Gordon v Chubb Group of Ins. Co.
2009 NY Slip Op 33408(U)
August 19, 2009
Supreme Court, New York County
Docket Number: 111265/2005
Judge: O. Peter Sherwood
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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MARK ROBERT GORDON,

Plaintiff,

-against-

DECISION AFTER TRIAL

CHUBB GROUP OF INSURANCE COMPANY, FEDERAL INSURANCE COMPANY and CHUBB INDEMNITY INSURANCE COMPANY,

Index.: 111265/2005

Defendants.

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O. PETER SHERWOOD, J.:

This action to recover no fault insurance benefits arose from the injuries suffered by plaintiff, Mark Robert Gordon ("Plaintiff" or "Gordon") who, on November 29, 1998, was struck by an automobile insured by Chubb Indemnity Insurance Company ("CIIC") while he was walking in New York City. The benefits claimed are lost wages, medical expenses and miscellaneous expenses.

The case which was commenced on August 11, 2005 based on a denial of benefits on November 24, 1999, was tried to the court without a jury over a two day period. The witnesses who testified were Lisa Lewis Amistad, a claims manager employed by defendant, Chubb Group of Insurance Companies (together with CIIC and Federal Insurance Company, "Defendants" or "Chubb"); Plaintiff; and Nelson S. Andino, treasurer and a member of the board of directors of Do Gooder Productions, Inc. ("Do Gooder Productions"), a live theater production company founded by Plaintiff. Plaintiff was (and is) a director of Do Gooder Productions and serves as its "Artistic Director and Executive Director."

The parties dispute when in 1999, Plaintiff applied for no fault insurance benefits. Plaintiff claims that the no fault claim was made in late January 1999. Defendant asserts that the claim was made on June 2, 1999. The evidence presented at trial revealed that Plaintiff, through his then attorney, Norman S. Goldsmith ("Goldsmith") filed an application for no fault insurance benefits in 1999 by submitting a completed New York "Form N-F 2" to Chubb. Plaintiff testified that in late January 1999, he witnessed Goldsmith place, the Form N-F 2 dated January 29, 1999, together with other documents to support his loss of earnings claim, in a mailing envelope and that he saw one of

Goldsmith's employees carry the stamped envelope out of the building intending to deposit it in a mailbox. The no fault claim file relating to Plaintiff maintained by Chubb does not reflect receipt of a Form N-F 2 in early 1999. The file contains a faxed Form N-F 2 dated January 29, 1999 along with a fax cover page addressed to Fred Slazkovsky, a Chubb claims representative. The Form N-F 2 which is a one page legal length document, appears on two letter size pages. The fax cover page is dated June 2, 1999 and includes the following message:

> Dear Mr. Slazkovsky,
> Pursuant to our conversation, this will verify that I represent [Gordon] for "no fault" and liability claims.
> Copy of NYS Form N-F 2 follows. Thank you for you cooperation.
> [Signature]
> Norman S. Goldsmith.

The fax cover sheet recites that the transmittal consists of 2 pages, including the cover sheet. The Form N-F 2 is the only document in the file associated with the cover sheet.

Chubb does not allege that the claim is untimely. Chubb continued to process Plaintiff's claim until November 24, 1999 when it issued a blanket denial of the claim based on an alleged failure of Gordon to appear after three attempts to schedule independent medical examinations ("IME") on September 29, 1999, October 13, 1999 and October 22, 1999. Plaintiff was unable to attend the first two IME's which were scheduled to be held in New York City because he was attending graduate school in Cambridge, MA. He testified that he had advised Chubb that he could not appear for his IME in New York and that Chubb then scheduled a third IME at a location near Plaintiff's school. Plaintiff testified that he arranged directly with the medical provider to reschedule the third appointment but that when he appeared as agreed, he was advised that Chubb had denied the claim (for repeated failure to appear for an IME) and that the appointment was cancelled as a result. Chubb's records reveals that it directed that the third IME not be rescheduled.

Plaintiff introduced a redacted version of Chubb's electronic database concerning his claim. It shows a number of failed attempts to communicate with Goldsmith between 2000 and 2002, knowledge that Plaintiff was continuing to press his claim and a conscious decision by Chubb to require Plaintiff to pursue his no fault claim through arbitration *(see Ex 21)*. Plaintiff did not arbitrate. Instead he commenced this case in August 2005, shortly before the time the case would

have been barred by the statute of limitations. By that time, Chubb had closed the no fault file and merged it with a "BI file" it maintained in connection with Plaintiff's personal injury claim against Chubb's insured.

As to his claim for lost income, Plaintiff seeks to recover $73,644.66 (representing 45% of $163,654.79 lost fees over three years under a consulting contract with Do Gooder Productions); $30,747.60 of three years of imputed lost acting wages (based on an adjustment to reflect 12 months work of Plaintiff's 1998 income tax return, which tax return shows income for approximately 11 months of $9,321.09); and $30,800.00 for loss of a stipend from Brown University (offered to Plaintiff in 1999 upon acceptance into a doctoral study program at the University). Under the New York No-Fault Law, compensation for lost wages is limited to three (3) years of income, reduced by twenty (20) percent and then setoff against any Social Security disability payments received.

Defendants claim that Plaintiff is not entitled to recover for loss of income because he failed to make a claim for lost wages when he submitted his no fault claim to Chubb in 1999. Defendants proved that the Chubb no fault file relating to Plaintiff's claim, contains limited information concerning Plaintiff's claim for loss of income. The only evidence of employment is set forth in Plaintiff's response to item 20 on the Form N-F 2. Item 20 asks the applicant to "list names and addresses of your employer and other employers for one year prior to accident date and give occupation and dates of employment." Plaintiff entered "DO GOODER PRODUCTIONS" in that box *(see Ex 1)*. The Chubb database relating to Plaintiff's claims, includes a record of a call from a Chubb representative to Goldsmith on June 2, 1999 requesting Plaintiff's Form N-F 2 and acknowledging receipt of the completed form. The database also includes a note indicating that there are lost wages and commenting "will sent N/F 6" to Goldsmith *(see Ex 24)*. There is no indication that the form was sent.

Plaintiff testified that his lost income claim is set forth in documents that were enclosed with the Form N-F 2 that was mailed to Chubb from Goldsmith's office in late January 1999. That enclosure which the court admitted into evidence over Defendant's objection, purports to document loss of income from Do Gooder of $16,000 for eight weeks work on Off-Broadway plays and $8,915 from appearances as an actor in the film "Random Hearts" *(see Ex 7)*.

Ms. Amistad testified that where a claim is made for loss of income, Chubb's claims personnel verify the claim by sending a wage verification, Form N-F 6, to each employer identified by the claimant. Plaintiff's claim file does not contain any completed wage verification forms. And it does not contain the loss of income documentation Plaintiff testified was sent to Chubbs in January 1999.

As to the claim for reimbursement of medical expenses, Plaintiff established a medical lien of over $6,000 for physical therapy. Plaintiff testified that the lien was compromised and discharged in exchange for a payment of $4,200 out of the proceeds of settlement of Plaintiff's personal injury suit against Chubb's insured *(see Ex C)*. Plaintiff also introduced evidence of miscellaneous out of pocket expenses in the aggregate amount of $846.45 as calculated by his counsel. Chubb has not challenged either of these claims *(see Ex 31)*.

DISCUSSION

Prior to trial, the court denied Plaintiff's motion *in limine* to impose sanctions against Chubb for alleged spoliation of Plaintiff's no fault claim file. Plaintiff asserted that Chubb lost the file and that documents Plaintiff submitted in connection with his no fault claim are missing. In support of his motion, Plaintiff submitted a copy of an unsigned letter on Chubb letterhead dated, September 3, 2004, stating that following a thorough search the file had not been located. The court denied the motion and noted that Plaintiff's motion sought to impose sanctions on defendants for failure to retain and produce Plaintiff's own documents.

At trial, Plaintiff explained why he was unable to produce the missing documents from his files. Goldsmith who had a small law office, is deceased. Plaintiff had worked as an intern in Goldsmith's office during law school. Following Goldsmith's death, Plaintiff visited the office to retrieve his file. He found the office in disarray and assembled as much of his file as he could from documents he was able to find. He also discovered that Goldsmith had been suffering from Alzheimer's disease.

At the end of the case, Plaintiff renewed his motion and requested that the court draw adverse inferences from Chubb's failure to produce documents that were in its no fault claim file. A fact finder may draw adverse inferences against a party who fails to produce documents upon a showing that the documents actually existed and were under that party's control (*see Jean-Pierre v. Turo College*, 40 AD3d 819 [2d Dept 2007]).

An adverse inference ruling is not warranted in these circumstances. The court finds that Chubb produced the original no fault hard-copy file at trial *(see Ex 22)*. Chubb also produced a printout from an electronic database relating to Plaintiff's claims which Chubb represents constitutes the record that concerns Plaintiff's no fault claim from which Chubb redacted documents claimed protected by the attorney client privilege, attorney work product privilege, HIPPA rules or that relate to the BI portion of the file. Plaintiff did not prove that Chubb removed or destroyed any document that is material to the case. In this regard, Plaintiff has not established that documentation of loss of income he testified was provided Chubb in late January 1999 was actually received. Plaintiff did not see the envelope containing the Form N-F 2 deposited in a United States Postal Service mailbox. Moreover, Plaintiff's testimony that in late January 1999, he witnessed Goldsmith place the Form N-F 2 together with documentation of his loss of income claim in a mailing envelope, seal it, apply postage and place the sealed envelope on his desk and his testimony given the next day (after learning that the foundation testimony he offered the previous day was insufficient) that as he was leaving Goldsmith's office, he saw Goldsmith pass the envelope to a secretary who marched it to the building lobby on the way to a mailbox on the street, illustrates a disturbing practice of Plaintiff to tailor his testimony to fit his case. Plaintiff's testimony in this regard is not credible.

Apart from the court's observation of Plaintiff on the witness stand and the implausibility of his testimony, there are other reasons for rejecting Plaintiff's lost earning claim as not credible. Plaintiff testified that Goldsmith completed the Form N-F 2 and that he signed it. The court observes that the form completed by Goldsmith makes no reference to the loss of income documentation purportedly submitted along with the completed Form N-F 2. It makes no mention of Plaintiff's employment as an actor. Do Gooder Productions is listed on the application *(see Ex 1)*. The documentation contains a "To Whom It May Concern" letter dated December 24, 1998 and signed by Mr. Andino *(see Ex 7)*. The letter indicates that in the four (4) week period from the date of the accident on November 29, 1998 through the week ending December 27, 1998, Gordon was unable to perform work for which he would have received $8,000 from Do Gooder Productions had he been able to work. In addition, the documentation states that during the eight week period commencing November 29, 1998, Gordon lost $8,915 due to missed time from acting work *(see Ex 7, page 2)*. Assuming that one half of this acting related income would have been earned in the last four weeks

of 1998, Plaintiff's lost earnings from the two jobs for the last month of the year would have been $12,458. Assuming that Plaintiff had no earned income for December 1998, his 1998 tax return shows earned income of only $9,321 during the other eleven (11) months of that year *(see Ex 27D)*. Further, the basis for calculation of the compensation from Do Gooder Productions referenced in Ex 7 is strikingly different from that which Plaintiff now advances (compare Ex 7, letter dated 12/24/1998 --$2,000 per preview or performance week-- with testimony of N. Andino --$40,000 for up to eight production weeks for 1998-99 theater season). Plaintiff failed to prove lost earnings based on acting work and theater management/production work.

Plaintiff argues that Chubb's disclaimer of his lost earnings claim is untimely and must be rejected because Chubb failed to disclaim within 30 days after Plaintiff submitted proof of loss earnings in January 1999 *(Ex 1, the Form N-F 2)* and August 1999 *(Ex 16, a letter dated August 24, 1999 relating to an offer of a Teaching Assistantship)*. New York Insurance Law §5106(a) states:

> Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such **benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained.** If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintended in regulations. *(Emphasis added)*.

The court finds that the provision is inapplicable as to lost earnings from acting jobs and consulting for Do Gooder Productions because Plaintiff has not shown that Goldsmith supplied "proof of the [loss] and amount of loss sustained." *Id.* The court accepts, based on Plaintiff's testimony and Ex 16, that Plaintiff submitted to Chubb proof of his admission to the Graduate School at Brown University "to study in the AM-Ph D program" and that the offer included a Teaching Assistantship that would have provided a stipend of $11,800 in the September 1999 through May 2000 Academic Year *(see Ex 18)*.[1] Plaintiff elected not to matriculate at Brown.

[1] Plaintiff's offer of a letter dated July 9, 2009, purportedly written by an administrator at Brown University regarding Plaintiff's eligibility for additional Teaching Assistantship in subsequent years was not admitted in evidence.

Instead, he enrolled in a masters program at Harvard University where he attended on a full time basis from 1999 until 2002.

The court finds that Plaintiff has not proved a compensatable loss of earning relating to the Teaching Assistantship. A claim for lost earnings requires medical testimony linking Plaintiff's injuries to his claimed disability to work (*see Miah v. Private One of New York*, 23 Misc.3d 1133(A), 2009 WL 1492725 [Sup Ct, NY Co. 2009]). No such testimony was presented at the trial of this case. Moreover, when Plaintiff elected to attend Harvard University rather than Brown University, he forfeited the offer of a Teaching Assistantship at Brown. That election, not the injury, was the proximate cause of loss of the stipend.

Plaintiff's claims for reimbursement of amounts he paid to discharge a medical lien and for miscellaneous expenses arose at various times before and after Chubb disclaimed coverage on November 24, 1999. The medical lien includes claims submitted prior to that date and rejected by Chubb, claims submitted thereafter and claims submitted for the first time in this litigation. Significantly, Chubb has not challenged specifically any of these amounts and it makes no reference to any of them in its post-trial submission. All amounts claimed shall be awarded.

Plaintiff argues that interest should be calculated from the date of denial of his claim at the rate of two (2) percent compounded monthly *(see 11 NYCRR 65-3.8)*, but has not provided the court with a calculation of that interest as applied to the various elements of his claim. For the reasons set forth in the next paragraph, this failure is not material.

Defendants argue that interest, if any, should run from the date of suit and should be applied only in late payment circumstances. They assert also that it should not be applied to untimely denials of claims. Where, as in this case, there is a timely (albeit improper) denial, interest on the disputed claim should not accumulate until the applicant requests arbitration or institutes a lawsuit (*see Massapequa General Hospital v. Travelers Ins. Co.*, 104 AD2d 638 [2d Dept 1984]). The court agrees. Interest at the rate of two (2) percent per month, shall be calculated from August 12, 2005 (as to the medical lien) and from August 11, 2005 (as to the miscellaneous expenses) until the date judgment is entered. Plaintiff is also entitled to an award of attorney fees to the extent he has prevailed.

Within thirty (30) days of the date of this decision, counsel shall meet and confer to attempt to agree on the amount of damages, including interest owed and the amount of attorney fees that shall be paid for the limited results achieved. Absent agreement, Plaintiff's counsel shall, within forty-five (45) days of the date of this order, submit an affirmation in support of Plaintiff's request for attorney fees together with a form of a Judgment for the expenses found to be owing interest and attorney fees. Defendants' opposition, if any, shall be served and filed within fourteen (14) days of receipt of Plaintiff's papers.

The parties shall recover their exhibits from Mr. Adamo, the Part Clerk.

This is the decision of the court.

DATED: August 19, 2009

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.