

Bahnuk v Countryway Ins. Co.
2021 NY Slip Op 32052(U)
September 28, 2021
Supreme Court, Broome County
Docket Number: EFCA2019000970
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 8th day of July 2021, by Microsoft Teams.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

PAUL BAHNUK,
Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2019000970

COUNTRYWAY INSURANCE COMPANY,
Defendant.

APPEARANCES:

Counsel for Plaintiff:

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EUGENE D. FAUGHNAN, J.S.C.

Plaintiff Paul Bahnuk (“Bahnuk”) has filed a motion seeking summary judgment on the basis that Defendant Countryway Insurance Company (“Countryway”) failed to properly disclaim coverage pursuant to Insurance Law § 3420(d)(2), and that he obtained a judgment against Countryway’s insured, for which Countryway is now responsible. Countryway opposes Bahnuk’s motion and has filed its own cross-motion seeking summary judgment and dismissal of the complaint. For the reasons set forth below, Bahnuk’s motion is denied, and Countryway’s cross-motion is also denied.¹

BACKGROUND FACTS

The injuries in this case date back nine and a half years. The matter was previously before the Court on a motion to dismiss filed by Countryway and a cross-motion of Bahnuk for summary judgment. In a Decision and Order dated July 27, 2020, the Court denied both motions.

The Court will briefly summarize the pertinent facts. On March 6, 2012, Bahnuk was working as a paramedic and sustained injuries while responding to a call at 42 Tremont Avenue in Binghamton, NY. The premises were owned by Pauline Williams, who had a homeowner’s policy with Countryway, with coverage effective from June 12, 2011 to June 12, 2012. Bahnuk sued Williams in Supreme Court in Broome County (Index No.: CA2013006424) for his injuries, and Countryway informed Williams that this was not a covered incident because Williams was not living at the premises, and secondly, because she was using the premises as rental property. Due to those facts, Countryway informed Williams that it did not believe the incident was a covered loss, and further, that Countryway would not be providing her with a defense of the action. Williams was thus required to defend the action herself without any insurance carrier. Williams ultimately signed a Confession of Judgment to Bahnuk for \$100,000 and a Judgment was entered in the County Clerk’s Office in January 2019.

¹ All the papers filed in connection with the motion and opposition/cross-motion are included in the NYSCEF electronic case file, and have been considered by the Court.

Bahnuk filed this case alleging that he has a direct cause of action under Insurance Law § 3420 (a)(2), which permits an injured party to bring a direct action against an insurer after that injured party has obtained a judgment against the insured. Bahnuk points to the judgment against Countryway's insured (Williams), which remains unsatisfied for at least 30 days. This gives him the right to pursue the direct action against the insurance carrier. He further claims that Countryway is precluded from raising any defenses because it did not provide him with a valid disclaimer.

Countryway claims it cannot be held responsible because the Judgment in the underlying action between Bahnuk and Williams was obtained by collusion in order to make Countryway ultimately pay the judgment. Countryway also continues to argue that it properly disclaimed coverage because Williams not living at the premises and was renting out the premises.

In the Court's earlier Decision and Order, which was prior to completion of discovery, the Court concluded that Countryway had not established collusion in the underlying judgment based upon documentary evidence (which was all the Court could consider on a motion to dismiss), and had not clearly shown that there should be no coverage for this incident. The Court also denied Bahnuk's motion for summary judgment motion and noted that discovery should be completed regarding whether any notice of the disclaimer was given to Bahnuk.

The primary issues between the parties at this point are: whether the resulting judgment in the underlying case between Bahnuk and William was the result of collusion so that the judgment should not bind Countryway under Insurance Law § 3420(a)(2); whether Countryway provided proper notice to disclaim to the injured party; whether the Tremont Ave location was Williams' residence such that Countryway is responsible for coverage for this accident; and whether rental of the premises excludes coverage.

BAHNUK'S CURRENT MOTION FOR SUMMARY JUDGMENT

Bahnuk's argument for summary judgment consists of two parts. One is based on the direct action against the insurance company, supported by the underlying judgment against Williams, where liability and damages has already been determined. The other is based on Countryway not being able to claim any exclusions apply because it failed to give sufficient notice of the disclaimer to Bahnuk.

When seeking summary judgment, “the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact.” *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); see *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff’d as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. “When faced with a motion for summary judgment, a court’s task is issue finding rather than issue determination (see, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact.” *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000); see, *Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

Pursuant to Insurance Law § 3420(a)(2), “an injured claimant has a direct cause of action against an insurer only after the injured claimant first obtains a judgment against the insured.” *Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co.*, 74 AD3d 1751, 1754 (4th Dept. 2010) citing *Lang v. Hanover Ins. Co.*, 3 NY3d 350 (2004); *Catskill v. Kemper Group-Lumbermen’s Mut. Casualty Co.*, 111 AD2d 1011, 1012 (3rd Dept. 1985); *John v. Centennial Ins. Co.*, 91 Ad2d 1104(3rd Dept. 1983). Specifically, that section provides “that in case judgment against the insured ... in an action brought to recover damages for injury sustained ... during the life of the

policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of the notice of entry or judgment upon the attorney for the insured ... then an action may ... be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.”

