Adirondack Ins. Exch. v Hewu
2017 NY Slip Op 32647(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 155658/2016
Judge: Arlene P. Bluth
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
COUNTY OF NEW YORK : PART 32
---X
ADIRONDACK INSURANCE EXCHANGE and GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Plaintiffs,

Index No. 155658/2016
Motion Seq: 003,004

-against-

DECISION and ORDER

ARLENE P. BLUTH, JSC

JULIO HEWU and XIU FEN LIU, as Personal Representative of the Estate of CHUN HSIEN "MICHAEL" DENG,

Defendants.
---X

Motion Sequence numbers 003 and 004 in this action for Declaratory Judgment are consolidated for disposition. For the following reasons, the motion by Adirondack Insurance Exchange ("Adirondack") for summary judgment (Motion Sequence Number 003) and the motion by Government Employees Insurance Company ("GEICO") for summary judgment (Motion Sequence Number 004) are both denied.

Background

During the weekend of December 7-8, 2013, a group of fraternity brothers and pledges of Pi Delta Psi rented a house in the Pennsylvania Poconos. Plaintiffs' action for declaratory judgment arises from a fraternity "hazing" incident during that weekend which tragically claimed the life of Chun Hsien "Michael" Deng. Defendant Julio Hewu was present that weekend. On the date of the incident, Mr. Hewu's father had a homeowners insurance policy issued by

Adirondack[1] and a personal lines umbrella policy issued by GEICO[2] and Mr. Hewu is an insured under both policies.

Mr. Deng's mother and representative of his estate, Xiu Feng "Mary" Liu, instituted a wrongful death action against Mr. Hewu and several other defendants in the Court of Common Pleas, Monroe County, Pennsylvania (the "underlying action"). Mr. Hewu notified Adirondack of the underlying action. Adirondack, via letter, informed Mr. Hewu that it disclaimed coverage.[3] GEICO also learned of the underlying action and disclaimed coverage. Each insurance company in this declaratory action move for summary judgment that it is not required to defend or indemnify Mr. Hewu in the underlying action.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

---

[1] Policy #: PHD0033131N1300, effective May 24, 2013 to May 24, 2014.

[2] Policy #: P7081066, effective May 24, 2013 to May 24, 2014.

[3] Adirondack has informed this Court that notwithstanding its disclaimer, it agreed to defend Mr. Hewu and is currently defending Mr. Hewu in the underlying action contingent on the resolution of this declaratory judgment action in its favor.

of New York, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

An insurer "is obligated by its policy to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159, 589 NE2d 365 [1992] [internal quotations and citation omitted]).

In order for an insurer "to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Dean v Tower Ins. Co. of New York*, 19 NY3d 704, 708, 979 N E2d 1143 [2012] [citation and internal quotations omitted]). "[I]n determining a dispute over insurance coverage, a court "will not disregard clear provisions which the insurers inserted in the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against" (*Raymond Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, 833 NE2d 232 [2005] [citation and internal quotation marks omitted]).

The underlying complaint

Here, it is alleged in the underlying complaint, and not disputed, that Mr. Deng was a victim of a horrible hazing initiation ceremony: after blindfolding and weighing him down with a backpack filled with 20 to 30 pounds of sand, he was repeatedly tackled by a line of fraternity members of Pi Delta Psi until he was knocked unconscious. It is also not disputed that none of the defendants sought professional medical help for Mr. Deng until an hour or two after he was unconscious. When they finally took him to the hospital, he could not be saved; he was put on life support until his parents arrived at his bedside to say good bye, and he died the next day. There is no question that Mr. Deng was beaten to death.

The underlying complaint[16] names fourteen individual defendants. It specifically states that "none of the defendants personally inflicted any serious injury on Michael" and "some but not all" participated in the hazing (para. 24). The complaint does not name Mr. Hewu (or anyone else) as one of the tacklers and does not allege that Mr. Hewu directly participated in or directed any of the conduct during the hazing nor that Mr. Hewu intended to hurt Mr. Deng. (NYSCEF Doc. No. 82).

Rather, the underlying complaint's focus is on the failure to promptly call for medical help. It bases its causes of action on the "grossly negligent actions and omissions [of the fraternity members or pledges] in failing to obtain medical care that would have saved Michael's life" (NYSCEF Doc. No. 74 at 4). Instead, they wasted precious time by searching for "information from the web . . . to determine how to respond" and waiting "one to two hours or

[16] NYSCEF Doc. No. 74.

more after Michael's obvious need for emergency care arose" to bring him to a hospital (*id.* at 7). The complaint alleges that the defendants had the duty to render medical help under Pennsylvania's "Good Samaritan rule" (*see Filter v McCabe*, 733 A2d 1274 [Sup. Ct. Pa. 1999]) and allege that they voluntarily undertook to provide assistance to Mr. Deng after he was injured, took charge of him after he was unconscious and had a special relationship with him from their affiliation with the fraternity and participating in the joint "social activity" (underlying complaint, para. 35).

Adirondack's Motion (Motion Seq. No. 003)

Adirondack seeks summary judgment and argues that because the claims in the underlying action arise out of physical abuse, declaratory judgment is appropriate because its policy excludes "physical or mental abuse". Therefore, Adirondack asserts, it is not obligated to indemnify or defend Mr. Hewu for any liability arising from the abuse.

Under Section II of the Adirondack policy[17], it states it will extend coverage: "If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' . . . caused by an 'occurrence . . .'"[18] The policy defines "occurrence" as: "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: **a.** 'Bodily injury'. . ."[19] The Adirondack policy excludes coverage for: 'Bodily Injury' . . . which is *expected or intended* by an 'insured' or which is the result of intentional acts or omissions, or criminal activity, even if the resulting 'bodily injury' . .

[17] *See* NYSCEF Doc. No. 43.

[18] *id.* at Section II- Liability Coverages at 15 (emphasis added).

[19] *id.* at Definitions at 2, ¶ 8 (emphasis added).

. [i]s of a different kind, quality or degree than initially expected or intended . . ."[20] The policy also excludes: "'Bodily injury' . . . arising out of sexual molestation, corporal punishment or physical or mental abuse;"[21]

In its motion papers, Adirondack asserts that its policy specifically excludes coverage for bodily injury claims if such claims arose out of conduct that constitutes "physical or mental abuse". Adirondack contends that the fraternity members' conduct of tackling Mr. Deng while he was blindfolded and strapped with a book bag weighted with sand is physical abuse.

In support, Adirondack offers: a) the underlying complaint, b) a copy of the Grand Jury Order issued in Pennsylvania Criminal Court charging Mr. Hewu for criminal hazing;[22] and c) the guilty pleas of two Pi Delta Psi fraternity members for criminal offenses that included criminal homicide, in which they admit the allegations in the underlying complaint.[23]

In further support, Adirondack cites *Auto-Owners Ins. Co. v American Central Ins. Co.*, 739 So2d 1078, 1081-82 (Ala. Sup Ct 1999), where the highest court of Alabama considered policy language similar to that of the subject policy and concluded that the policy excluded coverage for all claims which arose from alleged acts (such as kicking and pushing) by fraternity members against the pledge because the hazing constituted physical and mental abuse.

In opposition, Ms. Liu essentially contends that the bodily injuries Mr. Deng suffered were unintended by the fraternity and thus their conduct does not constitute physical abuse. She also points out that she is suing for the failure to call for help, not the hazing.

---

[20] *id.* at Section II- Exclusions at 16, ¶ 1 (emphasis added).

[21] *id.* at Section II- Exclusions at 17, ¶ 7.

[22] NYSCEF Doc. No. 45.

[23] NYSCEF Doc. No. 55.

This Court finds that the hazing was physical abuse. Even assuming the fraternity members did not intend the *death* of Mr. Deng, their actions of repeatedly tackling him while he was rendered helpless - blindfolded and weighed down - was physically abusive.

With regard to Ms. Liu's argument that Adirondack cannot establish physical abuse was committed against Mr. Deng with extrinsic hearsay evidence (Adirondack's submissions of the guilty pleas of two fraternity brothers and the Order of the Grand Jury), that argument is a distraction. The allegations contained in the underlying complaint describing the hazing are enough to show physical abuse.

The hazing itself was physical abuse and therefore is an excluded act under both insurance policies. However, and significantly, the underlying complaint does not allege this physical abuse as the basis for its causes of action. Rather, it bases its causes of action on the "grossly negligent actions and omissions [of the defendants] in failing to obtain medical care that would have saved Michael's life" (NYSCEF Doc. No. 74 at 4). The underlying complaint sets forth these actions and omissions to include; searching for "information from the web . . . to determine how to respond" and waiting "one to two hours or more after Michael's obvious need for emergency care arose" to bring him to a hospital (*id.* at 7).

