

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

755

CA 11-00107

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

GRAY-LINE OF NIAGARA FALLS, INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CINCINNATI INSURANCE COMPANIES,
DEFENDANT-APPELLANT,
AND ANN MARIE TRUSSO, DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (ANNA FALICOV OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 28, 2010 in a declaratory judgment action. The order and judgment granted plaintiff's motion for summary judgment and denied the cross motion of defendant Cincinnati Insurance Companies for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, the cross motion is granted and judgment is granted in favor of defendant Cincinnati Insurance Companies as follows:

It is ADJUDGED and DECLARED that defendant Cincinnati Insurance Companies has no duty to defend or indemnify plaintiff in the underlying action in federal court.

Memorandum: Plaintiff commenced this action seeking judgment declaring that Cincinnati Insurance Companies (defendant) is obligated to defend and indemnify it in the underlying action commenced in federal court by defendant Ann Marie Trusso, one of plaintiff's employees. In that underlying action, Trusso sought damages for, inter alia, injuries sustained by her when she was sexually assaulted by a person also employed by plaintiff. We agree with defendant that Supreme Court erred in granting plaintiff's motion for summary judgment against defendant. The commercial liability policy issued by defendant to plaintiff excludes coverage where "[a]n 'employee' of the insured sustain[s a bodily injury] in the 'workplace.'" There is no

dispute that Trusso was plaintiff's employee at the time of the incident and that she was working at the tour booth pursuant to plaintiff's directive when the incident occurred. Thus, the exclusion applies as a matter of law (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff and Trusso argue that coverage is nonetheless available because Trusso's injuries were unrelated to the performance of employment duties. We note that there is also a separate policy exclusion for bodily injuries to "[a]n 'employee' of the insured arising out of the performance of duties related to the conduct of the insured's business." Inasmuch as the policy separately excludes coverage for injuries that occur in the workplace as well as injuries that are work-related, the fact that Trusso's injuries were unrelated to the performance of employment duties is of no moment (see generally *Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, rearg denied 5 NY3d 825; *Progressive Halcyon Ins. Co. v Giacometti*, 72 AD3d 1503, 1506).

Entered: June 10, 2011

Patricia L. Morgan
Clerk of the Court