

Appel v Allstate Insurance Company

2004 NY Slip Op 30109(U)

September 22, 2004

Supreme Court, New York County

Docket Number: 0011584/2002

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

0115842/2002

APPEL, ROBIN
VS
ALLSTATE INSURANCE

SEQ 2

SUMMARY JUDGMENT

INDEX NO. 115842/02

MOTION DATE 6/24/04

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for SJ

PAPERS NUMBERED

1-4

5-7

8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

FILED
SEP 29 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/22/04

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
ROBIN APPEL,

Plaintiff,

INDEX NO. 115842/02

-against-

DECISION AND ORDER

ALLSTATE INSURANCE COMPANY,

Defendant.

-----X

JANE S. SOLOMON, J.

Defendant Allstate Insurance Company ("Allstate") moves for summary judgment dismissing the complaint in this action brought pursuant to Insurance Law § 3420 (b) to collect on a default judgment entered against Allstate's insureds Paul Julme and Marie Julme (collectively "the Julmes"). For the reasons set forth below, defendants' motion for summary judgment is granted, and the complaint is dismissed.

Background

This case arises from a personal injury action brought by plaintiff Robin Appel ("Appel") against the Julmes in Queens County (index no. 017949/00, hereinafter "the Queens County action"), wherein Appel asserts that she sustained injuries when the Julmes' dog bit her on June 8, 2000. She commenced an action in Queens Supreme Court against the Julmes and whether or not service was perfect, Mr. Julme admits seeing a copy of the

summons and complaint "on or about July 2000"; he also admits speaking with Appel at about that time. In the event, the Julmes defaulted, an inquest was held on February 27, 2001, and judgment was entered against them for \$100,000, plus costs and disbursements in the amount of \$1,069, on April 24, 2001. No enforcement was attempted until Mr. Julme's bank account was frozen in May 2002.

At this point, nearly two years later, the Julmes first contacted Allstate. Ordinarily, it would have been covered under their homeowners' policy, but Allstate disclaimed coverage due to late notice in a letter dated May 21, 2002, which was sent by certified mail to the Julmes and to Appel and her counsel. On May 29, 2002, Appel served Allstate with notice of entry of the Queens County judgment.

At about the same time, the Julmes moved to vacate the judgment, after which Appel and the Julmes stipulated that the restraint on Mr. Julme's bank account was released, further enforcement proceedings were placed on hold, and Appel agreed to proceed against Allstate, whose disclaimer was disclosed. Moreover, they agreed that if Appel failed in her efforts to secure payment from Allstate, the default judgment would be vacated and the merits of the claim litigated, jurisdictional defenses having been waived. Appel then commenced this action against Allstate.

While this case was pending, Allstate brought an action against the Julmes (index no. 0117744/03, New York County, hereinafter "the Allstate action"), which was assigned to me, for a declaration that it had no duty to defend or indemnify them in the Queens County action and that, in turn, it was entitled to indemnification and contribution from them should it lose this suit. The Julmes failed to respond until their attorney arrived at court on the return date of Allstate's motion for judgment by default against them.

Given that the Julmes had still not appeared or moved to serve a late answer, and my determination that there was no meritorious defense to Allstate's claim based on Mr. Julme's uncontradicted deposition testimony that he did not provide Allstate with notice of Appel's claim until nearly two years after he first learned of the event, I granted the motion for judgment in favor of Allstate on March 16, 2004.

Discussion

Allstate contends that it is entitled to summary judgment because my decision in the Allstate action that it has no duty to indemnify the Julmes against Appel's claim precludes Appel from recovering against it. In opposition, Appel argues that Allstate is liable to her because (1) that decision cannot bind her because she was not a party; (2) Allstate never

disclaimed coverage directly to her for her own failure to provide timely notice of claim; and (3) Allstate is now precluded from disclaiming coverage to her, because it failed to do so in a timely manner.

In seeking to recover directly from Allstate, Appel relies on Insurance Law § 3420. In pertinent part, section 3420(a)(2) provides that every insurance policy issued or delivered in New York must include

[a] provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the service of notice of entry of judgment upon the attorney for the insured, and upon the insurer, then an action may ... be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

Insurance Law § 3420(b)(1) then provides that, subject to the conditions set forth in § 3420(a)(2), "any person who...has obtained a judgment against the insured...for damages for injury sustained or loss or damage occasioned during the life of the policy or contract" may maintain an action against the insurer to recover the amount of the judgment against the insured.

There is no dispute that the prerequisites for an enforcement action under § 3420(b)(1) have been met. Appel has obtained a judgment against the Julmes, Allstate was served with notice of entry of the judgment, and it remains unsatisfied for

more than thirty days. Nevertheless, Appel is not entitled to the relief she seeks because, under New York Insurance Law, an insurer cannot be held liable to an injured party under § 3420(b) when it has validly disclaimed coverage against its insured. See D'Arata v. New York Central Mutual Fire Ins. Co., 76 N.Y.2d 659 (1990); Centrone v. State Farm Fire & Casualty Co., 275 A.D.2d 728 (2nd Dept. 2000); and Fisher v. Hanover Ins. Co., 288 A.D.2d 806 (3rd Dept. 2001).

The clear and unambiguous terms of the Julmes' homeowner's policy indicate that they were required to provide Allstate with prompt notice of their claim. In relevant part, the policy reads:

In the event of bodily injury or property damage, you must do the following:

- (a) Promptly notify us or our agent stating:
 - (1) your name and policy number;
 - (2) the date, the place and the circumstances of the loss;
 - (3) the name and address of anyone who might have a claim against an insured person;
 - (4) the name and addresses of any witnesses.

Allstate Deluxe Policy, Exh. C to Fitzgerald Affidavit in Support of Motion for Summary Judgment.

The Julmes failed to notify Allstate when they first learned of Appel's alleged claim only days after it occurred or when they learned that Appel had initiated a lawsuit against them. Indeed, they did not inform Allstate of Appel's claim until after she sought to enforce the judgment. As noted in my

March 16, 2004 decision in the Allstate action, Mr. Julme's unrefuted testimony unequivocally evidences the Julmes' failure to provide Allstate with prompt notice of Appel's claim.

An insured is under the obligation to provide notice of potential claims to its insurer as soon as it is practicable. White v. City of New York, 81 N.Y.2d 955 (1993). Timely notification of a claim by an insured to its insurer is a condition precedent to coverage. Am. Home Assurance Co. v. Int'l Ins. Co., 90 N.Y.2d 433 (1997). "Absent a valid excuse, failure to satisfy an insurance policy notice requirement vitiates coverage." Centennial Ins. Co. v. Hoffman, 265 A.D.2d 629, 630 (3rd Dept. 1999), quoting Matter of Allcity Ins. Co., 78 N.Y.2d 1054, 1055-56 (1991).

Section 3420 provides an injured claimant with a direct cause of action, but it does not provide the injured party with a statutory right wholly separate from that of the insured. As the injured party, Appel "stands in the shoes" of the Julmes "and may recover under the policy only to the extent that [they] would be entitled to indemnification coverage." In re Liquidation of Nassau Ins. Co., 161 A.D.2d 146, 147 (1st Dept. 1990); see also Wenig v. Glen Falls Indemnity Co., 294 N.Y. 195, 198-99 (1945). In other words, Appel has no rights greater than those of the Julmes, see D'Arata, supra at 665, and by proceeding directly against Allstate, she "does so as a subrogee of...[the Julmes']

rights and is subject to whatever rules of estoppel would apply" to the Julmes. Id. Because Allstate is not liable to the Julmes, it is equally not liable to Appel.

Appel's contention that Allstate cannot prevail because it failed to disclaim coverage directly to her is unpersuasive. Section 3420(d) of the Insurance Law requires that the insurer give written notice of disclaimer of coverage "to the insured and the injured person or any other claimant." The face of Allstate's disclaimer letter, copied to Appel and her counsel, indicates that it disclaimed coverage to the Julmes and "anyone else seeking coverage under the policy." This is sufficient. See Miranda v. Aetna Casualty Surety Co., 51 A.D.2d 1035, 1036 (2nd Dept. 1976); New York Mutual Underwriters v. O'Connor, 105 A.D.2d 994, 995 (3rd Dept. 1984); Utica Fire Ins. Co. Of Oneida Cty. v. Spagnolo, 221 A.D.2d 921, 922 (4th Dept. 1995). Allstate need not address the letter directly to Appel or explicitly name her in the disclaimer; she is included in "anyone else seeking coverage under the policy."

In addition, Allstate need not disclaim specifically based on Appel's own failure to timely notify it. Insurance Law § 3420(a)(3) provides an injured party an independent right to give notice of an accident and satisfy the notice requirement of the policy, which relieves the insured of its contractual obligation to provide notice. Massachusetts Bay Ins. Co. v.

Flood, 128 A.D.2d 683, 684 (2nd Dept. 1987). Such notice by the injured claimant constitutes prima facie compliance with the notice requirements of the policy. Id.

Were Appel to have been first to provide notice to Allstate, its disclaimer would have had to "address with specificity the grounds for disclaiming coverage applicable to both" Appel and the Julmes. See Ringel v. Blue Ridge Ins. Co., 293 A.D.2d 460, 462 (2nd Dept. 2002). However, because Appel did not provide first notice, Allstate need not address its disclaimer to her, as any information as to notice later provided by her would have been superfluous. See Massachusetts Bay, supra.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant to be taxed by the clerk of court upon submission of an appropriate bill of costs; and it further is

ORDERED that the clerk is directed to enter judgment accordingly.

Dated September 22, 2004 ENTER:

FILED
SEP 29 2004
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C. **JANE S. SOLOMON**