

City of New York v Philadelphia Indem. Ins. Co.

2022 NY Slip Op 30960(U)

March 16, 2022

Supreme Court, New York County

Docket Number: Index No. 450527/2019

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 38M

Justice

-----X

INDEX NO. 450527/2019

THE CITY OF NEW YORK and THE BOARD OF
EDUCATION OF THE CITY SCHOOL DISTRICT OF THE
CITY OF NEW YORK,

MOTION DATE 04/05/2021

MOTION SEQ. NO. 002

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72

were read on this motion for SUMMARY JUDGMENT (AFTER JOINDER).

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiffs' motion for summary judgment pursuant to CPLR 3212 is granted in part to the extent set forth herein, and defendant Philadelphia Indemnity Insurance Company's cross motion for summary judgment on its counterclaim is denied, based upon the following memorandum decision.

Background

In this declaratory judgment action, plaintiffs City of New York (the "City") and Board of Education of the City School District of the City of New York (the "Board," and collectively "plaintiffs") seek a declaration that they are entitled to defense and indemnification from their insurance carrier, defendant Philadelphia Indemnity Insurance Company ("PIIC") in an underlying personal injury action captioned *Washington v BronxWorks, Inc., et al*, Index No.

156646/2016 (Sup Ct NY County) (the “*Washington* action”),¹ as well as recovery of plaintiffs’ defense costs. Defendant PIIC counterclaimed seeking a declaratory judgment that it is not obligated to defend and indemnify plaintiffs in the *Washington* action. Plaintiffs now move for summary judgment on their complaint against PIIC; to dismiss PIIC’s counterclaim and affirmative defenses; and for a declaration that plaintiffs are entitled to their attorneys’ fees. PIIC cross-moves for summary judgment on its counterclaim and to dismiss the complaint.

Pursuant to a contract with the City’s Department of Youth and Community Development, former defendant BronxWorks, Inc.,² operated an “Out-of-School Youth” program, which provided eligible persons with education and employment services (NYSCEF Doc. No. 39). As part of the contract, which was renewed twice, BronxWorks agreed to maintain “Commercial General Liability Insurance covering [BronxWorks] as Named Insured and the City as an Additional Insured Such insurance shall protect the City and [BronxWorks] from claims for property damage and/or bodily injury” (NYSCEF Doc. No. 40, Appendix A, § 7.02[A]). Further, the policy must “contain no exclusions for abuse or molestation, including exclusions for such claims arising out of negligent employment, investigation, supervision, reporting, or retention” (*id.*, § 7.02[C]).

In accordance with the agreement, BronxWorks procured from PIIC a Commercial Lines Policy, which listed BronxWorks as the Named Insured (NYSCEF Doc. No. 42, Common Policy Declarations). The policy declarations include, *inter alia*, coverage for “Sexual/Physical Abuse” (*id.*). The policy provides that PIIC will pay “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury,’” and has the “right and duty to defend

¹ Pending in the City Trial Readiness Part.

² BronxWorks, Inc., was let out of the case by notice of discontinuance dated April 14, 2020 (NYSCEF Doc. No. 30). The caption of this decision and order reflects that reality by only listing PIIC as a party defendant.

the insured against any ‘suit’ seeking those damages” (*id.*, CG 00 01 12 07, ¶ 1[a]). Both the City and the Board are named as additional insureds to the extent that the policy covers bodily injury caused “in whole or in part, by [BronxWorks’] acts or omissions; or the acts or omissions of those acting on [BronxWorks’] behalf in the performance of [BronxWorks’] ongoing operations” (*id.* at 129, 131, 143, 144, 169-70).

Included in the policy documents is a Form CG 21 46 07 98 titled “Abuse or Molestation Exclusion” (*id.* at 146). This exclusion modified the Commercial General Liability Coverage by excluding bodily injury arising out of

- “1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or
2. The negligent: a. Employment; b. Investigation; c. Supervision; d. Reporting to the proper authorities, or failure to so report; or e. Retention; of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above” (*id.*).

