

**Allstate Insurance Co. v United International
Insurance Co.**

2003 NY Slip Op 30075(U)

October 16, 2003

Supreme Court, Suffolk County

Docket Number: 1002399/2000

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**

Justice

ALLSTATE INSURANCE COMPANY and
TIFFANY O'NEILL,

Plaintiffs,

- against -

UNITED INTERNATIONAL INSURANCE
COMPANY,

Defendant.

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& McElhenny, **Esqs.**
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DECISION AFTER TRIAL

An action entitled Thomas E. Muhs v. Lay-Up Enterprises, Inc., et al., appearing under Index Number 15057-99, was tried before this Court in June, 2000. In that action, the plaintiff alleged that he sustained personal injuries as a result of the negligence of defendants, Lay-Up Enterprises, Inc. d/b/a Sand ~~Bar~~ and its officer, John Rafferty, both insured by United International Insurance Company, and Tiemey O'Neill, who was insured by Allstate Insurance Company.

After trial, the **jury**, on June 9, 2000, found the individual defendant O'Neill to be **63%** responsible for the occurrence and the corporate defendant, Lay-Up Enterprises, Inc., to be **37 %** responsible.

On June 12, 2000, United International Insurance Company (hereinafter "United") disclaimed coverage ostensibly because John Rafferty, president of Lay-Up Enterprises, Inc. (hereinafter "Lay-Up"), did not attend or testify at the liability trial although he had been subpoenaed. United asserted that Rafferty's failure to testify at trial constituted a willful and wanton breach of the policy issued by United, and compromised the defense of the action, and on

that basis cancelled the policy prior to the conclusion of the trial. Nonetheless, counsel for Lay-Up was retained and paid by United to represent Lay-Up at the trial on damages, which took place from June 12,2000 through June 15,2000. After trial, the jury awarded the plaintiff, Muhs, a verdict of \$200,000.00, which judgment was paid to the plaintiff in full by Allstate on or about July 31,2000. A full satisfaction of judgment was executed by plaintiff Muhs' counsel on August 8,2000.

On or about August 29,2000 Lay-Up and United settled their dispute and in consideration of \$5,000.00, Rafferty released United from any and all obligations under the policy, including the rights for indemnification which may have existed under the policy.

Having paid the entire judgment on behalf of O'Neill, Allstate submitted and then entered on September 6,2000 a judgment, in favor of O'Neill and against Lay-Up, in the amount of \$74,675.25, which amount represented Lay-Up's equitable share of the \$200,000.00 judgment plus interest. Citing the aforementioned disclaimer, United refused to pay the judgment entered against their insured. Allstate then commenced the instant proceeding, seeking a judgment declaring that United's disclaimer was void and unenforceable, and that United owed Allstate the sum of \$74,675.25 together with interest, costs and attorneys fees.

The parties agreed to submit the dispute to the Court on paper and subsequently both parties submitted memorandums on the issues.

It is well settled that the non-cooperation of an insured party in the defense of an action is a ground upon which an insurer may deny coverage, and such a defense may be asserted by the insurer in an action on a judgment pursuant to Insurance Law section 3420. Gordon v. Otseao Mutual Fire Insurance Co., 232 A.D.2d 405,648 N.Y.S.2d 306. There is no dispute that John Rafferty failed to appear and testify at the trial of this action, notwithstanding that he was subpoenaed by plaintiffs counsel, and despite requests by defense counsel that he do so, including his apparent agreement to appear on a date and time certain.

The history of attempted communications between Rafferty and counsel for United discloses that, in addition to various telephone calls preceding the date certain for trial, the aforesaid parties spoke to each other the evening prior to the commencement of the trial, and Rafferty allegedly agreed to present himself to the Court on June 7,2000. When Rafferty did not appear at the appointed time, counsel for United states that he left four messages at Rafferty's Westhampton residence, a message at a "location known as Casey's", and a message at the Renaissance Institute in Boca Raton, Florida, where Rafferty had indicated he would be going after his Court appearance. Despite these efforts, Rafferty did not appear to testify. United's counsel states that he was advised that Rafferty had been seen on a golf course, although the exact time of this alleged sighting has not been noted. On the basis of the above, counsel maintains that the defense acted diligently to obtain Rafferty's cooperation and that his attitude was one of willful and avowed obstruction.

United bases its disclaimer on the language of its policy of insurance with Lay-Up, in particular, Section IV, entitled, Commercial General Liability Conditions, under the heading in paragraph 2 (c)(3) entitled Duties in the Event of Occurrence, Offense, Claim or Suit, which states in pertinent part, “You [the insured] and any other involved insured must: cooperate with us in the investigation, settlement or defense of the claim or suit.”

United argues that Rafferty’s testimony at trial could have affected the jury’s verdict to a substantial degree. This position is based upon United’s belief, that as the owner and manager of the subject bar, Rafferty could have testified as to the following points: the standards, procedures and practices of the bar; instructions and training given to bar personnel, in connection with age identification of prospective patrons, identification of intoxicated persons, general security, the hiring and training of personnel, employees skills and qualifications, and specific instructions given to employees. United maintains that this testimony could have had an important impact on the jury in reaching their verdict, and that if the jury had heard from Rafferty, it is likely that Lay-Up’s percentage of liability for the incident would have been a lower number, or perhaps zero.

Allstate counters that Rafferty’s failure to appear and testify at trial was not significant, pointing out that Rafferty was not at the premises on the night of the altercation between Muhs and O’Neill, and therefore not an eyewitness to the incident.

A carrier has a high burden to meet in sustaining a coverage disclaimer based upon the non-cooperation of its insured. “To effectively deny insurance coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured’s cooperation, (2) that the efforts employed by the carrier were reasonably calculated to obtain the insured’s cooperation, and (3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction” Physicians’ Reciprocal Insurers v. Keller, 243 A.D.2d 547,547,665 N.Y.S.2d 515; (See also, Baghaloo-White v. Allstate Insurance Company, 270 A.D.2d 296,704 N.Y.S.2d 131; Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159,278 N.Y.S.2d 793,225 N.E.2d 503; Commercial Union Ins. Co. v. Burr, 226 A.D.2d 416,641 N.Y.S.2d 69; Pawtucket Mut. Ins. Co. v. Soler, 184 A.D.2d 498,584 N.Y.S.2d 192). To this end, the defendant carrier, United International Insurance Company, is required to sustain the very heavy burden of demonstrating that the insured’s alleged failure to cooperate was deliberate (see, Mount Vernon Fire Ins. Co. v. 170 E. 106th St. Realty Corp., 212 A.D.2d 419,622 N.Y.S.2d 758) and that the insured’s absence at trial evinced an attitude of willful and avowed obstruction (cf., State Farm Ins. Co. v. Imeri, 182 A.D.2d 683,582 N.Y.S.2d 463).

While it is possible that the testimony to be offered by Rafferty, on the various procedures and policies of the subject business known as the Sand Bar, might have aided the jury in their deliberations, no explanation is offered by United as to why no other witnesses were produced at trial to testify **as** to those procedures and policies. It has not been demonstrated by United that there were no other witnesses or employees who could have been called to testify **as to** the procedures and practices in place for the safe and lawful service of potential patrons of the Sand Bar.

Since John Rafferty was not present on the night of the incident, he had no material testimony to offer regarding whether the Sand Bar served O'Neill alcohol, and if so, whether she was intoxicated at the time. Neither did he have personal knowledge concerning how O'Neill entered the bar that night and whether she had proof of legal age. These questions could have been responded to by a person with actual knowledge of the facts, including bartenders, waitresses, or bar security personnel, who were physically on the premises the night of the incident. There is no claim that any other employee or person associated with the Sand Bar business refused to cooperate with United at any time prior to, and during the time of, trial. The fact that one witness, who had no personal knowledge of the allegations of the complaint, but may have provided information during the investigative stage of the litigation, did not testify at trial, does not provide a sufficient basis for United's disclaimer against Lay-Up.

The Court finds that the failure of Rafferty to appear and testify at trial does not support the conclusion that Lay-Up willfully obstructed the defendant's efforts to defend the action. Accordingly, under the circumstances presented, United was not justified in the issuance of its disclaimer in this matter. Therefore, the release executed between United and Rafferty does not vitiate United's responsibility to Allstate for the payment of its share of the damages awarded to Muhs after trial.

The plaintiffs have demonstrated that a valid policy was issued and in effect at the time of the incident. In the absence of a valid disclaimer, the coverage afforded under the United policy remained in effect and the plaintiffs are now entitled to judgment against the defendant, United, in the amount of \$74,675.25 with interest from September 6, 2000, together with the costs and disbursements of this action.

The foregoing constitutes the Order and Judgment of this Court.

Dated: October 16, 2003

DENISE F. MOLIA

HON. DENISE F. MOLIA
J.S.C.