

Scalzo v State Farm Ins. Co.

2010 NY Slip Op 30109(U)

January 7, 2010

Supreme Court, Nassau County

Docket Number: 8846/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
RAYMOND SCALZO,

TRIAL TERM PART: 47

INDEX NO.: 8846/07

Plaintiff,

-against-

**MOTION DATE: 10-5-09
SUBMIT DATE: 12-21-09
SEQ. NUMBER - 003**

**STATE FARM INSURANCE COMPANY, STATE
FARM INSURANCE COMPANIES AND STATE
FARM MUTUAL AUTOMOBILE INSURANCE CO.**

**MOTION DATE: 10-1-09
SUBMIT DATE: 12-21-09
SEQ. NUMBER - 004**

Defendants.

-----x

**MOTION DATE: 12-19-09
SUBMIT DATE: 12-21-09
SEQ. NUMBER - 005**

The following papers have been read on this motion:

- Notice of Motion, dated 9-10-09.....1**
- Notice of Motion, dated 9-9-09.....2**
- Affirmation in Opposition, dated 11-18-09.....3**
- Notice of Cross Motion, dated 11-19-09.....4**
- Affirmation in Reply, dated 11-25-09.....5**
- Reply Affirmation, dated 12-17-09.....6**

The motion by the plaintiff pursuant to CPLR 3212, in effect, for partial summary judgment on the issue of liability (Seq. No. 003) is granted. The motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint or, in the alternative, for partial summary judgment regarding damages (Seq. No. 004) is denied in its entirety. The cross motion by the plaintiff, in effect, for partial summary judgment on the issue of damages, and for amendment of his complaint (Seq. No. 005) is granted to the extent

that permission to serve the amendment complaint is granted, but is otherwise denied.

This matter will proceed to trial on the issue of plaintiff's damages.

This is an action for first-party no fault benefits arising from an accident that took place on the Williamsburg Bridge in New York City on October 24, 2000. It is undisputed that the plaintiff was a carpenter working for a company that performed bridge maintenance, apparently under a contract with the City of New York or one of its agencies. He was attempting to hang a sign, and was standing on a ladder on the bed of a truck owned by his employer. The truck moved under circumstances that are unclear in the record, but this movement caused plaintiff to fall and to sustain serious injuries.

Although there is no dispute that plaintiff was an insured under an automobile insurance policy issued by defendant State Farm Insurance Company ("State Farm"), the documentation presented by the parties regarding the identity of the subject policy is inconsistent. The policy declarations page presented by the plaintiff is for a 1990 Oldsmobile (#L06 4013-C16-32D), names one Cynthia B. Santa Cruz as the insured, and contains an optional endorsement for Additional Personal Injury Protection ("APIP") "work loss" of \$4,000 per month, for a maximum of 3 years. The total personal injury protection benefits is stated to be \$175,000. The policy period is stated to end on September 16, 2000. That is prior to the October accident.

The declarations page presented by State Farm is for a 1998 Nissan , and names Cynthia B. Santa Cruz and Raymond Scalzo as the insureds. The APIP work loss endorsement is also for \$4,000, 3 year maximum, but the total personal injury benefits is stated to be \$125,000. The policy period is stated to end on February 17, 2000, also prior to

the October accident. The defendants have presented a certification that this policy was in effect at that time, and have presented a specimen policy, but also annex the declarations page for the Oldsmobile. It presents no affidavit identifying the specimen as an exact copy of the policy issued to the plaintiff, and/or that the Oldsmobile policy did not cover this loss. Indeed, as indicated below, the policy number noted on the denial was for the Oldsmobile.

It is thus unclear as to which policy covered this accident. The plaintiff himself has contributed to the confusion, as in his papers submitted in opposition to the defendants' motion his counsel declares the policy on the Nissan to be the policy (*see*, Exhibit A to affirmation in opposition) – even though he had submitted the declarations page applicable to the Oldsmobile as “the policy” (*see*, Exhibit D to moving papers). As indicated below, there also is a significant dispute as to whether the \$4,000 in work-loss coverage was in addition to the \$2,000 per month statutory minimum (plaintiff's position), or included the statutory amount (State Farm's position).¹ *See*, Insurance Law § 5102(a)(2).

In any event, a claim by plaintiff was made to State Farm, and on January 16, 2001 one of State Farm's claims representatives issued a denial under policy L064-013-32D, the policy presented by the plaintiff identifying the vehicle as the Oldsmobile.² The stated reasons for the denial were as follows:

¹ As noted below, by way of a separate cross motion the plaintiff seeks to amend his complaint to assert that the maximum benefit would be \$6,000 per month, not the \$4,000 per month asserted in the original pleading.

² Although the number varies slightly from the declarations page, the name of the policy holder is the same and it is apparent that this is the policy covering the Oldsmobile.

“Our investigation reveals that you were injured while you were in the course of your employment. Under the New York State No-Fault statute, your primary source of recovery for basic economic loss is through your employer’s compensation carrier. The secondary source of recovery for this loss would be the No-Fault insurance or [sic] the vehicle you were occupying at the time of the loss. Secondly, this is not a covered loss under this policy as the applicant’s injuries were not caused by an accident arising out of the use or operation of a motor vehicle.”

In April of 2001 the plaintiff commenced an action against the City of New York and the New York City Department of Transportation. The plaintiff also was being paid Workers’ Compensation benefits from his employer’s carrier, St. Paul Fire & Marine Insurance Company (“St. Paul”), in the amount of \$400 per week, beginning the same month as the accident, October 2000.

The Workers’ Compensation case under which St. Paul’s paid plaintiff was compromised in March, 2005 for \$100,000 pursuant to Workers’ Compensation Law § 32. The stipulation settling this matter recited that plaintiff would no longer receive his weekly benefits, the case would be closed, St. Paul’s would waive its lien and consent to settlement of a “third party action” in which it was “involved.” State Farm was not a party to discussions regarding this settlement with St. Paul’s.

In December of 2004, the preceding year, plaintiff had settled his law suit against New York City for \$675,000 (the additional \$100,000 from the Workers’ Compensation carrier was also recited). As part of that settlement a general release was given to the City which released it from any further liability. There was no reservation of rights in favor of State Farm, and State Farm’s approval was not sought by the plaintiff before entering into the settlement and giving the release.

In general, it is the law that an injured party who prejudices the subrogation rights of his own insurer by giving a release to the tortfeasor without the insurer's consent cannot make a claim for additional benefits from that insurer. *See, Weinberg v Transamerica Ins. Co.*, 62 NY2d 379 (1984); *Matter of State Farm Mut. Ins. Co. v Lucano*, 11 AD3d 548 (2d Dept. 2004); *Matter of Integon Ins. Co. v Battaglia*, 292 AD2d 527 (2d Dept. 2002). Although the present matter arises in the context of no-fault benefits, a creature of statute, the insurer's subrogation rights with regard to payment of APIP benefits is equitable rather than statutory in nature; it is one that exists under common law, and does not even require a specific contractual provision to be enforceable. *Allstate Ins. Co. v Stein*, 1 NY3d 416, 422 (2004).

However, if the insurer repudiates the insured's claim for first-party benefits, it thereby releases the insured from any requirement that the insured obtain the insurer's consent to a settlement with the tortfeasor. *Meier v Valley Forge Ins. Co.*, 226 AD2d 687 (2d Dept. 1996) [insurer repudiates claim for further lost wage benefits; motion to dismiss insured's complaint denied]; *see also, Matter of Vanguard Ins. Co. v Polchlopek*, 18 NY2d 376 (1966); *Matter of State Farm Ins. Co. v Domotor*, 266 AD2d 219 (2d Dept. 1999); *Matter of Automobile Ins. Co. of Hartford Conn. v Stillway*, 165 AD2d 572 (1st Dept. 1991); *Beckly v Ostego County Farmers Cooperative Fire Ins. Co.*, 3 AD2d 190 (3d Dept. 1957).

As the plaintiff has presented *prima facie* proof on its motion that the accident arose out the use and operation of a motor vehicle, State Farm's complete denial of coverage was without foundation, and for that reason the plaintiff could pursue his first-party benefits lost wages claim under the policy (which ever one it was). The burden thus shifts to the

defendants to demonstrate that issues of fact exist with regard to liability under the contract of insurance. *See generally, Zuckerman v City of New York*, 49 NY2d 557 (1980).

State Farm, by its counsel, admits that the denial of the wage claim was erroneous; there is thus no dispute that the accident did arise from the use or operation of a motor vehicle and was covered. Irrespective of the reasons given for the denial, however, the importance here is that it represented a repudiation of the obligation to pay benefits under the insurance contract. The Court therefore must reject the defendants' argument that because the disclaimer had more than one ground stated and that one of its reasons was valid – that State Farm was not primarily liable – it was not a complete waiver of all defenses, more particularly the defense based on violation of its subrogation rights. The denial of coverage here was absolute. Under the authority cited above, the plaintiff was thus able to settle his case without State Farm's consent, and without surrendering any additional rights he might have under the policy.

The Court also disagrees with the defendants that the rejection by State Farm meant only that there was a waiver of further compliance by plaintiff with regard to conditions precedent to making his claim, but that the situation here was breach by the plaintiff of a condition subsequent – *i.e.*, assuming it was entitled to the lost wages coverage, plaintiff still had a duty not to settle without consent because fulfilling that duty was distinct from conditions that had to be met before such coverage first would be available. While this is an inventive argument, defendants point to no policy provision or authority that makes such a distinction in the present context. Further, it is axiomatic that as the policy was drafted by State Farm any ambiguities are to be construed against it. *See, e.g., NAICC, LLC v*

Greenwich Ins. Co., 51 AD3d 883 (2d Dept. 2008).

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability is granted.

State Farm's motion is denied in its entirety. As indicated above, it is not entitled to dismissal of the complaint. The alternative relief sought for partial summary judgment on the issue of payment is based on calculations of offsets, but all such calculations must be made with regard to the maximums available under the policy, and as noted above there is an issue as to which declarations page sets forth the applicable limits. Relatedly, State Farm has not proved by way of reference to a clear policy provision or law that the \$4,000 per month maximum benefit must be interpreted to include the \$2,000 statutory minimum. Accordingly, the question of the maximum to which plaintiff is entitled under the policy is not something the Court can resolve as a matter of law on these papers, and under ordinary summary judgment standards this precludes a determination of plaintiff's damages without a trial; the Court is not to resolve but rather identify issues on this motion. *See, e.g., Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). Accordingly, as the defendants' motion papers themselves raise such issues the motion must be denied, without regard to the strength of plaintiff's opposition. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

The branch of plaintiff's cross motion that is for amendment of the complaint is granted. The assertion of the claim that he is entitled to a \$6,000 monthly benefit, not

\$4,000, is now made after discovery has been completed.³ However, there is nothing in the record to indicate that further discovery by the parties will shed any additional light on the subject, but rather the amendment essentially concerns the plaintiff's position regarding his damages. Thus, even if this request can be seen as made on the eve of trial, it should be granted under the general rule that such amendments should be permitted absent significant prejudice to another party. CPLR 3025(b); *Edenwald Contr. Co. v City of New York*, 60 NY2d 957 (1983). The amended complaint, annexed to the plaintiff's cross motion as Exhibit B, shall be deemed served on defendants as of the date of this order.

The branch of the plaintiff's cross motion that is for summary judgment on the issue of damages is denied. The plaintiff has not proved by reference to the policy that he was entitled to \$6,000 per month as a maximum, upon which much of his calculations are based. In that regard, it should be noted that the specimen policy annexed to the cross motion as Exhibit H provides, at p.4 of the section entitled "Additional Personal Injury Protection Endorsement" that the maximum extended economic loss benefit would be \$175,000 – and the plaintiff contends that, even without interest, he would be entitled to \$216,000 (\$6,000 per month for three years). As plaintiff here stands as the proponent of a summary judgment motion, it is not enough simply to attack the defendant's position; there must be an initial

³ The Court notes counsel's gratuitous comment regarding the Court's prior decision on discovery and that as a result plaintiff did not receive a copy of the policy, underlying the present application to amend, until defendants' motion was served. Counsel states that the policy "was of greater significance than the Court had deemed." The Court made no such determination. Rather, it struck the plaintiff's combined demands as palpably improper, and under such circumstances was under no obligation to consider those that might have had merit. *See, Renucci v Mercy Hosp.*, 124 AD2d 796 (2d Dept. 1986). Plaintiff's remedy was to reserve proper demands.

affirmative showing that the policy gives him the right to this benefit. That has not been demonstrated.

Accordingly, the Court finds that the plaintiff has not make out his *prima facie* showing for judgment for the total amount claimed (\$1,497,189.82) as a matter of law, requiring denial of the cross motion for summary judgment on damages without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*.


Given the above results, the Court does not reach the issue of the correct calculation of interest or attorney's fees. As elements of damage, they should be addressed at the trial.

This case will proceed to trial on the issue of plaintiff's damages.

This shall constitute the Decision and Order of this Court.

DATED: January 7, 2010

ENTER


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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JAN 15 2010
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