LANE v. SECURITY MUTUAL INSURANCE COMPANY, 256 A.D.2d 1100 [4th Dept 1998]

682 N.Y.S.2d 777

JORETTA K. LANE, Respondent, v. SECURITY MUTUAL INSURANCE COMPANY, Appellant.

Appellate Division of the Supreme Court of New York, Fourth Department.

December 31, 1998

Appeal from the Supreme Court, Monroe County, Siracuse, J. — Summary Judgment.

Order insofar as appealed from reversed on the law without costs and motion denied. Memorandum: In March 1997 plaintiff's home was destroyed by fire. Defendant insurer disclaimed coverage under plaintiffs homeowner's policy because the fire was allegedly set by plaintiff's 17-year-old son. Plaintiff commenced this action seeking declaratory relief and damages.

Supreme Court erred in granting plaintiffs motion for partial summary judgment on the first cause of action and declaring that the loss is covered under the policy. The policy is a contract (*see, Reed v. Federal Ins. Co.*, 71 N.Y.2d 581, 588), and its unambiguous terms should be given effect (*see, Allstate Ins. Co.v. Mugavero*, 79 N.Y.2d 153, 164). The policy defines "insured" to include "any person under the age of 21 in your care or in the care of your resident relatives". The policy excludes from coverage losses resulting from intentional acts committed by "an insured". Plaintiff conceded for purposes of her motion that the fire was intentionally set by her son who lives in her home. Thus, plaintiff's son is "an insured" under the policy, and the loss is not covered (*see, Branch v. Chenango Mut. Ins. Co.[appeal No. 2]*, 225 A.D.2d 1079; *see also, Allstate Ins. Co. v. Mugavero, supra*, at 164).

We reject plaintiff's contention that any policy of fire insurance that excludes from coverage losses resulting from intentional acts committed by "an insured", as opposed to "the insured", violates Insurance Law § 3404 (f) (1) (A) by providing significantly less coverage than the standard fire Insurance Page 1101 policy set forth in Insurance Law § 3404 (e). The standard policy is silent with respect to such an exclusion, and it does not define the term "insured". "The extent of the application of insurance under [the standard] policy * * * and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto" (standard policy, lines 42-47). Defendant insurer complied with this provision, and its policy form was approved by the Superintendent of Insurance pursuant to Insurance Law § 2307 (b) and § 3404 (f) (1) (*see, Matter of Liberty Mut. Ins. Co. [Hogan]*, 82 N.Y.2d 57, 61).

Plaintiff further contends that, because she is the sole owner of the insured residence, she is the only person with an insurable interest and her son's wrongdoing may not be imputed to her. Proof that the son is not an owner, however, is not conclusive on whether he has an insurable interest. The statutory definition of "insurable interest" is broad (*see*, Insurance Law § 3401) and liberally construed (*see, Scarola v. Insurance Co.*, 31 N.Y.2d 411, 413). "A legal or equitable interest in the property insured is not necessary to support an insurable interest" (*Weissman v. Galway Constr. Corp.*, 239 A.D.2d 410, 411). In any event, because the son resides with plaintiff, he has an insurable interest in the property (*see, Ellis v. New York Cent. Mut. Fire Ins. Co.*, 226 A.D.2d 1131; *Kradjian v. American Mfrs. Mut. Ins. Co.*, 206 A.D.2d 801, 803). Finally, we note that "[o]nly the insurer can raise the objection of want of insurable interest" (68A N Y Jur 2d, Insurance, § 936, at 626).

All concur except Hayes and Pigott, Jr., JJ., who dissent and vote to affirm in the following Memorandum.

Hayes and Pigott, Jr., JJ. (dissenting).

We respectfully dissent. In our view, the definition of "insured" under the general policy provisions of the contract should not be applied to expand the persons subject to exclusion from coverage for intentional acts committed by "an insured" under the principal property coverage of the policy. To define "insured" to mean "you and, if residents of your household, your relatives, and any other person under the age of 21 in your care or in the care of your resident relatives" violates two sections of the Insurance Law.

Section 3401 Ins. of the Insurance Law requires that the person benefitting from an insurance policy on property have an insurable interest in the property. The broad definition of "insured" in this policy includes the minor son of the owner, who does not have an insurable interest in the property. Insurable interest is defined as "any lawful and substantial economic interest

in the safety or preservation of property from loss, destruction or pecuniary damage" (Insurance Law § 3401; *see also, Weissman v. Galway Constr. Corp.*, 239 A.D.2d 410, 411). Although the term "insurable interest" is to be liberally construed, we believe that it cannot be stretched so far as to include minor children merely because they reside with the insured. Although a legal or equitable interest in the property is not necessary to sustain an insurable interest, it is necessary that the insured have "`a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it'" (*Scarola v. Insurance Co.*, 31 N.Y.2d 411, 413). The owner's minor son does not hold such an interest.

In addition, section 3404 Ins. of the Insurance Law contains the form of the standard fire insurance policy of the State of New York and mandates its use. A policy, such as the one in this case, that insures against the peril of fire must contain "terms and provisions no less favorable to the insured than those contained in the standard fire policy" (Insurance Law § 3404 [f] [1] [A]). Here, by including persons who do not have an insurable interest in the property as defined by section 3401, the policy contains terms and provisions less favorable to the insured than those contained in the standard fire policy; therefore, the policy violates section 3404 Ins. of the Insurance Law.

The cases relied upon by the majority for the proposition that a minor son has an insurable interest are not controlling because they involve personal property coverage rather than property damage coverage (*see, e.g., Kradjian v. American Mfrs. Mut. Ins. Co.*, 206 A.D.2d 801, 803). In our view, to hold that plaintiff, the sole owner of the property, has no fire insurance coverage because the fire was intentionally set by her minor son, deemed an insured although he has no insurable interest in the property, and in whose acts plaintiff had no complicity, impermissibly deprives an innocent owner of coverage (*see, Welch v. Commercial Mut. Ins. Co.*, 119 Misc.2d 630).

This Court's decision in *Branch v. Chenango Mut. Ins. Co.* ([appeal No. 2], 225 A.D.2d 1079) does not compel the result reached by the majority. In that case, we held that a wife could not recover for a fire loss caused by the intentional act of her husband. The husband was an insured under the policy and a co-owner of the property with his wife as tenants by the entirety; therefore, he had an insurable interest in the property. Page 1103 The majority's reliance on *Allstate Ins. Co. v. Mugavero* (79 N.Y.2d 153) is likewise misplaced because that case did not involve the peril of fire.

Present — Pine, J. P., Hayes, Wisner, Pigott, Jr., and Boehm, JJ. [*See*, 175 Misc.2d 616.]
