PR & TR Realty, LLC v Harleysville Preferred Ins. Co.
2020 NY Slip Op 35600(U)
February 25, 2020
Supreme Court, Queens County
Docket Number: Index No. 716970/18
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

PR & TR REALTY, LLC, POWERS CHANG, and RUTH CHANG,

Plaintiffs,

- against-

HARLEYSVILLE PREFERRED INSURANCE COMPANY N/K/A NATIONWIDE INSURANCE COMPANY,

Defendants.

Index No. 716970/18

Motion Date October 22, 2019

Motion Cal. No. 35

Motion Seq. No. 1

FILED
MAR 10 2020
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF12 to EF52 read on this motion by plaintiff for an Order declaring that Harleysville Preferred Insurance Company, n/k/a Nationwide Insurance Company ("Harleysville"), is obligated to fully insure, defend and indemnify plaintiff for the underlying lawsuit pending in Supreme Court under Index Number 712086/2017 and must reimburse plaintiff for attorneys costs, fees and disbursements for expenses in connection with its defense of the underlying lawsuit; and cross motion by Harleysville for summary judgment in its favor dismissing the complaint and declaring that Harleysville has no obligation to insure, defend or indemnify plaintiffs, PR & TR and Powers Chang and Ruth Chang in the underlying lawsuit.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF12-EF25
Notice of Cross Motion - Affirmation - Exhibits.....	EF40-EF51
Affirmation in Opposition - Exhibits.....	EF28-EF39
Reply Affirmation.....	EF52

Upon the foregoing papers, it is ordered that the motion and cross motion are determined herein as follows:

Plaintiff in this declaratory insurance action seeks a declaration by the court that Harleysville is obligated to fully insure, defend and indemnify plaintiff for the underlying lawsuit pending in Supreme Court under Index Number 712086/2017. Briefly, Harleysville issued a Dwelling Policy of insurance for the policy period of June 21, 2016 to June 21, 2017, to Mr. and Mrs. Chang at 4265 Kissena Blvd., Unit 203, Flushing, New York ("the Policy"). The

Policy included coverage for personal liability, including claim[s] made or if a suit is brought against an "insured" for damage because of bodily injury or property damage cause by an occurrence to which coverage applies. The liability coverage of the Policy excludes coverage to "business," or "bodily injury or property damage 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 an insured.

The Underlying action was commenced by Karl Yarborough against the City of New York, PR &TR and Ziba Holding, LLC. In the verified complaint, it is alleged that Yarborough was injured on October 8, 2016, after falling on the sidewalk and thoroughfare adjacent to premises known as 4104 108th Street, Corona, New York ("the premises"). The premises are owned by PR & TR, which appeared in the underlying action with service of a Verified Answer, dated November 6, 2017. In the Verified Answer, PR & TR admitted ownership of the Premises.

The Changs sought coverage for the Yarborough incident under the Harleysville Policy. Harleysville conducted an investigation into the accident and ownership and use of the Premises and learned that the premises were rented and not occupied by either Mr. or Mrs. Chang. Ultimately, after several attempts to question the property manager for the Premises, Harleysville denied coverage to the Changs by letter dated September 13, 2017. The underlying action was thereafter commenced against PR & TR.

After Harleysville refused coverage to the Changs in the underlying action, plaintiffs commenced the instant action. In this action, plaintiffs seek a declaration that Harleysville is obligated to provide them with coverage in the underlying action and reimburse them for all prior expenditures incurred in their defense of the Underlying Action. Harleysville appeared in this litigation by service of a Verified Answer to the Amended Verified Complaint, dated February 16, 2019. Subsequently on April 16, 2019, Harleysville served Combined Demands upon the plaintiffs, a First Set of Interrogatories to the Changs and a First Set of Interrogatories to PR & TR. By good faith correspondence dated July 19, 2019, Harleysville reminded counsel to plaintiff that responses to the foregoing discovery demands remained outstanding and sought responses to same in a timely fashion. When Harleysville did not receive said responses, Harleysville requested a Preliminary Conference to be held. The PC was scheduled for August 5, 2019. Plaintiffs failed to appear and it was adjourned to August 19, 2019. On August 19, 2019, a PC was held and an order entered into which provided that plaintiffs were to respond to Harleysville's demands within 30 days. One week later, plaintiff filed the instant motion for summary judgment. The motion is opposed by Harleysville, and Harleysville cross moves for summary judgment in its favor.

Discussion

Generally, it is for the insured to establish coverage *(Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]). Further, it is well-settled that a party not

named on the face of the policy is not entitled to coverage under said policy *(see Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]; *Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Company*, 5 AD3d 198 [1st Dept 2004]). On the merits, the evidence establishes that PR & TR are not insured under the Harleysville Policy. Plaintiff had the burden of establishing that the Changs had procured coverage for PR & TR, and they failed to do so (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [2d Dept 2003]).

The four corners of an insurance agreement govern who is covered and the extent of coverage (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1st Dept 1979]). In addition, where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent (*id.*). Here, the unambiguous language of the Harleysville policy comports with Harleysville's position that PR &TR Realty, LLC is not covered, either as a named or additional insured under the policy. Given that the pleading in the underlying action establish that only PR & TR are named as defendants in said litigation and that neither Mr. or Mrs. Chang are named as a defendant, and a Homeowner's Policy was issued to the Changs and provided only coverage to the Changs, PR & TR are not covered. Furthermore, the Policy defines "insured" to include "you and residents of your household who are (1) Your relatives; or (2) Other persons under the age of 21 and in the care of any person named above. . . " Therefore, Harleysville cannot be required to defend or indemnify plaintiffs for the underlying lawsuit claim (*see Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d at 388-89; *Moleon*, 304 AD2d at 339-340).

Plaintiffs argue that it was their "intent" to insure the Premises, the title of which was transferred by the Changs to PR & TR seven years prior to the commencement of the Harleysville Policy. In response, Harleysville argues that if this was, in fact, the case then plaintiffs should have secured a commercial policy or landlord policy of coverage when this transfer was made. Their failure to do so does not permit the court to re-write the Policy — a Homeowner's policy – to create coverage for a corporate entity where none exists. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform a contract entered into (*Grace v Nappa*, 46 NY2d 560, 565 [1979]; *see e.g., Laba v Carey,* 29 NY2d 302, 308 [1971]). It is this fundamental principle which controls the court's disposition of the present case.

In order to enforce the agreement, the court must construe the contract in accordance with the intent of the parties (*Greenfield v Philles Records, Inc.*, 98 NY2d 562 [2002]; *Garthon Bus. Inc. v Stein*, 138 AD3d 587 [1st Dept 2016]). In this regard, it has been held that the best evidence with regard to the intent of the parties is the very contract itself and the writings contained therein (*Greenfield v Philles Records, Inc.,* 98 NY2d at 569; *Dreisinger v Teglasi*, 130 AD3d 524 [1st Dept 2015]). " '[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies' " (*Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986], quoting *State of New York v*

Home Indem. Co., 66 NY2d 669, 671 [1985]), whose unambiguous provisions must be given "their plain and ordinary meaning" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [internal quotation marks and citations omitted]; *see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471-473 [2005]; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]). "An exclusion from coverage 'must be specific and clear in order to be enforced' (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]), and an ambiguity in an exclusionary clause must be construed most strongly against the insurer" (*Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 761 [2d Dept 2007]; *see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; *Ruge v Utica First Ins. Co.*, 32 AD3d 424, 426 [2d Dept 2006]). However, the plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists (*see Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2d Dept 2003]; *Garson Mgt. Co. v Travelers Indem. Co. of Ill.*, 300 AD2d 538, 539 [2d Dept 2002]). Thus, extrinsic evidence of the parties' intent– such as the affidavit plaintiffs submitted in support of their motion– may be considered only if the agreement is ambiguous (*see Greenfield v Philles Records, Inc.*, 98 NY2d at 570). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). The Policy at issue is clearly a homeowner's policy with a business exclusion. The Policy on its face is reasonably susceptible of only one meaning, and this court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]).

The Third Department case relied on by plaintiffs, *Greenstein v Kasonowitz*, does not dictate a different result. In ruling against the insurance carrier, the court in that 1941 case clearly stated, that "[t]he intent to cover the business is not questioned" (*Greenstein v Kastonowitz*, 261 AD 858, 858 [3d Dept 1941]), whereas in the instant case defendant, Harleysville, is clearly contesting coverage of the business of PR & TR Realty, LLC, when it only issued a homeowner's policy to the Changs.

Accordingly, that branch of the motion by plaintiffs which is for a judgment declaring that Harleysville is obligated to defend and indemnify PR & TR in the underlying action pursuant to the subject insurance policy, is denied. That branch of the motion which is to direct Harleysville to reimburse plaintiff for attorneys costs, fees and disbursements for expenses in connection with its defense of the underlying lawsuit, is also denied.

The cross motion by Harleysville for a judgment declaring that it is not obligated to defend and indemnify PR & TR in the underlying action pursuant to the subject insurance policy, is granted.

Dated: February 25, 2020

DARRELL L. GAVRIN, J.S.C.

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