Kenza Operating Corp. v Allcity Ins. Co.

2003 NY Slip Op 30214(U)

October 20, 2003

Supreme Court, New York County

Docket Number: 603314/00

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19
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KENZA OPERATING CORP. And ALFRED S.
FRIEDMAN MANAGEMENT CORP., d/b/a
FRIEDMAN MANAGEMENT CORP.,

Plaintiffs,

INDEX NO.
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- against -

ALLCITY INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, ONE BEACON INSURANCE GROUP as successor in interest to GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, NATIONWIDE INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA and TRANSIT CASUALTY COMPANY,

Defendants.
--x

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EDWARD H. LEHNER, J.:

In the complaint herein plaintiffs have sought a declaration that certain defendant-insurers had an obligation to defend and indemnify them in an underlying action commenced by January Butcher asserting a claim of lead paint poisoning (the "Butcher action").

In the Butcher action plaintiffs were represented by counsel retained by them as all defendants had disclaimed coverage for various reasons. Plaintiffs were successful in having the Butcher action dismissed and now seek recovery of the costs

of defending that suit.

The claim against defendant One Beacon Insurance Group was dismissed at oral argument held on May 2, 2003. I then declared that said defendant had no obligation to provide coverage as the claim in the Butcher action did not involve any of the years during which said defendant provided coverage (Tr. pp. 22-23).

The remaining claim before me is against defendant Allcity Insurance Company, ("Allcity") which denies that it ever issued a policy to plaintiffs providing coverage during the relevant years. Plaintiffs have not submitted copies of any policy or certificate showing coverage, nor do they claim that they ever had possession of such a policy or certificate. The only items offered by plaintiffs to establish coverage are copies of: (i) a closing statement prepared by an attorney in connection with the purchase of the subject building by plaintiffs in November 1981 which shows an adjustment due to the seller of $1,146.12 for a premium paid on an Allcity policy No. SMP 2-9654563 for a period through April 9, 1982; (ii) a bill issued by the seller's insurance broker showing purchase of the aforesaid policy as of April 9, 1981; and (iii) a certificate filed by a representative of the plaintiffs on November 4, 1981 with the City Department of Housing Preservation & Development stating that Allcity insured the purchased building. While in the affirmation of plaintiffs' counsel, Isidoros Tsamblakos, dated March 17,2003, he states (¶1 1) that "Allstate accepted

the premium payments by Kenza for the transferred policy", there is no proof presented that Kenza or any plaintiff made any payment to Allcity.

Allcity asserts that it has examined its records (which were not computerized in the early 1980s) and finds no record of any policy ever having been issued to any of the plaintiffs, nor any policy employing the aforesaid policy number.

A "party claiming insurance coverage has the burden of proving entitlement" [Moleon v. Kreisler Borg Florman General Construction Company, Inc., 304 AD2d 337, 339 (1st Dept. 2003)]. Accord: Roundabout Theatre Company, Inc. v. Continental Casualty Company, 302 AD2d 1 (1st Dept. 2002); Chase Manhattan Bank, N.A. v. The Travelers Group, Inc. 269 AD2d 107,108(1st Dept. 2000). "When an insured has met its burden of showing that a valid insurance policy was in full force and effect and that it incurred a presumptively covered loss, the burden of proof shifts to the insurer to demonstrate that an exclusion contained in the policy defeats the claim" [Throg's Neck Bagels, Inc. v. GA Insurance Company of New York, 241 AD2d 66, 70-71 (1st Dept. 1998)].

None of the above-cited cases in which the aforesaid well settled principles were enunciated involved situations where the insurer asserted that no policy had ever been issued to the claimant.

In Gold Fields American Corporation v. Aetna Casualty and Surety Company,

173 Misc. 2d 901 (Sup. Ct., N.Y. Co. 1997), the plaintiff asserted that it had lost policies that allegedly had been issued to it. The court, after determining that the proponent of a lost instrument need prove its existence only by a preponderance of the evidence rather than by clear and convincing evidence, concluded that a triable issue of fact existed as to whether the claimed policy had ever been issued. In that case (which involved policies allegedly issued in the 1960s and 1970s), there was evidence that some of the insurer's records were lost as a result of "housekeeping" in 1975 in its New York office and that its procedure prior to 1983 was to destroy all policies more than seven years old. Further there was proof that the insurer had made payments to plaintiff on claims asserted under the alleged policies and there were invoices referring to a premium credit and checks issued based on an overpayment of premiums.

In Burt Rigid Box, Inc. v. Travelers Property Casualty Corp., 126 F. Supp.2d 596 (W.D.N.Y. 2001), the court referred to the Gold Fields case as "the only New York case addressing the standard of proof necessary to establish the existence of insurance policies by secondary evidence when the actual policy cannot be found" (p. 610), and also concluded that the burden on the insured to prove the existence of a policy is by the traditional civil standard of a preponderance of the evidence, and that the evidence must be sufficient to support a "reasonable jury finding" of such

existence (p. 612). The court also held that secondary evidence may be received only where the failure to produce the original has been sufficiently explained. Finding that plaintiff had made a diligent search for the alleged lost policies, the court, in an exhaustive discussion of the evidence, found that the documentary evidence established that said alleged lost policies had in fact been issued to plaintiff for the years between 1963 and 1971. Plaintiff showed the existence of claims made under the policies which were handled by the insurer; oral discussions with the insurer's representative in which existence of the claimed policy numbers was recognized; financial statements of the insured issued through the years indicated the allocation of funds for prepaid insurance; Aetna's claim files older than 20 years had been destroyed; and invoices for premiums had been received and at one time it had physical possession of the contested policies. The court noted that the insurer had not produced any evidence challenging the credibility of the plaintiff's evidence.

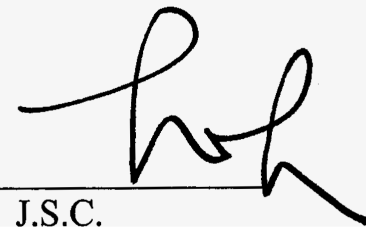
On appeal, the Second Circuit held [302 F. 3d 83 (2002)] that plaintiff had submitted "a plethora" of secondary evidence to support its claim that it had been covered by policies issued during the relevant time periods and that even if the standard was "clear-and-convincing" evidence, plaintiff's proof met that burden.

Here, as opposed to the facts in the above cases, there is no claim that any policy is lost as there is no claim that plaintiffs ever had possession of a policy issued

by Allcity. Further there is no proof that the policy referred to in the aforesaid closing statement was assignable without the consent of the insurer, or that any consent had ever been requested or obtained. Moreover, if plaintiffs paid the seller the aforesaid adjustment at the November 1981 closing, they have offered no explanation as to why they never received the policy thereafter, nor is there any proof as to the type of policy involved nor the extent of the coverage provided.

Thus, I find that plaintiffs have not met their burden of showing sufficient proof (applying the standard referred to in Gold Fields, supra) to raise a triable issue as to the existence of any of the claimed policies. Accordingly, the motion of Allcity for summaryjudgment is granted and the court declares that it had not issued a policy to any of the plaintiffs and thus it had no duty to defend them in the Butcher action.

The Clerk shall therefore enter judgment dismissing the action as against defendants Allcity and One Beacon Insurance Group.



Dated: October 20,2003

J.S.C.