Chong-Sam Kim v Camel Corp.
2013 NY Slip Op 34042(U)
May 17, 2013
Supreme Court, Queens County
Docket Number: 26980/10
Judge: Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Rudolph E. Greco, Jr.
Justice

IA Part 32

Index Number: 26980/10
Motion Date: February 21, 2013
Motion Cal. No. 89 & 90
Motion Seq. No. 1 & 2

CHONG-SAM KIM,

Plaintiff,

- against -

CAMEL CORP d/b/a CAMEL RESTAURANT, YUN H. KIM and 'JOHN DOE", a fictitious name for an unknown person known to exist.

Defendant.

CAMEL CORP. d/b/a CAMEL RESTAURANT

Third-Party Plaintiff

- against -

RCA INSURANCE GROUP and NATIONAL SPECIALTY INSURANCE CO., INC.

Third-Party Defendants.

FILED
MAY 24 2013
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 19 read on this motion by third-party defendants RCA Insurance Group and National Specialty Insurance Co., Inc. (collectively referred to as third-party defendants), for summary judgment dismissing the complaint, and for a declaratory judgment that they have no obligation to provide coverage to, defend, or indemnify defendants/third-party plaintiffs Camel Corp., Yun H. Kim, and John Doe (collectively referred to as defendants) in the underlying action commenced by plaintiff Chong-Sam Kim (plaintiff); and by separate amended notice of motion by third-party defendants for the same relief.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-8
Answering Affidavits - Exhibits	9-13
Reply Affidavits	14-19

Upon the foregoing papers it is ordered that the motions are determined as follows:

The underlying action in this matter is for assault and battery and was commenced by plaintiff against defendants when plaintiff, on Febraury19, 2010, as a patron of the Camel Restaurant, located at 28 West 33 Street, in the County of New York, was injured by another patron while on the premises. Plaintiff commenced the underlying action against defendant Camel Corp., as the owner of the premises, defendant Yun H. Kim, as a principal of Camel Corp., and against John Doe, as the individual who allegedly assaulted him. Plaintiff's complaint has alleged claims for negligence and for violation of General Obligations Law § 11-101(1), more commonly known as the Dram Shop Act.

Prior to the alleged incident on Febraury19, 2010, third-party defendant National Specialty Insurance Co., Inc. (NSIC) issued a Commercial Package insurance policy to Camel Corp. for the period from June 15, 2009, to June 15, 2010, which was in effect at the time of the incident. On May 13, 2010, after receiving notice of a claim against the policy as a result of the subject incident, defendant RCA Insurance Group, as NSIC's managing agent, denied coverage to Camel Corp. under the policy. Thereafter, defendants commenced a third-party action against third-party defendants for declaratory judgment. Following the filing of their initial motion for summary judgment and declaratory judgment, third-party defendants filed an amended notice of motion with an amended affirmation solely because they annexed a copy of an incorrect policy to the initial motion papers. Therefore, the second motion will supercede the first and the court's decision will be based upon the amended notice of motion and the papers annexed thereto.

Third-party defendants have now moved for summary judgment dismissing the complaint and for a declaratory judgment that they NSIC has no obligation to provide coverage to, defend, or indemnify defendants in the underlying action commenced by plaintiff. On their motion, "before [third-party defendants are] permitted to avoid policy coverage, [they] must satisfy the burden [] of establishing that [any] exclusions or exemptions apply in the particular case, and [] are subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [internal citations omitted]; *see Insurance Co. of Greater N.Y. v Clermont Armory, LLC*, 84 AD3d 1168, 1170 [2011], *lv denied* 17 NY3d 714 [2011]).

