Matter of Liquidation of the Insurance Co. of N.Y.
2013 NY Slip Op 33144(U)
November 4, 2013
Sup Ct, New York County
Docket Number: 401477/09
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 401477/2009
DINALLO, ERIC R.
vs.
INSURANCE CORPORATION
SEQUENCE NUMBER : 006
CONFIRM/REFECT REFEREE REPORT

INDEX NO. 401477/09
MOTION DATE 8/2/13
MOTION SEQ. NO. 006

The following papers, numbered 1 to 22, were read on this motion to/for Confirm Report

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-14

Answering Affidavits — Exhibits X Motion + opp No(s). 15-20

Replying Affidavits Reply to X motion No(s). 21, 22

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOVEMBER 4, 2013

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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In the Matter of the Liquidation of

THE INSURANCE COMPANY OF NEW YORK,

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DECISION & ORDER
Index No.: 401477/09

CLAIM: FIRST FINANCIAL INS. CO. v. THE PROS FROM DOVER
CLAIM NO.: 1R101191
LEGAL FILE NO.: I12978

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Joan M. Kenney, J.:

In this insurance liquidation proceeding, claimant First Financial Insurance Company (First Financial) moves, pursuant to CPLR 4403, for an order rejecting the report of referee dated May 30, 2013 (the Report), and granting First Financial's claim in its entirety.

Insurance Company of New York (Inscorp) cross-moves, pursuant to CPLR 4403, for an order denying First Financial's motion to reject the Report, and instead confirm the Report; as well as dismissal of the complaint against it. The Superintendent of Financial Services (the Superintendent) in his capacity as Liquidator of Inscorp also opposes the motion by First Financial.

For the following reasons, the motion is denied and the cross motion is granted with modification as set forth below.

FACTUAL BACKGROUND

First Financial is a judgment creditor of Inscorp's insured, The Pros from Dover, LLC (The Pros). First Financial seeks to recover over $1.5 million from Inscorp on a direct action subrogation claim that First Financial asserts against Inscorp under Insurance Law § 3420 (b) that arises out of a judgment First Financial obtained against The Pros in an underlying action as set forth more fully below.

Inscorp issued both a primary policy (policy No. IGL900189) and excess policy No. IXP002188) insurance coverage to The Pros, with an effective date from July 1, 2000 to July 1, 2001 (Inscorp policy).

The Pros entered into a contract with David Smilow (Smilow) and TLH 140 Perry Street LLC (TLH) requiring The Pros to renovate Smilow's condominium unit. Under the contract, The Pros were also allegedly required to indemnify and hold Smilow and TLH harmless from all claims, damages, losses and expenses incurred in connection with any lawsuit arising out of The Pro's work. First Financial claims that the contract also required The Pros to add Smilow and TLH as additional insureds under the Inscorp policy.

On June 1, 2001, Jose Canella, an employee of The Pros, injured himself while working on the condominium renovation project. On December 11, 2001, Canella brought a personal injury suit against TLH and Smilow as well as against the owner and manager of the building Andrews Building Corporation (Andrews) and 140 Perry Street Condominium (140 Perry), entitled *Canella v TLH Perry Strret LLC,* index No. 48250/01, in the Supreme Court, Kings County (the *Canella* action). On November 3, 2005, Canella settled with Andrews and 140 Perry, who in turn successfully sought indemnification from TLH and Smilow. First Financial paid more than $1.2 million on behalf of its insureds, TLH and Smilow, toward the underlying claim. The Pros were never impleaded by any of the defendants into the *Canella* action. The Pros never tendered a claim to Inscorp or requested a defense.

Inscorp received notice of the claim and purported to reserve its rights (through its duly authorized representative Fleming & Hall Administrators, Inc.) in a letter addressed to its insured, The Pros, but Inscorp never disclaimed coverage for the claim. First

Financial claims that when it contributed to the settlement of the *Canella* action, its subrogation rights, as subrogee of TLH and Smilow, accrued against The Pros, who was allegedly obligated to indemnify TLH and Smilow. On October 31, 2005, First Financial gave Inscorp notice of claim in the *Canella* action. On November 2, 2005, Inscorp disclaimed coverage.

On February 29, 2007, First Financial commenced a declaratory judgment action against The Pros and Inscorp, entitled *First Financial Insurance Company v The Pros from Dover*, index No. 102530/2007, in the Supreme Court of New York, New York County (Declaratory Judgment Action), seeking a ruling that TLH and Smilow were entitled to additional insured coverage from Inscorp.

The Pros never tendered a claim to Inscorp. The Pros did not appear in the Declaratory Judgment Action, so Inscorp did not defend them nor issue a disclaimer letter to them. On June 2008, First Financial obtained a default judgment against The Pros.

Thereafter, on May 22, 2009, the court granted Inscorp's motion for summary judgment holding that First Financial's notice to Inscorp, approximately four years after its insured was sued was "unquestionably untimely" (Steinke affirmation, exhibit 4). The court also rejected First Financial's attempt to recover the *Canella* settlement via the default judgment finding the timing premature. The court specifically held that while

> "[i]t is true that, under Insurance Law § 3420, a plaintiff who has suffered a loss or damage may sue the tortfeasor's insurance company to satisfy a judgment obtained against the tortfeaser. The statute, . . ., precludes a direct action against the tortfeasor's insurance company until a judgment has been secured aginst the tortfeasor and the judgment has been served on the insurance company but has remained unpaid for 30 days . . . . Assuming these provisions are applicable the plaintiff's claim against Inscorp is premature, and . . . must be asserted in a separate, plenary action"

(*id.*). Further, the court

> "declared that TLH and Smilow were not insureds of Inscorp and Inscorp is therefore not obligated to indemnify their subrogee, [First Financial], for the expenses it incurred on their behalf in the *Canella* action. This determination does not, however, preclude [First Financial], as a judgment creditor of The Pros, from later bringing a subrogation action against Inscorp pursuant to Insurance Law § 3420"

(*see* May 22, 2009 decision and order, Steinke affirmation, exhibit 4).

Inscorp was shortly thereafter, placed into rehabilitation and the Superintendent was appointed rehabilitator by order of this court. The rehabilitation proceeding was subsequently converted into a liquidation proceeding, and the court "enjoined and restrained all persons from commencing or prosecuting any actions against Inscorp" (*see* March 4, 2010 order of liquidation, Steinke affirmation, exhibit 9).

On January 29, 2010, the court granted a default judgment in the Declaratory Judgment Action against The Pros. On March 23, 2010, a final judgment was entered ordering that "pursuant to the default order granted against The Pros . . . for breach of its contractual obligation to indemnify and hold harmless [First Financial], as subrogee of its insureds [Smilow and TLH] . . ., it is hereby ordered and decreed that [First Financial] has a judgment against The Pros . . . for a total of $1,539,751.56."

After Inscorp was placed in liquidation, First Financial filed a claim to enforce the final judgment against The Pros, which was brought before the Liquidator. The Liquidator denied First Financial's claim, citing "no policy coverage" as the reason for disallowance (*see* May 11, 2012 notice of determination, exhibit 10). First Financial sought review of the denial, and a hearing was held before the court-appointed Referee, Michael J. Roberts.

After full briefing by both parties, the Referee, on May 31, 2013, issued a report

which concluded that First Financial's direct subrogation claim against Inscorp should be denied (*see* Report, Steinke affirmation, exhibit 1). The Referee cited that the two issues presented before him were: 1. Is First Financial's claim against Inscorp "barred by the doctrine of collateral estoppel?"; and 2. Is First Financial "as judgment creditor under § 3420 (b) (2), entitled to maintain a direct action against . . . Inscorp to recover the amount of a judgment against Inscorp's insured (The Pros)?" (*id.*). Both First Financial and Inscorp agree that neither issue was briefed by the other.

First, the Referee concluded that First Financial could not recover under Insurance Law § 3420 because it was not a "person" under the statute relying on Estates, Powers and Trusts Law or not within the class or category the statute was meant to protect.[1] Second, he concluded that the court's finding that First Financial gave late notice of its claim for additional insured coverage from Inscorp also barred its § 3420 subrogation claim. First Financial seeks entry of an order rejecting the Referee's report and granting First Financial's claim against Inscorp in its entirety claiming that the Referee erred in concluding that it was not entitled to proceed against Inscorp pursuant to Insurance Law § 3420.

While "Inscorp does not rely on the reasoning of the Referee[, it] urges this court to confirm his denial of coverage based on" the following issues: (1) whether there is any coverage owed by Inscorp to The Pros; and (2) assuming coverage is owed, whether First Financial is entitled to recover from Inscorp under Insurance Law § 3420.

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[1] The court finds this to be an error of law, and disregards this portion of the Referee's report (*see* NY Gen Constr Law §§ 37, 110 ["(t)he term person includes a corporation"]).

The Superintendent opposes the present motion to reject the Report, offering additional reasons why First Financial's claim should be denied. The Superintendent asserts that since Inscorp is in liquidation, it is no longer "an insurance company" or an "insurer", and any monies recoverable that could be paid, are not "insurance proceeds." Second, he claims, as does Inscorp, that First Financial was in control of its insured's defense in the *Canella* action, and could have impleaded The Pros. In addition, First Financial could have tried to give timely notice to Inscorp concerning the claim that TLH was an additional insured under the Inscorp policy, instead of waiting until October 31, 2005, four years after the *Canella* action was filed, and two days before trial. Since First Financial was in control of TLH's legal strategy, it cannot claim that it was prejudiced in any way. The Superintendent contends that the Referee knew that First Financial was attempting to run around an adverse coverage ruling, and the Referee correctly ruled that it should be collaterally estopped from doing so.

Discussion

A referee's authority is defined and limited by the order of reference (CPLR 4311), and if the referee exceeds that authority, the referee's report must be rejected (*see Furman v Wells Fargo Home Mtge., Inc.*, 105 AD3d 807, 810–811 [2d Dept 2013]).

> "The rule is well settled that where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility, and generally courts will not disturb the findings of a referee 'to the extent that the record substantiates his findings and they may reject findings not supported by the record ...'"

(*Kardanis v Velis*, 90 AD2d 727, 727 [1st Dept 1982] [citation omitted]; *see e.g. Continental Cas. Co. v Lecei*, 65 AD3d 931, 932 [1st Dept 2009]). Moreover, "[a] referee may inquire

into and determine all questions of law and fact" (*Chase Manhattan Mtge.Corp. v Hall*, 18 AD3d 413, 414 [2d Dept 2005]). "However, findings of the referee are not final. The Supreme Court has the final decision in the dispute and can confirm or reject the referee's report, and make its own findings" (*Board of Managers of Brightwater Towers Condominium v Lukashevskaya,* 37 Misc3d 1202(A) [Sup Ct, Kings County 2012], citing CPLR 4403; *Federal Deposit Ins. Corp. v 65 Lenox Road Owners Corp.,* 270 AD2d 303, 304 [2d Dept 2000]).

According to the Referee, the issue before it was whether First Financial, as a judgment creditor, was entitled to maintain a direct action against Inscorp to recover the default judgment it secured against The Pros, Incorp's insured. It is clear from the court's May 22, 2009 decision, in the Declaratory Judgment Action, that Inscorp was "not obligated to indemnify their subrogee, [First Financial], for the expenses it incurred on their behalf in the *Canella* action." The court further ruled that it did "not, however, preclude [First Finanical], as a judgment creditor of The Pros, from later bringing a subrogation action against Inscorp pursuant to Insurance Law § 3420." The court did not express anything to suggest that First Financial would be successful should it proceed with such an action. Rather, the court found that Insurance Law § 3420 "*assuming the provisions are applicable*", "precludes a direct action against the tortfeasor's insurance company[, i.e., Inscorp] until a judgment has been secured against the tortfeasor [the Pros] and the judgment has been served on the insurance company but has remained unpaid for 30 days" citing Insurance Law § 3420 (a) (2) and (b) (1). The issue, therefore, before the arbitrator was not whether First Financial can maintain a direct claim by an indemnitee

against the indemnitor's insurer, as that had already been decided by Judge Diamond in the negative, but rather whether First Financial is entitled to recover a money judgment against The Pros in its subsequent subrogation action against Inscorp, The Pros' liability insurer.

"Equitable subrogation is based upon the premise that a person who pays a debt that is owed by another should be allowed the opportunity to be reimbursed in full by the one primarily responsible for the losses" (*Rink v State*, 27 Misc3d 1159, 1162 [Ct of Claims, NY County 2010], *affd* 87 AD3d 1372 [4th Dept 2011]). "The right to equitable subrogation arises when the insurer makes payment on behalf of the insured" (*id.*, citing *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 296, 304 [1996]; *Winklemann v Excelsior Ins. Co.*, 85 NY2d 577 [1995]; *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]), and is well established (*see Fasso v Doerr*, 12 NY3d 80, 88 [2009]; *Winkelmann*, 85 NY2d 577; *Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366 [1990]). "Subrogation allows an insurance company to stand in the shoes of its insured and seek reimbursement from the one who caused the loss, as long as the insured's rights are not comprised" (*Rink*, 27 Misc3d at 1162.). "No express assignment of the insured's cause of action is required; equitable subrogation is accomplished by operation of law" (*Patent Scaffolding Co. v William Simpson Constr. Co.*, 256 Cal App 2d 506, 510 [1967]).

"To enforce its right of equitable subrogation, the insurer can bring an independent action against the wrongdoer in the name of its insured, the subrogor, or seek to intervene in an existing action between the insured and the wrongdoer" (*id.* at 1163). As noted by the Fourth Department, "[t]he First ... Department[has] denied an insurer's right to

intervene in pending litigation between its insured and the alleged wrongdoer" to avoid creating an adversarial relationship between the insurer and the insured and perhaps complicating the litigation (*id.*, citing *Marshall v 426-428 West 46th Street Owners, Inc.*, 33 AD3d 444 [1st Dept 2006]; *Halloran v Don's 47 West 44th Street Restaurant Corp.*, 255 AD2d 206 [1st Dept 1998] [other citation omitted]).

Inscorp claims that First Financial erred in asserting its claims under Insurance Law § 3420, because even if First Financial could bring a claim under Insurance Law § 3420, "by proceeding directly against defendant, [First Financial] does so as subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured," i.e., The Pros (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990]). In other words "the inevitable consequence of [First Financial's] election to proceed against [Inscorp] under Insurance Law § 3420 (b) (1) is that First Financial is in legal privity with the claimed insured for the purpose of collateral estoppel analysis" (*id.*), which was precisely the Referee's point in stating that the claim was barred by collateral estoppel.

As such, "[p]laintiffs, as judgment creditors seeking to enforce the policy, have no greater rights than the insured under the policy" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*,152 AD2d 1004 [4th Dept 1989], citing *Spadaro v Newark Ins. Co.*, 21 AD2d 226 [4th Dept 1964], *affd* 15 NY2d 1000 [1965]; *see also Feigelson v Allstate Ins. Co.*, 36 AD2d 929 [1st Dept 1971]). Inscorp argues that by bringing this case under Insurance Law § 3420 (b) (2), First Financial "steps into the shoes of [The Pros] and can assert any right of the [insured] against the insurance company"; similarly, Inscorp can assert any of the defenses it had against the insured" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354-355 [2004]). The

failure of The Pros to give notice to Inscorp bars The Pros from coverage under the policy (*Castro v Prana Assoc. Twenty One LP*, 95 AD3d 693 [1st Dept 2012]). As such, it claims that this defense to coverage bars First Financial from coverage. The court agrees.

In light of the above, the court need not address the remainder of the arguments.

Based on the foregoing, the motion to reject the Report is denied and the motion to confirm the Report is granted as modified herein, and the complaint is, therefore, dismissed. Accordingly, it is

ORDERED that the motion by claimant First Financial Insurance Company to reject the report of referee dated May 30, 2013 is denied; and it is further

ORDERED that the cross motion by Insurance Company of New York to confirm the report of referee dated May 30, 2013 is granted with modification as discussed herein; and it is further

ORDERED that the complaint is dismissed in its entirety.

Dated: November 4, 2013

ENTER: _____
JOAN M. KENNEY
J.S.C.