

American Safety Indem. Co. v Loganzo

2011 NY Slip Op 32641(U)

October 4, 2011

Supreme Court, Suffolk County

Docket Number: 19307-2010

Judge: Melvyn Tanenbaum

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

Decision date 10-4-11

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION # 001 Case Disp.
R/D: 11/15/2010
S/D: 06/07/2011

AMERICAN SAFETY INDEMNITY COMPANY,

Plaintiff,

PLTF'S/PET'S ATTY:
MORRISON MAHONEY LLP
17 State Street, Suite 1110
New York, NY 10004

-against-

ANTHONY W. LOGANZO, LONG ISLAND
POURHOUSE, INC., TP#2, LLC, LISA GIAMBALVO,
LENA SIGNORELLI, a/k/a/ LENA C. BIOVANA,
a/k/a LINDA C. BIOVANA, and LEE ROSNER,

DEFT'S/RESP'S ATTY:
LONG ISLAND POURHOUSE, INC.- Prose
43 Cherry Street
Selden, NY 11784

Defendants.

MS LENA SIGNORELLI - Prose
4 Lolly Lane
Centereach, NY 11720

MS LISA GIAMBALVO - Prose
121 South East 32nd Street
Cape Coral, Florida 33904

Upon the following papers numbered 1 to 23 read on this motion for an order pursuant to CPLR Sec 3212-3215 Notice of Motion/Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers Answering Affidavits and supporting papers 14-18 Replying Affidavits and supporting papers 19-23 Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff AMERICAN SAFETY INDEMNITY COMPANY ("ASIC") seeking an order pursuant to CPLR Sections 3212 & 3215 granting summary judgment in this declaratory judgment action declaring that "ASIC" is obligated to provide a \$100,000.00 limitation of insurance coverage for any liability of its insured, defendant LONG ISLAND POURHOUSE, LLC ("POURHOUSE") and granting a default judgment against defendants "POURHOUSE", LISA GIAMBALVO and LENA SIGNORELLI is granted.

On April 22, 2002 defendant ANTHONY LOGANZO ("LOGANZO") claims that he was beaten by security personnel while a patron at a bar/lounge operated by defendant "POURHOUSE". "LOGANZO" claims that after fleeing to escape the assault, he was struck by a motor vehicle sustaining serious injuries. In April, 2005 "LOGANZO" commenced a personal injury action against the bar/lounge, its owners and employees based upon the assault by the premises security personnel.

Plaintiff "ASIC" issued a commercial liability policy providing coverage for defendant "POURHOUSE" for the period between April 10, 2002 and April 10, 2003. This declaratory judgment action seeks a judgment declaring that the limitation of liability for damages resulting from the underlying assault is \$100,000.00 and seeks a default judgment against defendants POURHOUSE, INC., LENA SIGNORELLI and LISA GIAMBALVO.

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In support of the motion plaintiff "ASIC" submits two affidavits from the chief claims officer of "ASIC's" underwriter and two attorney affirmations and claim that the policy clearly provides a \$100,000.00 limitation of liability for damages resulting from an assault or battery. It is plaintiff's position that the underlying facts reveal that defendant "LOGANZO's" injuries were undisputably the result of an alleged assault by "POURHOUSE" employees and that "LOGANZO's" negligence claim (in his complaint) is irrelevant to the insurer's coverage obligations under the policy. Plaintiff contends that the insurer was not required to serve a disclaimer of coverage to its insured and "LOGANZO" since "ASIC" merely reduced the limits of liability for damages resulting from an assault but did not preclude coverage. Plaintiff also claims that "ASIC" timely apprised "LOGANZO" of amended coverage limits on August 15, 2006 and therefore the insurer is not estopped from enforcing the amendments. Finally plaintiff claims that a default judgment must be granted against the non-appearing defendants "POURHOUSE", "GIAMBALVO" and "SIGNORELLI".

In opposition defendant "LOGANZO" submits an affidavit and an attorney's affirmation and claims that substantial issues of fact exist concerning whether the allegations of negligence in the underlying complaint are subject to the insurer's \$100,000.00 policy limitation for injuries resulting from an "assault" sufficient to defeat plaintiff's motion. Defendant also claims that the insurer never timely apprised "LOGANZO" or his legal representative of the disclaimer of coverage and therefore "ASIC" is precluded from denying coverage. Defendant claims that Insurance Law Section 3420(d) requires that a disclaimer notice be sent to all interested claimants "as soon as reasonably possible" and the insurer's failure to notify "LOGANZO" estops "ASIC" from seeking to enforce the coverage limitation. Defendant also claims that the copy of the insurance contract annexed to the pleadings does not represent the terms of the original policy.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In constructing the terms of a contract, the judicial function is to give effect to the parties intentions (MALLAD CONSTRUCTION CORP. v. COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION, 32 NY 2d 285, 344 NYS 2d 925 (1973)). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (SELIGMAN v. MOUNT ARAFAT CEMETERY, INC., 112 AD 2d 928, 492 NYS 2d 445 (2nd Dept., 1985)). An agreement should be read as a whole

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so as to give each section meaning. Where a contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of parties intent or to rules of construction to ascertain the contract's meaning (BETHLEHEM STEEL CO. v. TURNER CONSTRUCTION CO., 2 NY2d 456, 161 NYS 2d 90 (1957)). However where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (See BRAY TERMINALS, INC. v. GRAND UNION CO., 74 AD 2d 965, 425 NYS 2d 886 (1st Dept., 1980)).

