

23 Grouse Drive, LLC v Hermitage Ins. Co.
2012 NY Slip Op 30661(U)
March 6, 2012
Supreme Court, Nassau County
Docket Number: 315/10
Judge: Thomas Feinman
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

23 GROUSE DRIVE, LLC and PASQUALE FEDELE
a/k/a PASCULLI FEDEL a/k/a FEDELE PASCULLI,

Plaintiffs,

- against -

HERMITAGE INSURANCE COMPANY,

Defendant.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 315/10

X X X

MOTION SUBMISSION
DATE: 1/20/12

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Notice of Cross-Motions and Affidavit.....	<u>X</u>
Memorandum of Law in Support of Motion..	<u>X</u>
Affirmations in Opposition.....	<u>X</u>
Reply Affirmation.....	<u>X</u>
Memorandum of Law in Support of Reply.....	<u>X</u>

RELIEF REQUESTED

The plaintiffs, 23 Grouse Drive, LLC and Pasquale Fedele a/k/a Pasculli Fedel a/k/a Fedele Pasculli, (hereinafter referred to as "23 Grouse Drive" and "Fedele Pasculli"), move for summary judgment. The defendant, Hermitage Insurance Company, (hereinafter referred to as "Hermitage"), cross-moves for summary judgment and submits a Memorandum of Law in support of its cross-motion. The plaintiffs submit opposition to the cross-motion. The defendant submits a reply affirmation and Memorandum of Law in support of its reply.

The plaintiffs initiated this declaratory judgment action, and by way of the instant motion for summary judgment, seek a declaration that the action entitled *Gerard Brady v. 23 Grouse Drive, LLC and Pasquale Fedele a/k/a Pasculli Fedele a/k/a Fedel Pasculli*, bearing Index Number 1912/09, in the Supreme Court, County of Nassau, (hereinafter referred to as the "underlying action"), is covered by the terms of the policy issued to Fedele Pasculli, that the defendant be obligated to defend and indemnify the plaintiffs, 23 Grouse Drive and Fedele Pasculli, that the defendant be obligated to pay any damages which may be awarded against the plaintiffs in this action, and in the underlying action, pursuant to the terms of the insurance contract, that the

defendant be obligated to pay attorneys' fees expended by the plaintiffs in defense of the underlying action, and award plaintiffs costs and disbursements.

The defendant, by way of cross-motion, seeks a declaration that the defendant has no duty to defend or indemnify plaintiffs in the underlying action.

BACKGROUND

The plaintiffs provide that Pasculli Fedele was the sole shareholder and President of 23 Grouse Drive, LLC, a corporation formed in 2007, which dissolved in 2010. The nature of the corporation was rental property. Fedele Pasculli testified that the premises located at 23 Grouse Drive, Brentwood, New York, a five bedroom, two bathroom house, was purchased as rental property and income property. The property was sold sometime in February 2009. Fedele Pasculli submits that the house was rented to two individuals under a verbal lease, and that he personally collected rent on a monthly basis. Rent was paid in cash. The plaintiffs were issued a commercial general liability policy from the defendant covering the premises, effective September 20, 2007 through September 20, 2008.

On or about April 26, 2008, Gerard Brady, (hereinafter referred to as 'Brady'), allegedly fell at the subject premises and sustained serious injuries. Brady, plaintiff in the underlying action, initiated the underlying action as and against 23 Grouse Drive and Fedele Pasculli, alleging negligence and labor law claims. The complaint alleges that Brady fell at the subject premises while working under the under the instruction of Fedele Pasculli, unsafe working conditions including failure to provide proper equipment, a safe ladder, and adequate supervision.

The defendant disclaimed coverage under the Employer's Liability Exclusion and the Independent Contractor's Exclusions. The defendant's disclaimer under the Employer's Liability Exclusion provision excludes coverage for bodily injury to an employee performing duties related to the conduct of the insured's business, whether the insured may be liable as and employer, or in any other capacity. The defendant's disclaimer under the Independent or Subcontractors Conditions Endorsement provision which excludes coverage for bodily injury arising out of any and all work performed by an independent contractor or subcontractor, regardless of whether the work is performed on the insured's behalf, or for others.

DISCUSSION

The plaintiff argues that the policy exclusion provisions cited by the defendant do not apply, and that the defendant cannot show that the allegations in the complaint can only be interpreted to exclude coverage. The plaintiff refers the paragraph "8" of the complaint in the underlying action, "The plaintiff fell while working under the instruction of defendant, Fedele, at the aforesaid premises", and submits such language "at best may present a question of whether the employee exclusion would apply". Plaintiff contends there are various interpretations to such language. The plaintiff also argues that Brady was not his employee, and was not hired by plaintiff to perform work at the premises.