"[A]ny ambiguity in contract language must be construed against the party that drafted the contract" (*Computer Assoc. Intl., Inc. v U.S. Balloon Mfg. Co., Inc.*, 10 AD3d 699, 700 [2004]; *see Insurance Co. of Greater N.Y. v Clermont Armory, LLC*, 84 AD3d at 1170; *Matter of Eveready Ins. Co. v Farrell*, 304 AD2d 830, 831 [2003]). "However, an unambiguous policy provision must be accorded its plain and ordinary meaning" and the plain language of an insurance policy may not be disregarded to find an ambiguity where none in fact exists (*Bazsuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2003], *lv dismissed* 3 NY3d 696 [2004]; *see Richner Dev., LLC v Burlington Ins. Co.*, 81 AD3d 705, 706 [2011]; *Empire Fire & Mar. Ins. Co. v Eveready Ins. Co.*, 48 AD3d 406, 407 [2008]). This would violate the "fundamental rule of construction that a contract must be construed as a whole and effect given, whenever possible, to all its parts" (*Acorn Ponds v Hartford Ins. Co.*, 105 AD2d 723, 724 [1984]; *see Richner Communications, Inc. v Tower Ins. Co. of N.Y.*, 72 AD3d 670, 671 [2010]).

In support of their motion, third-party defendants have relied upon, among other things, a copy of the insurance policy it issued to defendants and the pleadings. They have argued that the allegations in the underlaying complaint constitute an assault and battery, for which coverage

has been specifically excluded under the terms of the insurance policy and that as long as any related negligence claims arise out of facts which constitute a claim for assault and battery, coverage for any related negligence claims has also been excluded.

In general, an insurer is required to provide coverage to an insured when the allegations in a complaint state a cause of action that would reasonably be covered under the policy (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). In this case, the underlying complaint alleged that plaintiff "was suddenly and violently struck by [d]efendant 'John Doe,' who at the time was a patron of" defendants. "An exclusion for assault and/or battery applies if no cause of action would exist 'but for' the assault and/or battery" (*Anastasis v American Safety Indem. Co.*, 12 AD3d 628, 629 [2004], quoting *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 353 [1996]). It is undisputed in the record that this conduct constituted a battery, for which coverage is precluded by the assault and battery exclusion, which provided in pertinent part that "[n]o coverage is provided under this policy if the underlying operative facts constitute an assault and/or battery irrespective of whether the claim alleges negligent hiring, training, supervision, and/or retention against the insured, or for any other negligent actions of the insured."

Plaintiff's underlying complaint also alleged a claim for violation of the Dram Shop Act. Third-party defendants have argued that coverage for that claim has also been excluded by the language of the provision excluding coverage for "any other negligent actions of the insured." Upon the court's reading of the language of the assault and battery exclusion, it has determined that the language of the exclusion is not ambiguous and that it excludes coverage for plaintiff's claim based upon the Dram Shop Act. All claims of negligence alleged by plaintiff in the underlying complaint arise out of a battery and, thus, taking note of the plain language of the exclusion, fall within the subject exclusion (*see WSTC Corp. v National Specialty Ins. Co.*, 67 AD3d 781, 783 [2009]; *see Mark McNichol Enters. v First Fin. Ins. Co.*, 284 AD2d 964, 965 [2001]). Furthermore, based upon the language that the insurance does not apply to any "'[i]njury' arising out of any assault, battery, fight, altercation, misconduct or similar incident or act of violence," the exclusion applies because without the alleged battery, plaintiff would not have any causes of action (*see U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]; *QBE Ins. Corp. v Jinx-Proof Inc.*, 102 AD3d 508, 512 n 3 [2013]; *WSTC Corp. v National Specialty Ins. Co.*, 67 AD3d at 783; *Anastasis v American Safety Indem. Co.*, 12 AD3d at 629).

Therefore, based upon the above, third-party defendants have demonstrated their entitlement to judgment as a matter of law by establishing that the assault and battery exclusion is applicable to the claim asserted against defendants in plaintiff's underlying complaint alleging defendants' negligence and violation of the Dram Shop Act (*see Marina Grand, Inc. v Tower Ins. Co. of N.Y.*, 63 AD3d 1012, 1014 [2009]; *Sphere Drake Ins. Co. V Block 7206 Corp.*, 265 AD2d 78, 80 [2000]). In opposition, plaintiff and defendants have failed to raise a triable issue of fact as to the exclusion's applicability (*see Marina Grand, Inc. v Tower Ins. Co. of N.Y.*, 63 AD3d at 1014).

Accordingly, third-party defendants' motion for summary judgment and a declaratory judgment is granted in its entirety. This court, therefore, finds and declares that NSIC is not obligated to defend and indemnify defendants in the underlying action commenced by plaintiff.

Dated: May 17, 2013

JSC

FILED

MAY 24 2013

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QUEENS COUNTY