

Global Liberty Ins. Co. v Taveras

2014 NY Slip Op 33175(U)

November 21, 2014

Supreme Court, Suffolk County

Docket Number: 33162-2012

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-22-14
ADJ. DATE _____
Mot. Seq. # 001 - MD; 002 - MD

| | | |
|-----------------------------------|--------|---|
| GLOBAL LIBERTY INSURANCE COMPANY, | -----X | Brand Glick & Brand, PC |
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| Plaintiff(s), | : | Garden City, New York 11530 |
| | : | |
| - against - | : | Taller & Wizman, P.C. |
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| ANEURY TAVERAS, RICARDO GOMEZ, | : | Forest Hills, New York 11375 |
| YENILSHIA FIRO And VICTOR GOMEZ, | : | |
| | : | Lewis Johs Avallone Aviles, LLP |
| Defendant(s). | : | Attorneys for Deft Victor Casado |
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| | | Islandia, New York 11749 |
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| | | Richardo Gomez |
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant Firpo, dated March 13, 2014, and supporting papers; (2) Notice of Cross Motion by the defendant Casado, dated April 1, 2014, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated April 15, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #001) by the defendant, Yenilshia Firpo (i/s/h/a Yenilshia Firo), which seeks an order granting said defendant summary judgment pursuant to CPLR 3212, and directing plaintiff to afford coverage with respect to the motor vehicle accident of October 8, 2009, is hereby denied; and it is further

ORDERED that the cross-motion (seq. #002) by the defendant, Victor Casado (i/s/h/a Victor Gomez), which seeks an order granting said defendant summary judgment pursuant to CPLR 3212, and directing plaintiff to afford coverage with respect to the motor vehicle accident of October 8, 2009, is hereby denied; and it is further

ORDERED that after searching the record, upon all the papers and proof submitted, the Court hereby grants summary judgment in favor of non-moving plaintiff, Global Liberty Insurance Company, and declares that Global Liberty Insurance Company is not obligated to defend and/or indemnify Ricardo Gomez and Aneury Taveras in relation to any claims or causes of action asserted in the underlying action, *Firpo v Casado, et al.*, pending in Supreme Court, Bronx County (Index No. 302704/2010); and it is further

ORDERED that counsel for Global Liberty shall promptly serve a copy of this Order upon counsel for Yenilshia Firpo and Victor Casado, as well as upon Ricardo Gomez and Aneury Taveras at their last known address, via First Class Mail, and shall promptly thereafter file the affidavit(s) of such service with the County Clerk.

In this declaratory judgment proceeding, the plaintiff, Global Liberty Insurance Company ("Global") seeks a judicial declaration that it has no duty to defend or indemnify the defendants, Aneury Taveras and Victor Gomez, for the motor vehicle accident that occurred on October 8, 2009, which resulted in the underlying personal injury action commenced by Yenilshia Firpo ("Firpo") against Victor Casado ("Casado"), Aneury Taveras (Taveras") and Ricardo Gomez ("Gomez") in Supreme Court, Bronx County under Index # 302704-2010. Counsel was assigned by Global to defend Taveras and Gomez in the Bronx County action. Accordingly, counsel for Taveras and Gomez file an answer to the complaint on their behalf. Firpo alleges in her Bronx complaint that at the time of the accident, Taveras was operating a vehicle owned by Gomez, when Taveras executed an illegal U-turn and struck the vehicle owned and operated by Casado. At the time of the accident, Firpo was a passenger in the vehicle operated by Taveras.

In the discovery phase of Firpo's personal injury action, the police officer who investigated the subject accident testified at his nonparty deposition that Taveras admitted to him at the scene that he was attempting to make a U-turn when the collision occurred. After defendants Taveras and Gomez failed to appear at the previously ordered depositions, Bronx Supreme Court Justice, Hon. Laura G. Douglas, issued an August 9, 2012 order, mandating that defendants Taveras and Gomez "shall appear for their respective examinations before trial on or before October 11, 2012 or the non-appearing party shall be precluded without further motion." When Taveras and Gomez failed to appear and comply with the August 9, 2012 order, plaintiff Firpo and defendant Casado moved for summary judgment as to liability against Taveras and Gomez on the basis of their preclusion from being able to testify at trial. By order of the Hon. Howard H. Sherman, dated January 28, 2013, both the motions were granted without opposition by Taveras or Gomez. A trial on the issue of damages is pending in Bronx County.

In its declaratory judgment complaint, Global acknowledges that it had issued a policy of insurance to Gomez, and that it had assigned counsel to defend Gomez and Taveras in Firpo's Bronx County personal injury action. Global, however, seeks a judgment declaring that it has no duty to defend and/or indemnify Gomez and Taveras for Firpo's personal injury claims because they breached the policy provisions requiring cooperation with the investigation and defense of those claims, which is a condition precedent to insurance coverage.

Firpo and Casado, as defendants in this declaratory judgment action, seek summary judgment by motion and cross-motion, respectively, including dismissal of Global's complaint and an order requiring Global to provide insurance coverage for the subject October 8, 2009 motor vehicle accident. In support of their motions, Firpo and Casado essentially argue that the efforts made by Global and its counsel to secure cooperation of Gomez and Taveras were limited, at best, and that those efforts fail to meet the requisite standard for a proper disclaimer of coverage based upon non-cooperation. On that basis, Firpo and Casado contend that Global is not entitled to an order declaring it has no duty to defend or indemnify Taveras and Gomez for the October 8, 2009 accident, and that they (Firpo and Casado) are entitled to summary judgment in their favor and an order directing Global to afford coverage to Taveras and Gomez for the subject accident.

It is well settled that the remedy of summary judgment is a drastic one and, therefore, there is considerable reluctance by the courts to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*Id*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]; *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]). When a party moving for summary judgment makes a prima facie showing of entitlement to summary judgment, it becomes incumbent upon the party opposing the motion to come forward with evidentiary facts rebutting that showing and demonstrating the existence of a triable issue of fact (*Federal Deposit Ins. Corp. v Hyer*, 66 AD2d 521, 413 NYS2d 939 [2d Dept 1979], *app dismd without op*, 47 NY2d 951 [1979]; *Braun v. New York Life Ins. Co.*, 55 AD2d 99, 389 NYS2d 927 [4th Dept 1976], *affd* 42 NY2d 1020, 398 NYS2d 657 [1977]).

Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepcos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (*Dowsey v Megerian*, 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo*, 141 A.D.2d 636, 529 N.Y.S.2d 797 [2d Dept 1988]).

Here, the relevant provisions of the Global insurance policy regarding an insured's duty to cooperate are set forth in Section IV(A) as follows:

2. **Duties in the Event of Accident, Claim, Suit or Loss**

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

b. Additionally, you and any other involved “insured” must:

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit.”

Under New York Law, an insurer’s denial of insurance coverage based upon the insured’s lack of cooperation will be proper when the insurer demonstrates: (1) that it acted diligently in seeking to bring about the insured’s cooperation; (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured’s cooperation; and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction (*Preferred Mut. Ins. Co. v SAV Carpentry, Inc.*, 44 AD3d 921, 844 NYS2d 363 [2d Dept 2007]; *Allstate Ins. Co. v United Intl. Ins. Co.*, 16 AD3d 605, 792 NYS2d 549 [2005]); *Utica First Ins. Co. v Arken, Inc.*, 18 AD3d 644, 795 NYS2d 640 [2d Dept 2005]).

In opposition to the motions by Firpo and Casado, Global submits numerous letters, as well as an affidavit from the Global claims representative, Michael Jack, detailing the efforts made by Global to secure Gomez’s and Taveras’s cooperation. The evidence shows that Global, and the law firm it retained to represent Gomez and Taveras in the underlying suit, made diligent efforts, by means of correspondence, numerous telephone calls, and the hiring of an investigator, to secure their cooperation. The Court finds that Global’s efforts were diligent and reasonably calculated to bring about the cooperation of Gomez and Taveras to defend against the personal injury claims made by Firpo.

Furthermore, the evidence supports a finding that Gomez, the named insured under the Global policy, willfully obstructed defense of the underlying litigation. In this regard, during a telephone conversation with Mr. Jack on December 14, 2011, as a precondition for his cooperation, Gomez demanded Mr. Jack’s assistance to obtain money for him from the underwriting department in an unrelated matter. This precondition was also attached to Gomez revealing Taveras’s cell phone number. In response, Mr. Jack provided Gomez with the underwriting department’s contact information. Unsatisfied with Mr. Jack’s response, Gomez told Mr. Jack he would not help Global in any way. Failure to cooperate and wilful obstruction of the defense is also evident in the need for Justice Douglas to issue a conditional preclusion order on August 9, 2012 due to the failure of Gomez and Taveras to appear for court ordered depositions. Their repeated failure to cooperate ultimately led to preclusion and summary judgment against them pursuant to Justice Sherman’s order, dated January 28, 2013. Accordingly, the proofs submitted by the parties preclude summary judgment in favor of Firpo and Casado, and require denial of their respective motions.

In relevant part, CPLR §3212(b) requires that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” This provision of the CPLR also provides that “[i]f it shall appear that any party other than the moving party is entitled to a

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summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

In this regard, a court may search the record and grant summary judgment in favor of nonmoving party as to a cause of action or issue that is the subject of motions before the court (see *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Matter of Joy Builders, Inc. v Conklin*, 96 AD3d 939, 946 NYS2d 497 [2d Dept 2012]; *Netjets, Inc. v Signature Flight Support, Inc.*, 43 AD3d 1014, 842 NYS2d 492 [2d Dept 2007]; *Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; *Federal Natl. Mtge. Assn. v Katz*, 33 AD3d 755, 822 NYS2d 759 [2d Dept 2006]; *Murray v Murray*, 28 AD3d 624, 812 NYS2d 378 [2d Dept 2006]; *Goldstein v County of Suffolk*, 300 AD2d 441, 751 NYS2d 549 [2d Dept 2002]).

Based upon the foregoing, and upon all the papers and proof submitted, the Court determines that summary judgment in favor of Global is warranted as a matter of law (see CPLR 3212[b]). Accordingly, the Court hereby grants summary judgment in favor of Global on its complaint, and declares that Global is not obligated to defend and/or indemnify Gomez and Taveras in relation to any claims or causes of action asserted in the underlying action, *Firpo v Casado, et al.*, pending in Supreme Court, Bronx County (Index No. 302704/2010).

This constitutes the Order and Judgment of the Court.

Dated: November 21, 2014


PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION