Northern Sec. Ins. Co. v. Rosenthal, No. 818-12-07 Wncv (Toor, J., Nov. 21, 2008)

STATE OF VERMONT
WASHINGTON COUNTY

NORTHERN SECURITY INSURANCE CO., INC., Plaintiff v. DONALD ROSENTHAL, MARTHA ROSENTHAL, and THERESA HILSDON, Defendants	SUPERIOR COURT Docket No. 818-12-07 Wncv

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a declaratory judgment action by which plaintiff Northern Security Insurance Co. Inc. ("Northern Security") seeks a determination that it need not provide coverage to its insureds, the Rosenthals, for injuries suffered at their residence by Hilsdon. Northern Security has filed a motion for summary judgment and the Rosenthals have filed a cross-motion for partial summary judgment. Oral argument on the motions was held on November 17, 2008.

Undisputed Fats

The following facts are undisputed. On January 7, 2006, Hilsdon allegedly fell through an open trap door at the Rosenthals' home. Hilsdon was at the home in connection with a weekend couples retreat offered by the Rosenthals as part of their consulting business. Hilsdon and her fiancé were participating in the retreat. There was

no other reason for her presence at the home. Hilsdon was getting breakfast, which was included in the weekend event fee, when she fell. The trap door in the dining area was open because Martha Rosenthal was getting a bathmat from the basement drier for another weekend guest also there for the retreat.

Hilsdon sued the Rosenthals in connection with her injuries. Northern Security provides the Rosenthals with homeowner's coverage, but the Rosenthals did not purchase a home business rider. Nor did they have a separate business policy covering these events. Northern Security has denied coverage based upon the business exclusion in the homeowner's policy. The policy states that there is no coverage for bodily injury "arising out of 'business' pursuits of an 'insured.'" It also states that the exclusion "does not apply to activities which are usual to non-'business' pursuits."

Conclusions of Law

The issue before the court is whether or not the "non-business" exception to the business exclusion in the homeowners' policy applies here.[1] Hilsdon argues that the exception applies because her fall is something that could have happened to any visitor to the home, whether a business invitee or a social guest. She argues that there was a defective condition in the home, which is not a business issue. She points to a case in which coverage was found when a business invitee at a dog kennel was injured by dogs

[1] The motions raise other issues, but with one exception the court's resolution of this issue makes it unnecessary to reach the others. The exception is the Rosenthals' claim that Northern Security waived its right to raise the business exclusion because it initially accepted coverage without reservation *See* Amended Answer, Defense No. 4. Because the Rosenthals have not responded at all to Northern Security's argument on this issue, the court considers the defense to be abandoned. Even if it were not, based upon the undisputed fact that Ms. Hilsdon originally misrepresented her role at the home as that of a social guest, and that coverage was premised upon that fact, the court would not find Northern Security bound to its initial coverage decision.

in the driveway due to "the failure of the insured to maintain the driveway in a safe condition…" Vermont Mutual Insurance Co. v. Gambell, 166 Vt. 595, 596 (1997).

Northern Security argues that the real issue here is that Hilsdon was a business invitee and the Rosenthals owed her a duty in that capacity, citing Luneau v. Peerless Insurance Co., 170 Vt. 442 (2000) and Northern Security v. Perron, 172 Vt. 204, 223 (2001).

In Luneau, the Vermont Supreme Court rejected the old view that looked solely to the activity in which the insured was engaged at the time of the injury. That old view was exemplified by a case finding that because making coffee had nothing to do with home daycare services, a child's injuries from a hot coffee pot were non-business activities. Gulf Insurance Co. v. Tilley, 280 F. Supp. 60 (N.D. Ind. 1967), *aff'd* 393 F.2d 119 (7th Cir. 1968). Tilley was later followed by another home daycare case in which the child was injured falling into the fireplace while the owner was making lunch. In that case, the court decided that what mattered was not what the insured was doing at the time – making lunch – but her "failure to properly supervise a young child." Stanley v. American Fire and Casualty Co., 361 So.2d 1030, 1032 (Ala. 1978). The Stanley court noted: "Undertaking the business relation of child care for compensation is certainly not ordinarily incident to the conduct of a household." Id.

In Luneau, the Court adopted the Stanley approach and explained that the most important reason to do so was grounded in the purpose of a homeowner's policy:

> We are construing a homeowner's policy "designed to insure primarily within the personal sphere of the policyholder's life and to exclude coverage for hazards associated with regular income-producing activities …[which] involve different legal duties and a greater risk of injury or property damage to third parties than personal

> pursuits." Business persons can obtain business liability insurance. … It is undesirable to force homeowners' policy premiums to rise to cover a major part of the business tort risk of those homeowners who conduct a business in or out of the home but choose not to purchase insurance to cover the risk.

Luneau, 170 Vt. at 447(citations omitted). Thus, in that case the court held that injuries sustained from falling speakers at a wedding were not covered by the disc jockey's homeowner's policy, because they occurred as part of his business of performing. The Court reasoned that although what was alleged was negligence in stacking the speakers, "the very idea that [the DJ] was negligent is predicated on his business-related duty to maintain a safe space for his customers." Id. at 449.

The same is true here. Hilsdon was at the Rosenthals' home only as a business invitee, not as a friend. The Rosenthals had a duty to maintain safe business premises. Hilsdon was injured in the course of the business relationship. The fact that the open trapdoor could also have injured a social guest is irrelevant. There is nothing "personal" about the relationship or the activities.

Hilsdon argues that Gambell requires a different result. Rather than stating that it was overruling Gambell, our Supreme Court has distinguished that case on the grounds that Gambell (1) involved activities outside the business premises (in the driveway), and (2) involved dogs unrelated to the kennel business. Luneau, 170 Vt. at 449 n. 3. Although this court finds Luneau's attempt to distinguish Gambell on its facts strained at best, the distinction applies here as well. There is no question that the injury occurred inside the premises where the business was occurring, and there is no question that the trapdoor was

open because Rosenthal was conducting a part of her business – getting a bathmat for another business guest.[2]

To the extent that Hilsdon's claim is that the trapdoor was a hidden defect and she owed everyone, not just business invitees, a duty to warn of it, her argument is undercut by Perron. In that case, the homeowner's child was alleged to have assaulted other children who were in her home for daycare services. In arguing for application of the non-business exception to the business exclusion, the injured party argued that "supervision of one's own children is an activity usual to nonbusiness pursuits." Perron, 172 Vt. at 223. The Court rejected that argument, stating that "while parents generally have a duty to supervise their children regardless of whether they are operating a day care, here the [insureds] allowed their son to interact with the children attending the day care. The [insureds'] duty to supervise their own children was encompassed within their duty to ensure the safety of [children attending the daycare]." Id. at 224. Here, any duty to social guests was similarly encompassed within the Rosenthals' duty to their business invitees.

The court concludes that the business exclusion applies and the non-business exception to that exclusion does not. This conclusion also disposes of the Rosenthals' counterclaims in this case.

Order

Northern Security's motion for summary judgment is granted. The Rosenthals' cross-motion is denied. Judgment will be entered for the plaintiff.

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[2] This case is also distinguishable from the recent case of Towns v. Northern Security Insurance Co., 2008 VT 98, because there the court found as a factual matter that the activities at issue were "strictly for personal use" and "served no business purpose." Id. ¶¶ 12 and 15.

Dated at Montpelier this 21st day of November, 2008.

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Helen Toor
Superior Court Judge