

Schindler v Royal Ins. Co. of Am.

2007 NY Slip Op 32181(U)

July 11, 2007

Supreme Court, Suffolk County

Docket Number: 0017433/2005

Judge: Robert W. Doyle

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 RETURN DATE: 12-6-06
 MOT. SEQ. # 001

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
 HAROLD SCHINDLER and JEANNETTE SCHINDLER,

Plaintiffs,

-against-

ROYAL INSURANCE COMPANY OF AMERICA,
 ROYAL GROUP, INC., ROYAL & SUNALLIANCE,
 USA, INC. and ROYAL INDEMNITY COMPANY,

Defendants.
 -----x

CALENDAR DATE: April 11, 2007
 MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

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Upon the following papers numbered 1 to 44 read on this motion for summary judgment _____;
 Notice of Motion/Order to Show Cause and supporting papers 1-23 _____; Notice of Cross-Motion and
 supporting papers _____; Answering Affidavits and supporting papers 24-35 _____; Replying Affidavits
 and supporting papers 36-44 _____; Other _____; and after hearing counsel in support of and opposed
 to the motion it is,

ORDERED that this motion by the defendants, Royal Insurance Company of America, Royal Group, Inc., Royal & SunAlliance, USA, Inc., and Royal Indemnity Company for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 is, after due consideration, hereby granted in its entirety and the plaintiffs action is dismissed.

Plaintiff, Harold Schindler (hereinafter Schindler), was involved in a serious motor vehicle accident on July 29, 1999 at the intersection of County Road 98 and Brookfield Avenue in Center Moriches, Suffolk County on Long Island, New York. Schindler and his wife, both insurance brokers, thereafter instituted a personal injury lawsuit and loss of services claim against the offending defendant in the other motor vehicle as well as making an underinsurance/supplemental insurance (SUM) claim under Schindler's own automobile policy (#74-12120) with New York Central Mutual Insurance. The Schindlers settled their claims against the offending vehicle insured by the Travelers Indemnity Company for the policy limit of \$100,000.00. On July 5, 2002 Schindler was also awarded in arbitration of the SUM claim the policy limit of his automobile policy of \$250,000.00 less any offsets for bodily injury payments received from the offending vehicle. Plaintiffs thereafter instituted this declaratory judgment action against the defendants, Royal Insurance Company of America, Royal Group, Inc., Royal & SunAlliance, USA, Inc., and Royal Indemnity Company (hereinafter Royal), seeking underinsurance/supplemental uninsured motorist coverage under Schindlers' personal umbrella policy with Royal. The Royal umbrella insurance policy issued to the Schindlers under policy #PLV307468 ran from July 16, 1999 to July 16, 2000 and fell within the policy term of the automobile accident and was listed as "VIP Shield/Personal Catastrophe Liability Insurance" policy.

Royal now moves for summary judgment and dismissal of the complaint pursuant to CPLR §3212 arguing that there is no underinsurance/supplemental insurance or SUM coverage under the issued umbrella policy and therefore Royal rightly disclaimed coverage. Plaintiffs oppose the requested relief arguing that all discovery is not completed and that Schindler intended to add SUM coverage to his umbrella policy with Royal. However, Royal disputes this and states that there was no SUM endorsement with Schindlers' policy and the Royal policy specifically requires an endorsement to the umbrella policy, not present in this case, to have SUM coverage.

For the following reasons Royal's motion for summary judgment and dismissal of plaintiffs' declaratory judgment action pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiffs' action is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [VanNoy v. Corinth Central School, District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. DiSabato v. Soffee, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); Usefof v. Yamali, NYLJ 10/10/80, p.5, col.4 (App Term 1st Dept. 1980).

Here, in the case at bar, the Court initially notes that the plaintiffs agree that summary judgment and dismissal is warranted as to two (2) named defendants, Royal Group, Inc., and Royal & Sunalliance USA, Inc., especially since those two named defendants have no connection with any insurance obligations. Therefore, as to defendants Royal Group, Inc., and Royal & Sunalliance USA, Inc., summary judgment is granted and the action against these two defendants is dismissed.

As to the action against the remaining two defendants, Royal Insurance Company of America and Royal Indemnity Company (Royal), the Court finds that the defendants have established their entitlement to summary disposition that SUM coverage was never available to Schindler and that the plaintiffs have failed to establish a factual claim warranting a denial of summary judgment and dismissal of Schindler's action against Royal. Royal provides documentation that the umbrella policy does not cover underinsured motorist benefits or SUM coverage for first party claims without specifically requesting and paying for this coverage. Underinsured motorist coverage is optional under the Insurance Law and therefore coverage is unavailable unless specifically purchased. *Countrywide Insurance Co. v. Dumawal*, 200 AD2d 253, 606 NYS2d 174 (1st Dept. 1994). Schindler and his wife were experienced insurance brokers and a review of the policy and declaration page of Royal shows no coverage for first party or self underinsurance claims. Royal provides the policy (movants' papers, Exhibit B) which in the plaintiffs' declaration page under **State Specific Coverage** (which is in bold lettering) notes Uninsured/Underinsured Motorist Coverage, a blank in coverage, whereas primary insurance limits are noted as \$250,000, \$500,000 or \$300,000 respectively with regard to the other coverages provided within the policy. Further, on the declarations second page, the premiums for the coverages are set forth and there is no premium amount set forth for the SUM coverage or **State Specific Coverage Premium**, providing further proof of its unavailability to the Schindlers. Finally, the policy sets forth as exclusions under Part III "that there shall be no coverage under this policy for bodily injury, personal injury or property damage to you or a family member" and under number 19,

"Any uninsured Motorists coverage, Underinsured Motorists coverage, or any similar coverage unless it is endorsed to provide such coverage."

