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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

BIG APPLE CIRCUS, INC.,

Plaintiff,

Index No. 601871/00

- against -

DECISION AND ORDER

002

CHUBB INSURANCE GROUP, FEDERAL INSURANCE COMPANY, BLOOMBERG L.P., and BLOOMBERG, INC.,

Defendants.

SCANNED

APR 26 2002

MARTIN SCHOENFELD, J.:

In this action the overriding issue is whether, for purposes of an underlying personal injury action, plaintiff Big Apple Circus, Inc. ("Circus") was an additional insured, entitled to defense and indemnity, under a liability insurance policy issued by defendant Federal Insurance Company ("Federal") to defendant Bloomberg, L.P. ("Bloomberg"). As matters now stand, Circus is suing Federal for reimbursement of some or all of the defense costs Circus expended in the underlying litigation; and Federal is suing Circus for reimbursement for some or all of the defense costs Federal expended and, most importantly, the return of $375,000 Federal paid on behalf of Circus in the settlement of that action.

Plaintiff now moves and defendant now cross-moves for summary judgment. For the reasons set forth herein, the motion is granted and the cross-motion is denied.

Basic Backsround

Bloomberg is the named insured under a policy (the "Policy") issued by Federal. The instant action arises out of Bloomberg's employee holiday party of December 16, 1994, which essentially was a night at the circus. By an amendment to the Policy (Cross-Moving Exhibit 3), effective that one particular day (the "One-day Amendment"), Circus was named as an additional insured under the Policy. The One-day Amendment provides, in relevant part, that:

> [the] WHO IS INSURED provision . . . is amended to include as an additional insured The Big Apple Circus, as required by contract, but only with respect to bodily injury [or] personal injury . . . arising out of:
>
> work performed for and on behalf of the named insured.
>
> But
>
> No such person or organization is an insured with respect to:
>
> 1. any occurrence which takes place after the contract expires;
>
> 2. bodily injury . . . arising out of the sole negligence of such person or organization.

The crucial words are "as required by contract."

The contract to which the One-Day Amendment refers is the September 30, 1994 Tent Sale Agreement (Cross-Moving Exhibit 4) (the "Tent Sale Agreement") by which Bloomberg obtained a two-hour circus performance and use of the tent for a private party before, during, and after. Paragraph 10 of the Tent Sale Agreement provided as follows:

> (10) [Bloomberg] acknowledges and hereby approves the type and amount of insurance carried by . . . Circus . . . . Bloomberg specifically acknowledges that the Circus does not carry, and shall have no obligation whatsoever to purchase, insurance coverage for the [illegible] or furnishing of alcohol[ic] beverages by [Bloomberg] in connection with the Performance or with any Activity conducted pursuant to Paragraph 6 above. Any insurance coverage in addition to or of a different type than [that carried by Circus] which [Bloomberg] deems necessary or desirable in connection with this Agreement shall be obtained and paid for by [Bloomberg], and the Circus shall be added to such policy as an additional insured.

Id. at 7-8. Paragraph 6 essentially allowed Bloomberg "to use the Tent or adjacent area prior to, during, or after the [circus] Performance for a private party or a similar 'Activity.'" Paragraph 10(a) of the Tent Sale Agreement provided that, should Bloomberg choose to serve alcohol, such service would be permitted only on condition that Bloomberg "provides an insurance certificate providing coverage in the sum of 1 Million Dollars ($1 million) indemnity for the Performance naming [Circus] as an additional insured." Id. at 8.

In the aforesaid underlying action, Nancy Pollak[1] v Lincoln Center for the Performing Arts, Supreme Court, New York County, Index No. 115152/95, the plaintiff alleged that she slipped, fell and injured herself while working as a waitress at an "activity" that took place after the circus performance had ended.

Pursuant to a policy of insurance that Gulf Insurance Company ("Gulf") had issued to Circus, Gulf undertook to defend Circus in the underlying action. By letter dated January 27,

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[1] "Pollak" is often mispelled "Pollack" in the papers. Her own signature indicates that "Pollak" is correct.

1997 (Moving Exhibit C), sent approximately a year and a half after the underlying action was commenced, Circus tendered the defense of that action to Federal. By letter dated March 13, 1997, Federal replied, acknowledging that it was the general liability carrier for Bloomberg, and stating that it was considering the matter. By letter dated August 25, 1997 (Moving Exhibit D), Federal wrote as follows:

> This shall serve to confirm our conversation of this date, at which time I advised [that] Federal . . . [,] as the Commercial General Liability insurer of [Bloomberg], hereby acknowledges [Circus] as an additional insured on its policy, effective December 16, 1994.
>
> Based on the foregoing, Federal . . . will agreed *[sic]* to defend/indemnify [Circus] based on the contractual agreement between [Bloomberg] and [Circus].
>
> Should it be determined through discovery & inspection that the injuries allegedly sustained by Nancy Pollak resulted from the negligence of [Circus], [Federal] hereby reserves its rights to defend/indemnify [Circus] in this litigation.
>
> By taking this position, Federal . . . does not waive any rights to any defenses available under the policy should additional information be received.
>
> Our position relative to the issues described herein is based on the present allegations contained in the third party complaint and on the facts as we know them.

Thereafter, pursuant to the "other insurance" provisions of the respective insurance policies, Federal and Gulf evenly shared the defense costs of Circus in the underlying litigation.

Circus commenced the instant action on or about May 1, 2000. In an October 10, 2000, stipulation (Cross-Moving Exhibit 2), Circus, Gulf, and Federal essentially agreed (1) to work together to resolve the Pollak litigation; (2) to fund equally, on an

interim basis, Circus's share in settling that action; and (3) to let the instant litigation determine which insurance company would ultimately pay Circus's defense and indemnity costs. The parties thereto eventually settled the Pollak litigation, with Federal and Gulf each paying $375,000 in order to obtain a release in favor of Circus.

Discussion

This Court finds, for two independent reasons, that Federal was obligated to defend and indemnify Circus in the underlying action.

Pre-Accident Documents

First, and most importantly, the One-day Amendment and the Tent Sale Agreement, read in conjunction, provide that Federal's insurance of Bloomberg extended to and covered Circus, as an additional insured, for the risk that occurred. The One-day Amendment states that Circus is an additional insured "as required by contract." The contract, *i.e.*, the Tent Sale Agreement, provides that any insurance coverage that Bloomberg "deems necessary or desirable in connection with this Agreement shall be obtained by and paid for by [Bloomberg] and the Circus shall be added to such policy as an additional insured." Bloomberg deemed it necessary or desirable to obtain the One-Day Amendment, which extended Federal's coverage of Bloomberg to Circus for the night in question, in connection with the Tent

Sale Agreement. Simply put, the One-Day Amendment provided whatever insurance the Tent Sale Agreement required, and the Tent Sale Agreement required Bloomberg to obtain insurance for Circus along with any insurance for itself, insurance which Bloomberg did, in fact, purchase.

Federal's basic argument is that its coverage of Circus extended only to the two-hour circus "performance," and not to the other holiday party activities that, pursuant to ¶ 6 of the Tent Sale Agreement, were allowed before, during, and after the circus performance. Federal bases this argument largely on Paragraph 10(a) of the Agreement (see, e.g., Cross-Moving Aff. ¶ 15), which essentially provides that if Bloomberg chooses to serve alcohol, Bloomberg will procure one million dollars of insurance coverage "for the Performance." Federal argues that Pollak was injured after the performance, during what Federal calls a "Paragraph 6 activity." This argument is unavailing for two independent reasons.

First, there is no evidence in the record that Bloomberg purchased insurance pursuant to Paragraph 10(a) of the Tent Sale Agreement. Thus, the insurance at issue is that required by Paragraph 10, not 10(a), of the Tent Sale Agreement. Second, even if Paragraph 10(a) had applied, this Court would have construed "the Performance" to include the entire Bloomberg party that evening.

> In resolving [problems of construction] primary attention must be given to the manifest purpose sought to be accomplished. When this is ascertained it will take precedence over all other canons of construction.

> . . . Substance must not be destroyed in deference to the naked word.

Matter of Herzog, 301 NY 127, 135-36 (1950) (citations omitted).

It is unfathomable that a circus seeking to insure itself against personal injury claims based on the consumption of alcohol at its premises on a particular evening would do so for the duration of a circus performance but not during a holiday party held in conjunction with the performance. Whether caused by a drunken fall or a drunken brawl, it is in human nature that an alcohol-related injury is much more likely to occur during a late-night party than during an evening circus performance consisting of "clowns, jugglers, aerialists, acrobats . . . animals" and the like. It is inconceivable that Circus would want to cover itself for the performance, and not the party. The manifest purpose of Paragraph 10(a) is simply to require more insurance if Bloomberg was going to serve alcohol, and to set forth certain safety rules. See Tent Sale Agreement ¶ 10(a) (1-6) Indeed, rule 3 is that "[n]o alcoholic beverages . . . be served during the show." The "show" is obviously the performance, and the entire paragraph would be pointless unless the insurance was meant to cover non-performance activities. The law is well settled that contracts should be construed so that no provision is rendered meaningless.

Post-Accident Events

The second reason for the instant decision is that Federal not only failed to disclaim coverage, it acknowledged coverage. Federal reads the following language in its own letter of August 25, 1997 letter *(supra)*

> based on the contractual agreement between [Bloomberg] and [Circus]

to mean that the coverage is "as limited by" the Tent Sale Agreement. An equally, if not more, plausible reading is "because of" or "as a result of." Of course, courts construe ambiguous language against the drafter, here, Federal. Furthermore, read as a whole, at best the letter reserves certain rights as to factual details; it does not disclaim coverage for a post-performance accident.

Insurance Law § 3420(d) requires that an insurer wishing to:

> disclaim liability or deny coverage for death or bodily injury arising out of . . . [an] accident occurring within this state . . . give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

The cases hold that a reservation of rights such as that set forth in Federal's August 25, 1997 letter does not constitute a disclaimer of liability within the meaning of Insurance Law § 3420(d). Zappone v Home Ins. Co., 55 NY2d 131 (1982); Hartford Ins. Co. v County of Nassau, 46 NY2d 1028 (1979). Federal contributed to the defense of Circus for more than three years, without disclaiming liability or denying coverage. Federal acknowledges that, during discovery in the underlying litigation,

it learned that the plaintiff therein might have been injured as a result of negligence on the part of Circus employees. See, Grant Aff., at 6. Yet, even then, Federal failed to disclaim, although the amendment to the Policy excludes from coverage injuries "arising out of the sole negligence of [the added insured]." As a matter of law, such a delay, absent any explanation therefor, is unreasonable. Jefferson Ins. Co. v Travelers Indem. Co., 92 NY2d 363 (1998); Vecchiarelli v Continental Ins. Co., 277 AD2d 992 (4th Dept 2000); Consolidated Edison Co. of New York, Inc. v U.S. Fidelity and Guar. Co., 263 AD2d 380 (1st Dept 1999).

Conclusion

Thus, for the reasons set forth herein, this Court finds that defendant Federal Insurance Company insured plaintiff Big Apple Circus, Inc. for the loss here in issue.

This opinion constitutes the decision and order of the Court and the clerk shall enter judgment accordingly

Dated: April 19, 2002

J.S.C.