

Slocum v Progressive Northwestern Ins. Co.

2015 NY Slip Op 32559(U)

January 20, 2015

Supreme Court, Onondaga County

Docket Number: 2014EF3470

Judge: Donald F. Cerio

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This opinion is uncorrected and not selected for official publication.

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

LISA L. SLOCUM,

Plaintiff,

DECISION AND ORDER

v.

Index No. 2014EF3470

PROGRESSIVE NORTHWESTERN INSURANCE
COMPANY,

Defendant.

This matter comes before the Court upon the Plaintiff's Notice of Motion and Attorney Affirmation dated September 30, 2014, seeking a Declaratory Judgment pursuant to New York State Insurance Law §3420(6) that the Defendant is required to provide supplemental underinsured motorist coverage with respect to a motor vehicle accident occurring on or about July 29, 2012, wherein Plaintiff was injured. Defendant Cross-Moved by Notice dated November 7, 2014, in opposition to Plaintiff's Motion and in support of its Cross-Motion seeking to compel discovery. Plaintiff thereafter responded by a Reply Attorney Affirmation dated November 11, 2014, and Defendant submitted a Reply Affirmation of counsel November 13, 2014; a Memorandum of Law; and the November 7, 2014, Affidavits of Rebecca Shaughnessy and Joanne Wiemeier.

On November 20, 2014, the parties appeared in Onondaga County Supreme Court by counsel and were heard.

The following reflects the Decision and Order of this Court:

Brief Factual History

On July 29, 2012, the plaintiff was a passenger in a motor vehicle then being operated by Joseph Rousseau, plaintiff's boyfriend, when the Rousseau vehicle, while stopped at a stop sign, was rear-ended by a motor vehicle operated by Cindy M. Tack. Plaintiff, having been injured, sought no-fault coverage by and through Rousseau's insurance carrier, Mercury Casualty Company, by application dated August 13, 2012. On August 11, 2014, Mercury Casualty Company proffered to plaintiff its policy in the amount of \$50,000.00 as full payment for all matters arising from this motor vehicle accident. Thereafter, plaintiff, upon becoming aware of the fact that she was a named insured on her mother's motor vehicle insurance policy issued by the Defendant, gave notice to the Defendant in writing that she was seeking to assert a claim for uninsured/underinsured coverage. Defendant subsequently denied such coverage by letter dated August 20, 2014, informing Plaintiff that she had not timely given notice of her claim. In addition, Defendant notified Plaintiff in writing dated September 4, 2014, that it was denying her

claim under the Supplementary Uninsured/Underinsured Motorist Endorsement of its policy. Thereafter, the instant action was commenced.

Legal Analysis

Declaratory judgment may be sought as against an insurer pursuant to CPLR §3001 for the purpose of establishing the rights and relationships of parties to a justiciable matter such as whether the insurer's denial of a claim is appropriate. In this matter defendant has taken the position that the plaintiff's notice, some two plus years after she was injured in a motor vehicle accident, was untimely and, in any event, has materially prejudiced its ability to defend the action. Plaintiff, on the other hand, asserts that defendant has suffered no prejudice and must provide coverage to her.

There is no question that the plaintiff's notice to defendant was made on August 11, 2014, with respect to the July 29, 2012, motor vehicle accident. Plaintiff's position is simply that she was unaware of being a named insured on an insurance policy issued in her mother's name. However, once being made aware of her right to pursue redress by way of her mother's policy in August 2014 she immediately notified defendant of her claim.

With respect to the plaintiff's knowledge of the existence of potential recovery through her mother's insurance the defendant has demonstrated by its submissions that the plaintiff was a named insured on her mother's policy as of the date of the accident. Defendant has further demonstrated that the plaintiff was provided information pertaining to this coverage on a semi-annual basis beginning in August 2007 and continuing through September 2014 by renewal notices provided to the plaintiff by the defendant. The first page of each of these renewal notices identifies plaintiff as a named insured as well as a recipient of the correspondence, and specifically addresses supplementary uninsured/underinsured motorist coverage as provided by the policy. Defendant has also demonstrated that the plaintiff was clearly aware of the existence of this particular insurance policy as she, the plaintiff, had made claims on such policy in February 2012 and October 2012.

Defendant additionally submits that the delay in reporting this accident has materially prejudiced it in such a way that it is unable to adequately investigate and thus defend this claim. In particular, defendant alleges that the passage of time has resulted in the loss of its ability to examine the vehicles involved so as to "evaluate the crush damage" and to "assess the force of impact," amongst other physical examinations. Defendant alleges that the loss of the so-called "black box" will further impair the defendant's ability to assess whether the damage sustained to the vehicles would comport with the injuries alleged to have been suffered by the plaintiff. In addition, defendant alleges that the fact that the plaintiff has now had surgery prevents or impairs its ability to have conducted an adequate medical evaluation of the plaintiff prior to surgery to determine whether surgery was necessary and/or what residual impact such injuries would have. Plaintiff submits that the defendant has not been prejudiced in its ability to investigate this claim as the incident had been well documented by the investigating police agency; the drivers and passengers of both vehicles are available; plaintiff's medical records are available for review and plaintiff is subject for an independent medical examination by defendant's physician.

With respect to submission of a notice of claim, Insurance Law §3420 (a)(5) provides, with respect to late notice of claims, that:

A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer, except as provided in paragraph four of this subsection. With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period, except as provided in paragraph four of this subsection. As used in this paragraph, the terms "claims-made policy" and "extended reporting period" shall have their respective meanings as provided in a regulation promulgated by the superintendent.

Section (a)(6) thereof further provides that:

A provision that, with respect to a claim arising out of death or personal injury of any person, if the insurer disclaims liability or denies coverage based upon the failure to provide timely notice, then the injured person or other claimant may maintain an action directly against such insurer, in which the sole question is the insurer's disclaimer or denial based on the failure to provide timely notice, unless within sixty days following such disclaimer or denial, the insured or the insurer: (A) initiates an action to declare the rights of the parties under the insurance policy; and (B) names the injured person or other claimant as a party to the action.

Therefore, it is evident from a reading of Section (a)(5) that untimely notice of a claim is not, in and of itself, fatal to a claimant's application for coverage. Rather, such untimeliness will only be fatal where material prejudice may be demonstrated to the insurer. Prejudice, in this context, is defined within Section (c)(2) as follows:

(A) In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy.

(B) Notwithstanding subparagraph (A) of this paragraph, an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise.

(C) The insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim. (Emphasis added).

Thus, an insurer is not prejudiced unless the insurer has materially been impaired with respect to its ability to investigate and subsequently defend the claim as raised. Under Subdivision (A), above, as is relevant here given that notice was more than two years after the accident, the burden is upon the insured, i.e., the plaintiff, to prove that the insurer has not been prejudiced.

Plaintiff has, by the affidavit of Robert A. Quattrocci, Esq., dated January 13, 2015, affirmed that plaintiff became aware of the Mercury Insurance policy limit of \$50,000 on September 11, 2012, and that the plaintiff had undergone cervical fusion surgery on June 6, 2013, as a result of injuries sustained in this incident. On August 11, 2014, the plaintiff had been offered the policy limit of \$50,000 to settle her claim yet, to date, has not formally settled this matter.¹ On that same date plaintiff, for the first time, recalled being a named insured on her mother's policy and counsel for the plaintiff submitted a claim with the defendant for such coverage.

Plaintiff, in addition, and in support of her position that the defendant has not been prejudiced, has asserted that the Mercury Casualty Company would be possessed of all relevant information addressing the accident, that the police report has been provided detailing the accident and the offending driver's admissions of liability, and that the plaintiff's medical records are fully available to be reviewed. Plaintiff further consents to submit to any medical examination requested by the defendant. Plaintiff also takes the position that this claim had been asserted well before the expiration of the three year statute of limitations for the initiation of the initial action such that denial of the present relief would be temporally incongruous. Given the distinct policy applications attendant to statute of limitations and notice/prejudice provisions with respect to insurance claims, this court fails to assign such incongruity to the present circumstances.

Here, while recognizing that late notice is not fatal to this claim, it is the finding of this court, under these circumstances, that the plaintiff, as the insured, has failed to demonstrate that the defendant, as the insurer, has not been prejudiced by the two-plus year delay in notifying the insurer of this accident. Defendant's ability to investigate and defend this claim has clearly been adversely and materially impaired by the twenty-five month delay in reporting this accident. It cannot be said that Mercury's investigation into this matter would have been consistent with that conducted by the defendant as their interests are clearly different.

Therefore, upon the foregoing, the plaintiff's motion seeking a declaratory judgment against the defendant directing that defendant provide coverage for underinsured/uninsured motorist is **denied**. Given the foregoing, defendant's cross-motion is **denied** as moot.

Enter.

DATED: January 20, 2015
Syracuse, New York



Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

¹As plaintiff has not yet settled the initial claim, the irrebuttable presumption of prejudice as contained within Section (c)(2)(B) has not been established.