

Strathmore Ins. Co. v Utica First Ins. Co.

2020 NY Slip Op 31460(U)

May 19, 2020

Supreme Court, New York County

Docket Number: 153528/2017

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

STRATHMORE INSURANCE COMPANY

Plaintiff,

- v -

UTICA FIRST INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 153528/2017

MOTION DATE 06/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this declaratory judgement action arising from an insurance coverage dispute, the plaintiff, Strathmore Insurance Company, moves for partial summary judgment seeking a declaration that the defendant, Utica First Insurance Company, had a primary, noncontributory duty to defend Peldale Owners Corporation (Peldale) as additional insureds under the policy the defendant issued to Brothers Construction (Brothers), a party in the underlying personal injury action pending in the Supreme Court, Westchester County, Gerard Haughey v Peldale Owners Corporation et al, Index No. 59764/2016. The plaintiff also seeks summary judgment on the portion of the complaint seeking to require the defendant to reimburse the necessary costs and expenses incurred by the plaintiff, on behalf of Peldale, in defending Peldale in the underlying action plus statutory interest. The plaintiff also seeks, in essence, for the defendant to pay its costs in bringing the instant motion. The defendant opposes. The plaintiff's motion is granted in part as discussed herein.

In the underlying action, Gerard Haughey seeks damages for injuries allegedly sustained on September 9, 2015 when he tripped on the sidewalk adjacent to 838 Pelhamdale Avenue, in New Rochelle, New York, a property owned by Peldale. Brothers was performing construction on the sidewalk. The complaint alleges that Haughey was "injured solely as a result of the negligence, carelessness, and recklessness of Brothers Construction Inc., and their agents,

servants, and/or employees, in the ownership, possession, operation, management, use, maintenance, supervision, and control of the premises and in allowing and permitting the premises to exist in a dangerous and defective condition, and in failing to make proper and timely inspections and repairs thereto.”

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law (see Alvarez, supra; Zuckerman, supra; O’Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O’Halloran v City of New York, supra; Giaguinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

The plaintiff contends that the defendant has a duty to defend Peldale, as the defendant had an obligation to defend the additional insured under its insurance policy and the defendant improperly declined coverage under the agreement. For an insurance provider to disclaim a contractual duty to defend pursuant to a policy exclusion, it must demonstrate that the allegations in the underlying complaint against the insured, such as those made against Brother in Gerard Haughey v Peldale Owners Corporation et al, Supreme Court, Westchester County, Index No. 59764/2016, cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. See Frontier Insulation Contractors, Inc. v Merchs. Mut. Ins. Co., 91 NY2d 169 (1997). “The duty to defend is decided solely on the allegations in the complaint [against the insured] which must be accepted by a court as true.” Cont’l Cas. Co. v Employers Ins. Co. of

Wausau, 60 AD3d 128, 142 (1st Dept. 2008). The duty to defend is broader than the duty to indemnify. See Fitzpatrick v Am. Honda Motor Co., 78 NY2d 61 (1991). An allegation creates a duty to defend whenever there is a “reasonable possibility of recovery under the policy.” Id.; see also Frank v Cont’l Cas. Co., 123 AD3d 878 (2nd Dept. 2014). If the allegations of the complaint fall within the scope of coverage, an insurer must defend. See Fitzpatrick v Am. Honda Motor Co., supra.

Here, the plaintiff submits, *inter alia*, the insurance policy the defendant issued to Brothers, the Indemnification and Insurance Requirement Agreement between Brothers and Peldale, requiring Brothers to name Peldale as an additional insured under the policy, and the complaint and Verified Bill of Particulars from the underlying action. The policy, in form BAI-1 Ed.1.1, defines an additional insured as, “[a]ny person or organization whom you are required to name as an additional insured on the policy under a written contract or written agreement,” and provides coverage “with respect to liability arising out of A. ‘Your [Brother’s] work’ for that additional insured for or by you.” The complaint in the underlying action specifically alleges that Haughey was “injured solely as a result of the negligence, carelessness, and recklessness of Brothers Construction Inc., and their agents, servants, and/or employees, in the ownership, possession, operation, management, use, maintenance, supervision, and control of the premises and in allowing and permitting the premises to exist in a dangerous and defective condition, and in failing to make proper and timely inspections and repairs thereto” inasmuch as Brothers was performing construction work on the sidewalk of the premises. These submissions establish, *prima facie*, that under a plain reading of the policy there is a factual or legal basis upon which the defendant may eventually be held obligated to indemnify Peldale as the allegations of the complaint are not wholly within any exclusion under the policy, and as such that there is a duty to defend.

In opposition, the defendant raises several arguments. First, the defendant argues that there is no privity between Brothers and Peldale, as there is no signed written contract between Brothers and Peldale naming Peldale as an additional insured. Second, the defendant argues that the motion must be denied because the plaintiff submitted the Indemnification and Insurance Requirement Agreement between Brothers and Peldale as an exhibit to an attorney affirmation, which is insufficient to properly authenticate the documents the plaintiff submitted and is improper as it is used solely as a vehicle to introduce documents and is devoid of factual arguments.

The defendant's arguments do not warrant denial of the motion. The defendant sold a policy that permitted its named insured, Brothers, absolute discretion and authority in deciding who qualifies as an additional insured thereunder, stating that an additional insured is "[a]ny person or organization whom you are required to name as an additional insured." Inasmuch as the Indemnification and Insurance Requirement Agreement between Peldale and Brothers requires Brothers to name Peldale as an additional insured for jobs performed for Peldale, Peldale qualifies as an additional insured under the policy.

Similarly, the plaintiff's attorney affirmation is sufficient to provide, *inter alia*, an executed agreement maintained in its file under its claim handling processes, and is not improper inasmuch as it seeks only to introduce evidence. The plaintiff's attorney, Jonathan A. Messier, is an attorney in the general counsel's office of the plaintiff and states that he has personal knowledge of the authenticity of the documents by virtue of bring in possession of the documents and having read the claims files of his company. See First Interstate Credit All., Inc. v Sokol, 179 AD2d 583, 584 (1st Dept. 1992); Comptroller v Gards Realty Corp., 68 AD2d 186, 188 (2nd Dept. 1979) ["where the affidavit of an attorney on a motion for summary judgment is based on documentary evidence in the attorney's possession, it may have probative value and should be evaluated by the court" *quoting Getlan v Hofstra Univ.*, 41 AD2d 830, 831 (2nd Dept. 1973)]; see also Zuckerman v City of New York, 49 NY2d 557, 563 (1980) ["The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts."].

However, to the extent that the plaintiff seeks attorney's' fees, the plaintiff fails to establish its entitlement to that relief. Generally, in a cause of action seeking attorneys' fees, such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). Here, the plaintiff fails to point to any contractual or statutory provision, nor does it even discuss its entitlement to such relief in its papers.

Accordingly, it is,

ORDERED that the plaintiff's motion for partial summary judgment is granted to the extent that it seeks a declaration that the defendant has a primary, noncontributory duty to defend Peldale Owners Corporation with the amount owed by the defendant to the plaintiff to be determined at an evidentiary hearing, and the motion is otherwise denied; and it is further,

ADJUDGED and DECLARED that the defendant has a primary, noncontributory duty to defend Peldale Owners Corporation; and it is further,

ORDERED that the parties are directed to contact chambers on or before June 30, 2020 for a conference to schedule a hearing.

This constitutes the Decision, Order, and Judgment of the court.

5/19/2020
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE