

American Tr. Ins. Co. v Chamishe Corp.

2010 NY Slip Op 32760(U)

September 28, 2010

Sup Ct, Suffolk County

Docket Number: 08-11895

Judge: Jeffrey Arlen Spinner

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The plaintiff brings this declaratory judgment action seeking a declaration that it is not obligated to defend or indemnify the defendants Chamishe Corp. and Mamady Kaba (collectively Chamishe) regarding an underlying action, *Fleischer v Kaba*, Supreme Court, Suffolk County, Index No. 05-19908. The underlying action involves a motor vehicle accident that occurred on September 24, 2002. The accident allegedly happened when the vehicle which was owned and operated by the defendant Alan Fleisher (Fleisher) was struck in the rear by a vehicle owned by the defendant Chamishe Corp. and operated by the defendant Mamady Kaba.

At the time of the accident, Chamishe was insured under an automobile insurance policy issued to it by the plaintiff American Transit Insurance Company (American Transit), bearing policy number MR 73LR-9402055, effective March 1, 2002 to March 1, 2003 (Policy). It is undisputed that Fleischer filed a claim with the plaintiff regarding the accident, that the plaintiff investigated the accident, and that the plaintiff settled the property damage claim by assigning 100% of the fault to its insureds. However, the bodily injury portion of the claim was not settled, and Fleischer retained counsel in March, 2004. Thereafter, counsel for Fleischer transmitted medical records to American Transit, and the parties engaged in settlement negotiations. On or about April 12, 2005, Fleischer commenced the underlying action and served Chamishe on August 24, 2005.

On October 26, 2005, after Chamishe failed to serve an answer, counsel for Fleischer mailed a copy of the summons and complaint to American Transit. On November 7, 2005, counsel for Fleischer faxed another copy of the summons and complaint to American Transit along with the affidavit of service on Chamishe. On November 21, 2005, American Transit disclaimed coverage on the ground that Chamishe had failed to give it timely notice of suit pursuant to the Policy. The disclaimer letters were mailed to Chamishe Corp. and Mamady Kaba at their last known address, with copies to counsel for Fleischer. On December 28, 2005, American Transit commenced a declaratory judgment action which was eventually abandoned without prejudice. Thereafter, on February 27, 2007, Fleischer obtained a default judgment against Chamishe. On March 27, 2008, American Transit filed the instant declaratory judgment action.

American Transit moves for summary judgment in its action for an order declaring that it is not obligated to defend or indemnify Chamishe. In support of its motion, American Transit submits the pleadings herein, the complaint in the underlying action, the Policy, the order of default and default judgment, its disclaimer letter, two affidavits and miscellaneous items. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]).

American Transit submits the affidavit of its Director of Claims, Richard Carroll, who swears that Chamishe never forwarded the summons and complaint in the underlying action pursuant to the Policy, that American Transit was not advised of the underlying action until October 31, 2005 when it received a copy of the summons and complaint from Fleisher's attorney, and that American Transit attempted to enter into a stipulation with Fleisher's counsel to avoid a default by its insureds. He indicates that when Fleisher's counsel refused to enter into the stipulation, American disclaimed coverage on November 21, 2005 on the ground that American Transit had not received proper notice of suit.

A review of the Policy reveals that it contains the following relevant language:

Insuring Agreements

11. Notice, Claims and Suits.

... If any suit is brought against the Insured to recover such damages the insured shall immediately forward to the Company every summons or other process served upon him.

An insured's duty to give notice of suit and to forward suit papers is governed by the same rules which apply to its duty to give prompt notice of claim. This includes the provision that failure to give any notice as required pursuant to the policy within the time prescribed therein does not invalidate any claim if such notice is given as soon as reasonably possible (Ins. Law 3420 [a] [4]; *Holubetz v National Fire Ins. Co.*, 13 AD2d 228, 215 NYS2d 986 [3d Dept 1961]; *Lauritano v American Fidelity Fire Ins. Co.*, 3 AD2d 564, 162 NYS2d 553 [1957], *aff'd*, 4 NY2d 1028, 177 NYS2d 530 [1958]). Here, the record reveals that Chamishe has not forwarded the required notice of suit but it is undisputed that Fleisher forwarded notice of suit on October 31, 2005. Pursuant to the Insurance Law, an injured person or any other claimant may provide sufficient notice to an insurer (Ins. Law 3420 [a] [3]).¹

Notice given by an injured party is not judged by the same standards as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person. The test is one of reasonableness, measured by the diligence exercised by the injured party in light of the circumstances. The reasonableness of any delay and the sufficiency of the excuse offered ordinarily present questions of fact to be resolved at trial (*Allstate Ins. Co. v Marcone*, 29 AD3d 715, 815 NYS2d 235 [2006]; *see also*, *Tower Ins. Co. of New York v Lin Hsin Long Co.*, 50 AD3d 305, 855 NYS2d 75 [2008]; *Lauritano v American Fidelity Fire Ins. Co.*, *supra*). Where an injured party has pursued his rights as diligently as reasonably possible, the statute places the risk of the insured's delay on the insurer (*Tower Ins. Co. of New York v Lin Hsin Long Co.*, *supra*). Stated differently, "where the injured person proceeds diligently in ascertaining coverage and in giving notice, he [or she] is not vicariously charged with any delay by the assured" (*Jenkins v Burgos*, 99 AD2d 217, 472 NYS2d 373 [1984]; *see*, *National Grange Mut. Ins. Co. v Diaz*, 111 AD2d 700, 490 NYS2d 516 [1985]).

¹ Chamishe contends that it never received service of process in the underlying action, which would excuse its failure to give notice of suit pursuant to the Policy. On August 26, 2009, this Court denied Chamishe's motion to vacate its default in the underlying action, finding that service was properly made. Chamishe's appeal of that order is pending.

Despite American Transit's contention that notice of suit came 80 days after the commencement of the underlying action, it is undisputed that Chamishe was served in the underlying action by delivery of the summons and complaint upon the Secretary of State on August 24, 2005. Pursuant to CPLR 320 (a), Fleisher had the right to expect Chamishe to serve its answer within 30 days thereafter. That leaves a period of 38 days from the alleged failure of Chamishe in answering the complaint and the forwarding of the complaint to American Transit. In searching the record and considering the prior contact between the parties, the Court cannot find that Fleisher's delay of 38 days in providing American Transit with notice of suit pursuant to Ins. Law 3240 (a) (3) is unreasonable as a matter of law. State Farm has not established its entitlement to summary judgment herein and the failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*).

Irrespective of the Court's decision above, there are additional material issues of fact requiring a trial in this matter. In opposition to the motion, Fleisher contends that, even if his notice of suit was late, American Transit failed to disclaim in a timely manner. Insurance Law § 3420 (d) requires written notice of a disclaimer to be given "as soon as is reasonably possible" after the insurer learns of the grounds for disclaiming liability (*see, First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 769 NYS2d 459 [2003]; *Lancer Ins. Co. v T.F.D. Bus Co.*, 18 AD3d 445, 795 NYS2d 70 [2005]). The insurer bears the burden of justifying any delay (*see, First Fin. Ins. Co. v Jetco Contr. Corp., supra*). "Timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. An insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay" (*First Fin. Ins. Co. v Jetco Contr. Corp., supra*). The record reveals that there are material issues of fact regarding both the good faith and timeliness of American Transit's disclaimer of coverage in this matter.

Fleisher has submitted the affirmation of his counsel, Matt Fella (Fella), who affirms that he engaged in settlement negotiations for more than one year with Steven Kohn, a claims examiner with American Transit, and that he delivered Fleisher's medical records to Mr. Kohn. After rejecting an offer from American Transit, he initiated the underlying action on Fleisher's behalf. On November 4, 2005, well before any motion for default was contemplated, he spoke with an American Transit representative, Michael Koss (Koss), who indicated that he was going to disclaim coverage unless Fella agreed to extend Chamishe's time to answer. Fella indicates that he told Koss that an extension would be given to counsel, but that the policy of his office did not allow him to grant an extension to an insurance representative.

It is well settled that an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured (*see, Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137, 818 NYS2d 176 [2006]; *Global Constr. Co. v Essex Ins. Co.*, 52 AD3d 655, 860 NYS2d 614 [2008]; *City of New York v Evanston Ins. Co.*, 39 AD3d 153, 830 NYS2d 299 [2007]). An insurer's duty to defend arises whenever, as is the case here, "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*Worth Constr. Co. v Admiral Ins. Co.*, 10 NY3d 411, 415, 859 NYS2d 101 [2008], quoting *Frontier Insulation Contrs. v Merchants*

Mut. Ins. Co., 91 NY2d 169, 175, 667 NYS2d 982 [1997]). In addition, an insurer is bound by the general principle that a covenant of good faith and fair dealing is implied in all contracts, including insurance policies, as well as a recognition of the control an insurer maintains over claims against an insured (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 605 NYS2d 208 [1993]; *Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 334 NYS2d 601 [1972]).

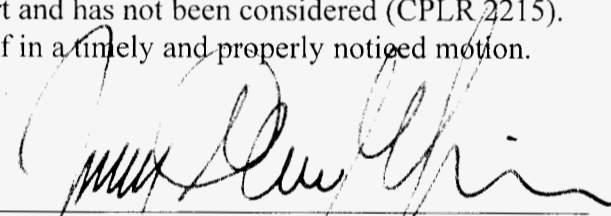
Here, Fleisher asserts that American Transit acted in bad faith when Koss refused to involve its counsel in the execution of a stipulation that would have protected Chamishe as well as him. American Transit has not included an affidavit of a person with personal knowledge to refute the assertion. In addition, based on the record, it is determined that there is a minimum of seventeen days in which American Transit delayed issuing its letter of disclaimer. Again, it is uncontroverted that Koss threatened to disclaim coverage on November 4, 2005 and that American Transit did not disclaim until November 21, 2005. Whether a notice of disclaimer has been sent "as soon as is reasonably possible" will be a question of fact, dependent on all of the circumstances of a case (see, *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 416 NYS2d 539 [1979]; *Allstate Ins. Co. v Gross*, 27 NY2d 263, 317 NYS2d 309 [1970]). It is only in the exceptional case that it may be decided as a matter of law (*Hartford Ins. Co. v County of Nassau, supra*). Under the circumstances, the Court cannot find that American Transit's disclaimer was sent "as soon as is reasonably possible" as a matter of law.

Accordingly, American Transits motion for summary judgment is denied.

Chamishe cross-moves for summary judgment on their counterclaim for an order declaring that the plaintiff is obligated to defend and indemnify them in the underlying action. It is clear that Chamishe has failed to provide American Transit with notice of suit as required by the Policy. However, Chamishe may yet benefit from Fleisher's delivery of notice of suit to American Transit pursuant to Ins. Law 3420 (a) (3), at least to the extent of its coverage under the Policy. However, for the reason set forth above, there are multiple issues requiring a trial in this matter. Accordingly, Chamishe's cross motion is denied.

Finally, the Court notes that Fleisher's affirmative request for relief, to wit: that the Court grant him summary judgment, is not properly before the Court and has not been considered (CPLR 2215). Fleisher may, however, renew his request for such relief in a timely and properly noticed motion.

Dated: SEP 28 2010



J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION