Spinner v Phoenix Ins. Co.
2011 NY Slip Op 32514(U)
September 14, 2011
Supreme Court, Nassau County
Docket Number: 18665/10
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ELAINE SPINNER AND STEVEN SPINNER,

Plaintiffs,

-against-

THE PHOENIX INSURANCE COMPANY,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 18665/10
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendants Notice of Motion	01
Defendant's Memorandum of Law	xx
Plaintiff's Affirmation in Opposition	xx
Defendants Reply Affirmation	xx

This is a motion by defendant, The Phoenix Insurance Company ("Phoenix") , for an Order of this Court, pursuant to CPLR §3212, granting Summary Judgment against plaintiffs, Elaine Spinner and Steven Spinner, dismissing their complaint or alternatively, dismissing the third cause of action for attorney fees.

This motion arises from a declaratory judgment action where the plaintiffs/insureds allege that Phoenix wrongfully denied their claim of a jewelry loss, filed in June 2009. The defendants contend that the plaintiffs, husband and wife, violated the "concealment and fraud" provisions of their homeowner's policy. Within the underlying action, the defendant filed a counterclaim regarding a 2008 claim on which it paid the plaintiffs for a loss of an earring[1].

[1]The insurer contends that plaintiffs claimed a loss of one earring at one occasion and then later claimed that both earrings were lost. This is one example of the plaintiffs' inconsistent

The defendant also served a Notice to Admit upon the plaintiffs regarding the authenticity of the form entitled "Insured's Statement For Burglary, Theft, And Mysterious Disappearance Losses", dated February 29, 2008 and bearing Ms. Spinner's signature. The plaintiffs responded by stating that such document could not be admitted or denied as it is not an original document. The defendants, within the body of the motion, seek an Order of this Court declaring that the plaintiffs' failure to respond to the Notice to Admit, is deemed an admission of the facts contained therein.

FACTS

On June 24, 2009, the Spinners, filed a claim with Phoenix, their homeowner's insurance company, for a the loss of a diamond ring valued at $21,000.00. According to Mr. Spinner, he reported that he removed Ms. Spinner's diamond engagement ring from their home safe where it had been stored, for the purpose of having the stone reset as a surprise birthday present. He put the ring in his pocket and set out to take the ring to a jeweler in New York City. However, en route, he became preoccupied with his business appointments and consequently, never made it to the jeweler. A few days later he went to retrieve the ring, but it was missing from his pocket. In February, 2008, the same plaintiffs/insureds filed a claim with Phoenix for the loss of earrings and Phoenix paid the plaintiffs $5,665 on that claim.

In April, 2010, after its investigation, Phoenix denied the 2009 claim on the grounds, *inter alia*, that the plaintiffs misrepresented the facts and circumstances regarding the 2008 loss based on their responses during the investigatory interview.

The endorsement of the subject policy provides in relevant part:

"....PERSONAL ARTICLES POLICY

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statements which are at issue in the instant motion.

AMENDATORY ENDORSEMENT-NEW YORK

...

GENERAL CONDITIONS

...

11. CONCEALMENT AND FRAUD. We shall not provide coverage, if whether before or after a loss, an 'insured' has:
a. Intentionally concealed or misrepresented any material fact or circumstance; or
b. Engaged in fraudulent conduct:...

Relating to this insurance..."
(Notice of Motion, Exhibit A)

Phoenix based its denial on alleged misrepresentations and inconsistencies that the plaintiff, particularly Ms. Spinner, made regarding her 2008 claim. When interviewed by the defendant's investigators, Ms. Spinner reported that the loss of the earring occurred at a golf course, after submitting a written statement in the February 2008 insurance form that the loss occurred in a Freeport, New York shopping center while she was trying on clothes in a store fitting room. During her Examination Before Trial, Ms. Spinner claimed that the loss occurred at a golf course "out east" in Long Island, New York, and later claimed that the loss occurred at a golf club in Florida when reminded that she reported that the loss occurred in February.

Phoenix also took note that the Spinners had the jewelry appraised about a year prior to filing their claims and that at the time of the 2009 loss, Mr. Spinner was experiencing financial difficulties, which included federal and state tax liens that were filed against him.

ARGUMENTS

Phoenix contends that the Spinners conduct is an indicia of fraud in that they gave inconsistent statements regarding a prior claim, that they had the jewelry appraised prior to filing the insurance claim, and that they were experiencing financial difficulties at the time they filed the claim of loss.

Taken together, the facts regarding the insureds' 2009 claim are most likely false. Further, as the insured did not adequately respond to the Notice to Admit, regarding the February 2008 form, the document is deemed to be genuine.

Phoenix submits as evidence: a copy of the subject insurance policy; recorded statements of the July 19, 2009 interviews with Steven Spinner and Elaine Spinner; Proof of Loss statements completed by Steven and Elaine Spinner; the Spinners' Personal Artifacts Schedule of insured items; the Insured's statement regarding 2008 loss completed by Elaine Spinner; an appraisal of the subject diamond ring prepared by H.I. Gross & Bro. setting its value at $21,000; transcripts of testimony of Steve Spinner and Elaine Spinner at their respective Examinations Before Trial; and copies of pleadings regarding underlying action.

The Spinners argue that any determination of fraud and concealment is based on conclusory and unsupported statements. Further, Phoenix's failure to attach a copy of the pleadings to its motion and its failure to state when the issue was joined, is fatal to its Summary Judgment motion. In addition, the Notice to Admit was improperly used as such admission could be ascertained from other venues of discovery. As such, the motion should be denied in its entirety.

DISCUSSION

On a motion for summary judgment, the moving party bears the initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (see *Beck v Westchester County Health Care Corp.*, 52 AD3d 555 [2nd Dept 2008]). Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied.

However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (see *Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2nd Dept1994]). The Court, in its determination, is required upon a defendant's motion for summary judgment to view the evidence in the light most favorable to the plaintiff (see *Healy v Spector* 87 AD2d 541[2nd Dept 2001).

Here, the proponent of the instant motion for summary judgment–the defendant in this case–must establish its entitlement to judgment as a matter of law by demonstrating that there are no triable issues of fact regarding whether the plaintiff insured acted with willful intent to defraud or misrepresent material facts (see *St. Irene Chrisovalantou Greek Orthodox Monastery, Inc. v Cigna Ins. Co.,* 226 AD2d 624 [2nd Dept 1996]). Moreover, such representation must not be due to a mere mistake or oversight (see *Christophersen v Allstate Ins. Co.*, 34 AD3d 515 [2nd Dept 2006]). Generally, an intent to deceive appears to be equated with intent to defraud in the case of claims asserted against an insurer (see *Jonari Management Corp. v St. Paul Fire & Marine Ins. Co.*58 NY2d 408 [1983], quoting 13A Couch, Cyclopedia of Insurance Law [2d rev ed], § 49A:66 N.Y.,1983).

As to the issue of materiality, the court in *Christophersen v. Allstate Ins. Co.,* supra, applied the rationale of cases where the insurer denied coverage to the insured based on his/her misrepresentations during the application process and the statutory criteria set forth in Insurance Law § 3105[b] (see *Parmar v Hermitage Ins. Co.*, 21 AD3d 538 [2nd Dept 2005]). In such cases, courts have held that a misrepresentation is material if the insurer is able to demonstrate that it would not have issued the policy had it known the facts misrepresented (see(*Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713 [2nd Dept, 2001], Insurance Law § 3105[b]). Said another way, to establish materiality as a matter of

law, the insurer must provide evidence that it would not have issued the same policy if the correct information had been disclosed in the application.

Conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law. Further, the issue of materiality is generally a question of fact for the jury (*Christophersen v Allstate Ins. Co.,* supra, *Lenhard v. Genesee Patrons Co-op. Ins. Co.*, 31 AD3d 831 [3rd Dept 2006]).

In light of the foregoing, materiality in cases where the insurer has denied a claim, can be established by documentary evidence indicating that the insurer has denied claims under similar circumstances. Here, the defendant only contends that the "plaintiffs made irreconcilable, contradictory statements" and that "[s]uch inconsistent statements...establish beyond any doubt that they violated the 'concealment and fraud' clause of the policy" (see Notice of Motion, Affidavit of Iva Burris, ¶ 6). The evidence in the record, however, is insufficient to support that Ms. Spinner's misrepresentations were material.

It is duly noted that the defendants cite *Rickert v Travelers Ins. Co.*,159 AD2d 758 [3rd Dept 1990]) as supporting authority that the insured's misrepresentation regarding prior claims is sufficient for this Court to grant its instant motion. However, the case at bar is distinguishable in that the *Rickert* insured filed about six claims within a six year time period and yet he could only recall the details of two of those claims. That court was able to determine the credibility issue on the motion papers, as the insured's testimony was incredulous.

Further, the defendant is also creating a credibility issue which generally cannot be determined on a summary judgment motion. While under certain circumstances, credibility may be determined as a

matter of law when evaluating fraud or misrepresentations by a claimant under an insurance policy; however, this is not the case in the instant motion. As the defendant has not provided sufficient evidence in the instant motion, the plaintiffs' credibility is an issue for the jury (*Ingarra v General Accident/PG Ins. Co. of New York*273 AD2d 766 [3rd Dept 2000], *Classon Realty Corp. v Tower Ins. Co. of N.Y.*, 68 AD3d 802 [2nd Dept 2009]).

Based on the record, there is no question that Ms. Spinner gave contradictory and inaccurate information in her interview with the defendant's investigators, and in her deposition. However, a triable issue of fact exists as to whether the plaintiff thereby intended to defraud the insurer (*see St. Irene Chrisovalantou Greek Orthodox Monastery v Cigna Ins. Co.*, 226 AD2d 624 [2nd Dept 1996]). It is well settled that a policy of insurance is vitiated where the insured has "willfully and fraudulently placed in the proofs of loss a statement of property lost which he did not possess, or has placed a false and fraudulent value upon the articles which he did own" (*Pipo Bar and Restaurant, Inc. v Certain Underwriters at Lloyd's*, 15 AD3d 556 [2nd Dept 2005], *Saks & Co. v Continental Ins. Co.*, 23 NY2d 161 [1968], quoting *Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 AD187 [4th Dept 1926]). However, "unintentional fraud or false swearing or the statement of any opinion mistakenly held are not grounds for vitiating a policy" (*Christophersen v Allstate*, supra). The defendant insurer has not sufficiently shown that Ms. Spinner's misrepresentations were willful with the intent to deceive regarding the loss in 2008 and the subject 2009 loss.

As to the branch of the motion regarding the dismissal of the third cause of action regarding attorney's fees, such fees and costs are considered incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule (see *Siamos v 36-02 35th Ave. Development, LLC* 54 AD3d 842 [2nd Dept

2008]). However, courts have held that an insured cannot recover legal expenses in controversy with an insurer over coverage, even though the insurer loses and is held responsible, unless insurer is guilty of such bad faith in denying coverage that no reasonable insurer would, under the facts, be expected to assert lack of coverage (see *Sukup v State*, 19 NY2d 519 [1967]).

The issue is whether the insured's denial of the 2009 claim, was issued in bad faith given the following: the plaintiffs' financial situation and tax indebtedness; the plaintiffs having the subject ring appraised about a year before filing a claim for its loss; Ms. Spinner's conflicting testimony within the same deposition regarding the facts and circumstances of the lost earring claim in 2008; the seemingly peculiar facts and circumstances regarding the loss of the subject ring; and the contradictory facts contained in the February 2008 form with Ms. Spinner's testimony. Based on the foregoing, this Court cannot determine, viewing the facts even in the light most favorable to plaintiff, that Phoenix had no arguable basis for denying plaintiff's claim (see *Wurm v Commercial Ins. Co. of Newark, New Jersey*, 308 AD2d 324 [1st Dept 2003]).

Finally, it is noted that the defendant is seeking relief that has not been set forth in its Notice of Motion, but in its supporting affirmation. It is seeking an Order of this Court that the plaintiffs' failure to respond to the Notice to Admit regarding the February 2008 form is deemed an admission that the document is genuine. First, this Court has to determine whether the request made within the affirmation should be considered in this motion.

It is noted that the presence of a general relief clause for "such other, further, or different relief," in a notice of motion enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no

party is prejudiced (see *Tirado v Miller,* 75 AD3d 153 [2nd Dept 2010]). Here, the relief sought is based on the Ms. Spinner's statement in the February, 2008 insurance form, and therefore it is related to the heart of the matter. Therefore, it is not improvident for the Court to consider this issue.

Generally, a failure to respond to a Notice to Admit is deemed an admission unless "... the matters of which an admission is requested cannot be fairly admitted without **some material qualification or explanation** (emphasis added), ...such party may, in lieu of a denial or statement, serve a sworn statement setting forth in detail his claim and, if the claim is that the matters cannot be fairly admitted without some material qualification or explanation, admitting the matters with such qualification or explanation...", CPLR §3123(a). Here, the plaintiffs argue that they could not admit to the document's authenticity as it is not a certified copy of an original. They further contend that such information could be uncovered through discovery.

The plaintiff opines that the Notice to Admit is an improper discovery device; however, the purpose of a notice to admit is to save a party the trouble and expense of proving a readily admittable fact. Said another way, the notice to admit is used to establish that certain facts are not in dispute and to eliminate the need for proof of that fact at trial. While responses to other discovery devices may be explained or amended, an admission in response to a notice to admit, unless amended or withdrawn by court order, is conclusive (*see Groeger v Col–Les Orthopedic Associates, P.C.,* 136 AD2d 952 [4th Dept 1988], Siegel, Practice Commentary, McKinney's , CPLR C §3123:1). This Court recognizes that a notice to admit may not be employed to request an admission of material issues or ultimate facts, or cover ultimate conclusions, which can only be made after a full and complete trial. However, the defendant is not employing this device for this purpose as it is not seeking that the plaintiffs admit to misrepresenting material facts regarding the subject claim, which is the heart of the instant matter (see

Sagiv v Gamache, 26 AD3d 368 [2nd Dept 2006]).

Additionally, the Notice to Admit statute does not require that the documents, for which an admission of genuineness is sought, be obtained in any particular way or with any particular formality (see *Radzyminski v Nalbone*, 24 Misc3d 1246(A) [Fam.Ct, Albany County, 2009]). However, in *Radzyminski*, where a notice to admit sought to have the party admit to the genuineness of medical records, that court determined it was reasonable for that party to deny its authenticity based on the fact that the documents were copies. The court's rationale was that the party could not be expected to know what documents were actually a part of the medical record, and/or whether such records were an actual representation what was contained in the doctor's office.

Here, the plaintiff does not proffer any rationale or reason as to why the February, 2008 insurance form should have been either an original document or a certified copy of an original document. For example, plaintiffs could have objected to the authenticity of Ms. Spinner's signature, or that she even made the statement contained therein. As such, plaintiffs' refusal to respond and/or admit is disingenuous and, at best, unreasonable (see *Guttridge v Schwenke*,155 Misc2d 317 [S. Ct. Westchester County, 1992]).

In sum, the defendant failed to proffer sufficient evidence to establish its entitlement to Summary Judgment against the Spinners regarding their alleged violation of the "concealment and fraud" policy endorsement. Accordingly, that branch of its motion is denied. Where, as here, the moving papers are insufficient, there is no necessity for an opposing party to respond with evidentiary proof regarding this branch of the defendant's motion (see *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2nd Dept 1999]).

For the reasons set forth herein, it is hereby

ORDERED, that the branch of defendant's motion seeking dismissal of plaintiff's third cause of action for attorney fees is ***granted***, and it is further

ORDERED, that the branch of defendants' motion seeking summary judgment is ***denied***. It is further

ORDERED, that the plaintiffs are deemed to have admitted that the February 29, 2008 "Insured's Statement for Burglary, Theft, and Mysterious Disappearance Losses", is a genuine document.

This constitutes the Decision and Order of the Court.

DATED: September 14, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD

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SEP 21 2011
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