

Pavilion Contr. Inc. v Utica First Ins. Co.
2016 NY Slip Op 33186(U)
November 28, 2016
Supreme Court, Queens County
Docket Number: Index Number 701434/2016
Judge: Martin E. Ritholtz
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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS
COMMERCIAL DIVISION, PART D
BY: MARTIN E. RITHOLTZ, Justice**

Pavilion Contracting Inc. x Index Number 701434/2016

- against - Motion Date: October 11, 2016

Utica First Insurance Company, et al. Motion Seq. No. 2

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The following papers read on this motion by defendant and third party plaintiff Utica First Insurance Company ("Utica First") for an order granting a default judgment against third party defendant DKJK Properties LLC ("DKJK").

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....	EF40-52
Opposing Affirmation	EF 56-59
Reply Affirmation.....	EF60-63

FILED
DEC - 6 2016
COUNTY CLERK
QUEENS COUNTY

MARTIN E. RITHOLTZ, J.:

Upon the foregoing papers, the motion is determined as follows:

DKJK is the owner of real property improved with a three-story apartment building located at 80-20 138th Street, Queens County, New York. Grand View Sponsor LLC (Grand View) is the owner of an adjacent property located at 135-46 Grand Central Parkway, Briarwood, New York. In 2013, Grand View demolished a pre-existing building on its property and commenced work in 2014 to construct a multi-family building on the site.

In November 2014, DKJK discovered damage to its building, and commenced the underlying property damage action against Grand View and Pavillion in Supreme Court, New York County (Index No. 154315/2015). Harleysville Worcester Insurance Company (Harleysville), DKJK's insurer, made payments to DKJK in excess of \$200,000.00 in connection with said property damage. Harleysville, as subrogee of DKJK, was granted leave to intervene as a plaintiff in the underlying New York County, pursuant to an order dated July 6, 2016.

Utica First issued a commercial liability insurance policy to Pavilion for the period of August 6, 2014 through August 6, 2015. Pavillion provided Utica First with timely notice

of the underlying action, and in a letter dated June 4, 2015, said insurer disclaimed coverage based upon certain policy exclusions. Pavillion also had an excess insurance policy that was issued by Scottsdale Insurance Company (Scottsdale), and on July 9, 2015, Scottsdale disclaimed coverage based on the same provisions, exclusions and limitations set forth in Utica First's policy.

Pavillion commenced by e-filing the within declaratory judgment action against Utica First and Scottsdale by e-filing on February 6, 2016. Pavillion, in its first cause of action asserts that the alleged damage to DKJK's property is a covered loss, and seeks a declaration to the effect that the defendants are obligated to defend and indemnify it in the underlying action. The second cause of action is for breach of contract.

On May 27, 2016, Utica First commenced by e-filing a third-party action against DKJK and Grand View for declaratory judgment. With respect to DKJK, Utica First seeks a seeks a declaration to the effect

- (i) that Utica First has no obligation to provide coverage under the Utica First policy to Pavilion or to any other person or entity, including, but not limited to DKJK Properties, or any damage, cost or expense incurred as a result of or in connection with the Loss" [damage to DKJK's property];
- (ii) that Utica First is under no obligation to defend or indemnify Pavilion or to any other person or entity in the Underlying Lawsuit, or any other lawsuit arising from the Loss; and
- (iii) that Utica First is under no obligation to reimburse or otherwise compensate Pavilion or any other entity, including but not limited to DKJK Properties for any damage, cost or expense incurred with the Loss or any lawsuit arising therefrom, or from any judgment or settlement obtained by any person or entity, including but not limited to DKJK Properties, against any other person or entity in connection with the Loss or any lawsuit arising therefrom, or for any judgment or settlement obtained by any person or entity, including, but not limited to DKJK Properties, against any other person or entity in connection with any lawsuit, including, but not limited to the Underlying Lawsuit, arising from the Loss.

A similar cause of action for declaratory judgment is alleged against Grand View.

Third party defendant Grand View apparently served an answer to the third party complaint. Harleysville, as subrogee of DKJK, was granted leave to intervene as a third-

party defendant pursuant to a so ordered stipulation dated September 28, 2016.

DKJK has neither appeared nor served an answer to the third-party complaint. Defendant and third-party plaintiff Utica First now seeks a default judgment against third party defendant DKJK on its first cause of action for declaratory judgment.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default in answering or appearing (*see* CPLR 3215[f]; *Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 985-986 [2d Dept 2016]; *Jacobsen v S & F Serv. Ctr. Co., Inc.*, 131 AD3d 450, 452 [2d Dept 2015]; *Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 698-699 [2d Dept 2014]; *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 [2d 2010]).

A plaintiff must allege enough facts to enable the court to determine that a viable cause of action exists (*see Roy v 81E98th KH Gym, LLC*, 142 AD3d at 985-986; *Jacobsen v S & F Serv. Ctr. Co., Inc.*, 131 AD3d at 452; *Triangle Props. #2, LLC v Narang*, 73 AD3d at 1032). A verified complaint may be used as the affidavit of the facts constituting the claim (*see* CPLR 3215 [f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]), but it must allege "enough facts to enable a court to determine that a viable cause of action exists" (*id.* at 71; *see Triangle Props. # 2, LLC v Narang*, 73 AD3d at 1032; *Neuman v Zurich N. Am.*, 36 AD3d 601, 602, [2d Dept 2007]). Moreover, the verified complaint must contain evidentiary facts from one with personal knowledge since a pleading verified by an attorney pursuant to CPLR 3020 (d) (3) is insufficient to establish its merits (*see Triangle Props. # 2, LLC v Narang*, 73 AD3d at 1032; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d 353, 356 [2d Dept 2005]; *Saks v New York City Health & Hosps. Corp.*, 302 AD2d 213 [1st Dept 2003]).

An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate . . . defense of [the] insured," without regard to the insured's ultimate likelihood of prevailing on the merits of a claim (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]; *see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]).

The insurer's duty to defend its insured "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; *see also see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264-265 [2011]; *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Moreover, if "any of the claims against an insured arguably arise from covered events, the insurer is

required to defend the entire action' ” (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002], quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). It is “immaterial that the complaint against the insured asserts additional claims which fall outside the policy’s general coverage” (*id.* at 444; see *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d at 264-265 [2011]).

It is well settled that “before an insurance company is permitted 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” (*Seaboard Surety Co. v Gillette Co.*, 64 NY2d 304, 311[1984] [internal citations omitted]). Thus, “[t]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Cont'l Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; see also *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d at 175).

Here, Utica First has submitted proof of service of the third party complaint on DKJK on June 6, 2016, pursuant to Limited Liability Company Law §303 and CPLR 311-a. DKJK has neither appeared nor answered and its time in which to do so expired on July 6, 2016. Utica First asserts that coverage under its policy for the damages claimed by DKJK in the underlying action is excluded by one or more of the exclusions cited in its June 4, 2015 disclaimer letter issued to its insured Pavilion.


In support of the within motion, Utica First also submits a copy of Pavillion’s verified complaint in the main action for declaratory judgment, an affidavit from Susan Wheaton, Utica First’s Vice President for Claims, the insurance policy Utica First issued to Pavillion, a copy of the June 4, 2015 disclaimer letter from Utica First to Pavillion, and a copy of the summons and complaint in the within third party action.

Utica First’s third party claim for declaratory judgment against DKJK is based upon the policy provisions and exclusions set forth in the disclaimer of coverage issued to Pavillion, as well as the allegations in the underlying action and the allegations in Pavillion’s verified complaint. Utica First, however, has failed to submit a copy of the complaint in the underlying action. As Pavillion’s complaint is verified by its counsel, it is insufficient to establish its merits. In addition, Ms. Wheaton, in her affidavit, does not state that she has personal knowledge of the facts pertaining to the property damage allegedly sustained by DKJK in the underlying action. The evidence submitted herein, therefore, is insufficient for this court to determine that a viable cause of action exists.

In view of the foregoing, defendant and third party plaintiff’s motion for a default

judgment against DKJK, is denied.

The foregoing constitutes the decision, opinion, and order of this Court.



Hon. Martin E. Ritholtz
Justice, Supreme Court, Queens County

Dated: Jamaica, New York
November 28, 2016

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