

Didio v Progressive Ins. Co.

2019 NY Slip Op 34356(U)

July 2, 2019

Supreme Court, Nassau County

Docket Number: Index No. 614299/18

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. RANDY SUE MARBER

JUSTICE

TRIAL/IAS PART 8

PAUL M DIDIO,

X

Plaintiff,

Index No.: 614299/18
Motion Sequence...01
Motion Date...04/17/19

-against-

XXX

PROGRESSIVE INSURANCE COMPANY,

Defendant.

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, PROGRESSIVE ADVANCED INSURANCE COMPANY i/s/h/a PROGRESSIVE INSURANCE COMPANY ("Progressive"), seeking an order pursuant to CPLR § 3212, dismissing the Plaintiff's Complaint on the grounds that the Plaintiff failed to comply with the conditions precedent set forth in the policy of insurance issued by Progressive, is determined as hereinafter provided.

This is a declaratory judgment action commenced by the Plaintiff, PAUL M

DIDIO (“Didio”), against his insurer, Progressive, for benefits under the Supplemental Uninsured/Underinsured Motorists (“SUM”) coverage provided by a policy of insurance issued by Progressive to the Plaintiff. The Plaintiff seeks SUM coverage for personal injuries allegedly sustained on July 24, 2016, when the Plaintiff, a pedestrian, was allegedly struck by a vehicle owned and operated by Jonathon Swift (“Swift” or the “tortfeasor”).

At the time of the accident, Didio maintained a policy of insurance with Progressive which provided SUM coverage in the amount of \$250,000 each person/\$500,000 each accident (the “Policy”) (*See* Affidavit of Lissette Jimenez, Claims Adjuster for Progressive, annexed to Defendant’s Motion as Exhibit “C”; *see also* Progressive Policy of Insurance, annexed to Defendant’s Motion as Exhibit “D”). Pursuant to the Policy, Didio was required to obtain written consent from Progressive prior to settling his bodily injury claim. Additionally, Didio was required to protect Progressive’s subrogation rights against the tortfeasor, who in this case was Swift.

The Swift vehicle maintained a policy of insurance with GEICO, with policy limits of \$25,000 per person/\$50,000 per accident. Following the subject accident, Didio commenced a personal injury action against GEICO’s insured for the alleged bodily injuries sustained therefrom. During the course of the litigation, the parties reached an agreement to settle Didio’s bodily injury claim for \$25,000, the limits of GEICO’s policy.

It is undisputed that Progressive was not notified of the settlement of Didio’s underlying personal injury claim prior to a general release being executed and delivered to

the tortfeasor's carrier, GEICO (*See Exhibit C*).

GEICO furnished Didio's attorney with a general release for Didio to execute in or about August 2017. On August 23, 2017, Didio executed the general release which released Swift and GEICO "of and from any and every claim, demand, right or cause of action, of whatever kind or nature, on account of or in any way growing out of any and all personal injuries and consequences thereof...from an accident that occurred on or about the 24th of July, 2016...and especially all liability arising out of said accident including, but not limited to, all liability for contribution and/or indemnity." (*See General Release, annexed to Defendant's motion as Exhibit "E", at ¶ 1*). Upon receipt of the General Release, GEICO issued a check to Didio's personal injury attorney, which was cashed on August 25, 2017. Notably, GEICO included the following language on the settlement check:

**In Payment of:
Bodily Injury Coverage
Full/Final settlement of
all claims/liens arising
from mva of 07/24/2016**

(*See Copy of GEICO Settlement Check, annexed to Defendant's Motion as Exhibit "F" [emphasis supplied]*).

It is undisputed that Progressive's first notification of the settlement was by letter dated October 14, 2017 from Didio's attorney wherein Progressive was advised that GEICO had tendered its policy (*See Letter dated 10/14/17, annexed to Plaintiff's*

Opposition as Exhibit “4”). Annexed thereto was a copy of the General Release executed by Didio releasing GEICO from any and all claims arising from the subject accident.

Following its receipt of the General Release, Progressive issued a disclaimer dated October 20, 2017, denying Didio’s claim for SUM coverage on the grounds that Didio failed to obtain permission from Progressive to settle the bodily injury claim and that Progressive’s subrogation rights were prejudiced due to Didio’s breach of the terms of the Policy (*See* Disclaimer Letter, annexed to Defendant’s Motion as Exhibit “G”).

Three months after the GEICO check was negotiated, and only after having received Progressive’s disclaimer letter, on or about November 30, 2017, Didio executed a revised release, which states that it does not release any insurance company from providing certain types of insurance coverage for the accident (*See* Plaintiff’s Opposition at Exhibit “6”). On or about January 9, 2018, Didio’s counsel forwarded the purported “corrected release” to GEICO and Progressive (*See* Plaintiff’s Opposition at Exhibit “7”). The record is devoid of any evidence that GEICO accepted such revised release.

Legal Analysis

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court’s task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its

task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal News*, 211 A.D.2d 626 [2d Dept. 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]).

It is well-settled that “where an automobile insurance policy expressly requires the insurer’s prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy unless the insured can demonstrate that the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement” (*MetLife Auto & Home v. Zampino*, 65 A.D.3d 1151 [2d Dept. 2009], citing, *Matter of State Farm Auto. Ins. Co. v. Blanco*, 208 A.D.2d 933, 934 [2d Dept. 1994]; *Matter of Integon Ins. Co. v. Battaglia*, 292 A.D.2d 527, *supra*; *Matter of State Farm Mut. Ins. Co. v. Lopez*, 163 A.D.2d 390 [2d Dept. 1990]; *Matter of State Farm Mut. Ins. Co. v. Parker*, 160 A.D.2d 882 [2d Dept. 1990]; *State Farm Mut. Auto. Ins. Co. v. Taglianetti*, 122 A.D.2d 40 [2d Dept. 1986]; *cf. Matter of State Farm Mut. Auto. Ins. Co. v. Lucano*, 11 A.D.3d 548 [2d Dept. 2004]; *Friedman v. Allstate Ins. Co.*, 268 A.D.2d 558 [2d Dept. 2000]).

In effectuating a settlement of personal injury claims against a third-party

tortfeasor arising out of a motor vehicle accident, an insured will be held to have prejudiced the subrogation rights of his/her insurer unless he/she establishes by express provision in the release executed to the third-party, or by necessary implication arising from the circumstances of the execution of the release, that the settling parties reserved the rights of the insurer against the third-party tortfeasor or otherwise limited the extent of their settlement to achieve that result (*Weinberg v. Transamerica Ins. Co.*, 62 N.Y.2d 379, 465 [1984]).

Here, Progressive has met its burden. Applying the foregoing law to the instant matter, it is clear that Didio violated a condition precedent of the insurance Policy and thus failed to protect Progressive's subrogation rights. Didio's breach of the insurance contract therefore disqualifies him from receiving the benefits of the Policy.

Moreover, the General Release executed by Didio on August 23, 2017 releasing Swift and GEICO from any and all claims failed to protect Progressive's subrogation rights and is prejudicial. It is undeniable from the General Release and the language on the settlement check that GEICO sought to ensure that such payment was in exchange for a final settlement and disposition of any and all disputes arising from the subject accident. Under these circumstances, if Progressive were required to issue any payment to Didio for injuries resulting from the subject accident and thereafter attempted to commence a subrogation action against Swift, GEICO will rely upon the first General Release executed and furnished by Didio.

Lastly, the second revised or “corrected release” executed by Didio on November 30, 2017 purporting to preserve Progressive’s subrogation rights does not raise an issue of fact. Progressive is still prejudiced by the first executed general release and is further prejudiced by the burden of having to show the validity of the second release (*See State Farm v. Lopez, supra*, (the insured’s failure to obtain the insurer’s written consent before issuing the subject release must be considered prejudicial, where the insurer would have to litigate the scope of the release in any subrogation action brought against the tortfeasor). Thus, the Court finds that, as in *State Farm v. Lopez*, Progressive’s rights were prejudiced as it would have to litigate the validity of the subsequent release in any subrogation action.

Accordingly, it is hereby

ORDERED, that the motion by the Defendant, PROGRESSIVE ADVANCED INSURANCE COMPANY i/s/h/a PROGRESSIVE INSURANCE COMPANY, seeking an order pursuant to CPLR § 3212, dismissing the Plaintiff’s Complaint on the grounds that the Plaintiff failed to comply with the conditions precedent set forth in the policy of insurance issued by Progressive, is **GRANTED**, and the Plaintiff’s Complaint is **DISMISSED**.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
July 2, 2019


Hon. Randy Sue Marber, J.S.C.
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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE