

AT STAMFORD
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STAMFORD, CT 06905

DOCKET NO. FST CV 20-6045119-S : SUPERIOR COURT
2021 AUG 10 PM 3:48
STEWART, JEFFREY : JUDICIAL DISTRICT OF
 : STAMFORD/NORWALK
V. : AT STAMFORD
OLD REPUBLIC NATIONAL TITLE INS. CO. : AUGUST 10, 2021

MEMORANDUM OF LAW

Defendant Old Republic National Title Insurance Company ("Old Republic") has moved for summary judgment to dismiss the claims against it brought by Jeffrey Stewart and Andrea Stewart (the "Stewarts") and 9 Byram Dock, LLC ("LLC"). For the reasons stated below, the motion is granted.

The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are well established. Practice Book [§17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact

which will make a difference in the result of the case. . . .” *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

“In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent....” *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: “it is then ‘incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.’” *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of “showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact.” *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

The Insurer Properly Denied Defense Costs on the 9 Byram Dock Street Claim.

The LLC, managed by plaintiff Jeffrey Stewart, owns 9 Byram Dock Street in the Byram neighborhood in Greenwich. The LLC is insured on an owner’s title insurance policy from Old

from Old Republic, issued with a coverage date of October 31, 2014 ("LLC Policy"). In 2016 the LLC was sued by the owners of 14 Byram Dock Street, a family named Kennedy, who alleged in their complaint that the LLC obstructed an easement to them over the private portion of Byram Dock Street (the "Kennedy Lawsuit"). Without notifying Old Republic, the LLC engaged counsel to defend the Kennedy Lawsuit. The LLC was alleged to have obstructed the easement by extending a lawn, installing a raised drainage system and removing a stone pillar. Six months after commencement of the Kennedy Lawsuit, after the Kennedys filed a Revised Complaint that alleged the LLC did not have exclusive ownership of or exclusive rights to the easement, the LLC notified Old Republic the Kennedy Lawsuit was pending and notified the insurer the LLC may have a claim under the LLC's title policy because its "ownership" of the subject property is at issue based on the Revised Complaint that had been recently filed. Old Republic denied coverage and concluded it had no obligation to defend the Kennedy Lawsuit for a number of reasons, including that the LLC Policy does not insure the LLC's exclusive rights to and ownership of the easement, the LLC does not have exclusive ownership of the easement, the LLC's conduct caused the Kennedy Lawsuit to be brought based on the allegations in the Revised Complaint and the events at issue occurred after issuance of the policy. The LLC later declined to pay the LLC's expenses of the Kennedys Lawsuit, reaffirming the disclaiming of coverage, and announced the LLC Policy did not insure the private portion of Byram Dock Street.

The Kennedy Lawsuit was settled by withdrawal of the suit and an agreement by plaintiff to pay for certain restorative work on the easement together with payment of \$10,000 to the LLC, which settlement did not require any payment by the LLC or the Stewarts.

Insurance contracts are construed under the general rules that govern written contracts. See *Jemiola, Trustee v. Hartford Cas. Co.*, 335 Conn. 117, 128 (2019).¹ As the Appellate Court observed in *RCN Capital, LLC v. Chicago Title Ins. Co.*, 196 Conn.App. 518, 523-24 (2020): “[a] title insurance policy is a contract of indemnity under which the insurer agrees to indemnify the insured in a specified amount against loss through defect of title to real estate. ... Accordingly, the relationship between an insurance company and the insured is essentially contractual.” (Citation omitted). In interpreting an insurance contract “[t]he determinative question is the intent of the parties, that is, what coverage the ... [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy..[.]” *Jemiola*, 335 Conn. at 128 (citations omitted).

In *General Ins. Co. of America v. Okeke*, 182 Conn.App. 83, 97 (2018), the Appellate Court held “the insurer's duty to defend is measured by the allegations of the complaint”:

“The principles governing the determination of this issue are well settled. ‘[A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint.... The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which

¹ “An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the ... [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy.... If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning.... Under those circumstances, the policy is to be given effect according to its terms.... When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result....’

‘In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms.... As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading.... Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy.’” *Jemiola*, 335 Conn. at 128-29 (citations omitted).

bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability.... It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint.... Hence, if the complaint sets forth a cause of action within the coverage of the policy, the insurer must defend.'... Indeed, '[i]f an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured.'.... 'On the other hand, if the complaint alleges a liability which the policy does not cover, the insurer is not required to defend.'" (Citations omitted).

Accord, Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co., 254 Conn. 387, 395 (2000) ("[t]he question of whether an insurer has a duty to defend its insured is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the insurance policy").

In this action the LLC claims in Count One that Old Republic breached the LLC Policy by failing to fund its costs to defend the Kennedy Lawsuit, primarily the attorney's fees incurred, and seeks indemnification for the expenses paid to defend the Kennedy Lawsuit. The LLC argues that when the Kennedys revised their complaint to raise an issue as to the "ownership" of the underlying property subject to the easement that raised a title issue within the coverage of the LLC Policy that triggered a duty to defend the Kennedy Lawsuit.² It is clear, however, that the use of the term "ownership" in the Kennedys' revised complaint did not challenge title to the property but rather the LLC's right to exclusive use of the easement, which was the primary issue raised in the Kennedy Lawsuit from its inception.³ On its face the complaint in

² The Kennedy complaint was revised again to remove the reference to "ownership" within a short time, which confirms that the term referred to exclusive rights to use the easement not title to the underlying property.

³ At the Court's request the parties briefed the ownership of the property underlying the easement over the private portion of Byram Dock Street. Not surprisingly, the parties did not agree with plaintiffs urging that the property belonged to the LLC and defendant stating that the property belonged to William Rowe or his heirs. The reason the Court requested this information was to ascertain whether the property underlying the right-of-way was part of the premises insured or whether it was an "abutting" roadway and thus within an exclusion to the LLC Policy. If the roadway was not abutting but part of the premises insured the exclusion would not apply. The

the Kennedy Lawsuit did not concern matters on which Old Republic had a duty to defend under the LLC Policy.

Moreover, the gravamen of the Kennedy Lawsuit was the affirmative conduct of the LLC that occurred after the policy was issued and therefore was excluded from coverage under the LLC Policy.

Old Republic has borne its burden to prove there is no genuine issue of material fact to be tried and it is entitled to summary judgment that Old Republic did not breach its duty to defend the Kennedy Lawsuit and it is not required to indemnify the LCC for its expenses in defending the action.

The Insurer Properly Denied Defense Costs on the 11 Byram Dock Street Claim.

The Stewarts obtained an owner's title policy from Old Republic when they acquired ownership of 11 Byram Dock Street, which is adjacent to 9 Byram Dock Street, that provides coverage from August 6, 2013 (the "Stewarts' Policy").

In April, 2016, almost three years after the Stewarts acquired 11 Byram Dock Street and issuance of the Stewarts' Policy, the Town of Greenwich Conservation Commission (the "Commission") recommended that the Town of Greenwich (the "Town") acquire the abandoned African-American cemetery, believed to be on or adjacent to 11 Byram Dock Street.

parties' dispute concerning ownership of the road is not material because the Kennedys were not challenging the ownership of the road, but rather the exclusivity of its use, and because there are other reasons to exclude coverage under the LLC Policy and it is not necessary to resolve the ownership of the property and whether to apply the policy exclusion relating to "abutting" roadways.

The Stewarts' attorneys objected to the Town's acquisition of the abandoned African-American cemetery because it was believed that the driveway to 11 Byram Dock Street, included in their deeded rights, crossed over the cemetery site. The Stewarts sent a notice of claim to Old Republic under the Stewarts' Policy claiming that the insured's ownership rights to the driveway "has recently been called into question by the Town of Greenwich" Old Republic declined coverage stating that that the cemetery would be a condition of the property not a matter of title, any action to acquire the cemetery would occur after issuance of the Stewarts' Policy and thus excluded from coverage and would be a government taking, also excluded from coverage. Old Republic left open the possibility that it may revisit its decision to decline coverage based on subsequent events.

Without notifying Old Republic, the Stewarts sued the Town seeking a declaratory judgment concerning the application of C.G.S. § 19a-308a to the African-American cemetery and to quiet title to the driveway or to acquire title thereto by prescriptive easement or adverse possession (the "Greenwich Lawsuit").⁴ The Greenwich Lawsuit was later settled by the Town acquiring the cemetery and quit-claiming the driveway back to the Stewarts. The Stewarts made a claim to recover their litigation expenses on the Greenwich Lawsuit and Old Republic again disclaimed coverage, noting that it did not approve the expenses and attorney's fees incurred in initiating and defending the Greenwich Lawsuit as required under the Stewarts' Policy.

⁴ C.G.S. § 19a-308a provides: "(b) [a]ny municipality may acquire an abandoned cemetery, including ownership of any occupied or unoccupied lots or grave sites in such cemetery."

In this action in Count Two the Stewarts claim that Old Republic breached the Stewarts' Policy by failing to fund its costs on the Greenwich Lawsuit, primarily the attorney's fees incurred from representation of counsel engaged by the Stewarts to prosecute the action, and seeks indemnification for the expenses paid to in connection with the Greenwich Lawsuit.

At the outset it should be noted that the Stewarts sued the Town, not the other way around, so the Stewarts cannot be said to have expended funds prosecuting the Greenwich Lawsuit to defend their title to 11 Dock Street. The possible presence of the African-American cemetery was a condition of the property not a matter of title. For the Town to acquire the portion of 11 Dock Street that contained the cemetery and impair the Stewarts' use of the driveway the Town would have to exercise its police power to take the property by eminent domain, an event that would occur after the issuance of the Stewarts' Policy, and therefore subject to exclusions from coverage as a post-issuance event and a governmental taking.

In addition, the Stewarts breached the policy by depriving Old Republic of its contractual right to control the defense, including its right to authorize defense costs, and to select counsel, by the Stewarts' failure to provide timely notice of commencement and later settlement of the Greenwich Lawsuit. The earlier declination of coverage did not excuse the Stewarts' obligation to provide Old Republic with notice of the suit and settlement and to incur and submit only authorized expenses for reimbursement.

Old Republic has borne its burden to prove there is no genuine issue of material fact to be tried and it is entitled to summary judgment that Old Republic did not breach its duty to

defend the Greenwich Lawsuit and it is not required to indemnify the Stewarts for their expenses in connection with that action.

DECISION ENTERED IN
ACCORDANCE WITH THE
FOREGANG O.J. 8/10/21,
IDNO SENT 8/10/21.

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Krumeich, J.T.R.