New York Inst. of Tech. v National Union Fire Ins. Co. of Pittsburgh, PA
2017 NY Slip Op 30345(U)
February 23, 2017
Supreme Court, New York County
Docket Number: 650376/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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NEW YORK INSTITUTE OF TECHNOLOGY,

Plaintiff,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant.

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Index No. 650376/16

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Richard J. Quadrino, Esq.
Eugene S. R. Pagano, Esq.
Quadrino Law Group, PC
225 Broad Hollow Rd., Ste. 304
Melville, NY 11747
631-815-5800

For defendant:
Patrick M. Kennell, Esq.
Kaufman Dolowich *et al.*
60 Broad St., 36th fl.
New York, NY 10004
212-458-9600

By notice of motion, defendant-insurer moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff-insured's action for a declaratory judgment. Plaintiff opposes.

I. PERTINENT BACKGROUND

On September 1, 2008, defendant issued a liability policy to plaintiff effective until September 1, 2009. Section 7 of the policy contains the following notice provision:

> (a) [Plaintiff] shall, as a condition precedent to the obligations of [defendant] under this policy, give written notice to the [defendant] of any Claim made against [plaintiff] as soon as practicable and either:
>
> (1) anytime during the Policy Year or during the [extended reporting period] (if applicable); or
>
> (2) within 30 days after the end of the Policy Year or the [extended reporting period] (if applicable), as long as such Claim is reported no later than 30 days after the date such Claim is first made against [plaintiff].

(NYSCEF 20). Under the policy, a claim is deemed to have been "made" against plaintiff when it receives written notice of it. (*Id.*).

An endorsement to the policy provides that when coverage ends, plaintiff "shall have the right to an Automatic Extending Reporting Period [ERP] or an Optional [ERP]," defined in the policy as coverage which provides:

> a period of sixty (60) days . . . following the effective date of Termination of Coverage . . . in which to give written notice to [defendant] of Claims first made against [plaintiff] during said sixty (60) . . . day period for any Wrongful Act occurring prior to such Termination of Coverage and otherwise covered by this policy.

(*Id.*).

An addendum to the policy, "Notice to New York Insureds," provides as follows:

> 1. This policy is written on a claims-made basis. The coverage afforded by this policy is limited to only those claims actually made while the policy remains in effect. All coverage under this policy ceases upon termination of the policy, except coverage for claims reported during the automatic [ERP] . . . .
>
> 2. Extended Reporting Periods:
>
> Automatic Extended Reporting Period
>
> The automatic [ERP] shall apply to claims first made against [plaintiff] and reported to [defendant] during the sixty (60) days immediately following the effective date of termination.

(*Id.* [capitalization and emphasis removed]).

On or about February 26, 2009, an employee of plaintiff commenced a defamation action against it by summons with notice. (NYSCEF 21). By notice filed and served on June 24, 2009, plaintiff's counsel in the underlying action indicated that he was not consenting to efiling. (NYSCEF 22).

Plaintiff's policy ended on September 1, 2009. By letter dated September 15, 2009, plaintiff notified defendant of the underlying action. (NYSCEF 31-32). Subsequent email correspondence between counsel for the parties in this action reflects that plaintiff received notice of the suit against it on August 6, 2009 at the latest. (NYSCEF 23, 38).

By letters dated January 29, 2010 and March 5, 2012, defendant disclaimed coverage. (NYSCEF 24-25).

II. CONTENTIONS

Defendant contends that having failed to report to it the underlying claim until 15 days after the policy period expired on September 1, 2009, plaintiff failed to satisfy the policy's notice requirement and is thus, not entitled to coverage. It argues that the 30-day grace period is inapplicable as the underlying claim was not made against plaintiff within 30 days before plaintiff reported it to defendant, and that plaintiff received notice of the underlying action either on June 24, 2009, when plaintiff's counsel served defendant with notice that it would not consent to efiling, or on July 31, 2009, the date on which the pleadings were allegedly served on plaintiff. Thus, it contends, having reported the claim to defendant on September 15, 2009, the latest plaintiff could have had notice of the claim against it was 30 days before September 15, 2009. Nor is the ERP endorsement applicable, it argues, as claims must be both made to plaintiff and reported to defendant during the ERP, and here, the claim was not made against plaintiff during the ERP, but during the policy year. Defendant concludes that, by the plain, unambiguous terms of the policy, plaintiff's report of the claim was untimely because the claim was not made against plaintiff during the ERP. (NYSCEF 26).

