

Selective Ins. Co. of N.Y. v Town of Chester
2021 NY Slip Op 33731(U)
February 24, 2021
Supreme Court, Orange County
Docket Number: Index No. EF002900-2019
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X
SELECTIVE INSURANCE COMPANY OF NEW YORK and SELECTIVE WAY INSURANCE COMPANY,

Plaintiffs,

-against-

TOWN OF CHESTER, NANCY J. SHERMAN, as Executor of the Estate of STEVEN M. SHERMAN, and LAROE ESTATES, INC.,

Defendants
-----X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF002900-2019

DECISION, ORDER AND JUDGMENT

Motion Dates: December 2, 2020

The following papers numbered 1 through 18 were read and considered on a (1) a motion by the Plaintiff, pursuant to CPLR 3212, for summary judgment; and (2) a cross motion by the Defendant Town of Chester, pursuant to CPLR 3025, to amend its answer.

Notice of Motion- Boyle Affirmation- Exhibits A-Q- Memorandum of Law 1-4
Opposition- Miele Affirmation - Exhibits 1-4- Memorandum of Law 5-7
Notice of Motion- Miele Affirmation- Exhibits 1-4- Memorandum of Law 8-10
Opposition to Motion- Diederich Affirmation- Exhibit 10- Sherman Affidavit- Memorandum of Law 11-14
Opposition to Cross Motion- Memorandum of Law 15
Reply- Boyle Affirmation 16
Reply- Miele Affirmation- Exhibit 1 17-18

Upon the foregoing papers, it is hereby,

ORDERED, that the motion and cross motion are decided as set forth herein.

Introduction

The Plaintiffs Selective Insurance Company of New York and Selective Way Insurance Company (hereinafter referred to collectively as "Selective") commenced this action seeking a

declaration that they have no duty to defend or indemnify the Town of Chester in an underlying action now pending in federal court, *Sherman v Town of Chester*, 12 Civ 647 (ER) (hereinafter “Federal Action”).

Selective moves for summary judgment.

The Town cross moves for leave to amend its answer to add a counterclaim alleging breach of the implied covenant of good faith and fair dealing.

The Court notes that, although the issues have been extensively argued and briefed by the parties, a determination may be rendered by applying well established principles of law to the basic facts and allegations.

Procedural/Factual Background

The following background information is taken from a decision rendered in the underlying Federal Action.

The Plaintiff in the Federal Action, Steven Sherman¹, purchased a 398-acre parcel of land in the Town of Chester, known as Marebrook, with the intention of developing the property into a residential housing community with a restaurant, equestrian center, golf course, clubhouse and sports facilities. However, the development never occurred, and Sherman ultimately lost the property in 2011.

Sherman filed a series of lawsuits against the Town of Chester, the Town of Chester Board, and the Town of Chester Planning Board (hereinafter referred to collectively as the “Town”) arising from the failed development, to wit: an action in federal court in 2008, and two

¹ In October 2013, Steven Sherman died. His wife, Nancy Sherman, is now the Plaintiff in this federal action. However, for clarity and ease of understanding, the facts will be discussed as if Steven Sherman remains the Plaintiff.

actions in state court in 2011 and 2012, respectively. The 2012 state court action was subsequently removed to federal court, where it remains pending (*i.e.*, the Federal Action). The Federal Action is the underlying action in this proceeding.

The complaint in the Federal Action, as filed, spans over 80 pages and contains almost 500 numbered paragraphs alleging nine causes of action.

In general, Sherman alleges that the Town of Chester had thwarted his efforts to develop the property in various ways, including, *inter alia*, passing moratoriums on development; denying subdivision approval without a legitimate basis; changing zoning laws; and delaying or denying consideration of various applications without a legitimate basis. Sherman alleges that the Town wrongfully prevented him from developing MareBrook because it variously wanted: (1) to make MareBrook a "de facto nature preserve," (2) to retaliate against him for instituting several lawsuits against the Town over the development of MareBrook; and (3) to discriminate against him because he is Jewish, one of his business associates is Jewish, and Town residents are worried about MareBrook becoming a Hasidic community.

After significant motion practice in the Federal Action, only the first and second causes of action remain.

In the first cause of action, captioned "Denial of, and Reprisal For Exercising, Plaintiff's First Amendment Rights, Including Right to Petition, and Freedom of Religion," Sherman alleges that he is Jewish, and associated with Jewish businessmen and lenders, and that there was a "fear and perception" that he might sell MareBrook housing to Jews, including ultra-Orthodox or Hasidic Jews. He alleges that this resulted in the "unlawful and discriminatory actions obstructing Plaintiff's MareBrook Project alleged in the complaint. Thus, he alleges, his right to

exercise his religion, and to associate with people who are Orthodox or Hasidic Jews, and to potentially sell land or housing to such individuals, was infringed.

In the subsection captioned “Denial of right to petition,” Sherman alleges that he was deprived of his right to petition the government for the redress of wrongs regarding the MareBrook application because the Town “did not provide Plaintiff with notice of its motivations and intention to obstruct his land use applications to it, thus depriving Plaintiff of due process (Third Cause of Action).” As a consequence, he alleges, the Town created a deprivation and grievance for which he was entitled to seek redress under the right to petition guarantee of the First Amendment. Sherman alleges that the Town refused to receive and consider his petitions (applications) concerning MareBrook, and that his applications were not considered because the Town “kept changing its zoning ordinances to avoid the need to address the merits of Plaintiff’s land use applications.”

Further, he alleges, he was deprived of another form of petition, to wit: being allowed to address a Town agency- such as the Planning Board- regarding matters pending before the body.

Sherman alleges that he sought for many months in 2009, 2010 and 2011, to be allowed on the Planning Board agenda so that he could be heard and have his subdivision application considered. However, that the Planning Board refused to allow him on its agenda, or appear otherwise.

The Petitioner alleges that this was done so “arbitrarily and in violation of law, upon the purported grounds that Plaintiff must pay Town consultant fees, even though such fees are in dispute. Thus, the Town, through its Planning Board, has denied Plaintiff his right to petition.”

Finally, Sherman alleges, he exercised his right to petition by commencing litigation

against the Town in 2002 regarding the moratorium, and in 2008 and 2010, regarding the regulatory abuse and constant rezoning described herein. As a result of his petitions to the courts, he alleges, he suffered reprisal, and will further be denied the right to petition if this Court does not provide a remedy.

In Sherman's second cause of action, captioned "Regulatory Taking of Plaintiff's Real Property, and Denial of His Property Interest in Using, Enjoying and Selling His Real Property," Sherman alleges that there was no basis for the Town's regulatory actions, which included constant rezoning and land use enactments (not substantially supported by the Town's master plan), and the "arbitrary and capricious administrative requirements imposed by financially self-interested consultants, constitute irrational regulation, which does not support a valid public purpose."

In fact, he alleges, the Town's 2001 land use moratorium, and subsequent changes to the Town's zoning and land use laws, regulations and the Town's interpretations thereof, were not designed to, and did not, substantially advance legitimate State or Town interests, lacked a rational basis, and were contrary to the master plan and comprehensive plans.

Moreover, he alleges, the regulatory actions taken to prevent residential development in an area zoned for residential development, in order to maintain a *de facto* nature preserve, constituted "reverse spot zoning," and was "irrational governmental action."

Further, he alleges, such conduct was directed at him, to single him out and to discriminate against the MareBrook subdivision proposal, and to prevent a legitimate and reasonable proposed use and development of the property.

In addition, he alleges, the Town was required to prepare its own EIS when it revised its

land use ordinance(s), but failed to do so.

Sherman alleges that the Town's actions deprived him of all use and enjoyment of his real property, and constituted a *per se* regulatory taking of his property.

Sherman alleges that, engaging in the balancing test of *Central Transportation Co. v. New York City* (438 U.S. 104 (1978)), the regulatory actions taken by the Town are supported by little, if any, valid public purpose, whereas the burden imposed upon Plaintiff has been “oppressive and devastating.”

Indeed, Sherman alleges, the Town's land use law changes were then used by the Town to impose oppressive regulatory burdens upon him, preventing him from using, developing and enjoying his property and destroying him financially.

Sherman alleges that, balancing the Town's minimal, if any, legitimate interests against his legitimate interests as a property owner, it was clear that the Town had “taken” his real property. That is, he alleges, by constantly and unreasonably changing its land use laws, continuing to this day, the Town had deprived him of all economically viable use of his land on a temporary and permanent basis.

Further, he alleges, upon information and belief, the individual Defendants were aware that their conduct violated, and was designed to violate, his federal civil rights.

Sherman alleges that the Town's actions essentially amounted to the creation of open space and visual easements for the benefit of MareBrook's neighbors and others in the Town; and that this amounted to a *de facto* invasion of his property, and a taking of his land, for the benefit of MareBrook's neighbors and the townspeople.

He alleges that this constitutes the *per se* taking of Plaintiff's real property without due

process or the payment of just compensation.

Sherman alleges that the indefinite, and potentially permanent, keeping of his lands in an undeveloped, semi-forested state, thereby allowing it to be sown with tree seeds from neighboring property, is not materially different from the land being permanently flooded with water; and constituted an actionable invasion of his property by the Town.

Further, he alleges, the Town's actions created an extraordinary delay regarding his right to use and subdivide his property, thereby destroying the "incidents of ownership," to which he is entitled under the Fifth and Fourteenth Amendments, and a "taking" of his property without due process or just compensation.

Moreover, Sherman argues, such takings occurred on the pretext of acting within the Town's police powers.

However, he alleges, such conduct created a local regulatory scheme that violated the teachings of *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393, 415 (1922)), to wit: that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Moreover, he alleges, under the teachings of *Penn Central* and subsequent cases, the Town's actions have so frustrated distinct investment-backed expectations as to amount to a taking of property when considering factors such as:

- the economic impact on the Plaintiff of the challenged rule, regulation or statute;
- the extent to which the regulation interferes with investment-backed expectations; and
- the nature of the challenged action.

Sherman argues that it is a question for a jury whether a developer has been denied all

economically viable use of property and whether (after repeatedly imposing more rigorous demands) a municipality's denial of the developer's proposal substantially advances legitimate public interests.

In addition, Sherman alleges, the Town's action prevented him from exercising the vested rights that he obtained (by law and/or equity), as well as subdividing and developing his property.

"Alternatively," he alleges, the Town, "through intent or negligence, improperly delayed Plaintiff's ability to obtain a 'vested' property interest in his MareBrook application."

Thus, he alleges, the Town is liable to him under the "special facts" exception, and also as a matter of equitable estoppel.

The Action at Bar

Selective commenced this action seeking a declaration that it is no longer obligated to defend or indemnify the Town in the Federal Action.

Selective now moves for summary judgment.

Selective notes that it has, in good faith, been defending the Town under a reservation of rights since 2008. Further, that it had participated in a series of mediation sessions in an attempt to resolve the underlying matter, but to no avail.

However, Selective argues, after the extensive motion practice in the federal action, the only two claims remaining (*supra*) "are unequivocally not covered under the Selective policies because they fall squarely within the Inverse Condemnation and Willful Violation exclusions contained in the Selective Policies."

In addition, Selective asserts, the Inverse Condemnation exclusion contained in the Selective Policies also bars coverage for any claims "arising out of" the taking of Sherman's

property.

In support of the motion, the Plaintiff submits an affirmation from counsel, Joyce E.

Boyle.

Boyle notes that Selective issued two policies to the Town.

The first, a Public Official Liability insurance policy (hereinafter "Selective Policy"), provided in relevant part as follows.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages resulting from claims, to which this insurance applies, against the insured by reason of "wrongful act(s)" rendered in discharging duties on behalf of the public entity named in the Declarations. * * *

* * *

2. Exclusions.

This insurance does not apply to any claim made against the insured:

* * *

- d. For any damage arising out of the willful violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of any insured.

* * *

- 1. For any damages arising out of or in any way connected with the operation of the principles of eminent domain, adverse possession, dedication by adverse use, inverse condemnation or condemnation proceedings, by whatever named used.

* * *

SECTION VI - DEFINITIONS

- 1. "Wrongful act(s)" means any alleged or actual breach of duty, or violation of any federal, state or local civil rights, by an insured while acting within the scope of his/her duties as a public official for the public entity named in the Declarations.

The second policy, Boyle notes, is a Commercial Umbrella Coverage (hereinafter

"Selective Umbrella Policy"), which incorporates the same exclusions as the Selective Policy.

Boyle argues that the Inverse Condemnation exclusion *supra* bars coverage for not only the takings claim alleged in the second cause of action in the complaint in the Federal Action, but also, all claims alleged against the Town in the action, as the exclusion integrates the broad "arising out of" language, which has been interpreted by New York courts to preclude coverage for all claims "arising out of" the taking.

Similarly, she asserts, the exclusion in the policies for "Willful Violations," bars coverage for the First Amendment retaliation claim alleged in the first cause of action.

Thus, she argues, as a matter of law, Selective does not owe a defense or indemnity to the Town for any of the remaining claims in the underlying action.

The Town cross moves to amend its answer to add a counterclaim for breach of the implied covenant of good faith and fair dealing. The Town alleges that Selective breached the implied covenant, *inter alia*:

- (a) by its delay of 11 years in commencing the within declaratory judgment action seeking to be relieved of its duty to defend and indemnify the Town in the underlying action;
- (b) by waiting 4 years after the dismissal of covered claims in the underlying action to commence the within declaratory judgment action and seek to deny coverage on the basis that the remaining claims are not covered;
- (c) by relying on a non-final interlocutory dismissal of covered claims in the underlying action to deny coverage on the remaining claims;
- (d) by moving for summary judgment in the within declaratory judgment action as soon the parties in the underlying action started meaningful settlement negotiations;
- (e) by negotiating in bad faith including, but not limited to, (i) by placing its own interest of succeeding in the within declaratory judgment action above

- Defendant's interest in settling the underlying action; (ii) by putting unfair pressure on Defendant to settle the underlying action with its own money; and (iii) by refusing to contribute to a prospective settlement and/or basing its contribution on the potential that it will succeed in the within declaratory judgment action;
- (f) by ignoring the potential that its actions in bringing this declaratory judgment action could compromise the Defendant's defense in the underlying action by exposing matters solely between it and its insured to the plaintiff in the underlying action;
 - (g) by openly arguing matters that are between Defendant, as insured, and Plaintiff, as insurer, in a declaratory judgment action that includes the plaintiff in the underlying action as a party; and
 - (h) by seeking without basis to exclude coverage of the First Amendment retaliation claim in the underlying action based on the willful violation exclusion without identifying a "federal, state, or local statute, ordinance, rule or regulation" that was alleged to be violated in such claim; and (i) by wrongfully attempting to transfer its duty to defend the underlying matter in its eleventh hour to the Defendant, its insured.

Discussion/Legal Analysis

Initially, it is noted, although not controlling, the timing of this action is noteworthy.

Selective has been defending the Town since at least 2008 without objection (albeit it under a reservation of rights).

In the action at bar, Selective's pleadings suggest that the latest decision from Federal Action, dismissing all but two of Sherman's causes of action, somehow changed the analysis. However, the Court notes, that decision was issued on March 31, 2015, which is now almost six years ago (Motion, Exhibit K).

Otherwise, the Court notes, it does not appear that there has been any disclosure in the Federal Action which has further clarified or narrowed the issues.

Regardless, the Court notes, Selective did not demonstrate entitlement to judgment as a

matter of law. Rather, the Court finds that Selective is obligated to defend the Town in the underlying action. By contrast, any determination as to whether Selective must indemnify the Town is premature.

It is well settled that the duty to defend, which is exceedingly broad, is triggered whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under a policy. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018]. If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018]. It is immaterial that the complaint alleges additional claims which fall outside the policy's general coverage or within its exclusory provisions. If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018]. Further, the duty to defend remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018].

When a policy represents that it will provide the insured with a defense, the Court of Appeals has said that such a policy actually constitutes litigation insurance in addition to liability coverage. Accordingly, an insurer may be contractually bound to defend even though it may not

ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018]. Accordingly, even where a duty to defend has been established, there may still be a triable issue of fact as to whether the underlying occurrence was actually within the scope of coverage afforded by the particular policy at issue. The scope of coverage under a general liability insurance policy is defined largely, if not exclusively, by the express grant of coverage contained in the policy. *Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435 (2002); *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 A.D.3d 974 [2nd Dept. 2018].

For an insurer to be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. *492 Kings Realty, LLC v. 506 Kings, LLC*, 88 A.D.3d 941 [2nd Dept. 2011].

As to the substantive elements of the claimed exclusion for inverse condemnation, a de facto taking is a permanent ouster of the owner or a permanent physical or legal interference with the owner's physical use, possession, and enjoyment of the property by one having condemnation powers. *Sarnelli v. City of New York*, 256 A.D.2d 39 [2nd Dept. 1998]. Although a de facto taking or appropriation may be characterized as an aggravated form of trespass, the basic distinction lies in the egregiousness of the trespass and whether it is of such intensity as to

amount to a taking. *Sarnelli v. City of New York*, 256 A.D.2d 39 [2nd Dept. 1998]. Where a governmental authority's continuous, permanent trespass onto private property constitutes a de facto taking, inverse condemnation, rather than trespass, is the appropriate theory for granting damages to an injured landowner. *Sarnelli v. City of New York*, 256 A.D.2d 39 [2nd Dept. 1998].

Here, as noted *supra*, the policies at issue provide coverage for "wrongful act(s)," which are defined to include "any alleged or actual breach of duty, or violation of any federal, state or local civil rights, by an insured while acting within the scope of his/her duties as a public official for the public entity named in the Declarations."

Thus, Selective's burden in this action, and on this motion practice, is to demonstrate that the allegations in the Federal Action that remain arise solely either from conduct by Town officials that was in "willful violation of any federal, state, or local statute, ordinance, rule or regulation," or which resulted in "inverse condemnation." Here, this was not done.

Initially, it is noted, the allegations of the first and second causes of action incorporate by reference the general background allegations of the complaint, which cover a broad variety of conduct and actions.

Further, it is noted, although Sherman focuses on conduct which he believes was intentionally directed at him (*e.g.*, denials of his applications), not all of the conduct at issue affected only him. Rather, some of the conduct complained of was applicable to all properties in the Town (*e.g.*, moratoriums, zoning changes). Moreover, the Court notes, in general, concerns about, and municipal action concerning, land use, in particular as to density, are not unique to the Town of Chester. Rather, these are regional issues, and have been for quite some time.

In addition, although, again, Sherman focuses on conduct which he believes was

intentionally directed at him, his allegations are not limited to “willful violations” of a federal, state, or local statute, ordinance, rule or regulation. Rather, Sherman expressly alleges that certain conduct was “arbitrary” and/or “negligent” and/or “irrational.”

Moreover, it is noted, many of Sherman’s allegations concern alleged violations of his civil rights, which are expressly encompassed within the coverage provided for “wrongful act(s).”

By contrast, the exclusion for “willful violations” does not expressly include civil rights, and, in general, exclusions are to be strictly and narrowly construed, and are not to be extended by interpretation or implication. *Boro Park Land Co., LLC v. Princeton Excess Surplus Lines Ins. Co.*, 140 A.D.3d 909 [2nd Dept. 2016].

In sum, on the record presented, Selective did not demonstrate that it need not defend the Town in the underlying action because, for Sherman to prevail on either of the two remaining causes of action, he must prove a willful violation of a federal, state, or local statute, ordinance, rule or regulation.

Finally, it is noted, although not expressly pleaded as such, some of the allegations in the Federal Action may be read as seeking a remedy for “inverse condemnation.” However, the Court notes, the remaining allegations do not concern solely allegations of inverse condemnation.

In any event, on the record presented, Selective did not demonstrate that it need not defend the Town in the underlying action because, for Sherman to prevail on either of the two remaining causes of action, he must prove inverse condemnation.

Thus, Selective is obligated to defend the Town in the underlying action.

However, any determination as to whether Selective is obligated to indemnify the Town

is premature. Whether Selective will be obligated to indemnify the Town will turn on whether Sherman prevails in the Federal Action and, if so, on what grounds.

In light of the foregoing, the Town's cross motion for leave to amend its answer is denied as moot.

Accordingly, and for the reasons stated, it is hereby,

ORDERED, ADJUDGED and DECREED, that the Plaintiffs are obligated to defend the Defendant Town of Chester in an underlying action pending in federal court, entitled *Sherman v Town of Chester*, 12 Civ 647 (ER); and it is further,

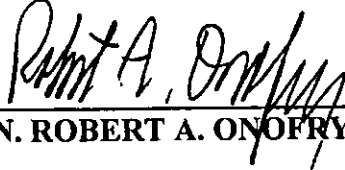
ORDERED, ADJUDGED and DECREED, that a declaration as to whether the Plaintiffs are obligated to indemnify the Defendant Town of Chester in an underlying action pending in federal court, entitled *Sherman v Town of Chester*, 12 Civ 647 (ER), is premature, and that request for relief is denied, without prejudice to renew ; and it is further,

ORDERED, ADJUDGED and DECREED, that the Town of Chester's cross motion is denied as academic.

The foregoing constitutes the decision and order of the Court.

Dated: February 24, 2021
Goshen, New York

ENTER



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