

Abraham v Allstate Ins. Co.

2007 NY Slip Op 33672(U)

October 29, 2007

Supreme Court, Richmond County

Docket Number: 0101329/2006

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

ELAINE ABRAHAM and SOL ABRAHAM,

Plaintiff(s),

-against-

**ALLSTATE INSURANCE COMPANY and
R.J. ISACSEN AGENCY INC.,**

Defendant(s).

**Index No: 101329/06
Motion No: 1344-001
2381-002**

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

-----X
The following papers numbered 1 to 6 were marked fully submitted on the 14th day of September, 2007:

Notice of Motion for Summary Judgment by Defendant Allstate Insurance Co., with Supporting Papers and Exhibits (dated April 26, 2007).....1

Affirmation in Opposition by Plaintiffs, with Exhibits (dated July 17, 2007).....2

Reply Affirmation (dated August 1, 2007).....3

Notice of Motion for Summary Judgment by Defendant R.J. Isacsen Agency, Inc., with Memorandum of Law, Supporting Papers and Exhibits (dated July 31, 2007).....4

Affirmation in Opposition by Plaintiffs, with Exhibits (dated August 29, 2007).....5

Reply Affirmation (dated September 11, 2007).....6

Upon the foregoing papers, the respective motions for summary judgment are granted, and the complaint is dismissed.

Defendants Allstate Insurance Company (hereafter Allstate) and R.J. Isacsen Agency, Inc. (hereafter Isacsen) move by separate notices of motion for an order granting each summary judgment and dismissing of the complaint and all cross claims against it. Plaintiffs Elaine and Sol Abraham oppose both motions.

This action involves an alleged breach of an insurance contract by both defendants. With respect to defendant Isacsen, it is alleged that the broker failed to include supplementary underinsured motorist (SUM) coverage in plaintiffs' excess liability (*i.e.*, umbrella) policy in the coverage amount of \$1,000,000.00. With respect to defendant Allstate, it is alleged that the insurer improperly disclaimed coverage under said umbrella policy (No. 043 610 959). To the extent relevant, it is undisputed that plaintiff Elaine Abraham was struck from behind by a motor vehicle while walking to her car on December 15, 2004. It is also undisputed that on the date of her accident, her husband (plaintiff Sol Abraham) had in force and effect with Allstate both an automobile liability insurance policy providing uninsured/underinsured liability coverage in the amount of \$100,000.00, and an excess liability policy with a limit of \$1,000,000.00. After the accident, Mrs. Abraham commenced a third-party action against the alleged tortfeasor, a nonparty insured by the St. Paul's Travelers Insurance Company under an automobile liability policy with a \$100,000.00 limit. Based upon the uncontroverted evidence, St. Paul's tendered its full policy limit of \$100,000.00 in satisfaction and settlement of the third-party action. However, due to the extensive nature of her injuries, Mrs. Abraham subsequently sought to recover additional damages under her husband's umbrella policy. In support of such additional coverage, plaintiffs allege that Isacsen, the defendant broker, had expressly told them that the umbrella policy applied to damages in excess of their underinsured motorist coverage, and that Allstate's disclaimer of coverage under the umbrella policy was therefore wrongful. As a result, plaintiffs commenced this action by the filing and service of a summons and complaint on or about April 24, 2006. Issue was joined by the service of answers by Isacsen, on May 15, 2006, and by Allstate, on May 16, 2006.¹

In support of its motion for summary judgment, Allstate relies upon (1) a copy of the relevant insurance policy, and (2) an affidavit by Anne Marie Fassler, one of its claims representatives. Based on these submissions, Allstate alleges that plaintiffs' umbrella policy is an excess "liability" policy which protects the insureds against liability to third persons, but does not provide

¹Previously, Elaine and Sol Abraham had commenced a proceeding under Richmond County Index No. 80294/05 seeking a court order directing that Allstate proceed to arbitration. By order dated November 14, 2005, this Court (Minardo, J.) denied the petition and granted Allstate's cross petition to permanently stay arbitration.

supplemental underinsured motorist coverage for injuries inflicted upon them by third persons. Additionally, Allstate contends that this issue was previously litigated before Justice Minardo in the proceeding to compel arbitration (under Index No. 80294/05), and was decided against these plaintiffs [petitioners therein] on the basis that the umbrella policy did not provide SUM coverage.²

In opposition, plaintiffs allege that Allstate's motion is premature, as court-ordered depositions have yet to be held. Additionally, plaintiffs reassert their understanding (based on discussions with Isacsen), that the umbrella policy included SUM coverage in excess of the limits fixed in their automobile policy, and claim that Allstate's purported disclaimer of coverage on June 10, 2005 occurred only after Allstate had consented in writing to plaintiffs' settlement of the third-party action and they attempted to recover additional SUM benefits under their umbrella policy..

In support of its parallel motion for summary judgment, defendant Isacsen relies upon (1) the affidavit of Robert J. Isacsen, it's owner, (2) a copy of the policy in question, and (3) a memorandum of law. Based upon these submissions, Isacsen alleges that (a) plaintiffs may not maintain an action against the brokerage company because it was acting on behalf of a disclosed principal, to wit: Allstate, (b) it did not breach any alleged agreement with plaintiffs to procure SUM umbrella coverage, (c) it did not have any special relationship with these plaintiffs, (d) plaintiffs do not have a viable misrepresentation claim against it, and (e) plaintiffs' claims are barred by principles of *res judicata*. In opposition, plaintiffs again assert that the motion is premature. Additionally, relying upon the affidavit of the plaintiff-husband, they reiterate the claim that Isacsen expressly represented to Sol Abraham that the policy in question provided SUM "umbrella" coverage. Finally, plaintiffs take issue with defendants' claims regarding, *e.g.*, the lack of misrepresentation, the absence of a special relationship and the applicability of *res judicata*.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment,

²The Court notes that none of the parties has provided this Court with a copy of the pleadings in the matter decided by Justice Minardo.

the function of the court is issue-finding, not issue-determination (see Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 580). To prevail on the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324), and upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue (*id.* at 562). Thus, summary judgment, which operates to deprive a party of his or her day in court, is only appropriate where the movant’s initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (Persaud v. Darbeau, 13 AD3d 347).

With respect to Allstate’s motion, the personal umbrella policy procured by Mr. Abraham expressly provides for protection against liability for damages inflicted on third parties. Personal injury to an insured person, Mrs. Abraham in this case, is clearly stated within the policy as a loss not covered. In any event, it is beyond cavil that the determination of whether a vehicle is underinsured can only be made by comparing the bodily injury limits of the claimant’s insurance policy with the bodily injury limits of the alleged tortfeasor’s policy (see Matter of Allstate Ins. Co. v. DeMorato, 262 AD2d 557), and in this case they are identical, *i.e.*, \$100,000.00. Thus, underinsurance is not even implicated. Equally unavailing is plaintiffs’ claim that Allstate’s disclaimer was untimely. A disclaimer is unnecessary where the claim does not fall within the coverage terms of an insurance policy (see Matter of Worcester Ins. Co. v. Bettenhauser, 95 NY 2d 185; Fair Price Med. Supply Corp. v. Travelers Indem. Co., 42 AD3d 277, 280-281).

The Court has considered the other arguments tendered by plaintiffs in opposition to Allstate’s motion, and finds them to be equally without merit. Thus, Allstate’s motion for summary judgment is granted.

The same is true with respect to Isacsen's motion for summary judgment. Initially, the Court notes that the fact that Isacsen purports to have acted on behalf of a disclosed principal does not relieve it of liability for its own negligent acts (*see* Tucci v. Hartford Cas. Ins. Co., 167 AD2d 387, 388). In fact, it is well settled that an agent may be held liable in damages for its neglect in failing to procure insurance (Katz v. Tower Ins. Co. of N.Y., 34 AD3d 432).

To prevail in their action against the insurance agency, plaintiffs must demonstrate by competent evidence that Isacsen breached its agreement to procure SUM umbrella coverage, or that it failed to exercise due care in the discharging of the duty arising out of its agreement to provide such coverage in plaintiffs' umbrella policy (*see* Mickey's Rides-N-More v. Anthony Vicuso Brokerage, 17 AD3d 328, 329). Here, it is uncontroverted that plaintiffs' personal umbrella policy was initially purchased in 1980 from a different agent, and that it was not until May 1, 2000 that plaintiff Sol Abraham became a customer of the Isacsen agency. It is further undisputed that each year the renewal documents for the umbrella policy were forwarded directly to Mr. Abraham by Allstate rather than through the agency. According to the affidavit of Mr. Isacsen, the only change that was ever made to the preexisting umbrella policy occurred on October 12, 2000, when Mr. Abraham requested that the telephone number listed on said policy be changed (*see* Isacsen's Exhibit "E"). In addition, Mr. Isacsen affirms that Mr. Abraham never asked about procuring \$1,000,000.00 of SUM umbrella coverage until December 15, 2004, the date of his wife's accident, and that the agency never agreed to procure such coverage because Allstate does not offer it.³ In the opinion of this Court, these submissions are sufficient to demonstrate *prima facie* Isacsen's entitlement to summary judgment. As a result, it is incumbent upon plaintiffs to demonstrate the existence of a triable issue of fact in order to avoid dismissal. In this regard it is worth noting that "a general request for coverage will not satisfy the requirement of a special request for a certain type of coverage" (Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 NY3d 152, 158).

In attempting to meet this burden, plaintiffs have submitted an affidavit by plaintiff/husband,

³This is in accord with the affidavit by Allstate's claims representative, wherein it is stated "Allstate's personal umbrella policies have never provided coverage for uninsured/underinsured first-party claims" (Allstate's Exhibit "E").

Sol Abraham, and a copy of a fax transmitted by Isacsen on April 15, 2005. In his affidavit, Mr. Abraham states that he first spoke with Isacsen when contacted about the change of insurance agents. At that time, Mr. Abraham claims that he specifically asked if all of his coverage, including the purported \$1,000,000.00 in excess SUM coverage would remain in place, and Isacsen represented that his existing coverage would remain in effect. Mr. Abraham also states that sometime in early 2005 he spoke to an Isacsen agency representative (Jean-Louis Tassart) about his wife's accident, and was told (1) that all of his wife's first party benefits...would be paid through the insurance carrier of the motor vehicle which struck [her]", and (2) "that upon exhausting...[that] policy... she could proceed against...Allstate". In addition, he allegedly asked for a copy of the declaration page purportedly documenting the \$1,000,000.00 in excess SUM coverage. Attached as plaintiffs' Exhibit "F" is the facsimile transmission dated April 15, 2005 purportedly received in reply to this inquiry, which plaintiffs' claim proves that the excess SUM coverage was in effect on the date of Mrs. Abraham's accident.

As a general rule, summary judgment is inappropriate where questions of credibility are raised that require a trial (*see e.g. Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385). There are, however, extraordinary circumstances where credibility may properly be determined as a matter of law (*see Sexstone v. Amato*, 8 AD3d 1116, *lv denied* 3 NY 3d 609), *e.g.*, where the allegations appear feigned (*see Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY 2d 439, 441) or patently false (*see MRI Broadway Rental v. United States Min. Prod. Co.*, 242 AD2d 440, *affd* 92 NY2d 421).

With this in mind, it is uncontroverted that Mr. Abraham purchased the Allstate umbrella policy from an agency other than Isacsen, and that the annual renewal policies were sent by Allstate directly to the insured. Under such circumstances, Mr. Abraham is conclusively presumed to have known, understood and agreed to the terms of the insurance policy which he received (*see Nicholas J. Masterpol, Inc. v. Travelers Cos.*, 273 AD2d 817, 818). Here, it is undisputed that among those terms, for over 25 years, were provisions indicating that the umbrella policy protected the insured against claims by third parties, up to a maximum of \$1,000,000.00. SUM coverage is never mentioned. Pertinent here is so much of Mr. Abraham's affidavit as claims that in 1980, long before

Isacsen became his broker, he specifically requested that his then-agent procure “One million dollars” in excess SUM coverage. Notwithstanding that each successive renewal of his umbrella policy did not so provide, there is no allegation that Mr. Abraham ever attempted to close this “gap” in coverage (*cf.* Nicholas J. Masterpol, Inc. v. Travelers Cos., 273 AD2d at 818). In addition, any fair reading of this plaintiff’s opposing affidavit merely recounts that Isacsen assured him that all of his existing policies would remain the same⁴, and that no changes were going to be made. Equally unpersuasive is plaintiffs’ purported reliance on the facsimile transmission dated April 15, 2005 which, even when viewed in the light most favorable to plaintiffs, does nothing to draw into question Allstate’s claim that it has never provided coverage for underinsured first-party benefits in its umbrella policies. Finally, the only proof of Isacsen’s relationship with plaintiffs is that of a successor agent, bereft of any fiduciary duties that might support a cause of action for negligent misrepresentation (*see* Murphy v. Kuhn, 90 NY 2d 266, 270, 272-273). Given the presumption of plaintiffs’ knowledge of the policy terms, and absent any proof of a special relationship or specific request for Isacsen to obtain excess SUM coverage, there are no triable issues to defeat Isacsen’s motion for summary judgment.

Accordingly, it is hereby:

ORDERED that the motions for summary judgment are granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

DATED: October 29, 2007

Joseph J. Maltese
Justice of the Supreme Court

⁴In point of fact, Mr. Abraham admits the same (*see* Plaintiffs’ Exhibit “C”).