

McLaughlin v Arch Ins. Co.

2020 NY Slip Op 30955(U)

April 5, 2020

Supreme Court, New York County

Docket Number: 161034/2013

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE
Justice

PART 15

MICHAEL McLAUGHLIN, and
MARIA PACHECO,

INDEX NO. 161034/2013
MOTION DATE
MOTION SEQ. NO. 007-009

v.

ARCH INSURANCE COMPANY, and
ARCH SPECIALITY INSURANCE COMPANY

MOTION CAL. NO.

The court consolidates motions 7-9 for disposition.

Background

On July 20, 2005, plaintiff, Michael McLaughlin, commenced a personal injury action because of injuries he sustained while working as an electrician at Shea Stadium. Plaintiff sued Sterling Mets, L.P. (“Sterling”) alleging that it violated New York’s Labor Law. On May 2, 2007, Sterling tendered the complaint for defense and indemnity to defendant Arch Insurance Company (“Arch Primary”) and Arch Specialty Insurance Company (“Arch Specialty” or “defendant”) as an additional insured under policies issued to Petrocelli, Sterling’s general contractor. Both Arch Primary and Arch Specialty declined coverage.

Plaintiffs were awarded a \$3.85 million dollar judgment in 2012 in the underlying personal injury action. After the judgment, plaintiff and Sterling entered into a settlement agreement in which Sterling agreed to satisfy the judgment in part and assigned to plaintiff its rights against Arch Primary and Arch Specialty. Also, as part of that settlement, Sterling released its third party claims against Petrocelli, in exchange for a \$175,000 payment.

On September 3, 2013, plaintiff commenced a declaratory judgment action against Chartis, Sterling’s own insurance plan (“the Chartis Action”). The parties settled the Chartis

action with Chartis paying \$2.4 million, and assigning its rights against Arch Primary to plaintiff. By partial satisfaction of judgment, dated August 18, 2014, plaintiffs acknowledged that the Judgment in the Underlying Action had been partially satisfied, in the amount of \$3,575,000 with the sum of \$275,000 remaining outstanding. Arch Primary paid the last \$275,000 on July 15, 2019. Thus, the underlying judgment of \$3.85M is fully paid (\$175k + \$1M+\$2.4M + \$275k).

Meanwhile, on November 26, 2013, while the Chartis action was pending, plaintiff commenced this action against Arch Primary and Arch Specialty, as Sterling's assignees. At the time, the coverage dispute centered on whether Sterling was an additional insured under both Arch Primary and Arch Specialty's policies. When plaintiff settled with Arch Primary, in April 2019, the case then proceeded against Arch Specialty as the only remaining defendant. Right before trial, defendant made a motion "*in limine*" (motion no. 7). After the jury trial, commencing in May of 2019, the jury determined that Sterling was, in fact, an additional insured under the policy. Defendant then made a motion for a JNOV (motion no. 8) that largely mimicked its motion *in limine*. Plaintiff then appears to have made a motion for a money judgment (motion no. 9). The court decides all three motions as follows.

Motion Seq. No. 7

The court denies motion number 7 as it is a motion for summary judgment disguised as a motion *in limine*, and, therefore, the court cannot address the merits (*see Cullity v Posner*, 143 AD3d 513 [1st Dep't 2016]). Moreover, defendant had the chance to make these arguments at the summary judgment phase, but failed take the opportunity. To the extent it appears the court limited damages to \$175,000 right before trial, that decision was incorrect because it relied on a misunderstanding for the reason plaintiff sought the amounts it did. The court mistakenly

thought that plaintiff was seeking indemnity only for the underlying judgment's principal, rather than other types of payment, such as post judgment interest or defense costs.

Motion Seq. # 8 and 9

After the jury rendered its verdict that Sterling was an additional insured, Arch Specialty made this motion (seq. no. 8) for JNOV on the grounds that the underlying judgment is not enough to reach Arch Specialty's Commercial Excess Umbrella policy. Arch Specialty argued that not all underlying insurance has been exhausted. While that motion was being briefed, plaintiff discontinued the action against Arch Primary (See EDOC 200).

As the jury was not tasked with deciding damages, the court cannot understand why Arch Specialty would move for JNOV, especially as Arch Specialty gives no reason for the court to set aside the jury's finding that Sterling was an additional insured. Therefore, the court will deem this motion one to limit damages as a matter of law based on priority of coverage.

1. Defense costs

There is no dispute that Arch Primary's policy covered Sterling as an additional insured on the primary level. The jury has found that Sterling was, in fact, an additional insured. Therefore, the same finding applies to Arch Specialty's policy that sits above Arch Primary. This is, thus, a dispute between an insurer and its additional insured. Accordingly, the cases Arch Specialty cites (which are between insurance companies) are inapplicable.

The Arch Specialty policy provides:

We will have the right and duty to defend the insured against any 'suit' seeking those damages when the "underlying Insurance" does not provide coverage or the limits of "underlying insurance" have been exhausted.
(emphasis supplied)

The Arch Specialty policy defines "underlying insurance" at paragraph 24 of the definitions section. It states:

“Underlying Insurance” means any policies of insurance listed in the declarations under the schedule of underlying insurance.

The only policy listed in Arch Specialty’s schedule of underlying insurance is the Arch Primary policy.

Sterling demanded a defense, and indemnity, from both Arch Primary and Arch Specialty. Both declined coverage. This declination was the wrong decision, because ultimately Sterling deserved coverage as an additional insured. On a primary policy, the duty to defend runs from the time the underlying action commences. To trigger Arch Specialty’s duty to defend one of two things needed to occur: (1) the underlying insurance “does not provide coverage,” or (2) the underlying policy becomes exhausted.

Here, Arch Primary refused to provide defense costs from the get go. At that point, due to the language “does not provide coverage,” Arch Specialty’s duty to defend attached (*see IMG Worldwide, Inc v Westchester Fire Ins. Co.*, 572 Fed Appx 402, 410-411 [6th Cir. 2014] [interpreting identical policy language, court held “Westchester breached the Policy when it refused to provide a defense despite IMG’s specific demand after the underlying insurance, Great Divide, refused to provide a defense.”]). Again, this is not a dispute between insurance companies. It is a dispute between an insured’s assignee and an insurance company. Therefore, Arch Specialty is not without remedy. It can sue Arch Primary for reimbursement. For some reason it has chosen not to follow that course.

Plaintiff has demonstrated that Sterling paid a total of \$261,765.35 in defense fees and costs in the underlying action. Arch Specialty has not contested this amount. Accordingly, Arch Specialty owes \$261,765.35 with 9% interest from April 19, 2009, a reasonable mid point date.

2. Post Judgment Interest

Arch Specialty is also liable for post judgment interest. The Supplementary Payments provision in the policy states, “when the duty to defend exists,” there is coverage for:

All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court the part of the judgment that is within the applicable limits of insurance.

The Arch Primary policy is exhausted at this point. Arch Specialty is therefore next on the hook for post judgment interest (*see Ragins v Hospitals Ins. Co.*, 22 NY3d 1019, 1022 [2013]; *RLI Ins. Co., v Navigators Ins. Co.*, 172 AD3d 475, 476 [1st Dep’t 2019]). Again, to the extent that Arch Specialty believes this should be the responsibility of a different insurance company, it is free to pursue those claims, but perhaps in a separate case. This one is not only post discovery, but post jury verdict as well (*see BP Air Conditioning Corp., v One Beacon Insurance Group*, 8 NY3d 708, 716 [2007])[Supreme Court correctly concluded that because none of the other insurance carriers are parties to this declaratory judgment action and no other relevant policies have been submitted, the priority of coverage cannot be determined]; *see also Turner Const. Co, v Kemper Ins Co.*, 341 Fed. Appx 684; 2009 WL 2143215 at *2 [2d Cir. July 16, 2009; *cf Paramount Ins. Co., v Federal Ins., Co.*, 174 AD3d 476 [1st Dep’t 2019]).

Here, although Arch Specialty has submitted the relevant insurance policies, given that Arch Specialty’s schedule of underlying insurance only lists Arch Primary’s policy, the procedural posture of this case, and that Arch Specialty has not proceeded against the other insurers, it is appropriate to rule in plaintiff’s favor now. Thus, Arch Specialty is liable for post judgment interest as follows:

The underlying judgment in the amount of \$3,850,000 was entered on September 10, 2012. Sterling satisfied \$1,175,000 of the judgment amount on October 12, 2012. Arch Specialty therefore owes interest at 9% for 32 days = \$9,271.00.

Arch Primary paid the remaining \$275,000 left on the judgment on July 15, 2019. Arch Specialty is therefore responsible for interest for 6 years and 308 days = \$169,385.00.

However, defendant need not cover interest on the \$2.4 million that AIG paid on September 30, 2014. Plaintiff cannot have it both ways. It cannot, on the one hand, insist that the other insurance policies are part of a different dispute, when the policy language is in defendant's favor, and then try to recover from defendant for interest on payments those other insurance companies made. Plaintiff has not put the other policies in front of the court and has not argued that limits on those other policies were or were not reached. If plaintiff insists that defendant should go after the other insurers for reimbursement, then plaintiff can seek post judgment interest that might be those other insurance companies' responsibility in that proceeding as well. Therefore, plaintiff has failed to meet its burden to show that Arch Specialty must pay post judgment interest on \$2.4 million.

3. Indemnity

Plaintiff claims that Arch Specialty needs to provide reimbursement for Sterling pursuant to insurance law § 3420 for "indemnity coverage to reimburse Sterling for its payment made to plaintiff's (see EDOC 206, plaintiff's affirmation in opposition to defendant's JNOV motion). Plaintiff, in paragraph 32 of EDOC 206, claims "Arch Specialty owes Sterling the principal amount of \$625,000." The court is not able to follow plaintiff's argument. If the limits on Arch Primary's policy was \$1,000,000 and Sterling, the insured, paid \$1,175,000 to plaintiff, then the only amount of indemnity that plaintiff can recover from Arch Specialty on the excess level, is

\$175,000. Plaintiff has argued repeatedly that Arch Primary is the only underlying insurance listed on Arch Specialty's schedule and that is why plaintiff can claim defense costs and post judgment interest. Plaintiff cannot now turn around and ask for reimbursement for what Sterling paid through USF&G, a different insurer. That is for another day and a different lawsuit. Arch Specialty does, however, owe interest at 9% on the \$175,000 from October 12, 2012, the date Sterling paid, until July 15, 2019, the date Arch Primary made its payment.

Accordingly, it is

ORDERED THAT the court denies defendant's motion in *limine* (motion no. 7); and it is further

ORDERED THAT the court denies defendant's motion for judgment notwithstanding the verdict (motion no. 8) that the court has deemed a motion to fix damages as a matter of law; and it is further

ORDERED THAT the court grants plaintiff's motion for a money judgment (motion no. 9) in part as follows:

- a. \$261,765.35 with statutory interest from April 19, 2009 (representing defense costs);
- b. \$175,000 plus statutory interest from October 12, 2012 until July 15, 2019 (representing indemnity);
- c. \$169,385.00 (representing statutory interest on \$275,000 for 6 years and 308 days);
- d. \$ 9,271.00 (representing 9% interest for 32 days on \$1,175,000);

The clerk is directed to enter judgment accordingly.

Dated April 5, 2020