Insurance contracts are liberally construed in favor of the insured and the Court must consider the plain language of the contract as it would be understood by an average or ordinary citizen (MILLER v. CONTINENTAL INSURANCE, 40 NY2d 675, 389 NYS2d 565 (1976)). The insurer bears the burden of proving that the loss falls within the exclusion and that there is no reasonable interpretation of the exclusion that supports the claim of the insured (SEABOARD SURETY COMPANY v. GILLETTE CO., 64 NY2d 304, 486 NYS2d 873 (1984)).

The original "ASIC" policy included an "Amended Limits of Insurance" Endorsement which provides:

The Declarations is amended by adding the following lines to Item 7:

Assault and Battery Aggregate Limit:	\$100,000
Assault and Battery Limit:	\$100,000

The coverage Part is amended as follows:

SECTION III - LIMITS OF INSURANCE is amended by adding the following additional paragraphs:

The Assault and Battery Limit, shown in the Declarations, is the most we will pay for the sum of all damages because of an "**assault**" or "**battery**", as herein defined, arising out of any one "**occurrence**".

The Assault and Battery Aggregate Limit, shown in the Declarationa, is the most we will pay for the sum of all damages because of an "**assault**" or "**battery**", as herein defined, regardless of the number of "**occurrences**".

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SECTION III - LIMITS OF INSURANCE, paragraph 3, is amended to read as follows:

The Aggregate Limit is the most we will pay for the sum of damages under Coverage A., Coverage B, and all damages because of an **“assault”** or **“battery”**, as herein defined, including damages because of injury and damage included in the **“products - completed operations hazard”**.

SECTION V - DEFINITIONS is amended by adding the following additional definitions:

- a. **“Assault”** means the apprehension of harmful or offensive contact between or among two or more persons by threats through words or deeds.
- b. **“Battery”** means the harmful or offensive contact between or among two or more persons.

The policy further provided liquor liability coverage, which included an ‘Amended Limits of Insurance’ (Assault and Battery) Endorsement which provides:

The declarations is amended by adding the following lines to Item 8:

Assault and Battery Aggregate Limit:	\$100,000
Assault and Battery Limit:	\$100,000

The Coverage Part is amended as follows:

SECTION III - LIMITS OF INSURANCE is amended by adding the following additional paragraphs:

The Assault and Battery Limit, shown in the Declarations, is the most we will pay for the sum of all damages because of an **“assault”** or **“battery”**, as herein defined, arising out of any one **“occurrence”**.

SECTION III - LIMITS OF INSURANCE, paragraph 3. Is amended to read as follows:

The Aggregate Limit is the most we will pay for all **“injury”**, including all damages because of an **“assault”** or **“battery”**, as herein defined, as the result of selling, serving or furnishing of alcoholic beverages.

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SECTION V - DEFINITIONS is amended by adding the following additional definitions:

- a. **“Assault”** means the apprehension of harmful or offensive contact between or among two or more Persons by threats through words or deeds.
- b. **“Battery”** means the harmful or offensive contact between or among two or more persons.

The “ASIC” policy endorsements clearly and unambiguously limit coverage for damages resulting from an assault or battery to \$100,000.00. There is no issue but that plaintiff “LOGANZO” in the underlying personal injury action sustained injuries as a result of an alleged assault committed by security personnel hired by the insured/defendant “POURHOUSE”. Under the circumstances defendant “LOGANZO” may only recover from “ASIC” the maximum limit of coverage provided by the plaintiff/insurer in the underlying action. The notice requirements set forth pursuant to Insurance Law Section 3420(d)(2) only apply where an insurer disclaims coverage, not in instances such as this, where the insurer merely limits coverage. Moreover plaintiff has submitted written proof that “LOGANZO” had prior notice of the coverage limitation when “LOGANZO’s” counsel was served with discovery demands from defendant “POURHOUSE” dated August 15, 2006 in the underlying action. Plaintiff’s motion for an order granting summary judgment against the defendants “LOGANZO” and for an order granting a default judgment against the remaining non-appearing defendants must be granted. Accordingly it is

ORDERED, ADJUDGED AND DECREED that plaintiff’s motion for an order pursuant to CPLR Sections 3212 & 3215 is granted to the extent that judgment is granted in favor of plaintiff declaring that the limitation of insurance coverage provided by the insurer “ASIC” under the terms of the commercial liability policy issued to defendant “POURHOUSE” for the claims asserted by defendant “LOGANZO” for the injuries sustained on January 18, 2002 is limited to \$100,000.00.

Dated: October 4, 2011

Hon. Melvyn Tanenbaum

J.S.C.