Encompass Ins. Co. v Adelis

2010 NY Slip Op 33448(U)

November 23, 2010

Sup Ct., Nassau County

Docket Number: 26092/09

Judge: Ute W. Lally

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

MS

ENCOMPASS INSURANCE COMPANY,

Plaintiff,

-against-

JAMES ADELIS, KEVIN P. SMITH, JR., A-LEET ENTERPRISES GROUP, INC., d/b/a BOGARTS,

Defendants.

Motion Sequence #1
Submitted October 8, 2010
XXX

INDEX NO: 26092/09

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-3
Affs in Opposition.....4-9
Affs in Reply.....10&11

This motion by the plaintiff Encompass Insurance Company ("Encompass") for an order pursuant to CPLR 3212 granting it summary judgment declaring its obligations and the defendant insured James Adelis' rights to a defense and indemnification in the underlying personal injury action entitled *Kevin P. Smith, Jr. v James Adelis and A-Leet Enterprises Group, Inc., d/b/a Bogarts* (Index No. 000711/07) pending in this court is determined as provided herein.

In this declaratory judgment action, the plaintiff insurer Encompass seeks a declaration that the defendant James Adelis is not entitled to a defense and/or indemnification in the personal injury action brought against him and A-Leet Enterprises

Group, Inc. d/b/a Bogarts by the victim of an assault, Kevin P. Smith Jr. Encompass seeks summary judgment declaring that it is not obligated to defend or indemnify James Adelis in the action.

The facts pertinent to the determination of this motion are as follows:

On January 12, 2006, the defendant James Adelis was involved in an altercation with Kevin P. Smith, Jr. at premises being operated by A-Leet Enterprises, d/b/a Bogarts. As a result of that altercation, defendant James Adelis was indicted by a Grand Jury for Assault in the Second and Third Degrees. James Adelis pled guilty to Assault in the Second Degree on August 28, 2006. When asked to describe what happened while allocating his plea, James Adelis testified "well . . . we got into a little argument with some other guys at a bar and things turned around. We were outside, I saw my friend get knocked to the floor. I turned around and one of the guys was coming at me and I hit him." The Court then inquired, "[w]hen you hit him, was it your intention to cause him to have an injury?" to which James Adelis responded, "Yes, your Honor."

On January 11, 2007, Kevin P. Smith, Jr. commenced an action against James Adelis and A-Leet Enterprises Group, Inc., d/b/a Bogarts. His first cause of action sounds in intentional tort and his second cause of action sounds in negligence. James Adelis sought a defense and indemnification from Encompass and via letter dated February 12, 2007, Encompass notified James Adelis that it was reserving all rights to assert any and all policy defenses in connection with his claim and that it was not waiving, giving up, withdrawing or otherwise losing any defenses it might have. It stated that any action taken by it should not be construed to be an admission of liability or to effect, impair, or waive any of its rights under the policy. The specific reason it gave for its reservation of rights was

identified as the policy's exclusion of coverage for "bodily injury caused by intentional or criminal acts." More specifically, it cited the following provision of the policy:

> Losses We Do Not Cover
>
> 1) Personal liability and medical expense coverages do not apply to bodily injury or property damage:
>
> (h) intended by or which may reasonably be expected to result from the intentional or criminal acts or omissions of one or more covered persons. This exclusion applies even if . . . 2) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected. This exclusion applies regardless of whether or not such covered person is actually charged with or convicted of a crime.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Sheppard-Mobley v King*, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v Prospect Hosp.*, *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521, citing *Secof v Greens Condominium*, 158 AD2d 591).

The law with respect to the duty to disclaim was set forth by the Court of Appeals in *Worcester Ins. Co. v Bettenhauser* (95 NY2d 185, 188-189), citing *Zappone v Home Ins. Co.*, 55 NY2d 131, 134, 138; Jerge v Buettner, 90 NY2d 950, 953; *Handelsman v Sea Ins. Co., Ltd.*, 85 NY2d 96, 102, rearg den., 85 NY2d 924 as follows:

> "Disclaimer pursuant to [Insurance Law] section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered. Failure to comply with section 3420(d) precludes denial of coverage based on a policy exclusion."

Therefore, "[a] disclaimer pursuant to Insurance Law § 3420(d) is required when the denial of coverage is based upon a policy exclusion without which the claim would be covered." (*Ciasullo v Nationwide Ins. Co.*, 32 AD3d 889, 890, citing *Worcester Ins. Co. v Bettenhauser*, *supra*, at p. 188-189; *Handelsman v Sea Ins. Co., Ltd.*, *supra*). In contrast, "a disclaimer pursuant to CPLR 3420(d) 'is unnecessary when a claim falls outside the scope of the policy's coverage portion.' " (*Ciasullo v Nationwide Ins. Co.*, *supra,* quoting *Worcester Ins. Co. v Bettenhauser*, *supra*, citing *Zappone v Home Ins. Co.*, *supra* at p. 134.) "[T]he generally applicable rule is that an insurer's untimely . . . denial of a claim results in preclusion and it is incumbent upon the insurer to establish that it is excused from compliance with the 30-day rule because 'the insurance policy did not contemplate coverage in the first instance.' " (*Fair Price Medical Supply Corp. v Travelers Indem. Co.*, 42 AD3d 277, 284, aff'd. 10 NY3d 550, citing *Presbyterian Hosp. in City of New York v*

Maryland Cas. Co., 90 NY2d 274, rearg den. 90 NY2d 937; *Worcester Ins. Co. v Bettenhauser*, *supra*.

"Pursuant to Insurance Law § 3420(d), an insurer must give written notice of a disclaimer 'as soon as is reasonably possible' after the insurer learns of the grounds for the disclaimer of liability." (*Tully Const. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150, 1153, citing *First Financial Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66; *Reyes v Diamond States Ins. Co.*, 35 AD3d 830, 831, rearg den. 9 NY3d 814; *Lancer Ins. Co. v T.F.D. Bus Co., Inc.*, 18 AD3d 445, 446; *Mann v Gulf Ins. Co.*, 3 AD3d 554, 556; *McGinnis v Mandracchia*, 291 AD2d 484, 485). " '[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage.' " (*First Financial Ins. Co. v Jetco Contr. Corp.*, *supra*, at p. 68-69, quoting *Matter of Arbitration Between Allcity Ins. Co. and Jiminez*, 78 NY2d 1054, rearg den., 79 NY2d 823, citing *Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, rearg den., 47 NY2d 951).

"A reservation of rights letter does not constitute a disclaimer of coverage, nor does it negate an insurer's obligation to provide a timely rejection." (*Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 2009 WL 1370819 (Supreme Court New York County 2009), citing *New York Cent. Mut. Fire Ins. Co. v Hildreth*, 40 AD3d 602). In fact, "a reservation of rights letter . . . has no relevance to the question of timely notice of disclaimer." (*NYAT Operating Corp. v GAN National Insurance Company*, 46 AD3d 287, 288, lv den., 10 NY3d 715, citing *Hartford Ins. Co. v County of Nassau*, *supra*, at p. 1029).

Having pled guilty to assault in the third degree, the defendant James Adelis is estopped from relitigating his intent in the personal injury action. (*Royal Indem. Co. v*

Belcer, III, 242 AD2d 899, citing *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 666-668). Furthermore, that the plaintiff's complaint in the underlying action advances claims sounding in negligence as well as intentional tort is of no moment: It "does not alter the fact that 'the operative act giving rise to any recovery is the assault.'" (*Desire v Nationwide Mut. Ins. Co.*, 50 AD3d 942, citing *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352; *Public Service Mut. Ins. Co. v Camp Raleigh, Inc.*, 233 AD2d 273, lv den. 90 NY2d 801; see also, *WSTC Corp. v National Specialty Ins. Co.*, 67 AD3d 781, 783, citing *Mark McNichol Enterprises, Inc. v First Financial Ins. Co.*, 284 AD2d 964, 965; *Dudley's Rest. v United Nat. Ins. Co.*, 247 AD2d 425, 426; *Sphere Drake Ins. Co. v 72 Centre Ave. Corp.*, 238 AD2d 574, 576; see also, *Gibbs v CAN Inc. Companies*, 263 AD2d 836, lv den., 94 NY2d 755).

Encompass never disclaimed coverage for James Adelis. Assuming, *arguendo*, that its complaint here constituted its disclaimer, it was untimely as a matter of law. Encompass has been defending James Adelis in the underlying personal injury action for over two year and that action was commenced over one year after the defendant James Adelis' pled guilty to assault in the third degree. Thus, Encompass' disclaimer based upon the plaintiff's allegations in the underlying action, the policy exclusion and James Adelis' guilty plea was woefully late: All of those facts were known to Encompass for virtually the entire time that it defended James Adelis. Thus, the pivotal question here becomes whether coverage exists under the policy but for the exclusion relied upon by Encompass. (See, *Desire v Nationwide Mutual Fire Insurance Company*, *supra*).

The subject policy covers a claim or suit for "personal injury" or "bodily injury" caused by an "occurrence." The policy defines an "occurrence" as, *inter alia*, "[a]n offense, including a series of related offenses, committed during the policy period which results in personal injury." James Adelis' alleged acts for which coverage is sought under the policy fit the description of an "occurrence." Accordingly, coverage for James Adelis' acts exists under the policy's terms, absent the application of an exclusion. Since Encompass is relegated to rely solely upon the policy's exclusion to defeat James Adelis' claim for coverage, Encompass' failure to timely disclaim results in coverage.

Encompass Insurance Company's motion for summary judgment is denied.

It is hereby declared that the plaintiff Encompass Insurance Company is obligated to defend and indemnify the defendant James Adelis in the action entitled *Kevin P. Smith, Jr. v James Adelis and A-Leet Enterprises Group, Inc., d/b/a Bogarts.*

Settle Judgment on notice.

Dated: November 23, 2010

UTE WOLFF LALLY, J.S.C.

ENTERED
DEC 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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