Varon v Country-Wide Ins. Co.
2014 NY Slip Op 32300(U)
August 27, 2014
Sup Ct, New York County
Docket Number: 154592/2013
Judge: Peter H. Moulton

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CHRISTIAN VARON

Plaintiff

Index No. 154592/2013

-against-

COUNTRY-WIDE INSURANCE COMPANY

Defendant

PETER H. MOULTON, J.S.C.:

In this action, plaintiff seeks a declaratory judgment stating that defendant is obligated to tender the full payment of two separate $25,000.00 automobile liability insurance policies issued to Orlo Kolenovic ("Kolenovic") and Adris Reckovic ("Reckovic"), the insured owner and driver, respectively, in an underlying action before plaintiff can pursue a claim against his own automobile insurance company ("High Point Safety and Insurance Company" hereinafter "High Point") for first-party supplemental under-insured motorist benefits.[1] Defendant cross-moves, pursuant to CPLR § 3212, for an order granting defendant summary judgment and declaring that defendant does not have to tender the $25,000.00 insurance policy issued to driver Reckovic in settlement of the underlying action in order to trigger plaintiff's right to recover under-insured motorist benefits from High Point.

BACKGROUND

On November 6, 2009, plaintiff commenced an underlying action to recover damages for

[1]Defendant has already agreed to tender $25,000.00 under the Kolenovic policy. Defendant's refusal to tender $25,000.00 under the Reckovic policy is the basis of the instant motion.

personal injuries sustained in a motor vehicle accident on April 27, 2009 when a 1999 Mercedes Benz owned by Kolenovic and operated by Reckovic struck his automobile, a 2000 Mercury Stable. Defendant issued an automobile insurance policy to Kolenovic, the vehicle's owner, in which liability coverage was set at $25,000.00 per person, and $50,000.00 per occurrence for the 1999 Mercedes Benz. Defendant also issued a separate automobile insurance policy to Reckovic, the operator of the 1999 Mercedes, in which liability coverage was similarly set at $25,000.00 per person, and $50,000.00 per occurrence for Reckovic's 2007 Acura.

The "other insurance" clause in the insurance policy issued to Reckovic states as follows:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, **any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for "your covered auto," shall be excess over any other collectible insurance** (*see* Reckovic insurance policy, No. 01 CS 4043854 09)(emphasis added).

High Point insured plaintiff's vehicle under an insurance policy issued in New Jersey in which under-insured motorist coverage was set at $100,000.00 per person. The "How We Will Settle a Claim (Part 3)" clause in High Point's policy states as follows:

> If a covered person under this part is in an accident, we will not pay more than the limit of coverage for this part applicable to any one automobile insured under this part. We will subtract from the amount otherwise payable under this part, the amount of damages paid or payable by or on behalf of anyone responsible for the bodily injury or property damage to an insured or additional insured. This limit of coverage applies regardless of the number of policies, insureds, insured automobiles, claims made, or vehicles involved in the accident or loss. Coverages on other automobiles insured by is under this police cannot be adduced or stacked on the coverage of the particular automobile involved, nor shall these coverages be

> increased by stacking the limits of coverage of multiple policies available to the insured (*see* High Point insurance policy, No. HPA125AA69581).

High Point's policy does not have an "other insurance" clause, and does not have any provision that provides that High Point's policy is "excess" to other valid and collectable insurance.

ARGUMENTS

Plaintiff contends that in order to trigger his right to recover under-insured motorist benefits from High Point, Country-Wide must tender the $25,000.00 policy limit for the Kolenovic insurance policy as well as the $25,000.00 limit for the Reckovic insurance policy.

Defendant disagrees, stating that the "other insurance" clause in the policy issued to Reckovic makes the policy excess to the policy issued to Kolenovic as well as other collectible insurance, and need not be tendered in order to trigger plaintiff's right to seek under-insured motorist benefits from High Point.

DISCUSSION

An under-insured motorist benefit provision of an insurance policy is triggered when an insured individual has exhausted the bodily injury policy limit under the policy of an offending vehicle, and that limit is less than the liability coverage provided under the injured individual's policy (*see Matter of Liberty Mut. Ins. Co. v. Doherty*, 13 AD3d 629, 630 [2d Dept. 2004]); *N.Y. Ins. Law* § 3420[f][2]; *S'Dao v. National Grange Mut. Ins. Co.*, 87 NY2d 853, 854 [1995]). An insured individual is not required to exhaust the liability coverage limit under a separate insurance policy for the operator of an offending vehicle (assuming that the owner of the vehicle is not the operator of the vehicle) prior to pursuing a claim for under-insured motorist benefits (*see S'Dao v. National*

Grange Mut. Ins. Co., supra; *see also Matter of Polesky v. GEICO Ins. Co*, 241 AD2d 551, 552 [2d Dept. 1997]). Insurance Law § 3420 provides as follows:

> Any [automobile insurance] policy shall, at the option of the insured, also provide supplementary/underinsured motorists insurance for bodily injury, in an amount up to the bodily injury liability insurance limits of coverage provided under such policy...insurance shall provide coverage...if the limits of liability under all...insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy...As a condition precedent to the obligation of the insurer to pay under the insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements (*see N.Y. Ins. Law* § 3420[2][A]).

The Court of Appeals has further interpreted Insurance Law § 3420 as follows:

> The clear language of the policy and statute requires [individuals] to 'exhaust *** by payment' the limits of all applicable bodily injury policies before [an insurance company] is required to pay pursuant to an under-insurance endorsement. **Thus, the statutory scheme requires primary insurers** to pay every last dollar, and requires plaintiffs to accept no less, prior to the initiation of an under-insurance claim (*see Matter of Federal Ins. Co. v. Watnick*, 80 NY2d 539, 546 [1992]) (emphasis added).

Consequently, under Insurance Law § 3420, it is the policy limit of "primary insurers" that must be tendered in order to trigger under-insured motorist benefits.

Here, defendant issued an insurance policy to Kolenovic for his 1999 Mercedes Benz, the vehicle that was involved in an accident with plaintiff's vehicle. Since Kolenvoic's vehicle was involved in the accident, Kolenovic's policy is the primary policy implicated here. Defendant also issued a policy to Reckovic, the driver of the 1999 Mercedes Benz on the date of the accident. The

Country-Wide policy issued to Reckovic states that any insurance provided to a vehicle not owned by the insured "shall be excess over any other collectible insurance." Defendant's insurance policy issued to Reckovic was for Reckovic's personal vehicle (which was not involved in the accident with plaintiff's vehicle). As such, the Reckovic policy need not be tendered, since it is "excess" to the Kolenovic policy as well as to "other collectible insurance" (*i.e.* plaintiff's High Point insurance), and does not constitute a "primary" insurance policy within the meaning and interpretation of Insurance Law § 3420. Defendant is entitled to have the provisions of the Reckovic policy enforced (*see National Cont. Ins. Co. v. Countrywide Ins.*, 112 AD3d 416, 417 [1st Dept. 2013] ["[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms"] *citing Broad St., LLC v. Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept. 2006]). As such, defendant is not required to tender under the Reckovic policy in order to trigger plaintiff's right to obtain under-insured motorist benefits from High Point.

Plaintiff argues in opposition that the phrase "excess over any other collectible insurance" in the Reckovic policy means excess over other "primary" insurance, and that the Reckovic policy therefore must be tendered in order to trigger plaintiff's right to recover under-insured motorist benefits from High Point. As defendant argues, however, plaintiff's argument would require the court to interpret the phrase "excess over any other collectible insurance" to read "excess over any other collectible **primary** insurance [emphasis added]." Such a reading would lead to an inference beyond the express terms of the policy. Moreover, it is unclear whether reading the term "primary" into the "other insurance" provision of the Reckovic policy would require payment under that policy to be tendered. Reckovic was a temporary user, not the owner, of Kolenovic's Mercedes. As such, based on the language of the "other insurance" clause in Reckovic's policy, the policy requires that

his personal automobile insurance policy for a vehicle separate from the one involved in the accident here be considered excess over other collectible insurance. High Point's policy is silent with respect to whether "other insurance" should be considered "excess" in the event that other valid and collectible insurance remains. High Point's policy therefore cannot be considered "excess," and it is the Reckovic policy alone that need not be tendered here.

Plaintiff's opposition to defendant's argument concerning the "other insurance" provision is unpersuasive. Plaintiff cites *Sport Rock Intl., Inc. v. American Cas. Co. Of Reading, Pa.*, 65 AD3d 12, 18-19 (1st Dept. 2009), for the proposition that when confronted with a *pro rata* clause in one policy and an excess clause in another, courts can read an excess clause as excess to "other **primary** insurance" (emphasis added). In contrast to *Sport Rock Intl., Inc.*, however, here the court is not confronted with two primary insurance policies containing an excess "other insurance" clause as well as a *pro rata* "other insurance." Only the Reckovic policy contains an excess clause. High Point's policy is does not contain an excess clause. As such, plaintiff's analogy between the instant matter and *Sport Rock Intl., Inc.* is misplaced.

Similarly, plaintiff's reliance on *State Farm Fire and Cas. Co. v. LiMauro*, 65 NY2d 369 (1985) is unfounded. There, the Court of Appeals addressed an umbrella policy that covered multiple risks but offered no primary coverage with respect to any of those risks, and purported to be "in excess of" other collectible insurance available to an insured. The Court, addressing the concern of whether an interpretation of the various policies at issue would leave the insured without coverage, concluded that the umbrella policy was not required to contribute until the limits of the policy covering the injury-causing automobile had been exhausted. The court is not confronted by a similar concern in the instant matter, as plaintiff is covered by plaintiff's own liability insurance

policy with High Point, not an umbrella policy. Finally, the instant case does not implicate a situation where "there are multiple policies covering the same risk, and each generally purports to be excess to the other" wherein "the excess coverage clauses are held to cancel out each other and the insurer contributes in proportion to its limit amount of insurance" (*Jefferson Ins. Co. of N.Y. v. Glen Falls, Ins. Co.*, 88 AD2d 925, 926 [2d Dept. 1982]). As such plaintiff's opposition to defendant's argument is misplaced, and defendant has no obligation to tender the Reckovic policy in settlement of the underlying action in order to trigger plaintiff's right to recover underinsured motorist benefits from High Point.

It is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted. The Reckovic policy need not be tendered in order to trigger plaintiff's right to seek under-insured benefits from High Point.

This constitutes the Decision and Judgment of the Court.

Dated: August 27, 2014

ENTER:

J.S.C.

HON. PETER H. MOULTON