Ramlochan v Scottsdale Ins. Co.
2015 NY Slip Op 30830(U)
April 6, 2015
Supreme Court, Queens County
Docket Number: 702183/13
Judge: Valerie Brathwaite Nelson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE VALERIE BRATHWAITE NELSON** IA Part 7
Justice

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QUEENS COUNTY

DEORAJ RAMLOCHAN, as Administrator of the Estate of KARISHMA RAMLOCHAN, Deceased, and DEBORAJ RAMLOCHAN, individually, Plaintiff,	Index Number: 702183/13
-against-	Motion Date: November 18, 2014
SCOTTSDALE INSURANCE COMPANY,	Motion Calendar Number: 181
Defendant.	Motion Sequence No.: 1

The following papers numbered 1 to 6 read on this motion by plaintiff Deoraj Ramlochan for summary judgment and on this cross motion by defendant Scottsdale Insurance Company for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits	2
Reply Affidavits	3-5
Memorandum of Law	6

Upon the foregoing papers it is ordered that the motion by plaintiff Ramlochan is denied, and the cross motion by defendant Scottsdale Insurance Company is granted. The Court declares that defendant Scottsdale Insurance Company has no duty to satisfy the judgment obtained in the underlying action *(Ramlochan v. Sweet P. Home Care, Inc.*, Queens County Index No. 24016/09).

I. The Facts

On October 10, 2007, Patricia Smith, a principal of Sweet P. Home Care (Sweet P), a home nurse agency, applied to defendant Scottsdale Insurance Company for a Home Health Care General Liability Policy. On page three of the application, Smith stated that 10% of its patients suffered from Alzheimer's Disease and that the other 90% were senile or aged. Scottsdale issued a liability policy to Sweet P effective from October 27, 2007 to October 27, 2008. The Scottsdale policy provided in relevant part: "Duties In The Event of Occurrence, Offense, Claim Or Suit [:] a. You must see to it that we are notified as soon as practicable of an 'error or omission' or an offense which may result in a 'claim.' *** b. If a 'claim' is made or 'suit' is brought against any insured, you must: (1) Immediately record the specifics of the 'claim' or 'suit' and the date received; and (2) Notify us as soon as practicable. You must see to it that we receive written notice of the 'claim' or 'suit' as soon as practicable."

On August 27, 2006, the wife of plaintiff Deoraj Ramlochan gave premature birth to a daughter, Karishma Ramlochan, who had underdeveloped lungs. Karishma underwent a tracheostomy, and, upon her release from Blythdale Hospital, arrangements were made with Sweet P for the purpose of providing home care for the baby.

On January 20, 2008, Karishma went into respiratory distress while feeding. The nurse assigned by Sweet P allegedly performed CPR incorrectly before an ambulance took the child to an emergency room where she died, allegedly because of the improper CPR. The nurse reported the incident to Smith in the evening of January 20, 2008, but Smith did not report the event to the defendant insurer in 2008.

On or about June 23, 2008, an attorney for plaintiff Ramlochan sent a letter to Sweet P, which Smith admits receiving, demanding certified copies of any and all medical records concerning Karishma. Smith forwarded the letter to Sweet P's attorney, but no one complied with the demand made in the June 23, 2008 letter or the repeated demands made in communications sent on August 6, 2008 and September 8, 2008.

On March 11, 2009, the plaintiff began a pre-action discovery proceeding pursuant to CPLR 3102© in the New York State Supreme Court, County of Queens for the purpose of obtaining the medical records (*Ramlochan v. Sweet P Home Care, Inc.*, Index No. 1724/09.) The supporting affirmation stated in relevant part: " Petitioner properly authorized his attorney to receive such records that, it is believed, *** contain facts essential to Petitioner's potential claims sounding in negligence and medical malpractice. *** The aid began CPR by blowing into the infant's mouth instead of using an Ambu-bag at the tracheostomy, which was the proper protocol for an infant with a tracheostomy. As a result

the aid failed to recognize infant's tracheostomy was completed obstructed. Within minutes EMS arrived, but by then Infant had already suffered irreversible cardiorespiratory arrest." Sweet P did not oppose the application, which the court granted. Ramlochan served Sweet P with the order and notice of entry on June 8, 2009, and Sweet P provided the medical records on June 24, 2009.

On September 4, 2009, Ramlochan began an action against Sweet P and North Shore University Hospital in the New York State Supreme Court, County of Queens (*Ramlochan v. Sweet P. Home Care, Inc.*, Index No. 24016/09.). On September 25, 2009, defendant Scottsdale received a letter from Sweet P concerning Ramlochan. The letter enclosed the order and notice of entry requiring Sweet P to provide medical records to the plaintiff's attorney. This was the first notice to defendant Scottsdale of the event concerning Karishma. On November 3, 2009, the defendant insurer disclaimed coverage because of late notice of an occurrence and late notice of a lawsuit.

After a trial, the plaintiff entered judgment against Sweet P in the amount of $2,077,249.13. The judgment has not been satisfied. On or about June 11, 2013, plaintiff Ramlochan began this action for a judgment declaring that Scottsdale improperly disclaimed coverage for Sweet P and has an obligation to satisfy the judgment obtained in the underlying action.

II. The Notice of Occurrence

The Court notes initially that because of amendments effective January 17, 2009, Insurance Law §§ 3420(a)(5) and 3420(c)(2)(A) read together now provide that untimely notice shall not invalidate a claim unless, in the case of notice provided within two years, an insurer proves prejudice, and, in the case of notice provided after two years, the insured fails to prove lack of prejudice. However, the amendments do not apply to this case since Scottsdale issued the policy before January 17, 2009. (*See, Ponok Realty Corp. v. United Nat'l Specialty Ins. Co.*, 69 AD3d 596.)

With respect to policies issued before January 17, 2009, absent a valid excuse, where an insured has failed to give timely notice of an occurrence, the insurer may disclaim coverage without demonstrating prejudice. (*See, Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 NY2d 436; *Quality Investors, Ltd. v. Lloyd's London, England*, 11 AD3d 443; *Blue Ridge Ins. Co. v. Jiminez*, 7 AD3d 652; *Reynolds Metal Co. v. Aetna Cas. & Sur. Co.*, 259 AD2d 195; *Smalls v. Reliable Auto Service, Inc.*, 205 AD2d 523.) " The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage ***." (*White v. City of New York*, 81 NY2d 955, 957; *Unigard Sec. Ins. Co., Inc. v.North River Ins. Co.*, 79 NY2d 576; *Security Mut. Ins. Co. of*

New York v. Acken-Fitzsimons Corp. supra; SSBSS Realty Corp. v. Public Service Mut. Ins. Co., 253 AD2d 583.) " It is well settled that where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time under the facts and circumstances of each case ***." (*Kim v. Maher*, 226 AD2d 350; *see, Argentina v. Otsego Mut. Fire Ins. Co.*, 86 NY2d 748; *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 NY2d 12.)

"There may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice ***." (*White v. City of New York, supra*, 957; *Witriol v. Travelers Ins. Group*, 251 AD2d 497.) "When the facts of an occurrence are such that an insured acting in good faith would not reasonably believe that liability will result, notice of the occurrence is given 'as soon as possible' if given promptly after the insured receives notice that a claim will in fact be made ***." (*D'Aloia v. Travelers Ins. Co.*, 85 NY2d 825, 826; *Merchants Mut. Ins. Co. v. Hoffman*, 56 NY2d 799.) The insured has the burden of showing that there was a reasonable excuse for the delay (*see, Argentina v. Otsego Mut. Fire Ins. Co, supra; Security Mut. Ins. Co. v. Acker-Fitzsimons Corp, supra.*), and one excuse may be the insured's reasonable, good-faith belief that the injured party would not seek to hold him liable. (*See, Argentina v. Otsego Mut. Fire Ins. Co., supra.; Herold v. East Coast Scaffolding, Inc.*, 208 AD2d 592.)

In the case at bar, plaintiff Ramlochan failed to offer a valid excuse for the delay. First, the child was taken away by an ambulance and hospitalized. (*See, Magistro v. Buttered Bagel, Inc.*, 79 AD3d 822 [child taken away in an ambulance]; *Tower Ins. Co. of New York v. Lin Hsin Long Co.*, 50 AD3d 305 [patron taken away in an ambulance]; *Rondale Bldg. Corp. v. Nationwide Property and Cas. Ins. Co.*, 1 AD3d 584, 585-586 [" a reasonable and prudent insured would have concluded that there existed a strong possibility that a liability claim would be made due to the fact that the victim was removed from the scene by ambulance and hospitalized for three days"].) Second, in March, 2009, the plaintiff began a pre-action discovery proceeding pursuant to CPLR 3102(c) in the New York State Supreme Court, County of Queens for the purpose of obtaining records, expressly alerting Sweet P of potential claims sounding in negligence and medical malpractice.

In the case at bar, the event happened on January 20, 2008, but the insurer did not receive notice of the occurrence until September 25, 2009. As a matter of law, under all of the facts and circumstances of this case, notice twenty months after the event did not comply with the condition precedent in the Scottsdale policy requiring notice of an occurrence "as soon as practicable." (*See, e.g., Tower Ins. Co. of New York v. Lin Hsin Long Co.*, *supra* [nine month delay]; *Prudential Property & Cas. Ins. v. Persaud,* 256 AD2d 502

[delay of over six months in providing notice was unreasonable as a matter of law]; *Zadrima v. PSM Ins. Companies*, 208 AD2d 529 [four months delay unreasonable as a matter of law]; *Herold v. East Coast Scaffolding, Inc., supra* [3 ½ month delay in notification of an insurer not reasonable under the circumstances]; *Shaw Temple A.M.E. Zion Church v. Mount Vernon Fire Ins. Co.*, 199 AD2d 374 [nine-month delay in providing the written notice required by the policy was unreasonable as a matter of law].)

III. The Notice of Disclaimer

Regardless of whether or not the insured has given timely notice of an occurrence, an insurer still has a duty pursuant to Insurance Law §3420(d) to issue a timely notice of disclaimer. An insurer's duty to provide a notice of disclaimer as soon as is reasonably possible applies even if the insured or the injured claimant has in the first instance failed to provide the insurer with timely notice of an accident or a claim. (*See, First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64; *Prudential Property & Cas. Ins. v. Persaud*, 256 AD2d 502; *Interboro Mut. Indem. Ins. Co. v. Rivas*, 205 AD2d 536.) Insurance Law § 3420(d) requires that a disclaimer be made in writing, as soon as reasonably possible, and to the insured person as well as to the injured person . (*See, Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028; *Markevics v. Liberty Mutual Insurance Company*, 278 AD2d 285.)

Where an insurer fails to comply with Insurance Law § 3420(d), it is estopped from denying coverage. (*See, Magistro v. Buttered Bagel, Inc.*, 79 AD3d 822; *Markevics v. Liberty Mutual Insurance Company, supra* [homeowners' insurer failed to comply with disclaimer statute when it unexplainedly delayed more than three months in disclaiming liability coverage];*Colonial Penn Ins. Co. v. Pevzner*, 266 AD2d 391 [41-day delay of insurer in disclaiming coverage for the vehicle of its insured based on his failure to provide it with timely notice of an accident was unreasonable as a matter of law]; *Nationwide Mut. Ins. Co. v. Steiner*, 199 AD2d 507[insurer's unexplained 41 day delay in disclaiming coverage was unreasonable as a matter of law].) "The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage ***." (*Matter of Arbitration Between Allcity Ins. Co. and Jimenez*, 78 NY2d 1054,1056; *see, First Financial Ins. Co. v. Jetco Contracting Corp., supra; Danna Const. Corp. v. Utica First Ins. Co.*, 17 AD3d 622.)

A delay caused by a "reasonably prompt, thorough, and diligent investigation of the claim" does not render the insurer's disclaimer untimely, because the insurer must often investigate to determine if there are grounds for a disclaimer. (*See, Webster ex rel. Webster v. Mount Vernon Fire Ins. Co.*,. 368 F3d 209, quoting *In re Prudential Property & Cas. Ins. Co.*, 213 AD2d 408; *First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64.) In

the case at bar, defendant Scottsdale first learned of the event on September 25, 2009 and disclaimed coverage by letter dated November 3, 2009. The insurer demonstrated through the affidavit of Allan Gesualdo that the delay was caused by its investigation of the claim. Under all of the facts and circumstances of this case, Scottsdale's disclaimer of coverage was timely as a matter of law. (*See, Magistro v. Buttered Bagel, Inc., supra.*)

IV. Good Faith

"[I]n order to establish a *prima facie* case of bad faith [based on a disclaimer of coverage], [a party] must establish that the insurer's conduct constituted a gross disregard of the insured's interests ... In other words, [the party] must establish that the ... insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the interests of the insured." (*State Farm Fire & Cas. Co. v. Ricci,* 96 AD3d 1571, 1572 [internal quotation marks and citations omitted].) In the case at bar, the plaintiff failed to raise a genuine issue of fact concerning whether defendant Scottsdale disclaimed coverage in bad faith. (*See, State Farm Fire & Cas. Co. v. Ricci, supra.*)

Conclusions

In summary, for the reasons set forth above, defendant's cross-motion is granted pursuant to CPLR 3212 and it is the declaration of the Court that Scottsdale Insurance Company has no duty to satisfy the judgment obtained in the underlying action *(Ramlochan v. Sweet P. Home Care, Inc.*, Queens County Index No. 24016/09). The motion by plaintiff Deoraj Ramlochan is denied.

Dated: 4/6/15

VALERIE BRATHWAITE NELSON, J.S.C.

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