

Tri-State Consumer Ins. Co. v Venezia

2011 NY Slip Op 31800(U)

June 20, 2011

Supreme Court, Nassau County

Docket Number: 020399-10

Judge: Arthur M. Diamond

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.

Copy

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
TRI-STATE CONSUMER INSURANCE COMPANY,

Plaintiff,

-against-

**KAREN VENEZIA, PATRICIA MCMONIGLE,
CHRISTOPHER MCMONIGLE and MEGAN LAWLOR,
Defendants.**

-----x

TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 020399-10

MOTION SEQ. NO:1-4

SUBMIT DATE:05/19/11

The following papers having been read on this motion:

Notice of Motion.....1-4
Opposition.....5
Reply.....6

Defendants, Karen Venezia, Patricia McMonigle and Christopher McMonigle (collectively referred to herein as the "Venezia Defendants") motion [Mot. Seq. 001], pursuant to CPLR §3212, for an Order of this Court, granting them summary judgment and directing the plaintiff, Tri-State Consumer Insurance Company (referred to hereinafter as "TSC"), to provide both defense and coverage in the matter of Megan Lawlor v. Karen Venezia, et. al., Index Number 008873/2010, and for an award to reasonable counsel fees is denied.

Plaintiff, TSC's motion [Mot. Seq. 002], for an Order of this Court, pursuant to CPLR § 3012(d), granting it an extension of time to serve it's Answer(s) to the counterclaim(s) of the defendants, or alternatively, for an Order, compelling the defendants to accept the Answer(s) to the counterclaim(s) previously served is granted.

Defendant, Megan Lawlor ("Lawlor"), cross motion [Mot. Seq. 003], for an Order of this Court, pursuant to CPLR § 3212, granting her summary judgment dismissal of the plaintiff, TSC's complaint in this action is denied.

Finally, plaintiff, TSC's cross motion [Mot. Seq. 004], for an Order, pursuant to CPLR § 3212, awarding it summary judgment against the defendants declaring that it is not obligated to

defend or indemnify the defendants or any other person regarding the claim that is the subject of the underlying action entitled Lawlor v. Venezia, et. al. is also denied.

At the heart of this declaratory judgment action is the claim brought by defendant, Megan Lawlor, against the defendants, Karen Venezia, Patricia McMonigle and Christopher McMonigle, in which Lawlor seeks to recover for injuries she sustained as a result of a dog bite. Specifically, the facts are as follows:

On January 17, 2010, defendant Karen Venezia was the owner of a residence at 1060 Oaks Drive, Franklin Square, New York. Karen's sister and nephew, defendants, Patricia McMonigle and Christopher McMonigle, who also resided at 1060 Oaks Drive, owned and housed a mixed breed dog at said address. The dog was adopted from the North Shore Animal League. On January 17, 2010, said dog bit the defendant Megan Lawlor on her face. It is undisputed that Lawlor was lawfully on the premises at the time of her accident.

On January 25, 2010, Venezia reported the incident to the plaintiff, insurance carrier.

On June 17, 2010, the plaintiff insurance carrier notified the insured of its decision to deny coverage. The denial of claim/disclaimer of coverage letter stated that the plaintiff would not cover the damages in this matter, based upon exclusions in its homeowners' policy regarding unlicensed dogs, and injury to any person arising out of the insureds' ownership, custody, care of, or control of certain animals, including unlicensed dogs.

In the interim, i.e., between the initial loss report of January 25, 2010 and the Notice of Denial dated June 17, 2010, Lawlor brought a lawsuit naming Karen Venezia, Patricia McMonigle and Christopher McMonigle as the responsible parties for the dog bite. As the insurance carrier, TSC, had yet to issue its denial, the defendants in Lawlor's personal injury action, defaulted therein by not having answered within the time proscribed by law. Following TSC's issuance of the Notice of Denial, on June 25, 2010, however, the Venezia defendants herein (also the defendants in Lawlor's personal injury action) ultimately submitted a *pro se* answer to Lawlor's counsel and the Court.

Thereafter, the Venezia defendants' retained counsel who ultimately persuaded Lawlor's personal injury attorney to accept the late Answer and the insurance company, TSC, to defend the personal injury action.

At this point, while the defense of the personal injury action continues by TSC, coverage nonetheless remains disputed.

In bringing this action, plaintiff, TSC, seeks a declaratory judgment that it is not obligated to defend or indemnify the defendants or any other person regarding the underlying claim entitled Lawlor v. Venezia, et. al. (referred to hereinafter as the “Lawlor Action” or the “underlying personal injury action”). TSC predicates its action and its basis for denial of coverage “based upon the very specific and clear exclusions in its homeowners’ policy regarding unlicensed dogs, and injury to any person arising out of the insureds’ ownership, custody, care of, or control of certain animals, including unlicensed dogs.” Indeed, upon the instant motion, plaintiff, TSC, seeks summary judgment declaring that it is not obligated to defend and indemnify the defendants with respect to the Lawlor action.

The Venezia defendants, in turn, seek summary judgment directing the plaintiff to provide a defense and coverage in the underlying personal injury action. Critically important to the determination of this action is the Venezia defendants’ admission that the dog that bit Megan Lawlor was in fact unlicensed, in violation of New York’s Agricultural and Markets Law §109, at the time of the accident. Nonetheless, the Venezia Defendants base their motion for summary judgment on two grounds: (1) the denial was issued in an untimely manner; and (2) the exclusion for unlicensed dogs is “legally inappropriate, against public policy and unconscionable.”

The law relating to an insurer’s duty to disclaim or deny coverage is well settled. Pursuant to Insurance Law § 3420(d), an insurance carrier is required to provide the insured with timely notice of its disclaimer or denial of coverage on the basis of a policy exclusion (*Markevics v. Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001]; *Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d 185, 188-189 [2000]) and will be stopped from disclaiming liability or denying coverage if it fails to do so (*First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]; *Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 1029 [1979]). “[T]imeliness 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” (*First Fin. Ins. Co. v. Jetco Contr. Corp.*, supra at 68-69). The determination of whether a notice of disclaimer is untimely often is a question of fact dependent on all the circumstances of the case (*First Fin. Ins. Co. v. Jetco Contr. Corp.*, supra at 70; *Hartford Ins. Co. v. County of*

Nassau, supra at 1030). For example, while an investigation into issues affecting the insurer's decision to disclaim may excuse a delay (*Id*), if the grounds for disclaimer were or should have been "readily apparent" to the insurer when it first learned of the claim, any subsequent delay in the insurer's issuing the disclaimer is untimely as a matter of law (*Id*). Ultimately, it is the responsibility of the insurer to explain its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law (*Id*; see also *Mayer's Cider Mill, Inc. v Preferred Mut. Ins. Co.*, 63 AD3d 1522 [4th Dept. 2009]; *Tully Constr. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150 [2nd Dept. 2007]).

It must be noted that a disclaimer pursuant to Insurance Law §3420(d) is not necessary when a claim falls outside the scope of the policy's coverage (*Markevics v Liberty Mut. Ins. Co.*, supra). That is, there is a distinction between lack of coverage in the first instance (not requiring disclaimer) and lack of coverage based on an exclusion (requiring timely disclaimer) (*Matter of Worcester Ins. Co. v Bettenhauser*, supra).

In this case however, in bringing this action, TSC has plainly and clearly asserted that it is seeking to disclaim coverage based on an exclusion. Specifically, TSC does not claim that the dog bite was not covered under its insurance policy; rather, it claims that the claim falls within the coverage terms but is denied because of an exclusion, to wit, an unlicensed dog. Under these circumstances, it is plain that by its own admission that TSC was under a duty to timely disclaim the coverage (*Markevics v Liberty Mut. Ins. Co.*, supra).

Turning first to defendants' argument that the exclusion was "legally inappropriate, against public policy and unconscionable" this Court notes that "[w]henver an insurer wishes to exclude certain coverage from its policy obligations, it must do so 'in clear and unmistakable' language" which will "be accorded a strict and narrow construction" and satisfy the burden of establishing that the exclusion is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). The record is clear that the TSC policy at issue only provided coverage to the insureds if the dog was licensed. There is no doubt that TSC's disclaimer was based upon a plain and unambiguous policy exclusion spelled out in Section II – Exclusions (pp. 14-15). The exclusion is applicable to coverages E (Personal Liability) and F (Medical Payments to Others) and excludes coverage for bodily injury or property damage "(k) caused directly or indirectly by, and/or arising out of, certain animals, owned by, held by, or in the care, custody or control of, any insured. This

animal exclusion excludes coverage for:...(7) [a]ny dog that is not licensed and/or registered as required by law, statute, regulation, ordinance or code.”

Defendants’ principal arguments, that the exclusion is prohibited by the Insurance Law or is void as against public policy, cannot withstand summary judgment analysis. In support of its motion, TSC, submits ample documentary proof in admissible form, including correspondence between its Chief Corporate Counsel and a Senior Examiner for the Superintendent of Insurance, which establishes that after much deliberation between the plaintiff insurance company and the State of New York Insurance Department, this exclusion that is the subject of this matter, was approved by the New York State Insurance Department and was first added to TSC’s Homeowner Policy as an endorsement in 2004 and only after its public policy considerations were thoroughly discussed. Thus, it is plain from the documentary evidence submitted herein that in response to the State of New York Insurance Department’s specific inquiries of TSC, TSC proffered the following:

1. The exclusion clearly serves several valid “public policies” by:
 - a. discouraging the ownership of various types of dogs (and related animals) which present a heightened risk of hazard to those individuals who come into contact with these animals, and to the public at large.
 - b. encouraging the appropriate disposition of those dogs with a history of prior bites/attacks;
 - c. encouraging the timely and continued vaccination and inoculation of dogs against diseases harmful to human beings and/or other animals (i.e., rabies, distemper);
 - d. encouraging the licensing and registration of dogs, which assists in animal control efforts and as a revenue source for local government.

(Plaintiff’s cross motion, Ex. G [May 17, 2004 Letter])

It was following the issuance of this letter by counsel to TSC that the State of New York

Insurance Department approved the subject exclusion.

Based upon the foregoing, this Court finds it reasonable to conclude that the policy at issue was intended (and indeed was unambiguously written) so as to only provide liability coverage to the insured for, *inter alia*, bites by licensed dogs (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618 [1994]). In the absence of any admissible evidence that the subject exclusion was “legally inappropriate, against public policy and unconscionable” this Court finds that the claim herein falls within the policy’s coverage terms but was denied based on a valid insurance policy exclusion. Under these circumstances, a timely disclaimer is required of the insurance company (*Markevics v. Liberty Mut. Ins. Co.*, supra).

With respect to defendants’ argument that they should be awarded summary judgment because TSC did not issue its disclaimer in a timely fashion, plaintiff TSC maintains that according to its records, the accident was first reported to the plaintiff on January 25, 2010. An investigator was dispatched and on March 15, 2010 TSC’s investigator interviewed Karen Venezia, Patricia McMonigle and Chris McMonigle regarding the incident, the dog’s health and whether the dog was licensed. The investigator noted that the owners were unsure as to whether the dog was licensed but on March 23, 2010, veterinary records were provided regarding the dog. On June 9, 2010, an investigation was conducted at the Town of Hempstead for a search of any dog license for Patricia McMonigle, Karen Venezia or Christopher McMonigle. The denial was issued on June 17, 2010. Plaintiff maintains that based on this sequence of events, the denial was within 30 days after receipt of the final investigative materials and was thus timely.

Reasonableness of any delay in disclaiming coverage must be judged from that point in time that the insurer is aware of sufficient facts to issue a disclaimer (*Matter of Federal Ins. Co. v Provenzano*, 300 AD2d 485 [2nd Dept. 2002]).

As verified by TSC’s claim representative Jasmine Eng in her affidavit, the claim was received by TSC on January 25, 2010 and 49 days later, on March 15, 2010, TSC dispatched its investigator to interview the witnesses and the insured at their home. Further, it is clear from the disclaimer letter issued by TSC on June 17, 2010 that when interviewed on March 15, 2010, Patricia McMonigle was uncertain as to whether the dog was licensed, by her, Karen Venezia or by the facility from which the dog had been obtained. Specifically, the investigative report submitted by

TSC itself confirms the following:

Patricia McMonigle stated she obtained the dog from North Shore Animal League 3 years ago and was told the dog was already three years old. *She did not submit an application for a dog license then or any other time but thought that North Shore Animal League may have obtained one for her. She declined to comment in written form whether or not the dog had a license.* *** (Emphasis supplied).

In addition, the same report disclosed that it was not until June 9, 2010, 86 days later, that TSC sent its investigator down to the Town of Hempstead to search for the dog's license, if any. While there is case law to the effect that an insurer's unexplained delay of two months in disclaiming coverage is unreasonable as a matter of law (*Hartford Ins. Co. v County of Nassau*, supra at 1029), such decisions appear to represent an exception to the rule that the timeliness of an insurer's disclaimer ordinarily presents a jury question, and depends upon the facts and circumstances of the particular case (*Allstate Ins. Co. v Gross*, 27 NY2d 263, 270 [1970]; *Colonial Coop. Ins. Co. v Desert Storm Constr. Corp.*, 305 AD2d 363 [2nd Dept. 2003]). In this case, whether TSC has adequately explained its delay in disclaiming coverage by its need to investigate the claim over the span of five months is a question of fact to be resolved by the jury.

Therefore, the Venezia Defendants' motion for summary judgment and the plaintiff's cross motion for summary judgment are both denied.

TSC's motion, for an Order of this Court, pursuant to CPLR § 3012(d), granting it an extension of time to server its Answers to the counterclaims of the defendants, or alternatively, for an Order, compelling the defendants to accept the Answers to the counterclaims previously served is granted.

The procedural history of this case is as follows: On September 27, 2010, this declaratory judgment action was commenced by service of summons and complaint on all parties. Both defendants' counsel requested an extension of time to answer which was granted. On December 13, 2010, plaintiff received an Answer with Counterclaims from defendant Venezia. On January 6, 2011, plaintiff received an Answer with counterclaim from defendant Lawlor. Counsel for TSC submits however that "due to law office failure, the Answers were inadvertently not routed to [her] as the handling attorney on the file. As a result, [she] was not aware of the Answers with counterclaims

until on or about March, 2011” (*Verill Aff.*, ¶6). On March 21, 2011, counsel for TSC served her reply to the counterclaims. However, on March 29, 2011, she received notification from the attorney for the Defendant Lawlor indicating that they were rejecting the Answer as untimely. The Venezia defendants however did not object to the late Answer.

Pursuant to CPLR§ 3012(d):

(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Thus, to prevail on it’s motion for an extension of time to serve its Reply, TSC is obligated to demonstrate a reasonable excuse for the delay (CPLR§3012[d]). Whether an excuse is reasonable is a matter within the sound discretion of this court (*Special Prods. Mfg. v Douglass*, 159 AD2d 847 [3rd Dept. 1990]).

Considering the lack of any prejudice to defendant Lawlor as a result of the relatively short delay, the existence of potentially meritorious defenses, and the public policy favoring the resolution of cases on the merits, this Court herewith excuses the plaintiff’s delay in serving its Reply papers upon Lawlor (*Falla v Keel Holdings, LLC*, 50 AD3d 844, 845 [2nd Dept. 2008]; *A & C Constr. Inc. of N.Y. v Flanagan*, 34 AD3d 510 [2nd Dept. 2006]). However, insofar as only defendant Lawlor rejected TSC’s Reply papers, this Court herewith directs Lawlor, pursuant to CPLR§3012(d), to accept plaintiff’s late Answer to her counterclaims.

Finally, defendant Lawlor’s cross motion for an Order granting her summary judgment dismissal of plaintiff’s declaratory judgment action on the grounds that she was not privy to the underwriting circumstances between the plaintiff and the co-defendants’ and therefore she cannot state what transpired, said motion, albeit unopposed, is nonetheless denied.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form (*Menekou v Crean*, 222 AD2d 418, 419-420 [2nd Dept. 1995]). If the movant tenders sufficient

admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact (*Id.* at 420). Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact (*Id.*).

Notably, plaintiff advances the same claims against Lawlor as it does against the Venezia defendants, i.e., a declaration that it is not obligated to defend or indemnify the Venezia defendants with regard to the alleged incident of January 17, 2010 because the injuries and/or damages of Lawlor are excluded from and/or are otherwise not covered by the terms of it's policy issued to Karen Venezia.

As stated above, inasmuch as there remain issues of fact as to whether the insurer disclaimed its coverage to the insured in a timely manner, this Court finds that the defendant Lawlor has also failed to carry her prima facie burden of entitlement to judgment as a matter of law.

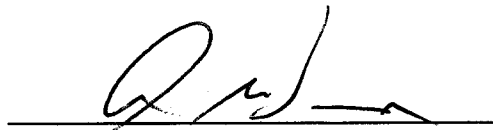
In light of the foregoing, this Court finds that Lawlor's failure to make a prima facie showing of entitlement to judgment as a matter of law requires a denial of the motion (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]), regardless of the fact that the plaintiff, TSC does not oppose her motion for summary judgment (*see Zecca v. Ricciardelli*, 293 AD2d 31 [2nd Dept. 2002]).

Therefore, defendant Lawlor's motion for summary judgment dismissal of plaintiff's complaint is denied.

This shall constitute the decision and order of this Court.

ENTER

DATED: June 20, 2011



HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiff
ERIKA VERRILL ESQ.
Two Robbins Lane , Suite 200
Jericho, New York 11753

Attorney of Defendants
HIRSCH & HIRSCH, LLP.
64 Hilton Avenue
Hempstead, New York 11550

ENTERED
JUN 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

DANIEL W. DELUCA & ASSOCIATES
3555 Veterans Memorial Hwy, Suite P
Ronkonkoma, New York 11779