

City of New York v Alliance of Nonprofits for Ins.

2023 NY Slip Op 30216(U)

January 20, 2023

Supreme Court, New York County

Docket Number: Index No. 451467/2020

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

THE CITY OF NEW YORK,

Plaintiff,

INDEX NO. 451467/2020

MOTION DATE 12/08/2020

MOTION SEQ. NO. 001

- v -

ALLIANCE OF NONPROFITS FOR INSURANCE,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 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, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, and 44

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that plaintiff’s motion for summary judgment is granted and defendant’s cross motion for summary judgment is denied, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 9-10, 43-44), and the exhibits attached thereto, in which the court concurs.

As more specifically set forth therein, plaintiff City of New York (the “City”) is an additional insured under a policy of insurance issued by defendant Alliance of Nonprofits for Insurance (“ANI”) a Risk Retention Group chartered in Vermont, to nonparty Highland Park Community Development Corporation (“Highland Park”). The City engaged Highland Park to operate a homeless shelter located at 2520 Tilden Avenue, Brooklyn, New York (the “shelter”). Pursuant to its contract with the City, Highland Park was responsible for maintaining the grounds of the shelter (contract, NYSCEF Doc. No. 14, Appendix B, § 13.03[C][1]) and complying with Title 18, Part 900 of the New York Codes, Rules, and Regulations (18 NYCRR §§ 900.1, *et seq.*) and “all other applicable laws” (contract, NYSCEF Doc. No. 14, Appendix B, § 13.03).

In an underlying personal injury action captioned as *Nicole Leach v City of New York, New York City Department of Homeless Services, 2520 Tilden Fee, LLC, and Mason Services, LLC*, pending in Supreme Court, Kings County, under index Number 523833/2017 (the “*Leach* action”), the plaintiff, Nicole Leach, alleges that she stepped on a garbage bag outside of the shelter and injured her foot (notice of claim, NYSCEF Doc. No. 18; *Leach* action complaint, NYSCEF Doc. No. 19). The City, on January 22, 2018, tendered the defense of the *Leach* action to ANI, and forwarded to ANI a copy of the complaint and Highland Park’s certificate of insurance (Comarou affirmation, NYSCEF Doc. No. 10, ¶ 15). In follow-up conversations, the City also forwarded its contract with Highland Park, the agreement extending the contract, and the notice of claim that Nicole Leach sent to the City (*id.*). On February 19, 2018, ANI disclaimed coverage, on the grounds that the complaint in the *Leach* action did not name Highland Park as a defendant or allege that Highland Park was responsible for maintenance of the sidewalk outside the shelter or the garbage bags placed on the sidewalk and therefore the *Leach* action did not arise out of Highland Park’s acts or omissions (disclaimer letter, NYSCEF Doc. No. 24 at 4).

As an initial matter, ANI raises several grounds to disclaim coverage, including late notice and exceptions to the additional insured endorsements of the ANI policy, that were not raised in the disclaimer letter. Under New York law, defenses to coverage not raised in the disclaimer letter are waived (Insurance Law § 3420[d][2]; *Hartford Underwriting Ins. Co. v Greenman-Pederson, Inc.*, 111 AD3d 562, 563 [1st Dept 2013]). ANI argues that because it is a Risk Retention Group it is covered by the Liability Risk Retention Act and exempt from this provision of the Insurance Law (*see generally Wadsworth v Allied Professionals Ins. Co.*, 748 F3d 100 [2d Cir 2014]). Assuming for purposes of deciding the motion that ANI was acting as a

Risk Retention Group and is not covered by Insurance Law § 3420, ANI remains subject to the laws of its chartering state, in this case Vermont (*Wadsworth*, 748 F3d at 103; *see Hala v Orange Regional Med. Ctr.*, 178 AD3d 151, 153 [2d Dept 2019] [analyzing claim regarding insured of a Risk Retention Group under law of domicile state as well as New York]). Like New York, Vermont also requires that insurers state all known defenses in the disclaimer or else waive them (*Northshire Communications, Inc. v AIU Ins. Co.*, 174 Vt 295, 299 [2002]). Accordingly, other than the defense that the *Leach* action does not arise out of Highland Park's acts or omissions, all defenses raised in ANI's opposition have been waived by ANI's failure to include them in its disclaimer of coverage.

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]).

"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]).

Here, Highland Park was responsible for maintenance of the grounds of the shelter pursuant to its contract with the City. Under the same contract, Highland Park was also responsible for compliance with applicable laws and regulations regarding "sanitation and maintenance" (18 NYCRR 900.6[a][6]; 900.18[a] ["The facility must be maintained in a good state of repair and sanitation"]), keeping the sidewalk outside of the shelter clear of garbage and other obstructions (Administrative Code of City of NY § 16-118[2][a]), and timely placing trash for collection and removing trash receptacles (16 RCNY 1-02.1[a]). A photograph attached to Leach's notice of claim and forwarded to ANI show several trash bags on the sidewalk in front of the shelter where Leach was injured. Accordingly, there is at least "a reasonable possibility" that Highland Park's act or omission regarding the trash within the bags caused Leach's injury, as Highland Park was responsible for the shelter's trash and sidewalk maintenance pursuant to the contract and the above-cited rules and regulations (contract, NYSCEF Doc. No. 14, Appendix B, §§ 13.03; 13.03[C][1]; *Cook*, 7 NY3d at 137). While Highland Park is not a party to the *Leach* action the finder of fact could determine that the defendants therein are only vicariously liable for Highland Park's conduct, and accordingly the *Leach* action comes within

the embrace of the policy (*Cook*, 7 NY3d at 137). ANI must tender a defense, and the City is entitled to a declaration to that effect.

The City also seeks to recover its costs and reasonable attorney's fees in defending the *Leach* 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 Kozłowski*, 18 AD3d 33, 40 [1st Dept 2005]). It appears from the record that ANI denied tender of the *Leach* action on February 19, 2018, and accordingly ANI must reimburse plaintiffs for their defense costs in the *Leach* 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 a further hearing before the undersigned.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted as set forth herein, and defendant Alliance of Nonprofits for Insurance's cross motion is denied; and it is further

ADJUDGED and DECLARED that defendant Alliance of Nonprofits for Insurance is obliged to provide a defense to, and provide coverage for plaintiff in the action captioned *Nicole Leach v The City of New York, New York City Department of Homeless Services, 2520 Tilden Fee, LLC, and Mason Services, LLC*, Index No. 523833/2017, Supreme Court, Kings County; and it is further

ORDERED that the issue of the amount of plaintiff's defense costs and reasonable attorney's fees incurred in the underlying action from February 19, 2018, to the time defendant Alliance of Nonprofits for Insurance takes up a defense of the underlying action, shall be determined at a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for a scheduling conference in Room 1166, 111 Centre Street, New York, New York, on February 15, 2023 at 10:00 AM.

This constitutes the decision and order of the court.

Louis L. Nock

<u>1/20/2023</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 type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE