

Plotkin v Republic-Franklin Ins. Co.
2018 NY Slip Op 33637(U)
January 3, 2018
Supreme Court, Kings County
Docket Number: 3359/11
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January, 2018.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X

CHAYA PLOTKIN,

PLAINTIFF,

- against -

Index No. 3359/11

REPUBLIC - FRANKLIN INSURANCE COMPANY,
AND UTICA MUTUAL INSURANCE COMPANY,

DEFENDANTS.

-----X

The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1-2, 3-5

Opposing Affidavits (Affirmations)_____

6

Reply Affidavits (Affirmations)_____

7

Affidavit (Affirmation)_____

Other Papers_____

Upon the foregoing papers, defendants Republic-Franklin Insurance Company and Utica Mutual Insurance Company (collectively referred to as "defendants") move, pursuant to CPLR §3124, for an order compelling plaintiff Chaya Plotkin to appear for a deposition or, alternatively, seeking an order pursuant to CPLR §2221(d) granting leave

to reargue the Court's order dated March 23, 2016 (J.Bayne) and upon reargument, granting its motion to compel plaintiff to appear for deposition. Plaintiff cross-moves for an order, pursuant to CPLR §3212, for summary judgment dismissing defendants' sixth, seventh, ninth, eleventh, and thirteenth affirmative defenses, and for a judgment against defendants on her causes of action to enforce a \$3.25 million consent judgment pursuant to CPLR §3420(a) against defendants' insured in the underlying action entitled *Chaya Plotkin v Israel Braun and American Pack Sys., Inc.*, Index No. 2333/09 (Sup Ct, Kings County) ("the underlying action").

BACKGROUND

In this action, plaintiff, pursuant to Insurance Law §3420 (a), seeks to recover \$3.25 million from defendants Republic-Franklin Insurance Company ("Republic") and Utica Mutual Insurance Company ("Utica") based on a settlement agreement and resulting consent judgment in the matter of *Chaya Plotkin v. Israel Braun and American Pack Systems, Inc.*, Index No. 2333/09.

The underlying action arises from plaintiff's employment with American Pack Systems, Inc., ("APS") and asserts fourteen causes of action sounding in assault, battery, false imprisonment and sexual misconduct, against APS and its alleged owner, Israel Braun. On March 13, 2009, the defendants disclaimed coverage to their named insured, APS, based on an untimely notice of claim. Thereafter, plaintiff and defendants in the underlying action agreed to settle the underlying action for \$3.25 million. Pursuant to

the settlement agreement, APS conceded liability for the acts set forth in the underlying complaint and pursuant to CPLR §3221 made an offer to compromise in the amount of \$3,250,000. The settlement agreement also provided that after accepting the offer of compromise, plaintiff would submit a judgment against APS only, but agreed that the judgment would not be executed against APS. Additionally, APS assigned to plaintiff all of its right to litigate the validity of the disclaimers. Upon issuance of the judgment, the settlement agreement provided that plaintiff would commence an action against defendants under Insurance Law §3420(a) to collect upon the judgment. Consistent with the terms of the settlement agreement, on December 22, 2010 judgment was entered by the Kings County Clerk pursuant to CPLR §3221.

On February 14, 2011, plaintiff commenced the instant action against defendants pursuant to Insurance Law §3420(a) to recover on the unpaid judgment. Defendants in their joint answer dated March 16, 2011 denied the allegations contained in the complaint and asserted fourteen (14) affirmative defenses. Thereafter, plaintiff moved for summary judgment to dismiss nine of defendants affirmative defenses on the ground that they lacked merit as a matter of law since they related to disclaimer(s)/denial(s) of coverage issued by defendants. The remaining affirmative defenses relating to the reasonableness of the settlement and judgment amount were not addressed by plaintiff's motion. In turn, defendants moved for an order lifting the automatic stay of CPLR §3214 and to compel plaintiff to appear for deposition.

By order dated March 23, 2016 (J.Bayne), plaintiff's motion for partial summary judgment dismissing defendant's First, Second, Third, Fourth, Fifth, Eighth, Tenth, Twelfth and Fourteenth was granted, on the basis that defendants letters of disclaimer were invalid and ineffective as to APS. The Court also denied defendants' motion to compel.

Defendants now move to compel plaintiff to appear for a deposition to determine the reasonableness of the settlement and resulting consent judgment on the grounds that the consent judgment was a product of fraud and collusion, and not a valid judgment resulting from a "determination" by a judge or jury. In the event that the motion is not granted, defendants seek, alternatively, leave to reargue their prior motion to compel which was denied by J. Bayne on March 23, 2016. Plaintiff, by contrast, relying on *Lang v Hanover* (3 NY3d 350, 356 [2004]) asserts that where an insurer disclaims coverage and declines to defend its insured in the underlying lawsuit, it may only litigate the validity of its disclaimer and cannot challenge the liability or damages *determination* underlying the judgment (emphasis added).

DISCUSSION

The Court shall first decide the cross motion since whether or not plaintiff shall be compelled to appear for deposition shall rest upon whether dismissal is warranted.

As a result of the court's March 23, 2016¹ order, defendants' answer now contains five affirmative defenses as to the reasonableness of the \$3.25 million settlement. Based on a review thereof, the Court is unpersuaded by plaintiff's argument that *Lang, supra*, has a preclusive effect on defendants' ability to challenge the reasonableness and validity of the judgment. In *Lang, supra*, unlike the case at bar, the underlying action was still pending and there was no settlement or consent judgment. Since plaintiff has not been deposed regarding defendants remaining affirmative defenses, at a minimum, a question of fact is raised regarding the reasonableness of the settlement.

Additionally, it is well settled that a motion for summary judgment should be denied where the opposing party is entitled to obtain further discovery (CPLR §3212(f)). The Court agrees with defendants that plaintiff's deposition is both material and necessary as to the reasonableness of the \$3.25 million settlement and consent judgment and a determination as to whether or not they were the product of fraud and collusion. Further, the Court is unpersuaded by plaintiff's argument that liability or damages underlying the judgment cannot be challenged, based on the remaining grounds. It is well settled that a judgment entered through fraud, misrepresentation, or other misconduct is a nullity and is subject to collateral attack. (*see, Hernandez v American Transit Ins. Co*, 2 AD 3d 584 [2d Dept.]). In this regard, defendants are entitled to "full disclosure of all matters material and necessary in the prosecution or defense of an action." (*see CPLR*

¹ While the instant case has been assigned to this Court due to Judge Baynes' retirement, the Court shall not consider the portion of the motion relating to re-argument since it cannot speculate as to the basis for the Court's denial of defendants' previous motion to compel.

§3101(a)), Material and necessary information is that which is required to be disclosed because it bears upon the controversy at issue and will assist the requesting party in preparing for trial. (*see*, *M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676). To preclude defendants from deposing plaintiff would be prejudicial and would impair defendants ability to have a full and fair opportunity to prosecute this action since plaintiff's deposition is probative on the issue of actual damages.

Accordingly, it is hereby,

ORDERED that the plaintiff's cross motion is denied without prejudice to renew upon completion of discovery; and it is further

ORDERED defendants' motion is granted to the extent of compelling plaintiff to appear for deposition pursuant to CPLR §3124; and it is further

ORDERED that plaintiff shall appear for deposition on or before April 30 2018, at date, time, and place to be agreed upon by the parties.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. KATHY J. KING

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