

Physicians' Reciprocal Insurers v Short

2008 NY Slip Op 33276(U)

November 26, 2008

Supreme Court, Nassau County

Docket Number: 009902/08

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

PHYSICIANS' RECIPROCAL INSURERS,

Plaintiff(s),

ORIGINAL RETURN DATE: 09/19/08
SUBMISSION DATE: 10/17/08
INDEX No.: 009902/08

-against-

ROBBY F. SHORT, M.D. and JENNIFER
COBALLERO, as the mother and natural
guardian of Jason Coballero, an infant,

MOTION SEQUENCE #1,2

Defendant(s).

The following papers read on this motion:

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Motion by plaintiff ("PRI") pursuant to CPLR 3212 for summary judgment awarding declaratory relief and directing the Clerk to enter a judgment declaring that PRI no longer has an obligation to defend or indemnify Robby F. Short, M.D. in an underlying action entitled *Jason Coballero, an infant, by Jennifer Coballero, his mother and natural guardian v. Robby Short, M.D.*, which is pending in Supreme Court, Kings County, under index number 7054/07, is granted to the extent that it is declared and adjudged that plaintiff no longer has a duty to defend or indemnify Robby F. Short, M.D. in the action entitled *Jason Coballero, an infant, by Jennifer Coballero, his mother and natural guardian v. Robby Short, M.D.*, pending in Supreme Court, Kings County, under Index No. 7054/07, with the proviso that the court's declaration does not extend to and shall have no effect upon PRI's duty pursuant to regulation to defend and indemnify St. John's Queens Hospital and Mary Immaculate Hospital Ambulatory Care Center in the underlying action.

Cross-motion by Jennifer Coballero for a stay pending a deposition of Dr. Short and resolution of a motion in the underlying action seeking to vacate a stipulation of discontinuance against the defendant hospitals is denied.

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In this action plaintiff seeks a judgment declaring that it has no duty to defend or indemnify defendant Robby F. Short, M.D. in an underlying action in which defendant Jennifer Coballero ("Coballero) seeks to recover for injuries to herself and her newborn infant Jason. Plaintiff alleges that the grounds which initially required it to defend Dr. Short no longer exist and, therefore, it is relieved of any further contractual duty to him.

Robby F. Short, M.D. purchased a "claims made" liability policy from PRI for the period January 1, 2004, to January 1, 2005. PRI cancelled Dr. Short's policy as of October 31, 2004, before Coballero asserted her claims and those of her infant son. Nevertheless PRI commenced representation of Dr. Short because of a policy provision which required coverage when a hospital was drawn into the litigation based upon the insured's conduct.

Under a claims made policy such as that issued to Dr. Short, there is no coverage for any claim not filed within the policy period (see 11 NYCRR § 73.1[a]). Extended reporting coverage or "tail" coverage may be provided for with relation to claims filed after termination or expiration, and by regulation New York requires a carrier to offer a claims made policy holder an option to purchase "tail" coverage, as well as to provide for an automatic extended reporting period of sixty days after termination (11 NYCRR §§ 73.3[d], 73.5[b][3]). Claims made during a tail period are "considered made during the policy term" (11 NYCRR § 73.1[d]). Dr. Short, whose policy was cancelled for nonpayment of premium, did not purchase tail coverage.

Turning to the underlying action, Jennifer Coballero, on behalf of herself and her infant child Jason, alleged that St. John's Queens Hospital, Mary Immaculate Hospital Ambulatory Care Center (hereafter collectively referred to as the hospitals) and Dr. Short, commencing on or about May 15, 2004, and thereafter, provided negligent prenatal care, and on February 17, 2005, negligently delivered her infant son causing him to suffer from Erb's Palsy. Coballero alleged that Dr. Short was an employee of the hospitals and/or that they maintained a professional relationship which rendered the hospitals liable for Short's failure of reasonable care.

Coballero discontinued the underlying action against the hospitals due to a previously commenced proceeding in bankruptcy. Thereafter PRI alleged a right to discontinue representation of Dr. Short and brought this declaratory judgment action for a declaration that it no longer has any contractual obligation to defend Dr. Short in the underlying action. PRI relies upon the policy language and *Physician's Reciprocal Insurers v. Abraham* (303 AD2d 734 [2d Dept 2003]), where the Second Department affirmed a Special Term decision insofar as it held that "the carrier's obligation to defend" pursuant to "Section 7G2 ("Hospital Interest")" ceased when the hospital was dismissed from the case. Relying upon the intention of the regulation to protect the interests of hospitals, Special Term found that once the hospital was no longer at risk "the public purpose of the coverage" disappeared (Slip Op 1/18/02, Winslow J. annexed to memorandum).

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As the hospitals are admittedly no longer defendants in the underlying action, Dr. Short is no longer covered by the PRI policy for any claims asserted by Coballero, and it has no duty to defend or indemnify him (*Physician's Reciprocal Insurers v. Abraham*, 303 AD2d 734 [2d Dept 2003]). However by regulation PRI must provide tail coverage for the hospitals in the underlying action, and the court must insure that the hospitals are not prejudiced by a declaration of PRI's rights with respect to Dr. Short (*see, Unitrin Advantage Ins. Co. v. Carothers*, 17 Misc3d 1121(A) [Sup. Ct.; New York Co. 2007]; *Merchants Ins. Co. of New Hampshire v. Long Island Pet Cemetery*, 206 AD2d 827 [4th Dept 1994]).

New York State Insurance Regulations, part 73, provide the "minimum standards" for "claims made" policies. 11 NYCRR 73.5(d) provides 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* as required by subdivision (b) of this section, *to protect the interests of such hospital*, if such person does not purchase extended reporting period coverage. *The insurer shall not charge the hospital a premium for such coverage* (emphasis supplied).

(11 NYCRR 73.5(d); *see* Insurance Law §§ 3436, 5504). Accordingly, pursuant to the minimum standards required by the cited regulations, PRI is required to provide tail coverage under Dr. Short's policy to the hospitals in the underlying action, and they are entitled to a defense and indemnity for any injuries caused by Dr. Short during the period he was covered.

The parties do not discuss the subject policy's shortcomings with respect to hospitals, as Section I, Part 7G(2) of the policy is not in strict compliance with 11 NYCRR 73.5(d). 7G2 states:

2. Hospital Interest

If Claims-Made Professional Liability Coverage under this policy ends for any reason, with respect to any claims received by a hospital and/or its employees, which involve acts or omissions of the INSURED while insured by the Exchange, Exchange will *defend and pay solely on behalf of the INSURED on such claims as though he/she had the TAIL COVERAGE PROVIDED IN Section A of this Part*.

3. The INSURED shall in any event be liable to the Exchange for any losses and loss expenses paid or incurred pursuant to this Section G, Part 1 and Part 2. (emphasis supplied)

Rather than providing coverage without premium to hospitals, the PRI policy provides tail coverage to its insured. It also permits PRI to seek indemnity for that coverage from its insured. This is not strictly in compliance with the regulation and appears violative of the well established rule that in order to avoid any conflict of interest while representing its insured,

an insurer has no right of subrogation "for a claim arising from the very risk for which the insured was covered" (*Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 NY2d 465, 468 [1986]). The effect of the difference in policy language providing coverage to Dr. Short rather than to the implicated hospitals is critical in this matter, as PRI asserts that it does not insure the hospitals.

Because the hospitals filed for bankruptcy prior to the time Coballero filed her complaint against them she did not receive notice and did not file a timely claim in the bankruptcy proceeding. She discontinued the underlying action against the hospitals by so ordered stipulation dated January 25, 2008, as she was barred from proceeding against them. She avers that she believed Dr. Short was still covered.

Coballero has sought to vacate the stipulation of discontinuance. The hospitals' discontinuance was not based upon the merits but upon bankruptcy proceedings. Relief from a stay in bankruptcy "to proceed nominally against the debtor" in order to recover against the debtor's insurance carrier is "routinely granted" to personal injury claimants in a bankruptcy proceeding (*In re Chateaugay Corp.*, 201 B.R. 48 [Bankr.S.D.N.Y. 1996], *affd in part*, 213 B.R. 633 [S.D.N.Y. 1997]). Thus, it may be possible for Coballero to seek permission to proceed against the hospitals. PRI is obligated pursuant to regulation to provide tail coverage to St. John's Queens Hospital and Mary Immaculate Hospital Ambulatory Care Center for the claims against Dr. Short. These factors affect the court's discretion to grant a declaratory judgment to PRI for this decision must not be read to affect the rights, if any, of the hospitals should they require the coverage mandated by regulation (*Merchants Ins. Co. of New Hampshire v. Long Island Pet Cemetery*, 206 AD2d 827, *supra*).

As plaintiff in the underlying action is seeking to set aside the stipulation of discontinuance against the hospitals, she will need to seek permission to pursue her claims against PRI as insurer of the hospitals. As these issues have not been determined, PRI *may* yet have an obligation to provide tail coverage to the hospitals in the underlying action. This court is not in a position to determine these issues which are not before it. Therefore, in order to protect the interests of the hospitals, the relief PRI seeks is granted solely against Dr. Short, with a proviso that the declaration does not extend to the hospitals in the underlying action. The court makes no rulings in this regard; it is merely necessary to clarify that the rights of the hospitals remain unaffected by the court's decision.

The cross-motion is denied based upon the resolution of the main motion.

Submit Clerk's judgment.

This decision constitutes the order of the court.

Dated: 11-26-08

ENTERED ON THOMAS P. PHELAN
DEC 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE
J.S.C.

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