Thus, Royal has established its entitlement to summary disposition and the burden shifts to the plaintiffs to establish a factual issue for trial that there is such coverage. In response to Royal's arguments, Schindler submits surmise, conjecture and expressions of hope that the Royal policy provides him with SUM coverage. Schindler states that as an insurance broker, it was his intention to have such coverage, yet the policy did not provide for it. The language of the policy was clear that an endorsement was required and Schindler's policy had no endorsement and he paid no premium for a SUM endorsement. As a person in the insurance brokerage business for 35 years as he states, it is difficult to comprehend how Schindler could miss, not only the clear policy provision requiring a separate endorsement for SUM coverage in his umbrella policy, but the fact that the declaration page shows no premium or policy limits for SUM coverage. A blanket statement of hoped for coverage without more is insufficient to defeat Royal's application for summary disposition under the clear provisions of the Royal policy.

A cardinal rule of contract interpretation is to give plain meaning to the provisions of a contract. Williston on Contracts, §32.3; See also, Breed v. Insurance Co. of America, 46 NY2d 351, 413 NYS2d 352 (1978); Essex Insurance Co. V. Pingley, AD3d , NYS2d (2nd Dept. 2007) WL 1846821 decided June 26, 2007. Royal's policy provisions specifically provide that SUM coverage is unavailable under its umbrella policy unless a specific endorsement is provided in the policy. The fact that the policy did not have such an endorsement and the declaration page with the policy did not provide either policy limits for SUM coverage or a premium amount for such coverage as required by New York Insurance Law §3420(f)(2) and 11 NYCRR 60-2.0 (commonly known as Regulation 35-D) is a very clear indication that no such endorsement or coverage was provided or available to Schindler. Aetna Casualty and Surety Co. v. Fullam, 203 AD2d 457, 610 NYS2d 856 (2nd Dept. 1994). The plaintiffs' attempts to suggest or argue that further discovery may unearth ambiguities in the policy or documentation that would form a basis to question the clear import of the policy provisions is without any factual support or legal merit. Further, the plaintiffs produce no proof that Schindler either sought, requested or claimed to have purchased SUM coverage under the Royal umbrella policy as he did for his personal motor vehicle liability policy with New York Central Mutual Insurance Company.

A party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts to defeat the motion. Lambert v. Bracco, 18 AD3d 619, 795 NYS2d 662 (2nd Dept. 2005); Romeo v. City of New York, 261 AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). Here, the Royal policy is clear by its terms that no SUM coverage was available to Schindler, yet plaintiffs' counsel argues issues of Royal's document retention policy and claims that documents in the possession of Royal "may be detrimental to defendant's position." The plaintiffs' argument that they purchased "underinsurance coverage endorsement to their personal motor vehicle insurance policy" (affirmation in opp. P.12) does not translate to coverage under Royal's umbrella policy. Indeed, plaintiffs' argument strengthens Royal's claim that Schindler was aware that underinsurance protection was a separate endorsement and purchase and therefore if Schindler, an experienced insurance broker, wanted such coverage, he needed to ask and pay for the endorsement. See, Liberty Mutual Ins. Co. v. Alberto, 186 AD2d 658, 588 NYS2d 624 (2nd Dept. 1992).

As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. V. Savino Oil and Heating Co. Inc. v. Rana Management Corp., 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); Dabney v. Ayre, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, Marine Midland Bank N.A. v. Idar Gem Distributors, Inc., 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). Absent some proof that the plaintiffs purchased SUM coverage in the Royal umbrella policy, or even sought or wanted it by way of letter, communication or other written documentary proof, the Royal policy provisions are clear that such coverage was not provided or available to Schindler without a specific endorsement of such coverage and the payment of the premium required for such coverage. The policy provisions are clear and subject to the plain meaning within the policy that without a specific endorsement for SUM coverage, it is not provided or available within the plaintiffs' umbrella policy of insurance with Royal. See, Sutton v. East River Sav. Bank, 55 NY2d 550, 555, 450 NYS2d 460 (1982) citing Heller v. Pope, 250 NY2d 132 (1928).

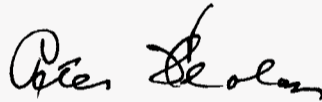
As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briarcliff Farms, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, Royal's motion for summary judgment and dismissal of the plaintiffs' complaint seeking a declaration of SUM coverage in the Royal policy pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiffs' complaint is dismissed. The plain meaning of the Royal policy states that SUM coverage is not available without a specific endorsement to that effect which is not present in this case.

The foregoing constitutes the decision of the Court.

Dated: JUL 11 2007



J.S.C.