Royal Indemnity Company v Travelers Indemnity Co.
2006 NY Slip Op 30343(U)
January 12, 2006
Supreme Court, New York County
Docket Number: 0604378/2001
Judge: Harold B. Beeler
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[* 1] SCANNED ON 1/19/2006

Never sent to Gische

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

PRESENT: HAROLD BEELER, Justice — PART 9

Royal Indemnity

- v -

Travelers

INDEX NO. 604378/01

MOTION DATE

MOTION SEQ. NO. 05

MOTION CAL. NO.

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

	PAPERS NUMBERED
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 resolved in accordance with the annexed memorandum of today's date.

FILED JAN 19 2006 COUNTY CLERK'S OFFICE NEW YORK

It is respectfully requested that Trial Support schedule a compliance conference for this action which has been reassigned to the Honorable Judith J. Gische as Part 9 is now a Matrimonial Part.

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

Dated: 1/12/06

HAROLD BEELER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 9

--X

ROYAL INDEMNITY COMPANY, Individual, and as Subrogee of Nissan North America, Inc., and Nissan Motor Acceptance Corporation,

Plaintiff,

-against-

TRAVELERS INDEMNITY CO., MOORE & ASSOCIATES and CLUNE, HAYES & LOPRESTI, P.C.,

Defendants.

--X

Index No. 604378/01

Decision/Order

MS:005 & MS:006

BEELER, J.:

Motion Sequence Nos. 005 and 006 are consolidated for disposition. In Motion Sequence No. 005, defendants Travelers Indemnity Co. (Travelers) and Moore & Associates (Moore) move to disqualify plaintiff's counsel, Leahey & Johnson (L&J). In Motion Sequence No. 006, Moore moves for summary judgment dismissing the complaint asserted against it. Royal Indemnity Company (Royal) cross-moves to amend the complaint.

In the instant action, plaintiff Royal seeks to recover $1.3 million in damages from defendants arising from their alleged bad faith, negligence, malpractice and breach of fiduciary duty in, inter alia, the defense provided for Royal's

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insured in the underlying personal injury action, entitled Douglas A. Marcoux v Jonathan Bullock, et al (Supreme Court, New York County), under Index No. 110432/99 (the Marcoux action). In the Marcoux action, Marcoux alleged that he sustained injuries on May 8, 1999 as a result of an automobile collision with a vehicle that was operated by Jonathan Bullock and leased to Alexandra Villalba by Nissan North America, Inc., and Nissan Motor Acceptance Corporation (collectively the Nissan entities). Travelers was the primary insurer for Villalba and the Nissan entities, with a policy limit of $100,000 for personal injury. The Nissan Entities were also insured by Yusuda Fire & Marine Insurance Company with a $1,000,000 policy limit, and by Royal with an excess automobile insurance policy with a $15,000,000 policy limit.

The Marcoux action was commenced on May 12, 1999. After defendant Moore was retained by Travelers to represent Villalba, Bullock and the Nissan entities, a motion in the Marcoux action for entry of a default judgment against all defendants was made. Since it was unopposed, an order dated October 6, 1999 entered a default judgment as to liability against all defendants, and set down the matter for an inquest for an assessment of damages. Clune, Hayes & Lopresti, P.C.

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(Clune) allegedly was then substituted as counsel by Travelers for the Nissan Entities on December 29, 1999. An inquest on damages was held, after which, by decision and order dated July 20, 2000, Marcoux was awarded approximately $3,000,000 in damages against defendants. The action was later settled for $2.4 million ($100,000 from Travelers, $1 million from Yasuda, and $1.3 million from Royal).

Royal commenced the instant action against Moore and Travelers to recover the $1.3 million it paid towards the settlement. It pleads five causes of action: two against Travelers, individually (first) and as contractual and equitable subrogee of the Nissan Entities (second), for bad faith; and three against Moore, individually, for negligence and legal malpractice (third), for breach of a fiduciary duty (fourth), and for bad faith in its representation of the Nissan Entities (fifth). Defendants interposed an answer, which included six affirmative defenses, including one claiming that Kevin T. McCarthy (McCarthy), Marcoux's counsel in the Marcoux action, fraudulently procured the default therein, which "constituted a superseding and intervening cause of any loss to Royal" (Exhibit Y to James P. Tenney's opposing affidavit to defendant's motion to disqualify, defendant's answer dated 12/20/01, third

affirmative defense at 16). Defendants later commenced a third party action against McCarthy based upon his purported fraud (Exhibit Z to James P. Tenney's opposing affidavit to defendants' motion to disqualify, third-party complaint dated 3/12/02). A motion by McCarthy to dismiss the third-party complaint was granted (Exhibit BB to James P. Tenney's opposing affidavit to defendants' motion to disqualify, Royal Indemnity Co. v Travelers Indemnity Co., et. al., Sup Ct, NY County, Nov. 2, 2002, Braun, J., Index No. 604378/01). Thus, only the main action herein is pending.

In Motion Sequence No. 005, Travelers and Moore now move to disqualify L&J, the law firm retained by Royal in June 2000 to replace Clune. Defendants move for disqualification on two grounds. Defendants initially argue that L&J's acceptance of employment as Royal's attorneys in the instant action violates Disciplinary Rule 5-102 (a) and (b)(22 NYCRR § 1200.21), since Travelers intends to call counsel from L&J as witnesses, and defendants anticipate that the testimony to be given by L&J will be adverse to Royal's interests. Defendants specifically seek to question L&J as to its current position that Moore negligently failed to argue in the Marcoux action that the default judgment should have been vacated on the ground of McCarthy's fraud.

Defendants claim that, although L&J, during its representation of Royal in the Marcoux action, had possession of the documents given to it by Travelers and Moore in 1999, L&J never raised any issue of possible fraud, nor asked or suggested that Travelers or Moore seek to vacate the default judgment on ground of any purported fraud. Defendants claim that, in its testimony, L&J will have to concede that, during its representation of Royal, it never perceived any fraud ground on which to vacate the subject default, and that such testimony would be adverse to Royal's interests.

In opposition to this ground, L&J's counsel maintains that L&J's current position regarding Moore's negligence arose after defendants' assertion of an affirmative defense, and their commencement of a third-party action against McCarthy. He claims that L&J's position was based on this court's determination dismissing the third-party complaint against McCarthy, which essentially held that any such claims of fraud should have been raised in the Marcoux action (Exhibit BB to James P. Tenney's opposing affidavit to defendants' motion to disqualify, Royal Indem. Co. v Travelers Indem. Co., et. al., Sup Ct, NY County, Nov. 2, 2002, Braun, J., Index No. 604378/01). Additionally, counsel claims that the documents provided to L&J did not

demonstrate any proof, in admissible form, of either an extrinsic fraud or other misconduct by McCarthy related to the subject default. He also contends that L&J's counsel have no personal knowledge of any events surrounding the 1999 default since L&J was not retained until June 2000.

Disqualification of an attorney or law firm is a matter that rests within the sound discretion of the court (Flores v Willard J. Price Assoc., LLC, 20 AD3d 343 [1st Dept 2005]). Defendants rely on Disciplinary Rule 5-102 of the Code of Professional Responsibility to disqualify L&J, which provides in relevant part:

> (a) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue ...;
> (b) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

"An attorney witness 'ought' to be called 'only when it is likely that the testimony to be given by the witness is necessary'" (Talvy v American Red Cross in Greater New York, 205

AD2d 143, 152 [1st Dept 1994], affd 87 NY2d 826 [1995], quoting S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 445-446 [1987]). A finding of necessity takes into account "such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (id., citing S & S Hotel Ventures Limited Partnership v 777 S.H. Corp., 69 NY2d at 446).

A review of the record discloses that, as argued by Royal, it was subsequent to the dismissal of the third-party complaint against McCarthy in the instant action that Royal filed a prior motion arguing that defendants' failure to take any action in the underlying action regarding Marcoux' alleged wrongdoing was prima facie evidence of Moore's negligence[1]. Further, L&J were not representing Royal at the time of the alleged conduct by Marcoux' counsel, and any testimony it could proffer would not be based on any personal knowledge. Additionally, testimony regarding any alleged wrongdoing by Marcoux's counsel or defendants could be obtained from those directly involved in the underlying action at the time of the default, including Travelers' employees, Moore's counsel, and

[1]This prior motion was subsequently withdrawn by Royal.

McCarthy. Therefore, defendants fail to demonstrate that the testimony of any counsel within L&J is necessary, or that any testimony that would be procured from L&J would be prejudicial to Royal (see H.H.B.K. 45th St. Corp. v Stern, 158 AD2d 395 [1st Dept 1990]). Thus, defendants' first ground for disqualification is without merit.

Defendants also claim that disqualification is warranted based upon L&J's alleged violation of the confidentiality agreements entered into by the parties during mediation. Defendants specifically claims that L&J disclosed certain information and documentation to this court that were considered confidential thereunder.

L&J's counsel denies recounting any specifics of the mediation to this court. In correspondence to this court, L&J's counsel expressed that since L&J was concerned that defendants might challenge its submission of certain documents with its opposing papers on the basis of confidentiality under the confidentiality agreements, counsel submitted L&J's original affirmation in opposition, supporting affidavits and related exhibits in a sealed envelope to be opened and reviewed in camera (Correspondence from L&J to this court dated 5/19/2005). Subsequently, L&J's counsel withdrew two documents L&J had

submitted and which defendants contended were confidential under the agreements, identified as Exhibits M and N in its opposing papers (Correspondence from L&J to this court dated 7/21/05). L&J's counsel admits that Exhibit M was erroneously attached to his affidavit in opposition (id.). As for Exhibit N, L&J's counsel states that, after conducting a review of the documents in his possession that were exchanged during discovery, he was unable to confirm that it had been previously produced, and concedes that it was inadvertently produced (id.).

In considering the parties' arguments, disqualification is also denied as to defendants' second ground. In support of their second ground, defendants rely on Matter of Beiny (129 AD2d 126 [1st Dept 1987], lv denied 71 NY2d 994 [1988]), wherein the court granted disqualification based on counsel's procurement and use of improperly obtained privileged materials, and on Lipin v Bender (84 NY2d 562 [1994]), wherein the court granted dismissal of plaintiff's complaint based on her improper taking and using of the defendant's privilege documents. Here, however, the circumstances are distinguishable from the cases relied on by defendants, in that the instant documents were not improperly obtained, through any deceitful conduct, but instead were procured in accordance with the parties' mediation agreements.

Further, this court is cognizant that the practical effect of disqualification would be to deny the parties the counsel of their choice and to delay the proceedings to the detriment of all concerned (see S & S Hotel Ventures Limited Partnership v 777 S.H. Corp., 69 NY2d 437, supra).

Although, admittedly, there has been certain disclosure of confidential documentation by L&J, albeit allegedly inadvertently, there is no showing that the disclosure herein was prejudicial to defendants. However, Royal and its counsel are placed on notice that this court would entertain a motion for contempt if the disclosure, inadvertent or intentional, of confidential documents or information under the confidentiality agreements occurs again.

In view of the foregoing, defendants' motion, in Sequence No. 005, for disqualification is denied.

In Motion Sequence No. 006, Moore moves for summary judgment dismissing the complaint as asserted against it. A motion for summary judgment can be granted only where there is no genuine issues to be resolved at trial and the claims can properly be resolved as a matter of law (Andre v Pomeroy, 35 NY2d 361 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter

of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of its motion, Moore essentially argues that Royal cannot assert direct claims against it, since it was not representing the Nissan entities at the time Royal began participating in the action, and, thus it did not have an attorney-client relationship nor was it in privity with the Nissan entities.

In opposition, Royal's counsel acknowledges that Royal first became aware of the Marcoux action in May 2000. With respect to the defense of the Nissan entities in the Marcoux action, JoAnne Filiberti, a counsel at L&J, alleges that, upon her review of the court file, she discovered a Notice of Appearance by Moore for all defendants on December 21, 1999, but no notice of appearance for Clune as counsel for the Nissan entities, nor a notarized, court-stamped consent to change

counsel by Clune and Moore (Exhibit Y to James P. Tenney's Opposing Affirmation to Moore's motion for summary judgment, affidavit by JoAnne Filiberti dated 4/13/05). Thus, Royal argues that, at this juncture, it is unclear what the relationship between Moore and Clune was during the Marcoux action, including whether Clune was co-counsel with Moore for the remainder of the litigation.

It is undisputed that a primary insurer owes fiduciary duties to an excess insurer in the defense of an action, and any right of action arising out of that independent and direct duty to the excess insurer is not dependent upon equitable principles of subrogation (see Hartford Acc. & Indem. Co. v Michigan Mut. Ins. Co., 93 AD2d 337 [1st Dept 1983], affd 61 NY2d 569 [1984]) (the Hartford case). It is well settled that an attorney is not liable to third parties for negligence absent circumstances giving rise to a duty of care (see Crandall v Bernard, Overton & Russell, 133 AD2d 878 [3d Dept], lv denied 70 NY2d 940 [1988]). As argued by Royal, the Hartford case permitted a direct action by an excess insurer against an insured's attorney for malpractice (the Hartford case, at 344-345), where the primary insurer and its counsel were in full control of the defense of the parties in the underlying action at the time they engaged in

the tortious conduct alleged by the excess insurer. Additionally, it held that "[a]t this stage of the litigation, where there has been no disclosure held, the parties should not be foreclosed, particularly where, as here, the pleadings raise serious issues involving ethical considerations, in terms of the fiduciary obligations of the parties" (the Hartford case, at 344). Here, similarly, Royal complains of serious tortious conduct by Moore during the time it was in full control of the defense of the Nissan entities. A review of the pleadings and affidavits disclose, at this juncture, triable issues of fact, including the relationship between Moore and Clune, when, if at any time, Moore was properly replaced by Clune as the Nissan entities' counsel, and whether there was negligence, bad faith or a breach of fiduciary duty by Moore to Royal. Thus, Moore's motion for summary judgment dismissing the direct claims asserted against it are denied.

Royal cross-moves for leave to amend its complaint to also assert the claims against Moore in a subrogee capacity.

Turning to plaintiff's motion to amend the complaint, CPLR 3025(b) directs that absent a showing of prejudice or unfair surprise, leave to amend pleadings shall be granted freely unless the proposed amended pleading clearly lacks merit, or prejudice

or surprise directly results from undue delay(see Barbour v Hospital for Special Surgery, 169 AD2d 385[1st Dept 1991]. The burden is on the party opposing the motion for leave to amend to overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient. Peretich v City of New York, 263 AD2d 410[1st Dept 1999]. Applying these standards, the Court grants plaintiff's motion for leave to amend its complaint.

Accordingly, it is

ORDERED that, in Motion Sequence Nos. 005, the motion by defendants Travelers Indemnity Co. and Moore & Associates to disqualify plaintiff's counsel, Leahey & Johnson, is denied; and it is further

ORDERED that in Motion Sequence No. 006, Moore & Associates' motion for summary judgment dismissing the complaint asserted against it is denied; and it is further

ORDERED that, in Motion Sequence No. 006, Royal Indemnity Company's cross motion for leave to amend the complaint is granted; and it is further

ORDERED that defendants shall serve an answer to the plaintiff's amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: January 12, 2006

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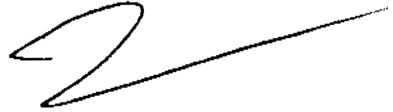

HAROLD B. BEELER, J. S. C.

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