While it is true that "but for" the physical abuse, the need to summon medical care would never have arisen, that is not the end of the inquiry. Sometimes the abuse and the failure to call for help are significantly intertwined; clearly, for perpetrators of physical abuse, their subsequent failure to get help for the victim should not provide a "back door" way for them to get coverage that would otherwise not be covered due to the physical abuse. And so if in fact Hewu was involved in the hazing of Mr. Deng, then the policies would not cover the physical abuse and

would not cover him for the subsequent failure to call for help.

Here, however, there is simply is not enough information in the record before the Court to grant summary judgment. Other than making it clear that she is not suing for the intentional acts, the underlying complaint is very vague with respect to the allegations against the individual defendants and there is not a single specific allegation as to Mr. Hewu. For example, this Court has no idea whether Mr. Hewu had a role in planning the hazing, whether he participated in the hazing, whether he tackled Mr. Deng, whether he witnessed the hazing, whether he helped Mr. Deng on with his backpack or blindfold, whether he helped remove the backpack or blindfold. Nor does this Court know whether Mr. Hewu was aware of the unconscious Mr. Deng, whether he googled how to revive him, whether he tried but was prevented from calling an ambulance or whether he tried to prevent others from calling an ambulance. Of course, not all this information would be necessary, but without any of this information, the Court can not determine what role, if any, Mr. Hewu had that weekend. Without knowing his role, the Court cannot determine if his actions fall within the coverage or are excluded.

Without knowing the facts particular to Mr. Hewu, this motion is premature. Of course, if he participated in the hazing and also failed to call for medical help, the policies would not cover him If he was a pledge and had nothing to do with the hazing, then whatever actions he took and did not take would have to be analyzed. Any analysis will have to wait until the facts are presented. In short, the Court cannot, as a matter of law and on this record, find that Mr. Hewu is not even entitled to an insurance defense in the underlying case.

GEICO's Motion (Motion Seq. No. 004)

Like Adirondack, GEICO also seeks summary judgment that the claims in the underlying action arose out of conduct that is not covered under its policy and seeks a declaration that it is not obligated to defend Mr. Hewu or indemnify him for any liability arising therefrom.

The GEICO policy[24] is very similar to Adirondack's policy terms. Part II of GEICO's policy covers "damages on behalf of an insured arising out of an occurrence, subject to the terms and conditions of this policy." (NYSCEF Doc. No. 67 at 5). Part I.8 of GEICO's policy defines an "occurrence" as "an accident or event, including a continuous repeated exposure to conditions which result in personal injury . . . neither expected or intended by you" (*id.*) Part III of the GEICO policy excludes coverage for: "Acts committed by or at an insured's direction with the intent to cause personal injury . . ." (*id*). The GEICO policy also excludes: "corporal punishment or physical or mental abuse inflicted upon any person by or at the direction of an insured, an insured's employee or any other person at an insured's direction." (NYSCEF Doc. No. 67 at 6).

GEICO argues that Ms. Liu incorrectly attempts to "shoehorn" the subsequent act of failing to summon medical care as a basis of coverage under its policy. As discussed above, if Mr. Hewu was involved in the physical abuse, then he would not be covered either for the intentional act or the failure to call for help. If, however, he had nothing to do with the hazing, then his conduct must be analyzed to see whether it is included or excluded from the GEICO policy. On this record, it has not been established that Hewu participated in the abuse.

---

[24] NYSCEF Doc. No. 75.

Summary

Without knowing the facts particular to Mr. Hewu, this motion is premature. If, for example only, it is established that Mr. Hewu was a pledge who had no knowledge of the planned hazing and did not participate in it, then his conduct in failing to get prompt medical help must be analyzed to determine whether it is included or excluded from the policies. If it is determined that he participated in the hazing, then the policies would not cover him, either for the abuse or the failure to call for help. Any analysis will have to wait until the facts are presented.

Once Hewu's particular actions are established, then each plaintiff may bring another motion for summary judgment.

It is, however, conceded that punitive damages are not covered under the policies.

Accordingly, it is hereby

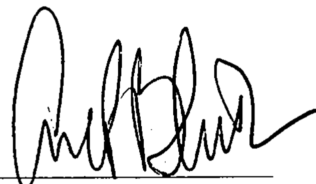
ORDERED that Adirondack's motion (Motion Sequence Number 003) is denied except that the Court finds that punitive damages are not covered by the policy; and it is further

ORDERED that the GEICO's motion (Motion Sequence Number 004) is denied except that the Court finds that punitive damages are not covered by the policy.

This is the Decision and Order of the Court.

Preliminary conference is scheduled on February 13, 2018 at 2:15 PM

Dated: December 19, 2017
New York, New York



HON. ARLENE P. BLUTH, JSC