

Daiuto v Lubicz

2007 NY Slip Op 30447(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0604658/2002

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Samiha Koura Daiuto, as Administratrix of the
estate of Nadia Koura

INDEX NO. 604658/02

MOTION DATE 1/22/07

- v -

MOTION SEQ. NO. 005

Stephane S. Lubicz, M.D. and Physicians' Reciprocal
Insurers

MOTION CAL. NO. 59

The following papers, numbered 1 to _____
were entered on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant
Physicians' Reciprocal Insurers ("PRI") for an order pursuant to CPLR 3212,
granting a declaratory judgment in its favor is granted.

In this declaratory judgment action plaintiff seeks a declaration that
defendant PRI is obligated to afford liability insurance protection in
connection with a medical malpractice action commenced by Nadia Koura,
now deceased, against Stephane Lubicz, M.D. In that action (Index No.
107258/00), Ms. Koura alleged that Dr. Lubicz had been negligent in his
treatment of her that occurred from January 1998 through March 1998. St.
Vincent's Hospital was also a defendant in the action. On March 3, 2004,
just prior to jury selection, counsel for plaintiff, the hospital and Dr. Lubicz
entered into a stipulation in open court providing that the action was

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

**his judgment on this motion to/for _____
and notice of entry cannot be served by the County Clerk
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
41B)**

PAPERS NUMBERED

discontinued against the hospital, with prejudice. Counsel indicated at that time that stipulations had also been signed to that effect. With respect to the plaintiff and Dr. Lubicz, it was further stipulated that they had agreed to a confession of judgment against Dr. Lubicz in the amount of \$1.5 million.

Defendant PRI has shown that the underlying action is not covered under the policy issued to Dr. Lubicz, which was a "claims-made" policy. By letter dated December 22, 1998, Dr. Lubicz informed PRI that "[a]s of November 10, 1998 my PRI coverage has been cancelled." [PRI's Ex. F [1]]. Defendant has demonstrated that Dr. Lubicz did not provide notice of any claim made by Ms. Koura until after the policy had been terminated and the extended reporting (tail coverage) period had expired.

The record shows that the policy required the insured to provide notice of a potential claim to be made by filling out a form provided by PRI or sending PRI a written report that included details of the occurrence including date, time and place, a description of the occurrence and the name and address of the patient. Dr. Lubicz has stated at his deposition and in answering interrogatories that he contacted a representative of PRI by telephone on January 20, 1998 regarding a potential claim that might be asserted by Ms. Koura and contacted PRI again by telephone on March 18, 1999. It is undisputed that he did not submit a written "Report of Incident Form" to PRI until March 31, 1999.

The policy defines a claim as:

a. written notice, demand, cross claim or lawsuit (including an arbitration proceeding) first reported to the Exchange during the policy period which alleges disability, sickness, disease or death to a patient arising from your rendering or failing to render PROFESSIONAL SERVICES during the policy period.

b. written notice to the Exchange by you or your legal representative, which is first reported during the policy period, that a demand, cross-claim, or lawsuit which alleges disability, sickness, disease, or death to a patient arising from your rendering or failing to render PROFESSIONAL SERVICES during

the policy period may be made against you by the patient or the patient's legal representative.

[Policy, p. 19]

Dr. Lubicz's contention that he gave oral notice to PRI in January 1998 and again on March 18, 1999 (the latter oral notice is not disputed by PRI) is insufficient to raise any triable issue of fact regarding notice to the insurer " . . . in light of the written notice requirements under the policy." (Structure Tone, Inc., v. Zurich Insurance Company, 193 AD2d 554 [1993]). Thus, there is no coverage for the Koura lawsuit unless (1) the written incident report dated March 31, 1999 was provided to PRI during the coverage period or (2) as is argued by plaintiff, PRI is obligated to defend and indemnify Dr. Lubicz under the "hospital interest clause" of the policy (Policy Part 7 (G) (2); 11 NYCRR 73.55).

With respect to the issue of written notice during the coverage period, plaintiff contends that the March 31, 1999 incident report was filed within the extended coverage (tail coverage) period required by the Rules and Regulations of the Insurance Department (NYCRR Title 11). Section 73.3, entitled "Terms and conditions of claims-made policies" provides that there shall be a 60-day automatic extended reporting period upon termination of coverage (73.3 (d)) and that within 30 days after termination of coverage, the insurer must advise the insured in writing of the automatic extended reporting period coverage and the availability of and the importance of purchasing additional extended reporting period coverage (73.3 (e) (1)). Furthermore, the time within which the insured must submit written acceptance of the extended reporting period coverage is the greater of 60 days from the effective date of termination of coverage or 30 days from the mailing or delivery of the advice mentioned in subsection (e) (1).

The policy provides that the cancellation date of the policy will be either the date requested by the insured's written request for cancellation or the date stated in PRI's written notice to the insured. Thus, because Dr.

Lubicz requested that the insurance be cancelled on November 10, 1998, that is the cancellation date (see e.g. Lehmann v. Engel, 97 AD2d 675 [1983], appeal dismissed 62 NY2d 617 (1984)). 60 days from that date was January 10, 1999. PRI issued its tail premium notice required by 11 NYCRR 73.3 (e)(1) on January 22, 1999. Thus, Dr. Lubicz had 30 days from on or about January 22, 1999 to purchase tail coverage. He did not do so. Thus, there was no extended coverage in effect as of the time he called PRI on March 18, 1999 or submitted a written report on March 31, 1999. As was noted by the First Department with application here:

The distinction between "claims made" and "occurrence" policies controls the issue of coverage in this case, not whether defendant-insurer suffered any prejudice as a result of the short delay in giving notice of the claim (citation omitted). An insured under a "claims made" policy knows in advance that there is an applicable date that cuts off claims, this being a distinct characteristic of such a policy that directly relates to rate setting (citation omitted).

[Rochwarger v. National Fire Insurance Company of Pittsburgh, 192 AD2d 305 (1993)].

Regarding the "hospital interest clause", that does not provide coverage for the Koura lawsuit under this situation. 11 NYCRR 73.5 provides, in pertinent part, that "[u]pon termination of coverage, a policy issued to a person must provide, to a hospital whose facilities are used by such person, extended reporting period coverage . . . to protect the interests of such hospital, if such person does not purchase extended reporting period coverage. . ." (73.5 (d)). The clause is expressly for the protection of the hospital. In this case, plaintiff, with full knowledge that PRI had disclaimed coverage for the claim asserted by Ms. Koura against Dr. Lubicz, stipulated to discontinue the action against the hospital, and at the same time, plaintiff and Dr. Lubicz stipulated to a confession of judgment against Dr. Lubicz. Any obligation that PRI had to defend and indemnify Dr. Lubicz under the "hospital interest clause" ended when the action was discontinued against

the hospital. (Physicians' Reciprocal Insurers v. Abraham, et al., Sup Ct, Nassau County, January 18, 2002, Winslow, J., Index No. 6187/01, affd as modified 303 AD2d 734 [2003]).

Accordingly, it is

ADJUDGED AND DECLARED that defendant PRI is not obligated to pay the judgment or indemnify Stephane Lubicz in the action Koura v. Lubicz, Index No. 107258/00.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B).

Dated: March 22, 2007

SA-A

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE