identified as an additional insured in defendant’s policy. Although that policy limits coverage to bodily injuries proximately caused by Property Tenant, that limitation, per *Vargas*, and even post-*Burlington*, will only mandate a deferral of determination as to the duty to indemnify; but not as to the duty to defend, which depends solely upon the allegations of the underlying personal injury complaint directed at Property Owner as a negligent party defendant. In the words of the *Vargas* court: “The limitations in [the] endorsements . . . do not vitiate [the defendant insurer’s] duty to defend,

because the . . . complaint brings the insurance claim at least ‘potentially within the protection purchased’ (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714, 840 N.Y.S.2d 302, 871 N.E.2d 1128 [2007])” (*Vargas, supra*, at 524-25.)

Defendant acknowledges the existence of the *Vargas* decision, but attempts to distinguish it on the basis of policy language which defines who may be identified as an additional insured. However, that distinction is irrelevant to the instant discussion because in this case it is indisputable that the Property Owner has been identified as an additional insured in Utica First Ins. Co. Form BP 0845 10 05 appended to Utica First Ins. Co. Policy # BOP 4424340-00, which is the business liability policy issued by defendant to the Property Tenant.

Defendant has essentially not opposed plaintiff’s showing that defendant’s policy applies on a primary, noncontributory, basis, on this motion for partial summary judgment focused on the duty to defend.

Although defendant asserts that discovery is not yet complete in the *Anthony Simon* lawsuit, that point bears relevance only to the duty to indemnify, because, per *Burlington*, we would need to know that Mr. Simon’s injuries were proximately caused by the Property Tenant before the policy’s causation language will allow for indemnification of the Property Owner. But plaintiff, wisely, has limited its instant motion to the duty to defend – non-inclusive of the duty to indemnify, for the time being. As held above, the duty to defend is broader than the duty to indemnify and is defined by the allegations in the *Anthony Simon* complaint, even in this post-*Burlington* era (*see, Vargas, supra. See also, Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419 [1985]; *Bovis Lend Lease LMB Inc. v Garito Contracting, Inc.*, 65 AD3d 872 [1st Dept], *appeal dismissed* 13 NY3d 878 [2009] [the duty to defend is broadly correlative to the allegations in the underlying action, and is distinct of the narrower duty to indemnify]).

Defendant's assertion that more evidentiary material is necessary to support plaintiff's motion for partial summary judgment is incorrect. The submitted policies and policy appendices, and the pleading in the *Anthony Simon* lawsuit, present a sufficient backdrop for application of the First Department's holding in *Vargas*, limited on this motion to the duty to defend.

Accordingly, plaintiff's motion for partial summary judgment as to defendant's duty to defend is granted.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted; and it is, therefore,

ORDERED, ADJUDGED, and DECLARED that defendant Utica First Insurance Company is obligated to defend 1395 Rockaway Parkway LLC in the action titled *Anthony Simon v 1395 Rockaway Parkway, LLC; Tasty Delicious Restaurant, Inc.; and Tasty Delicious Bakery & Restaurant, Inc.* (index No. 000244/2016 [Sup Ct Kings County]) on a primary, noncontributory, basis; and it is further

ORDERED and ADJUDGED that plaintiff Greater New York Mutual Insurance Company is entitled to recover from defendant Utica First Insurance Company its expenditures, including attorneys' fees and costs, incurred by it in connection with the defense of 1395 Rockaway Parkway LLC in the action titled *Anthony Simon v 1395 Rockaway Parkway, LLC; Tasty Delicious Restaurant, Inc.; and Tasty Delicious Bakery & Restaurant, Inc.* (index No. 000244/2016 [Sup Ct Kings County]); and it is further

ORDERED that the quantum of said expenditures is referred to a Special Referee to hear and determine, and that plaintiff's counsel will coordinate the calendaring of such a hearing with the Special Referees' Office of this court; and it is further

ORDERED that a preliminary conference will be held in this matter on February 6, 2020, at 2:15 p.m., at 111 Centre Street, Room 1166, New York, New York.

This shall constitute the decision, order, and judgment of the court.

ENTER:

Louis L. Nock

<u>1/3/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE