

Matter of Progressive Ins. Co. v Herschberg
2012 NY Slip Op 30149(U)
January 9, 2012
Supreme Court, Nassau County
Docket Number: 0014-2010
Judge: Steven M. Jaeger
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.

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the matter of the Application of
PROGRESSIVE INSURANCE COMPANY,

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 0014-2010

Petitioner,

-against-

MARC HERSCHBERG,

Defendant.

DECISION AND ORDER

Pursuant to the order of the Court (Winslow, J.) dated March 30, 2011, a framed issued hearing was held on September 28, 2011 before this Court on the issue of whether Respondent breached the policy by providing false testimony at his examination under oath ("EUO") on May 12, 2010. Two witnesses testified at the hearing, Petitioner's claims specialist and Respondent. Petitioner's claim is that photos and information posted on the public pages of Respondent's Facebook account materially varies from his EUO testimony sufficiently to constitute a breach of the insurance policy between the parties.

Petitioner PROGRESSIVE INSURANCE COMPANY ("Petitioner") seeks an order pursuant to CPLR §7503 staying the underinsured motorist arbitration brought by respondent MARC HERSCHBERG ("Respondent").

Respondent's claim for underinsured motorist ("UIM") benefits arises out of a motor vehicle accident that occurred on October 20, 2008 in Nassau County, New York.

Respondent brought a personal injury action against the owner and driver of the adverse vehicle, which resulted in a settlement in the amount of \$25,000 (the adverse vehicle's policy limit), to which Petitioner consented. Respondent then demanded an underinsured motorist arbitration on or about December 17, 2009.

The petition is based upon Petitioner's assertion that coverage of the subject UIM claim was vitiated by Respondent's breach of the insurance contract. Petitioner alleges that Respondent misrepresented material facts at his EUO in violation of Part VII (General Provisions) of the insurance policy, which provides:

FRAUD OR MISREPRESENTATION

This policy was issued in reliance upon the information provided on your insurance application. We may cancel this policy and deny coverage under this policy at any time, including after the occurrence of an accident or loss, if you:

1. made incorrect statements or representations to us with regard to any material fact or circumstance;
2. concealed or misrepresented any material fact or circumstance; or
3. engaged in fraudulent conduct;

at the time of application, or in connection with the presentation or settlement of a claim.

Petitioner's claims specialist, Danielle Verga, testified that she was present at Respondent's EUO. Based upon his testimony, Verga did further investigation of his claim, including an investigation of the publicly available portions of Respondent's Facebook online social network account.

Verga recalled that Respondent stated at the EUO that his boat was not in the water since last summer, that he did not have to shop (and "would not" shop), and that

[*3]

he "could not do stairs". Verga testified that his Facebook page displayed photos of him standing on a sheet of ice on his pool cover and going up the stairs on a pool slide. Verga contacted his prior attorney and sent the pictures to him. Thereafter, his attorney withdrew from the case and, after Respondent did not withdraw his underinsured motorist claim and retained new counsel, Verga issued a denial of coverage letter.

Respondent testified that as a result of a motor vehicle accident on October 20, 2009, he sustained knee, back, and neck injuries. Respondent settled his personal injury action against the other driver for \$25,000. Respondent also filed a claim with his insurer, Petitioner herein, for underinsured benefits.

Respondent testified that he appeared for an EUO and was asked questions about his physical condition, complaints, and limitations. He was then questioned about certain questions and answers he gave at the EUO (The Court notes that the transcript of the EUO was not placed in evidence by Petitioner) as well as the changes he made on the errata sheet (which was placed in evidence). Respondent admitted he changed certain answers and did not note on the errata sheet any reasons or explanations for the changes.

Petitioner questioned Respondent about numerous excerpts from his EUO testimony on May 12, 2010. A summary of this EUO testimony is as follows:

1. Respondent stated his boat was not then in the water and was on a trailer. It was last in the water the prior summer.
2. Respondent stated he did not go to shop on his own, someone takes him or he would wait.

3. Respondent stated that he had not gone on his boat yet.
4. Respondent stated that the surgery did not help his knee and his doctor told him he had "to live with it". He stated he could not do stairs and had problems bending and walking.
5. Respondent stated that he cannot now do "lifting, running, skiing, dancing...walking up stairs".

Respondent admitted that he made the following changes on the errata sheet:

1. His boat is in the water sometimes and was not on a trailer but in the water on May 12, 2010.
2. He was able to go on his boat with his knee.
3. He was able to go shopping if he needed to get something.
4. He had no surgeries on his back.

The balance of the hearing concerned Respondent's explanations of these changes and questioning about the photos and his comments on his Facebook page.

On cross-examination by his counsel, Respondent confirmed that he stated at the EUO that he did not use a cane every day, only when he needed it. He also stated at the EUO that he did not always limp, his walking is good on some days and not good on others.

Petitioner argues that Respondent testified falsely regarding his physical disabilities arising from the subject accident and consequent knee surgery.

Respondent claimed that, among other things, he was unable to work, had difficulty walking, and was unable to lift heavy objects, run, ski, dance or walk up stairs. He also

claimed a limited ability to bend his knee. Petitioner alleges that such claims are belied by the photographs and statements posted in the spring and early summer of 2010 on the publicly available portions of Respondent's online social network ("Facebook") account. The photographs depicted Respondent engaged in various activities, including, among other things, standing on top of a pool slide, climbing the ladder to the pool slide, and bending over a boat trailer.

Based on the above, Petitioner argues that Respondent testified falsely by misrepresenting material facts at the EUO and, further, that Respondent's entire testimony at the hearing before this Court was incredible. Respondent argues that Petitioner has failed to meet its burden of proof as to the framed issue since there were no material misrepresentations. Respondent alleges that he made certain mistakes in his EUO testimony and that he satisfactorily explained those mistakes at this hearing. In essence, Respondent states that his Facebook pages contained puffery and fantasy, not factual statements. He denied actually performing certain activities and stated that at least one picture of a pool was not even of his pool.

The insurance policy herein provides that any fraudulent concealment or misrepresentation of material facts in connection with a claim may result in voiding of the policy and denial of coverage. Such a provision is valid and binding on the parties. Further, the insurer bears the burden of proving such fraud or misrepresentation by clear and convincing evidence. Saks & Co. v. Continental Ins. Co., 23 NY2d 161, 165 (1968), aff'g., 26 AD2d 540 (1st Dept. 1966).

Based on the testimony and evidence presented at the hearing, the Court finds that petitioner has not met this heavy burden of proof. Pursuant to the policy terms, to justify a denial of coverage, the facts concealed or misrepresented have to be "material" or Respondent had to engage in "fraudulent conduct".

The fraud or misrepresentation provision in the policy provides, in sum and substance, that any fraud or misrepresentation as to material matters knowingly made by the insured in writing or at an EUO with the intention of deceiving the insurer will bar any recovery on the policy. A & B Enterprises Inc. v. Hartford Ins. Co., 198 AD2d 389 (2d Dept. 1993) (insurer's affirmative defense).

A misrepresentation is "material" if the insurer would not have settled a claim if the insurer had known the facts misrepresented. See, e.g., Schirmer v. Penkert, 41 AD3d 688 (2d Dept. 2007) (issuance of policy); DiDonna v. State Farm Mut. Ins. Co., 259 AD2d 727 (2d Dept. 1999); see also, Ins. Law §3105(b). Materiality is generally a question of fact and conclusory statements by an employee of the insurer are not binding on the trier of fact.

To establish "fraudulent conduct", Petitioner must establish the following elements: representation of a material fact, falsity, scienter, deception, and injury (reliance). NYU v. Continental Ins. Co., 87 NY2d 308, 318 (1995); cf. Essex Refining Corp. v. Home Ins. Co., 89 Misc.2d 792, 794 (Sup. Ct., NY Co. 1975) (knowing misrepresentation, but intent to deceive not required).

The Court cannot conclude from the record at the hearing that Respondent's answers to a hand-picked group of questions were material in the context of his entire

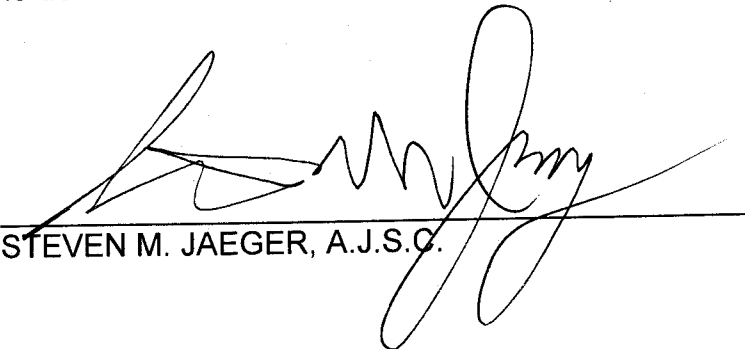
EUO testimony, which Petitioner did not place in evidence. While Respondent admits certain of his answers were false or mistaken, he also explained some of those answers as oversights or misunderstandings at the EUO and at the framed issue hearing.

The Court does not find his testimony to be fraudulent or knowing misrepresentations. Respondent will not be his own most effective witness due to his demeanor and attitude but that does not, by itself, render the excerpts from the EUO material.

Accordingly, the Courts finds that Respondent did not breach the insurance policy by his testimony at the EUO on May 12, 2010.

The foregoing constitutes the decision and order of the Court.

Dated: January 9, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED

JAN 12 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**