On August 9, 2016, Dawn Washington, mother of female infant plaintiff Z.H., filed the *Washington* action against BronxWorks and nonparty Storefront Academy Harlem, which complaint was later amended (NYSCEF Doc. No. 43). In sum and substance, Washington alleged that BronxWorks placed nonparty Charles Johnson to intern at Storefront Academy Harlem but failed to adequately investigate and discover Johnson’s prior criminal record of charges of various sexually based offenses (*id.*). In June 2016, Johnson allegedly sexually assaulted Z.H. on multiple occasions at Storefront Academy Harlem and in a stairwell at a public housing project (*id.*). When Washington discovered what had happened, she swore out a criminal complaint against Johnson, and charges were subsequently brought against him (*id.*). On May 8, 2017, Washington commenced a second action captioned *Washington v New York City Department of Education, et al.*, Index No. 154262/2017, making substantially the same allegations against the Board, the New York City Department of Education, and the City

(NYSCEF Doc. No. 44). Washington held the defendants in both actions responsible for the abuse of her daughter, alleging that they were negligent in hiring and investigating Johnson and in recommending that Storefront Academy Harlem hire him, and that such negligence caused her daughter's abuse (NYSCEF Doc. Nos. 43-44). On December 13, 2017, this court, per the Hon. Robert R. Reed, issued an order consolidating both actions under the *Washington* action's index number, and ordering that the pleadings in the prior actions would stand as the pleadings in the consolidated action (NYSCEF Doc. No. 2).

On August 16, 2018, plaintiffs attempted to tender the defense of the *Washington* action to PIIC (NYSCEF Doc. No. 35, Exhibit A). PIIC asserts that it never received this tender because of a typographical error in the email address it was sent to (NYSCEF Doc. No. 65, ¶ 22). On October 17, 2018, plaintiffs made a second tender of the defense of the *Washington* action, and PIIC then disclaimed coverage on October 18, 2018, stating that the allegations of the complaints in the *Washington* action are excluded from coverage by the "Abuse or Molestation Exclusion" (NYSCEF Doc. No. 46).

Plaintiffs commenced this action against PIIC and BronxWorks by filing a summons and complaint on April 23, 2019 (NYSCEF Doc. No. 1). PIIC answered and interposed a counterclaim on July 1, 2019 (NYSCEF Doc. No. 8). Plaintiffs then later discontinued this action as against BronxWorks (NYSCEF Doc. No. 30). Plaintiffs and PIIC now make the instant motion and cross motion for summary judgment.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

Central to the dispute between the parties is the language of the Abuse and Molestation Exclusion, and whether it should operate to bar coverage of the *Washington* action. Plaintiffs have disclaimed reliance on other provisions of the policy (NYSCEF Doc. No. 71 at 1).

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 A.D.3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 N.Y.3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 N.Y.2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 A.D.3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 N.Y.2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 N.Y.2d 347, 352 [1996]).

The duty to defend under an insurance policy is exceedingly broad and extends beyond the limits of the duty to indemnify, covering any situation where the allegations of the complaint “suggest a reasonable possibility of coverage” (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotations and citation marks omitted]). “Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course” (*id.*). “If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be” (*id.* [internal quotations and citation marks omitted]). The duty remains “even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered” (*id.* [internal quotations and citation marks omitted]).

“When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage” (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]). More specifically,

“[t]o be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint 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”

(*Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997].)

Here, plaintiffs assert, and PIIC does not contest, that they are additional insureds under the policy. Accordingly, plaintiffs are entitled to coverage for bodily injury arising out of any of BronxWorks’ acts or omissions, or the acts or omissions of anyone acting on BronxWorks’ behalf (NYSCEF Doc. No. 42 at 129, 131, 143, 144, 169-70). Plaintiffs argue that the Abuse and Molestation Exclusion does not apply to bar coverage, and defendants assert that it does.

The Abuse and Molestation Exclusion has two provisions, each of which itself has multiple components. First, the exclusion bars coverage for the actual or threatened abuse or molestation by anyone of any person,” provided that such abuse or molestation takes place while the victim is “in the care, custody or control of any insured” (NYSCEF Doc. No. 42 at 146, § 1). Thus, while the allegations of the *Washington* action clearly satisfy the first requirement to bar coverage, the first provision of the exclusion will only apply if Z.H. was in the care, custody, or control of BronxWorks or plaintiffs. The allegations of the consolidated pleadings are directed equally at all four defendants: the City, the Board, BronxWorks, and Storefront Academy Harlem (NYSCEF Doc. No. 43, ¶¶ 7-24, 28-29; NYSCEF Doc. No. 44, ¶¶ 8-22, 30-31). Moreover, Washington alleges that Z.H. was assaulted both at Storefront Academy Harlem and in a public housing project (NYSCEF Doc. No. 43, ¶¶ 14-17, 19; NYSCEF Doc. No. 44, ¶¶ 15-18, 20). Neither side argues that Z.H. was under a named insured’s care, custody or control while at the housing project, but there exists a factual scenario where Z.H. was in the care, custody and control of Storefront Academy Harlem, rather than any named insured, which would bar application of the exclusion. As plaintiffs correctly assert, Storefront Academy Harlem, a charter school, is a separate entity from both the City and the Board (The policy provides coverage for bodily injury caused in whole or in part by BronxWorks’ acts or omissions; or the acts or omissions of those acting on BronxWorks’ behalf in the performance of BronxWorks’ ongoing operations (NYSCEF Doc. No. 42 at 129, 131, 143, 144, 169-70), and Johnson was a volunteer participant in BronxWorks’ program when it referred him to the school.

Similarly, the second provision of the Exclusion does not operate to bar coverage. This provision consists of three components: (1) the negligent employment, investigation, supervision, reporting to the proper authorities, or failure to so report, or retention (2) of any

person for whom an insured is now or ever was legally responsible (3) “and whose conduct would be excluded by” the first provision (*id.* at 146, § 2). Again, the allegations of the complaint fall within the first two components; the consolidated pleadings allege that plaintiffs, BronxWorks, and Storefront Academy Harlem, were negligent in failing to discover Johnson’s prior criminal history, and were negligent in recommending him for hire as an intern to Storefront Academy Harlem (NYSCEF Doc. No. 43, ¶¶ 23, 28; NYSCEF Doc. No. 44, ¶ 30). It is the third component, however, that bars application of the exclusion, as person who is the subject of the attempt to apply the exclusion must have acted in a way that would be excluded from coverage under the first provision. As set forth above, the first provision does not apply, and ergo, neither does the second.

Because there exists a factual scenario outside of the contours of the exclusion, PIIC has not met its burden of showing that “the allegations of the complaint 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 (*Frontier Insulation Contractors, Inc.*, 91 NY2d at 175). Even if plaintiffs are ultimately found not to be liable in the underlying action, the broad duty to defend requires that PIIC provide them with a defense until then (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137).

Plaintiffs also seek to recover their costs and reasonable attorney’s fees in defending the *Washington* action until now. Where the allegations of an underlying action trigger a duty to defend, the insurer is also obligated to pay defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40 [1st Dept 2005]). It appears from the record that PIIC timely denied tender of the *Washington* action on October 18, 2018, and accordingly PIIC must reimburse plaintiffs for their

defense costs in the *Washington* action from that date until they take up defense of that action as required by the policy, plus prejudgment interest (*National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.*, 103 A.D.3d 473, 474 [1st Dept 2013]). Determination of the amount of those costs and fees shall be severed and set down for an inquest before Judicial Hearing Officer or Special Referee.

Plaintiffs are not, however, entitled to recover their costs and attorney's fees in the instant action. As both parties recognize, one of the seminal cases on this issue, *Mighty Midgets, Inc. v Centennial Ins. Co.* (47 NY2d 12, 21 [1979]), held that such recovery "may not be had in an affirmative action brought by an assured to settle its rights," but only where the assured "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995] ["It is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy"]). PIIC did nothing to cast plaintiffs into a defensive posture prior to plaintiffs commencing the instant action, and plaintiffs may not create a new exception to the rule previously stated simply because PIIC happened to assert a counterclaim. As the Court of Appeals has subsequently held, "an insured who prevails *in an action brought by an insurance company* seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598 [2004] [emphasis added]). Plaintiff's reliance on *Hurney v Mattson* (59 AD2d 934, 935 [2d Dept 1977]), which predates the Court of Appeals decisions cited above, is unavailing.

Finally, the Court's decision granting plaintiffs' motion renders PIIC's cross motion for summary judgment on the counterclaim, as well as PIIC's affirmative defenses, academic. Accordingly, that branch of plaintiffs' motion seeking dismissal of the counterclaim and affirmative defenses is granted, and PIIC's cross motion is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted as set forth herein, and defendant Philadelphia Indemnity Insurance Company's cross motion is denied; and it is further

ADJUDGED and DECLARED that defendant Philadelphia Indemnity Insurance Company is obliged to provide a defense to, and provide coverage for plaintiffs in the action captioned *Washington v BronxWorks, Inc., et al*, Index No. 156646/2016 (Sup Ct NY County); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs the City of New York and the Board of Education of the City School District of the City of New York and against defendant Philadelphia Indemnity Insurance Company on the issue of liability for plaintiffs' defense costs and reasonable attorney's fees incurred in the underlying action from October 18, 2018 to the time defendant Philadelphia Indemnity Insurance Company takes up a defense of the underlying action, with the issue of the amount of said defense costs and reasonable attorney's fees and the interest accruing thereon to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of such defense costs and reasonable attorney's fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of Plaintiff's said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that the branch of plaintiffs' motion that seeks summary judgment dismissing the counterclaim and defendant PIIC's affirmative defenses is granted; and it is further

ORDERED that the branch of plaintiffs' motion seeking its costs and reasonable attorney's fees in the instant action is denied.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/16/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
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 checked="" 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 checked="" type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER