

**Matter of Progressive Advanced Ins. Co. v
Widdecombe**

2016 NY Slip Op 32907(U)

December 8, 2016

Supreme Court, Sullivan County

Docket Number: 2051-2015

Judge: Michael F. McGuire

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This opinion is uncorrected and not selected for official publication.

At an IAS Term of the Supreme Court of the State of New York held in and for the County of Sullivan at the Government Center thereof at 100 North Street, Monticello, New York, 12701, on the 14th day of July, 2016.

PRESENT:

HON. MICHAEL F. McGUIRE
Acting Justice, Supreme Court

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**AMENDED
DECISION & ORDER**

In the Matter of the Petition of
PROGRESSIVE ADVANCED INSURANCE CO.
Petitioner

-against-

Index: 2051-2015

MICHAEL WIDDECOMBE,
Respondent

and

**ROBERT GERMAIN and HARTFORD
UNDERWRITERS INSURANCE CO,**
Proposed Additional Respondents.

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In this proceeding brought pursuant to CPLR article 75, petitioner Progressive Advanced Insurance Company (Progressive) seeks an order of this Court permanently staying arbitration demanded by respondent Michael Widdecombe (Respondent). Progressive also seeks an order adding as additional respondents Hartford Underwriters Insurance Company (Hartford) and Robert Germain (Germain); and a finding that the instant matter involves an intentional

act and therefore would vitiate the uninsured motorist claim. Respondent Michael Widdecombe opposes the petition insofar as it seeks to permanently stay arbitration.

This Court by decision dated January 28, 2016, granted that branch of the petition seeking to add Hartford and Germain and temporarily stayed arbitration subject to further proceedings. The matter was scheduled for an evidentiary hearing to resolve factual issues in this case.

The Court conducted a framed issue hearing on April 19, 2016 and July 14, 2016 to resolve the factual dispute regarding whether the acts of Robert Germain were intentional and, if so, was it the intent of Germain to injure Widdecombe known to Germain at the time of the incident. Progressive first called Michael Widdecombe who testified that on the evening of February 9, 2015 he was at the Fisherman's Net Bar on the corner of 6th and 7th in Pelham, New York, an establishment which the witness visits frequently. He arrived at about 3:30 in the afternoon and ordered a beer but no food. While at the bar he saw Germain. After Widdecombe bought German a drink, the two exchanged small talk for the next several hours. The witness stated that, ultimately, he got up to leave and had not noticed that Germain had already left the bar. As Widdecombe was preparing to leave, a woman entered the bar and reported that someone had fallen outside, whereupon Widdecombe, along with others, went outside to assist the fallen individual, subsequently identified as Germain. Observing that Germain had some relatively minor injuries, Widdecombe had him return to the bar, his face bloodied presumably from the fall. Despite being advised to remain inside the bar while staff tended to his injuries, Germain left after a few minutes, pursued by several employees and Widdecombe. Once outside, Widdecombe observed Germain heading for his vehicle. As Widdecombe watched, Germain crossed the street and opened the door to his car and got into the driver's seat. Widdecombe offered that in an effort to dissuade or even prevent the Germain from operating his car, the witness

leaned into the car with his right foot inside the vehicle and his elbow on the roof of thereof in an effort to grab the keys from the ignition. Germain, according to Widdecombe, was becoming increasingly more agitated at Widdecombe and as the latter attempted to reach for the keys, Germain started the motor, placed the car in drive, and dragged Widdecombe up the road, with his right foot still inside the vehicle.

Widdecombe testified that Germain was fully aware of Widdecombe's presence inside the vehicle because he heard Germain advise that him that he was intent on driving the car and if Widdecombe persisted in his efforts to impede same Germain would cut the witness' leg off. Despite Widdecombe's insistence that Germain stop, it was clear that Germain intended to drive away regardless of the impact that action would have on Widdecombe. After being dragged a distance, Widdecombe ultimately extricated himself from the vehicle, notwithstanding the fact that Germain never stopped. Widdecombe testified that since the incident, he has had some contact with Germain. In fact, a few hours following the incident, Germain returned to the bar and when confronted by Widdecombe, Germain made no response other than to shrug his shoulders. Subsequent to this action Germain entered a plea of guilty to reckless endangerment, stemming from his actions of February 9, 2015.

On cross examination the witness was clear that he never imagined that when he placed his foot inside the vehicle that he would be dragged down the street. He offered that he would not have stepped in front of the car to stop Germain if the vehicle was already rolling. Despite the witness' subjective understanding of Germain's resolve when he followed him outside the bar, he was clearly aware that Germain had gotten into the driver's seat and that he had placed the keys inot the ignition. He knew that he was trying to leave and after the car was running, Widdecombe tried to get out of the car but he was stuck, it all happened so fast that he was unable to get his leg out.

Discussion

It is virtually conceded that the Hartford Insurance Company policy was effectively canceled prior to the subject incident. Hartford provided the Court with documents establishing that the license plates were surrendered voluntarily by Germain and that subsequent to that action the policy was effectively canceled as reflected in the DMV report provided. It was suggested that after cancellation of the Hartford policy, Germain's vehicle was registered and insured in the State of Florida. Documents stipulated to by all parties establish unequivocally that the subject vehicle was insured by GEICO up until December 1, 2014 when that policy was properly cancelled by GEICO. Thereafter, the GEICO policy was reinstated on February 16, 2015 by Germain, establishing that on the date of the subject incident, there was no policy covering the vehicle. Thus, Germain, at the time of the incident, was an uninsured motorist.

Petitioner Progressive had a valid policy with Widdecombe on February 9, 2015 which contained an uninsured motorist provision. Such provision would cover Widdecombe's loss unless the injury he suffered was the result of Germain's intentional act and if the insured was aware of Germain's intention at the time of the incident.

As the Appellate Division, Third Department noted in *Progressive No. Ins. Co. v Rafferty*, (17 AD3d 888 [2005]):

"It is now well settled that there exists 'a narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent.' In such cases, 'the intentional act exclusion applies if the injury is inherent in the nature' of an act when the act is so exceptional that 'cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequences and that since unquestionably the act is intended, so also is the harm'" (*id.* at 889).

Here, the evidence has established that Germain, prior to driving away from the scene, made clear what his intentions were. He advised Widdecombe to remove his foot from the vehicle or he would cut it off; he was agitated and clearly intent on pulling away in his car. Since Widdecombe knew that Germain intended to drive away, his act of placing his foot inside the car, knowing what Germain intended to do, was an intentional act. Widdecombe advances the danger invites rescue doctrine first to distinguish this case from the facts in *Rafferty, supra*, in which there was no rescue by the injured party. In that case, however, the injured party was merely standing on the driveway when Rafferty ran his car into him and the garage door. Counsel for Widdecombe argues that Widdecombe was attempting to stop Germain from operating his vehicle while intoxicated which would imperil all users of the highway and that Widdecombe was the insured under the progressive policy.

Counsel further argues that applying the danger invites rescue doctrine to the instant case to preclude Widdecombe from collecting through his own policy would have a chilling effect on people attempting to save others from danger. He states that this doctrine has been supported and upheld by the Court of Appeals in this state and by each of the four Appellate Divisions. However, this doctrine does not vitiate the standards to be applied in cases where the intentional act exclusion applies, for to do so would render such a clause illusory and expose companies to claims not otherwise contracted for by the parties. Clearly, the legislature has the opportunity to promulgate such a provision whereby each of the parties would be fully aware at the time of contract what would be their respective exposure. Under the current law, if the conclusion that Widdecombe, though acting courageously, did so at his own peril and fully cognizant that Germain was intoxicated and was intent on driving away from the scene – with or without Widdecombe attached to his car – then the acts of Widdecombe must be deemed to have been intentional with respect

to his interaction with Germain and the injuries that flowed therefrom were the direct result of his intentional act.


Accordingly, the Court finds that petitioner's disclaimer based on the intentional act exclusion is proper.

This shall constitute the Decision and Order of this Court. All papers, including the original copy of this Decision and Order, are being filed with the Sullivan County Clerk's Office. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: Monticello, New York

December 8, 2016

ENTER



HON. MICHAEL F. MCGUIRE, AJSC