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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla PART 19

Index Number : 114856/2010

QBE INSURANCE CORPORATION

vs.

JINX-PROOF, INC.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision/order.

Dated: 8/15/11

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

QBE INSURANCE CORPORATION,

Plaintiff,

-against-

JINX-PROOF INC. d/b/a BEAUTY BAR, GARRETT ALARCON, and VERA HENDRIX

Defendants.

---------- X

Index No.: 114856/2010
Submission Date: 5/4/2011

DECISION AND ORDER

For Plaintiff:
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Papers considered in review of motion for summary judgment and cross motion to dismiss:

Notice of Motion.....1
Notice of Motion to Dismiss 2
Mem of Law in Opposition to Motion 3
Aff in Opposition.....4
Reply Aff 5

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, plaintiff QBE Insurance Corporation ("QBE") moves for summary judgment on its complaint. Defendant Jinx-Proof Inc. d/b/a Beauty Bar ("Jinx-Proof") cross moves to dismiss the complaint insofar as asserted against it.

On August 25, 2007, an altercation arose between Vera Hendrix ("Hendrix") and Garrett Alarcon ("Alarcon") at Beauty Bar located at 231 East 14th Street, New York,

New York 10003, premises allegedly owned by Jinx-Proof. Hendrix commenced an action against Jinx-Proof, Alarcon, Deborah Parker ("Parker"), and Paul Devitt ("Devitt") by summons and complaint dated December 11, 2007 to recover damages for personal injuries she claims to have sustained when door security guard Alarcon threw a glass at her face ("underlying action"). Specifically, Hendrix alleged claims for negligence, gross negligence, violation of the Dram Shop Act against all defendants and a claim for negligent hiring and supervision against Beauty Bar. By Order dated April 30, 2010, this Court granted summary judgment dismissing the complaint in its entirety as asserted against Paul Devitt and Deborah Parker, and dismissed the negligent hiring and supervision and Dram Shop Act claims against the remaining defendants.

In the remaining claims, Hendrix alleges that Alarcon (1) caused physical contact to occur without her consent; (2) intentionally placed her in apprehension of imminent harmful and/or offensive contact as a result of which she sustained a laceration to her cheek; and (3) as an agent of Beauty Bar, was negligent in touching and kicking Hendrix and in striking her with a glass.

Subsequently, QBE commenced an action by summons and complaint on November 12, 2010 seeking declaratory relief and a determination of rights and responsibilities of the parties under an insurance policy issued by QBE to defendant Jinx-Proof. QBE issued a commercial general liability policy to Jinx-Proof from August 26, 2006 to August 26, 2007, which contained an Assault and Battery Exclusion. QBE asserted that the Assault and Battery exclusion applied to the facts of the underlying action and thus no coverage existed for Hendrix's claim.

QBE now moves for summary judgment on its complaint, arguing that it is not obligated to defend or indemnify any of the defendants in the underlying action pursuant to the Assault and Battery Exclusion.

Jinx-Proof cross moves for summary judgment dismissing the complaint insofar as asserted against it primarily asserting that (1) that a reading of two confusing "reservation of rights" letters submitted to it by QBE would suggest that QBE would defend the case to verdict without any qualifications; (2) QBE failed to comply with Insurance Law §3420(d) in that it failed to submit a formal disclaimer letter to the insured; and (3) the evidence indicates that no assault and battery occurred and the remaining negligence claims set forth in Hendrix's underlying complaint are not merged into the assault and battery exclusion.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

An assault and battery exclusion shall apply if the underlying causes of action alleged are "rooted in intentional tortious behavior." *Anastasis v. American Safety Indem. Co.*, 12 A.D.3d 628 (2nd Dept. 2004) *citing Silva v. Utica First Ins. Co.*, 303 A.D.2d 487 (2nd Dept. 2003). Here, Hendrix's pleadings specifically allege that Alarcon

"intentionally placed plaintiff in apprehension of imminent harmful and/or offensive contact." Additionally, an assault and battery exclusion applies if no cause of action would exist but for the assault and/or battery allegedly committed. *See Perez-Mendez v. Roseland Amusement & Dev. Corp.*, 305 A.D.2d 166 (1st Dept. 2003); *Towne Bus Corp. v. Ins. Co. of Pa.*; 295 A.D.2d 272 (1st Dept. 2002). The pleadings clearly demonstrate that the main act, which would give rise to any recovery, is Alarcon's alleged intentional throwing of a glass object. The possibility that the insured may be found liable under a theory of negligence does not overcome the policy's assault and battery exclusion and any injury resulting from such acts. *See U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821 (1995). The underlying incident, therefore, falls within the assault and battery exclusion of the insurance policy.

Insurance Law §3420(d) provides that an insurance carrier seeking to deny liability or coverage must "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." *Progressive Cas. Ins. Co., v. Conklin*, 123 A.D.2d 6, 8 (3rd Dept. 1986). An insurance carrier is estopped from disclaiming coverage if there has been an unreasonable delay in doing so if the policy at issue would provide the claimed coverage but for a policy exclusion. *Osohowsky by Kracer v. Romaniello*, 201 A.D.2d 473 (2nd Dept. 1994); *see Employers Ins. of Wausau v. County of Nassau*, 141 A.D.2d 496 (2nd Dept. 1988). Here, the policy would have provided the claimed coverage but for the assault and battery exclusion and therefore, timely disclaimer was necessary.

While reservation of rights letters have been held not to constitute effective notices of disclaimer, *see Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028 (1979); *Blue Ridge Ins. Co. v. Jiminez*, 7 A.D.3d 652 (2nd Dept. 2004), there is no magic formula which separates a reservation of rights letter from a denial of coverage. Here, QBE sent two letters to Jinx-Proof, one dated January 31, 2008 and another dated February 26, 2008. QBE refers to these letters as "reservation of rights" letters, but the Court finds that coverage for assault and battery claims was clearly denied in both letters. The January 31, 2008 letter clearly states, "...QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations. Accordingly we suggest that you consult an attorney in order to protect your interests and provide a defense for the assault and battery claim." The February 26, 2008 letter provides, "should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered . . . ."[1] An insurer's notice of disclaimer must notify the insured with a high degree of specificity the ground or grounds on which the disclaimer is based. *See General Acc. Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864 (1979); *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*, 62 A.D.3d 33 (1st Dept. 2009). Therefore, the January 31, 2008 and February 26, 2008 letters serve as effective written notices of disclaimer.

A carrier must give timely notice of disclaimer as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability. *See Hartford*

[1] The letter also makes mention of a liquor liability defense, however, this court dismissed all Dram Shop claims in its April 30, 2010 order.

Ins. Co. v. County of Nassau, 46 N.Y.2d 1028 (1979). Here, QBE indicates in its January 31, 2008 reservation of rights letter that although the underlying incident took place on August 25, 2007, it was only notified of the incident on January 28, 2008. QBE properly denied coverage via the January 31, 2008 and February 26, 2008 letters, which were sent within a reasonable time frame after receiving notice of the incident. *See generally N.Y. Cent. Mut. Fire Ins. Co. v. Majid,* 5 A.D.3d 447 (2nd Dept. 2004); *State Farm Mut. Auto. Ins. Co. v. Daniels*, 269 A.D.2d 860 (4th Dept. 2000).

In accordance with the foregoing, it is

ORDERED that the plaintiff QBE Insurance Corporation's motion for summary judgment on its complaint is granted; and it is further

ORDERED that defendant Jinx Proof Inc. d/b/a/ Beauty Bar's cross motion for summary judgment dismissing the complaint insofar as asserted against it is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED

AUG 17 2011

Dated: New York, New York
August 15, 2011

ENTER

NEW YORK
COUNTY CLERK'S OFFICE

Saliann Scarpulla

Saliann Scarpulla, J.S.C.