In opposition, plaintiff disputes defendant's interpretation of the notice requirements, claiming that the policy permits claims to be reported to it at any time during the original policy term and ERP. It accuses defendant of omitting the reference in the policy to an insured's option of reporting a claim at any time during the ERP as an alternative to the 30-day grace period. Plaintiff moreover argues that defendant's interpretation of the policy as permitting reporting a claim to defendant during the ERP only if no more than 30 days after plaintiff's receipt of the claim violates applicable regulations mandating that insurers provide, unconditionally, an automatic ERP, and disputes that claims must be both made against plaintiff and reported to defendant during the ERP, as a provision of the policy addendum does not require that claims first be made to it during the ERP, thus resulting in an ambiguity which it contends must be resolved in favor of coverage. (NYSCEF 41).

In reply, defendant argues that plaintiff misinterprets the notice provision as creating, in effect, a 60-day reporting grace period, when in fact, the ERP does not apply absent any indication that plaintiff received the claim during the ERP, which plaintiff admits it did not. Moreover, it argues, the clause which plaintiff references as proof of an ambiguity does not define how notice is given during the ERP, and that the clause following it references both claims made and reported, and is thus consistent with the endorsement defining how notice is given during the ERP. It accuses plaintiff of conflating the 30-day grace period with the 60-day ERP, which are separate, unrelated methods of reporting claims under the policy. (NYSCEF 43).

At oral argument, plaintiff's counsel offered an opinion letter issued in 2003 by the New York State Insurance Department addressing Insurance Department Regulation No. 121 (11 NYCRR 73.0 *et seq.*), which he alleges supports plaintiff's position that the notice provisions in

the instant policy are prohibited in New York, as the policy's ERP provision improperly imposes the additional requirement that the underlying claim be made against plaintiff during the 60-day period, which conflicts with the notice provision permitting the insured to report a claim at "any time," including during the original policy term, and argues that in Regulation No. 121 a "claim first made" is defined as one that is reported to the insurer, and thus, plaintiff both "made and reported" its claim on September 15, 2009. (NYSCEF 46).

In a reply brief, submitted after oral argument, defendant disputes the impact of the opinion letter, observing that many courts have since upheld "claims-made-and-reported" policies. At most, it contends, the opinion letter cautions against such policies that have no automatic 60-day ERP. Moreover, it argues, accepting plaintiff's position that a claim is first made when it is reported to the insurer defeats the purpose of the reporting conditions contained in claims-made policies and will "create chaos on the New York insurance market." (NYSCEF 47).

III. ANALYSIS

A. Applicable law

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence provided that the evidence conclusively establishes, as a matter of law, a defense to the asserted claims. (*Leon*, 84 NY2d at 87-99). While the court must construe the pleadings liberally, it is not required to accept the truth of allegations that are flatly contradicted by documentary evidence. (*Maldonado v DiBre*, 140 AD3d 1501, 1505 [3d Dept 2016], *lv denied* 28 NY3d 908; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). The evidence must be "unambiguous, authentic, and undeniable." (*Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 725 [2d Dept 2016]).

B. Interpretation of a policy

An insurance policy is interpreted in the same manner as any contract. (*Universal Am. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). Clear and unambiguous provisions of an insurance policy must be afforded their "plain and ordinary meaning, and the "construction of the policy presents a question of law for the court." (*Id.*; *Slattery Skanska Inc. v Am. Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]), or where its terms are subject to more than one reasonable interpretation (*id.*; *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]). Thus, the court must initially determine if the policy "on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Seaport Park Condominium v Greater New York Mut. Ins. Co.*, 39 AD3d 51, 54 [1st Dept 2007]), and the court should not interpret a policy in a way that "some provisions are rendered

meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]; *Roundabout Theatre Co., Inc. v Continental Cas. Co.*, 302 AD2d 1, 8 [1st Dept 2002]).

Here, the policy sets forth two methods for plaintiff to give defendant notice of a claim: (1) at any time during the original policy term or the ERP, or (2) within 30 days following the end of the policy, provided that plaintiff received notice of the underlying claim no more than 30 days before reporting it to defendant. The endorsement additionally provides that the automatic ERP only applies where the underlying claim is both made to plaintiff and reported to defendant during the 60-day period, and that such a claim is deemed "made" when plaintiff first receives notice of it. These notice provisions are summarized in the addendum, which provides that ERP "coverage [is] for claims reported," although the notice provisions within the ERP and as they appear in the addendum and endorsement require that claims both be made and reported within the ERP. An interpretation of the endorsement as requiring that a claim need only be reported during the ERP renders another provision of the policy meaningless, as plaintiff, with the option of reporting its claim to defendant within 60 days following the end of the policy, would have no reason to elect to use the 30-day grace period. As the policy is not reasonably susceptible to plaintiff's interpretation of it, that claims need not be made against plaintiff during the ERP, it is not ambiguous.

C. Notice provisions

A claims-made insurance policy is designed to protect the insured during the term of the policy "upon notice to the carrier within the policy period[,]" and also provides the insurer with certainty that upon expiration of the policy period, it will not be exposed to further liability. (*Am. Guar. & Liab. Ins. Co. v Chicago Ins. Co.*, 105 AD3d 655, 656 [1st Dept 2013]; *JPMorgan*

Chase & Co. v Travelers Indem. Co., 73 AD3d 9, 16 [1st Dept 2010]). Although claims-made policies are generally disfavored in New York, they are nevertheless permitted for certain types of coverage, and subject to certain minimum standards set forth in Insurance Department Regulation No. 121. (11 NYCRR 73.2, 73.3; *see Segal Co. v Certain Underwriters at Lloyd's, London*, 21 AD3d 138, 141-142 [1st Dept 2005]).

Pursuant to these minimum standards, a claims-made policy is defined as one "that covers liability for injury or damage that the insured is legally obligated to pay, . . . arising out of incidents, acts or omissions, as long as the claim is first made during the policy period or any [ERP]." (11 NYCRR 73.1[a]). A claim made pursuant to such a policy is "deemed first made when the insurer receives written notice of a claim or suit from the insureds or a third party, ..." (11 NYCRR 73.3[a]). Claims-made policies must include an automatic extended reporting period (ERP), or "tail coverage," which is

> coverage for that period of time specified in the policy wherein claims first made after termination of coverage under the policy, for injury or damage that occurs during the policy term, or that occurs on or after the [effective date of the policy], . . . will be considered made during the policy term.

(11 NYCRR 73.1[b], [d]; 73.3[d]).

Here, as the policy includes an ERP, the applicability of which is conditioned on both plaintiff's receipt of notice of the underlying claim and report of it to defendant during the ERP, it violates the minimum standard set forth in 11 NYCRR 73.3(d), whereby the insurer must provide an automatic ERP allowing the insured an additional 60 days to report claims based on "injury or damage" occurring during the original policy term. Thus, by providing, as a condition precedent to coverage, that claims must be both made against plaintiff and reported to defendant during the 60-day ERP, the policy falls below the minimum standards set forth in Regulation No.

121 as it imposes an additional obstacle to coverage. (*See also* 11 NYCRR 73.3[o] ["An insurer may issue a claims-made policy with more liberal policy provisions than required by this Part, ..."]; Ops Gen Counsel NY Ins Dept No. 07-31-2003 [#2] [claims-made-and-reported policy imposed "additional reporting requirements not permitted under the statute," and thus not approved by New York Insurance Department]).

While there exist decisions based on insurance policies containing claims-made-and-reported provisions (*eg Executive Risk Indem., Inc. v Starwood Hotels & Resorts Worldwide, Inc.*, 98 AD3d 878 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]; *Liberty Ins. Underwriters, Inc. Perkins Eastman Architects, P.C.*, 101 AD3d 650 [1st Dept 2012]; *Camalloy Wire, Inc. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 273 AD2d 123 [1st Dept 2000], *lv denied* 95 NY2d 763), absent any indication that the validity of such a provision was raised in any of those cases, they do not support defendant's position. Thus, pursuant to the applicable regulation, the policy should have afforded plaintiff an additional 60 days at the end of the policy term to provide defendant notice of the claim "for injury or damage that occurred," as it did here, "during the policy term" (11 NYCRR 73.1[d]; 73.3[d]), notwithstanding that plaintiff did not first receive notice of the claim against it during the ERP.

By so conditioning the application of the ERP, defendant created a potential gap in coverage for claims made against plaintiff during the original policy term but not reported to defendant until the ERP, as where an insured purchases successive claims-made policies and the latter excludes coverage for claims made against the insured during the former coverage period. (*See* 11 NYCRR 73.0[c] [claims-made coverage may "create potential coverage gaps"]; *see also Checkrite Ltd., Inc. v Illinois Natl. Ins. Co.*, 95 F Supp 2d 180, 193 [SD NY 2000] [gap in

coverage may occur "where the insured switches to another claims-made policy because the subsequent carrier might impose a retroactive date that limits coverage for prior acts"]).

Given the foregoing, I need not address plaintiff's contention that defendant waived certain arguments here by not first raising them in its disclaimers. In any event, a claims-made carrier may not waive a defense to coverage based on the timeliness or effectiveness of notice, as it concerns the existence of coverage. (*See McCabe v St. Paul Fire & Mar. Ins. Co.*, 79 AD3d 1612, 1613 [4th Dept 2010], *appeal withdrawn* 18 NY3d 881 [in context of claims-made policy, assertion that insured failed to notify insurer of claim during policy period is defense to coverage not subject to waiver]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order dismissing the action is denied.

ENTER:

Barbara Jaffe, JSC

DATED: February 23, 2017
New York, New York