It is well settled that provisions of an insurance contract which are clear and unambiguous must be enforced as written. (*Breed v. Insurance Co., N.A.*, 46 NY2d 351; *Venigalla v. Pennsylvania Mutual Insurance Co.*, 130 AD2d 974; *Pennsylvania General Ins. Co. v. Kielon*, 112 AD2d 709).

It is also well settled that a default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them. (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62; *Al Fayed v. Barak*, 39 AD3d 371). It was held to be error when the lower court reopened and redetermined the issue of Hass' liability, when Hass, by defaulting, was deemed to have admitted liability and should have only been permitted to contest the amount of damages at inquest. (*DD&P Realty, Inc. v. Robustiano*, 68 AD3d 1496).

A defaulting defendant admits to all traversable allegations in the complaint, including the basic issue of liability, however, does not admit to plaintiff's conclusion of damages. (*ABBAS v. Cole*, 44 AD3d 31). An insurer could not go behind an underlying default judgment to raise defenses extending to the merits of plaintiff's claim, (*Matychak v. Security Mutual Insurance Company*, 181 AD2d 957), but is entitled to proffer evidence concerning its disclaimer, (*Grover Hill Assoc. v. Colonial Indem. Ins. Co.*, 24 AD3d 607). An insurer has "the opportunity to meet its burden of establishing that it has no duty to indemnify because of the actual basis for the insured's liability to plaintiff" may fall under an exclusion. (*Robbins v. Michigan Millers Mutual Ins. Co.*, 236 AD2d 769). An "insurer is entitled, in a direct action against it, to raise defenses with respect to its obligations to cover the claims against [the] insured, including the applicability of any asserted policy exclusions" in the face of a default judgment obtained in the underlying action. (*K Investment Group, LLC v. American Guaranteed Liability Insurance Company*, 91 AD3d 401).

Here, this court does not find the plaintiff's selected portion of the complaint in the underlying action, *to wit*, "The plaintiff fell while working under the instruction of defendant, Fedele, at the aforesaid premises", as ambiguous. More importantly, the policy exclusion provisions relied upon by the defendant are clear and unambiguous.

However, the defendant has made a *prima facie* showing that the policy exclusions apply. Brady initiated an action as and against 23 Grouse and Fedele Pasculli in the underlying action asserting allegations of negligence and Labor law violations. Brady claimed that he fell at the subject premises on April 26, 2008 while performing work at the subject premises on behalf of 23 Grouse and Fedele Pasculli. Brady averred, in an affidavit in support of Brady's motion for a default judgment, that he "was hired by the defendants [23 Grouse and Fedele Pasculli] to replace windows on the side of their house." Brady further averred that Fedele Pasculli provided the ladder, and was holding the ladder, when Fedele Pasculli walked away causing Brady to fall onto the ground and sustain injuries. The defendant's claims examiner submits that as per the investigation conducted by the defendant, coupled with the underlying pleadings, the defendant concluded that the Independent Contractors Exclusion and Employer's Liability exclusion were applicable to this loss.

The plaintiff, Fedele Pasculli, as per his deposition testimony, does not deny that Brady fell on April 26, 2008, and provides that he learned that Brady fell on the same day [April 26, 2008], went to the premises shortly thereafter, saw a ladder, at the exterior of the premises, and was told by Brady that Brady fell off the ladder while he was performing some type of work to a window. However, Fedele Pasculli denied that he held the ladder for Brady, that Brady was doing work on his behalf, and that he gave Brady a ladder. However, as already provided, Fedele Pasculli, a

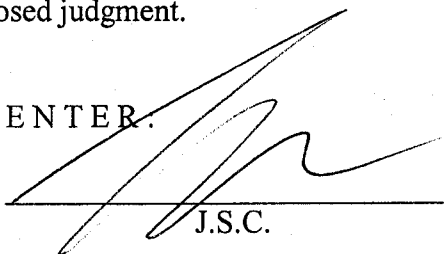
defaulting defendant, admitted to all traversable allegations in the complaint, including the basic issue of liability, and therefore, the issue of 23 Grouse and Fedele Pasculli's liability cannot be re-opened.

The plaintiff's contention that the policy exclusions do not apply, and the plaintiff's self-serving statement that he did not hire Brady to perform work on plaintiffs' behalf, are unavailing.

CONCLUSION

In light of the foregoing, the plaintiff's motion for summary judgment is denied, and the defendant's cross-motion for summary judgment is granted.

The defendant is hereby directed to Settle Judgment on Notice to the Clerk. A copy of this order with notice of entry shall accompany the proposed judgment.

ENTER.


J.S.C.

Dated: March 6, 2012

cc: Mound Cotton Wollan & Greengrass, Esqs.
Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP

ENTERED
MAR 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE