

Progressive Ins. Cos. v Kemper Ins. Co.

2007 NY Slip Op 32927(U)

August 28, 2007

Supreme Court, Schuyler County

Docket Number: 0000022/2007

Judge: Elizabeth A Garry

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At a Term of the Supreme Court of
the State of New York held for the
County of Schuyler in Watkins Glen,
NY on the 1st day of June, 2007.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF SCHUYLER

PRESENT: HON. ELIZABETH GARRY
SUPREME COURT JUSTICE

PROGRESSIVE INSURANCE COMPANIES,

Plaintiffs,

vs.

KEMPER INSURANCE COMPANY, LIBERTY
MUTUAL INSURANCE COMPANY, WILLIAM
J. DEGRAW and MICHAEL T. BARBER,

Defendants.

DECISION AND ORDER

RJI No.: 2007-0022
Index No.: 2005/281

In this declaratory judgment action, Plaintiff Progressive Insurance Companies (Progressive) brings a motion seeking a framed issue hearing to determine whether Defendant DeGraw (DeGraw) had permission to drive a vehicle owned by Defendant Barber (Barber) on August 27, 2004, when Barber's vehicle was involved in an accident. The motion is opposed by Barber and Defendant Kemper Insurance Company (Kemper). The parties appeared, by Counsel, for oral argument on June 1, 2007. At the Court's request, Counsel for Progressive and Counsel for Kemper and Barber thereafter made additional submissions on the question of the parties' right to a jury trial in this declaratory judgment action, dated June 6 and June 19, 2007.

Factual and Procedural History

Plaintiff's Complaint (Plaintiff's Motion, Exhibit A) alleges that on August 27, 2004, a truck owned by Barber and driven by DeGraw struck a vehicle owned and operated by non-party Danielle Patrigiani, insured by Defendant Liberty Mutual Insurance Company (Liberty). Liberty paid property damages to Patrigiani and, as subrogee, demanded reimbursement from Barber's

insurance carrier, Kemper. Kemper refused to pay on the ground that DeGraw did not have Barber's permission and consent to operate Barber's vehicle and was therefore a non-permissive user for whom no coverage was provided.

Progressive filed this declaratory judgment action asserting that its investigation showed that DeGraw did have Barber's permission to operate the vehicle. If DeGraw had Barber's permission and consent to drive his vehicle, then Kemper owes primary insurance coverage to its insureds, Barber and DeGraw, on Liberty's subrogation claim, and Progressive's coverage is excess to Kemper's coverage. If DeGraw did not have Barber's permission and consent, then Progressive owes no coverage. Progressive therefore seeks either a judgment declaring that DeGraw was a permissive user of Barber's vehicle at the time of the accident, that Kemper's denial of coverage to him is void, and that Kemper must provide DeGraw with primary coverage with Progressive following as the excess carrier, or in the alternative, a judgment declaring that DeGraw used and operated the vehicle without Barber's permission and consent and that Progressive therefore has no duty to provide DeGraw with insurance coverage.

Both DeGraw and Barber were deposed on October 11, 2006. DeGraw testified that he had permission to drive Barber's vehicle. (Plaintiff's Motion Exhibit C, pp. 15-22, 24-36). Barber testified that DeGraw did not have permission to drive his vehicle. (Plaintiff's Motion Exhibit D, pp. 16-23). Kemper and Barber assert that DeGraw also gave a statement on September 3, 2004, on the permissive use question that contradicts his deposition testimony (Affidavit of Valerie A. Barbic, Esq., Exhibit A).

Progressive requests a framed issue hearing to determine the disputed issue of fact as to whether DeGraw had permission to drive Barber's vehicle, as the rights of the parties cannot be determined until after the permissive use issue is decided. Kemper and Barber oppose on the grounds that a framed issue hearing is not appropriate in a Supreme Court proceeding and that the permissive use question should be determined by a jury. Kemper and Barber argue that the defendants are entitled to a jury trial to determine whether or not DeGraw's operation was

permissive as resolution of the contradictory testimony depends on issues of credibility.

Legal Analysis

Under the New York State Constitution, the right to a jury trial is guaranteed “in all cases in which it is heretofore been guaranteed by constitutional provision.” NY Constitution, article I, § 2. Under this provision, there is a right to a jury trial in cases in which the right was recognized at common law or by statute as of the adoption of the Constitution of 1894. The right to jury trial also extends to new types of cases that are analogous to those which were traditionally tried by a jury. In re DES Market Share Litigation, 79 NY2d 299, 305 [1992]. As declaratory judgment actions developed after 1894 and were unknown to the common law, determining whether a right to jury trial exists in such an action requires examining the action to see whether the action is, in its essence, legal and therefore triable by a jury, or equitable and therefore triable by the court. Siegel, New York Practice, § 439 [4th Ed.]; Martell v. North River Insurance Company, 107 AD2d 948 [3d Dep’t 1985]. In Independent Church v. Board of Assessors of Nassau County, 72 AD2d 554 [2d Dep’t 1979], for example, the court found that no right to a jury trial existed in a declaratory judgment action that challenged a tax assessment because the proceeding was analogous to an equitable action to vacate the assessment as a lien.

In the context of insurance, declaratory judgment actions that primarily involve the equitable construction of insurance policies “present no apt subjects for a jury to pass upon.” Fidelity & Casualty Co. of New York v. Groth et al, 47 NYS2d 68 [Supreme Court, Herkimer County 1944]. However, where the underlying action arising out of an insurance contract is legal rather than equitable in nature, the declaratory judgment action may not be used “to afford a sanctuary of escape from trying jury issues before a jury.” Utica Mutual Ins. Co. v. Beers, 250 AD2d 348 [4th Dep’t 1937]. Thus, when an insured filed an action for a judgment declaring that his insurer was obligated to defend and indemnify him in a pending personal injury case, the Third Department found that the insured’s demand for a jury trial was improperly vacated,

reasoning that if the declaratory judgment action had not been created, relief for the claim would have been available by way of a money damage action for breach of contract and tort, in which the insured would have been entitled to a jury trial. Martell, *supra.*, at 950.

By the same analysis, if the declaratory judgment device had not been created, relief in the current action would have been available in a money damage action for breach of contract or tort rather than in an equitable action. It has, in fact, been held in the Third Department that a declaratory judgment action may not be used to prevent a jury determination of a disputed issue of fact as to whether a vehicle is being operated with its owner's permission and consent, at least when there is an underlying negligence action. The Travelers Indemnity Company v. Burg, 253 AD 43 [3rd Dep't 1937]; *see also* Nationwide Mutual Insurance Company v. Dennis, 14 AD2d 188 [1961].

In requesting a framed issue hearing to resolve this question, Progressive relied upon In re Eagle Insurance Co. v. Lucia, 33 AD3d 552 [1st Dep't 2006], in which a framed issue hearing was used to decide issues of credibility related to whether the owner of a vehicle had given express or implied consent to a driver's operation of her vehicle. As Kemper and Barber note, however, that case was not a declaratory judgment action. It arose, instead, in the context of an arbitration proceeding, in which the parties had necessarily waived their rights to determination of the facts by a jury. In the present action, on the other hand, no such waiver has taken place. The defendants in this action are entitled to have a jury determine the questions of credibility presented by the conflicting evidence as to whether DeGraw's use of Barber's vehicle was permissive.

Conclusion

The evidence presented raises questions of credibility which must be resolved by a fact-finder. As the relief sought in this declaratory judgment action is essentially legal rather than equitable, either party may seek a hearing by jury regarding the factual issues. The motion for a framed issue hearing is therefore granted to the limited extent of directing that this issue be tried first and separately to the fact finder. (CPLR Section 603). It appears that all necessary discovery has been completed. It further appears that the limited issue of permissive use should require no

more than one day for trial, whether to the Court or a civil jury.

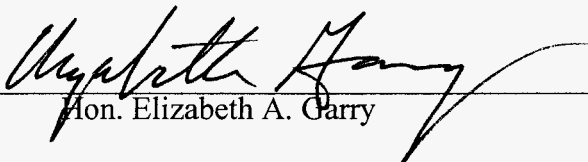
Accordingly, the Plaintiff is directed to file a trial Note of Issue immediately upon receipt of this Decision; if this is done promptly the trial shall then be scheduled, as a back up, to commence **on Monday October 22, 2007, at 9:30 am**, at the Schuyler County Courthouse in Watkins Glen. Whether the trial will be held before a jury or the Court shall be determined by the parties in accord with the statutory procedure established by CPLR Section 4102.

This constitutes the Decision and Order of the Court.

Dated: August 28, 2007

Norwich, New York

ENTER


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Rita Decker, Schuyler County Supreme & County Court Chief Clerk, Original Decision and Order, with Notice of Motion dated March 2, 2007, with attached Attorney's Affidavit of Kevin R. Van Duser, Esq., sworn to on March 2, 2007, and Exhibits A through E; Affidavit of Valerie L. Barbic, Esq., sworn to on May 24, 2007, with attached Exhibit A; Correspondence to the Court from Valerie L. Barbic, Esq., dated June 6, 2007; Correspondence to the Court from Kevin R. Van Duser, Esq., dated June 19, 2007.