

Cicero v Great Am. Ins. Co.

2007 NY Slip Op 32390(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0600737/2005

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Index Number : 600737/2005

CICERO, LYDIA

INDEX NO. _____

vs

GREAT AMERICAN INSURANCE

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DEFAULT JUDGMENT

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 determined in accordance with the annexed decision and order.*

FILED

AUG 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 23, 2007

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
LYDIA CICERO AND MARK CICERO,

Plaintiffs,

INDEX NO. 600737/05

-against-

GREAT AMERICAN INSURANCE COMPANY,
AMERICAN NATIONAL FIRE INSURANCE
COMPANY, and GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK,

Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiffs Lydia Cicero and Mark Cicero move for an order pursuant to CPLR 3212 granting them summary judgment against the three named defendants, Great American Insurance Company, American National Fire Insurance Company, and Great American Insurance Company of New York (collectively "Great American"),¹ in the amount of \$1,501,211.00. Defendants oppose the motion.

Plaintiffs commenced this action pursuant to Insurance Law §3420(b)(1) seeking to enforce the balance of a judgment entered in their favor and against Western Beef, Inc., in the underlying personal injury action entitled Lydia Cicero and Mark Cicero v. Western Beef, Inc., Index No. 21716-98, Supreme Court, Queens County. Plaintiff Lydia Cicero was injured on January 20, 1998, when she slipped and fell in a supermarket owned by Western Beef. On or

¹Defendants assert and it is not disputed that the excess insurance policy in question was issued to Western Beef, Inc. by American National Fire Insurance Company, which is now known as Great American Insurance Company of NY, which is a subsidiary of Great American Insurance Company.

about May 5, 1998, plaintiffs commenced the underlying action against Western Beef, seeking damages for personal injuries. Western Beef appeared in that action through counsel retained by Zurich North American Insurance Group (“Zurich”), which provided primary insurance for Western Beef with limits of \$1,000,000. By Combined Demands dated May 27, 1999, plaintiffs requested, *inter alia*, that Western Beef provide information regarding applicable insurance coverage. On September 14, 1999, the court issued a preliminary conference directing Western Beef to disclose within 45 days, “the existence and contents of any insurance agreement as described in CPLR 3101(f),” and to respond within 60 days, to plaintiffs’ Combined Demands dated May 27, 1999. By response dated January 21, 2000, Western Beef stated, *inter alia*, that at the time of plaintiffs’ alleged accident, it was insured by Zurich with a single limit coverage of \$1,000,000. Although CPLR 3101(f) requires full disclosure of “any insurance agreement . . . liable to satisfy part or all of a judgment,” which includes excess insurance agreements, Western Beef provided no information as to any excess coverage.

In January and April 2003, Zurich sent letters to Western Beef requesting information as to “all insurance carriers that may have any possible additional coverage for you.” Each letter stated that “[f]ailing to hear from you, we will assume there is no additional carriers or coverage.” Zurich received no response to either letter. On December 15, 2003, Zurich again wrote to Western Beef, stating that “[b]ased on the absence of your cooperation” in placing your excess insurance carrier on notice, “we have been informed by your broker that your excess carrier was American National Fire Insurance Company. The policy number is TUU20358-20-00 with policy limits of \$25,000,000. Again we strongly suggest that you forward this letter to American National Fire Insurance Company placing them on notice of this claim.”

On December 29, 2003, Western Beef's counsel, Keith J. Conway, wrote to plaintiffs' counsel stating as follows:

In response to your recent inquiries regarding insurance coverage for the defendant in the above-reference case, please be advised that I have recently learned that Western Beef, Inc. did have an excess insurance policy in effect at the time of plaintiff's alleged accident.

The former insurance broker for Western Beef, Inc. has advised a representative of Zurich North American Insurance Company, that the excess carrier for the period covering this accident date was American National Fire Insurance Company. The policy number is TUU90358-200-00 with a single limit coverage of \$25,000,000.

The client has been instructed by Zurich to notify their excess carrier of this claim at this time, if they have not already done so.

Plaintiffs' counsel received the above letter on January 7, 2004. Two days later, on January 9, 2004, plaintiffs' counsel, Alan Russo, sent a letter via overnight mail to the general counsel for the excess insurer, Great American, advising as follows:

Please be advised that this office represents the plaintiff Lydia Cicero, in connection with an accident which occurred on January 20, 1998 at Western Beef Supermarket located on Merrick Boulevard in Queens, NY. We have just received notice this week, for the first time, that Western Beef, where this accident occurred, had an excess policy of insurance with American National Fire Insurance Company under policy under TUU90358-200-00 of \$25,000,000 covering the time period of the date of this loss. This letter shall place you on notice of this loss.

The above-captioned case is scheduled for a Pre-Trial Conference in Queens County Supreme Court on January 15, 2004, Justice Alan LeVinc.

This case involves a slip and fall on "food skin" on the floor of the produce department . . . As a result of the accident, the plaintiff, Lydia Cicero, suffered a fractured right patella, which required an open reduction with internal fixation and a second surgery to remove the hardware. Thereafter, as a result of the original disability caused by this accident, Ms. Cicero placed undue pressure on her left leg and foot causing severe ulcerations to develop on her left foot. These ulcerations became infected and necessitated five surgical interventions during which time various portions of her left lower extremity were amputated. She has been left with a below the knee amputation of her left lower extremity, is currently totally disabled and is confined to a wheelchair.

Based upon the clear liability and damages suffered in this case, the case

has a potential exposure well in excess of the \$1,000,000.00 primary policy of insurance afforded Western Beef by Zurich North American Insurance Company. Accordingly, be on notice that the plaintiff intends to satisfy any verdict in excess of \$1,000,000.00 out of the coverage provided Western Beef for this loss, by your company under policy number 2UU90358-200-00.

Please contact the undersigned immediately if you wish to discuss this lawsuit in greater detail.

On January 19, 2004, Great American sent a letter via certified mail, addressed to Western Beef, Zurich and plaintiffs' counsel, denying coverage based on untimely notice and explaining as follows:

By way of a letter dated January 7, 2004, we received notice of lawsuit commenced in the New York County Supreme Court, Queens County, against Western Beef by a plaintiff simply identified as Cicero ("Cicero litigation"). Our investigation conducted after receiving notice, reveals that the Cicero litigation stems from an accident that occurred on January 20, 1998, nearly six (6) years ago. Furthermore, the Cicero litigation appears to have been commenced a number of years ago. However, neither Great American or any of its subsidiaries including GANY [Great American Insurance Company of NY] was ever given any notice of either the underlying accident (i.e. the occurrence) or the Cicero litigation until a few days ago by way of the January 7, 2004 letter. . . . Please be advised that Great American and its affiliated company GANY, hereby separately, alternatively, and independently deny coverage to Western Beef, including any obligation to defend and/or indemnify, on the basis that neither Western Beef or anyone on its behalf, nor plaintiff Cicero or anyone on her behalf, nor Zurich or anyone on its behalf, nor any other claimant or anyone on behalf of such claimant provided timely and adequate notice of either the occurrence or the litigation to Great American or GANY as required by the policy. . .

The underlying action was scheduled for trial on May 10, 2004, at which time plaintiffs and Western Beef agreed to a settlement. On December 8, 2004, judgment was entered in favor of plaintiffs and against Western Beef, in the amount of \$2,500,000. To date plaintiffs have received \$998,789.00 in satisfaction of its settlement with and judgment against Western Beef. As part of the settlement, Western Beef assigned to plaintiffs, its right against its excess insurer, Great American. On or about March 1, 2005, the Ciceros commenced the instant action pursuant

to Insurance Law §3420(b)(1), seeking to recover from Great American, the balance of the judgment which remains unpaid, \$1,501,211.00.

Plaintiffs made a prior motion for summary judgment against defendants. By a decision and order dated January 11, 2006, this court denied the motion as premature, since discovery had not yet been conducted. Discovery is now complete, the matter is on the trial calendar, and plaintiffs are moving once again for summary judgment on their Insurance Law §3420(b)(1) claim against Great American to recover the balance of the judgment in the underlying action.

In support of the motion, plaintiffs contend that there is no question that they placed defendants on notice of their claim immediately after learning of the existence of the excess coverage. Defendants argue that the motion should be denied, as an issue of fact exists as to whether plaintiffs acted diligently in ascertaining the existence of Western Beef's excess coverage.

Under Insurance Law §3420(b)(1), plaintiffs are permitted to maintain a direct action against Great American on the policy of excess insurance provided to the judgment debtor, Western Beef. See D'Arata v. New York Central Mutual Fire Insurance Co., 76 NY2d 659, 665 (1990). Under Insurance Law §3420(a)(3), when an insured fails to give proper notice to its insurance carrier, the injured parties can give notice themselves, thereby preserving their right to proceed directly against the insurer. See Allstate Insurance Co. v. Marcone, 29 AD3d 715, 717 (2nd Dept), lv appeal dismissed 7 NY3d 841 (2006); Appel v. Allstate Insurance Co., 20 AD3d 367 (1st Dept 2005). In terms of time, the sufficiency of notice by the injured parties is measured less rigidly than notice by the insured, as what is reasonably possible for the insured may not be reasonably practical for the injured parties. See National Grange Mutual Insurance Co. v. Diaz,

111 AD2d 700 (1st Dept 1985); Jenkins v. Burgos, 99 AD2d 217, 221 (1st Dept 1984); Lauritano v. American Fidelity Fire Insurance Co., 3 AD2d 564, 568 (1st Dept 1957), aff'd 4 NY2d 1028 (1958). "Promptness is relative and measured by the circumstances." Id. Thus, the notice is evaluated in the context of "the prospects for giving notice available to the injured person, not by those available to the assured, and the mere passage of time does not make the resulting delay unreasonable." Jenkins v. Burgos, supra at 221; accord National Grange Mutual Insurance Co. v. Diaz, supra. In each case the test is one of reasonableness, based on the injured parties' diligence ascertaining the identity of the insurer, in light of the prospects afforded under the circumstances. See Appel v. Allstate Insurance Co., supra; Jenkins v. Burgos, supra. The reasonableness of any delay and the sufficiency of the excuse offered ordinarily present questions of fact to be resolved at trial. See Allstate Insurance Co. v. Marcone, supra at 717; James v. Allstate Insurance Co., 177 AD2d 998 (4th Dept 1991); Eveready Insurance Co. v. Chavis, 150 AD2d 332, 333 (2nd Dept), app wdn 74 NY2d 844 (1989). Moreover, the injured parties have the burden of proving that they or their counsel acted diligently in attempting to ascertain the identity of an insurer, and thereafter expeditiously notified the insurer. See Trepel v. Asian Pacific Express Corp., 16 AD3d 405, 406 (2nd Dept 2005); American Home Assurance Co. v. State Farm Mutual Automobile Insurance Co., 277 AD2d 409, 410 (2nd Dept 2000); Serravillo v. Sterling Insurance Co., 261 AD2d 384, 385 (2nd Dept 1999), lv app den 95 NY2d 758 (2000).

Here, it is not disputed that plaintiffs have a right to maintain this action and that Great American received notice from plaintiffs. The only issue is the sufficiency of plaintiffs' notice, as judged by the standards discussed above.

Plaintiffs contend that they “had absolutely no opportunity to discover the information at any time before” they received the letter from defendants’ counsel and “as a matter of law” they gave notice “as soon as was reasonably possibly.” Specifically, plaintiffs argue that they reasonably relied on their adversary’s representations regarding insurance coverage which were made in response to a court order, and the fact that Western Beef was represented by counsel provided by its primary insurer, Zurich. Plaintiffs also point to Zurich’s several unsuccessful efforts to contact Western Beef directly for excess insurance information, and the fact that Zurich finally obtained such information from Western Beef’s former insurance broker.

Based on the record, the court concludes that a triable issue of fact exists as to whether plaintiffs made reasonably diligent efforts to ascertain the identity of the excess insurer. While the accident occurred in January 1998 and plaintiffs commenced the underlying action the following May, it appears that plaintiffs’ counsel did not take any affirmative steps to obtain insurance information from defendant until a year later in May 1999, when the Combined Demands requesting insurance information were served. On the other hand, in response to plaintiffs’ Combined Demands and the direction of the court in the preliminary conference order, defendant finally responded in January 2000, but that response was incomplete and arguably misleading, as it listed only the primary insurer, Zurich, and was silent as to the existence of any excess coverage. It appears that plaintiffs’ counsel subsequently inquired about additional insurance coverage, but it is unclear precisely when, as the December 29, 2003 letter from Western Beef’s counsel simply references plaintiffs’ counsel’s “*recent* inquiries regarding insurance coverage” (emphasis added).

Although plaintiffs' January 7, 2004 letter demonstrates that they were diligent in notifying Great American within days of receiving information as to its identity, an issue for trial nevertheless remains as to whether under the circumstances presented, plaintiffs made reasonably diligent efforts to ascertain Great American's identity from the outset. See Appel v. Allstate Insurance Co., *supra*; Denneny v. Lizzie Buggies, Inc., 306 AD2d 89 (1st Dept 2003). As noted above, ordinarily, the reasonableness of the delay and the sufficiency of the excuse, present questions of fact for trial. See Allstate Insurance Co. v. Marcone, *supra*. Plaintiffs, therefore, are not entitled to summary judgment.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for the pre-trial conference previously scheduled for August 9, 2007 at 2:30 p.m., in Part 11, Room 351, 60 Centre Street.

DATED: July 23, 2007

ENTER:

FILED

AUG 02 2007

NEW YORK
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J.S.C.