Bahnuk has made a *prima facie* showing of entitlement to summary judgment under Insurance Law § 3420(a)(2), by submitting evidence of the underlying action and judgment against Williams. The action was commenced in Broome County, and Williams was represented by an attorney. The Court conducted pre-trial conferences with the parties, and it appears that several conferences were re-scheduled due to the non-appearance of Williams’ attorney. Eventually, the parties agreed to Williams signing a Confession of Judgment, which Bahnuk claims gave fair consideration of the risks to both sides in continuing the litigation. He argues that the resolution was the result of valid, good-faith negotiations. Based on this evidence, the Court concludes Bahnuk has made a *prima facie* showing by establishing the existence of the underlying judgment against Williams, the expiration of the 30 days since notice of entry of that judgment, and the existence of a valid contract of insurance between Williams and Countryway.

Similarly, Bahnuk has made a *prima facie* showing that Countryway is precluded from relying on any exclusions from coverage. There is no dispute that the incident occurred within the effective coverage dates of the insurance policy and occurred at the premises listed on the contract. It is also apparent that Countryway’s disclaimer was not based on a “lack of inclusion” but was based on an “exclusion” from coverage. Accordingly, a timely disclaimer was required pursuant to Insurance Law § 3420(d). *Markevics v. Liberty Mut. Ins. Co.*, 97 NY2d 646 (2001). If the insurer denies coverage or disclaims liability in a case involving bodily injury, it must give written notice “as soon as reasonably possible ... to the insured and the injured person or any other claimant.” Insurance Law § 3420(d) (emphasis added). This rule “is meant not only to protect the insured but is also intended to aid injured parties in attaining prompt compensation.” *Associated Mut. Ins. Co. v. Samicaban, Inc.*, 178 AD2d 883, 885 (3rd Dept. 1991), *citing Allstate Ins. Co. v. Gross*, 27 NY2d 263 (1970). Furthermore, “[t]he notice of disclaimer must promptly apprise the claimant with a *high degree of specificity* of the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully.” *Gen. Acc. Ins. Group v. Cirucci*, 46

NY2d 862, 864 (1979) (emphasis added); *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778 (3rd Dept. 2004), *aff'd* 5 NY3d 467 (2005); *John v. Centennial Ins. Co.*, 91 AD2d at 1105. The insurer is “strictly limited to those grounds stated in the notice of disclaimer.” *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778, 781, quoting *2540 Assocs. v. Assicurazioni Generali, S.P.A.*, 271 AD2d 282, 284 (1st Dept. 2000); *General Acc. Ins. Group v. Cirucci*, 46 NY2d 862. If the insurer fails to include an exclusion in its disclaimer letter, the insurer waives its right to rely on that ground. *General Acc. Ins. Group v. Cirucci*, 46 NY2d at 864; *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 58 AD3d 990 (3rd Dept. 2009); *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778; *Kokonis v. Hanover Ins. Co.*, 279 AD2d 868 (3rd Dept. 2001).

In the present case, following the March 6, 2012 incident, Countryway sent a 6 page letter to Williams on April 5, 2013, whereby it disclaimed coverage on two grounds. The first basis was that Williams did not live at the Tremont Ave premises and therefore, it was not a “residence premises” under the insurance contract. The second reason given was that Williams was renting the premises to another person, and there was no coverage for incidents arising out of a business on the property.

Notably, Countryway chose not to defend Williams in the underlying action instead of providing a defense with a reservation of rights. An insurance carrier’s duty to defend is broader than the duty to indemnify (*Seaboard Surety Co. v. Gillette Co.*, 64 NY2d 304 [1984]), and if the insurance carrier declines to defend, it does so at its own peril that the results of the underlying action may not be as favorable as the carrier would like.

Countryway also contacted Plaintiff’s attorneys on March 29, 2013 to obtain a copy of the affidavit of service of the summons and complaint against Williams, and thus, was aware of the claim and the Plaintiff’s attorneys. Countryway cannot argue that it was impossible to provide the disclaimer to the injured party. Subsequently, on April 10, 2013, Countryway sent a letter to Plaintiff’s counsel stating “there is no coverage available for the above referenced date of loss ... The premises ... does not meet the definition of an ‘insured location’ within the meaning of the policy.” The letter did not explain how or why the Tremont Avenue residence was not an “insured location” and did not make any mention of a specific exclusion in the policy. In response, Plaintiff’s counsel wrote to Countryway on April 15, 2013 and noted that the date of loss was within the coverage dates for this policy, so the disclaimer did not seem to make sense. In a reply letter of the same date, Countryway acknowledged that the policy was effective on the

date of the accident, but “coverage under that policy is specifically excluded for this loss based upon the circumstances of the loss and the policy language.” Again, this denial letter did not explain how or why the loss was excluded, nor did it make any reference to any facts to justify exclusion other than “based upon the circumstances of the loss.” As the Court of Appeals has observed, the failure of the insurance company to provide specifics as to the reason for a denial “could prejudice the claimant’s ability to ultimately obtain recovery.” *Gen. Acc. Ins. Group v. Cirucci*, 46 NY2d at 864.

When an insurer disclaims liability, it is required to provide written notice to the insured or injured person. Insurance Law § 3420 (d)(2). Thus, both Williams and Bahnuk were entitled to the written notice of disclaimer. The disclaimer provided to Bahnuk lacked the required high degree of specificity. That fact is manifestly evident from a review of the two letters sent to Bahnuk, which provide very few details or explanation, and the juxtaposition of those two vague letters to the detailed letter provided to Williams. Contrary to Countryway’s argument, the injured party is not entitled to any lesser specificity than the insured. *John v. Centennial Ins. Co.*, 91 AD2d 1104. Countryway has not provided any persuasive argument for a contrary conclusion, and the rationale for detailed specific disclaimers to insureds is equally applicable to an injured party. It is also important to point out that the Court of Appeals in *Gen Acc. Ins. Group* did not use the term “insured” when discussing the high degree of specificity required in a disclaimer, but used the term “claimant”, which is not limited to just an insured, but would include anyone who could maintain a claim, including an injured party.

The Court concludes that Countryway did not provide sufficient notice of its disclaimer to the injured party Bahnuk, and accordingly, it has waived its rights to rely on those grounds. *See, John v. Centennial Ins. Co.*, 91 AD2d 1104. The *John* case is factually similar and particularly persuasive. In that case, the injured plaintiffs were struck by a boat owned by the defendant’s insured. The insurance company informed its insured that the type of boat involved in the accident was excluded from coverage, but it never sent written notice of its disclaimer to the injured parties. The underlying personal injury case proceeded to trial with plaintiffs receiving a verdict and judgment against the defendant landowner. Plaintiffs then filed a direct action against the insurance company, which answered, setting forth the exclusion in the policy as an affirmative defense, and also raising a question of whether the underlying judgment was fraudulently obtained. The trial court granted summary judgment to plaintiffs on the grounds

that the insurance carrier failed to give written notice of disclaimer to the injured parties and the Third Department affirmed. The same facts are present in the instant case—a detailed disclaimer was provided to Williams but not to Bahnuk. Accordingly, Countryway cannot now avoid responsibility based on a disclaimer.

Thus, the burden is shifted to Countryway to submit proof in admissible form to create a triable issue of fact. Countryway attempts to do that first by questioning the validity of the underlying Confession of Judgment and second, by arguing it issued a proper disclaimer of coverage.

Countryway has submitted deposition transcripts of Plaintiff, conducted on March 11, 2021 and Jason Hubicki, Esq. (Williams' attorney), conducted on March 20, 2011, as well as affidavits of Williams, and Christine Wesko, the tenant at the Tremont Avenue address. Hubicki was previously employed at a firm that handled matters for Williams' union and he became involved in the underlying action sometime in 2012. The firm dissolved, but Hubicki agreed to continue handling the case for Williams without being paid, with the expectation being that he would not come to Broome County for trial. Hubicki had negotiations with Bahnuk's attorneys and eventually agreed to the Confession of Judgment that Williams signed. He did not recall conducting any discovery in the case, but felt Bahnuk's injuries justified the \$100,000 amount because Bahnuk had undergone surgery and missed substantial time for work. He was also aware that Williams would likely have difficulty defending the case in Broome County and probably did not have the money to hire another attorney. He also testified that Williams did not want to have to sell the property. He also stated that the parties signed a stipulation to be filed with the Confession of Judgment. The stipulation provided that Bahnuk would not seek to collect on the judgment against Williams while his claim against Countryway was pending, and that Bahnuk would file a satisfaction of judgment at the conclusion of the direct action against the insurance carrier. Hubicki was also generally aware that Bahnuk's attorneys would be using the Confession of Judgment to initiate some action against the insurance carrier.

Ms. Wesko supplied an affidavit in which she affirmed the statements she made in a telephone interview with the insurance carrier in March 2013. This affidavit was apparently submitted to eliminate some concerns raised in the Court's July 2020 Decision and Order about the admissibility of the unsworn telephone interview transcript, and the lack of information about the amount of rent. In the affidavit, Ms. Wesko stated she was paying \$1,300 per month in rent

to Williams (which would be in excess of the amount in the policy that would trigger the business exclusions).

Ms. Williams also supplied an affidavit where she stated that she was living and residing in Brooklyn in March 2012 and had been so for several years. This would support a defense that the Tremont Avenue property was not a residence premises as defined in the policy. Williams also stated that she could not get another attorney to handle the case for her, and knew Mr. Hubicki could not completely represent her in the case in Broome County. The affidavit also averred that “[a]s a result, we did not fight the lawsuit and I agreed to a confession of judgment for \$100,000 as requested by Mr. Bahnuk and his lawyer in return for an agreement that I would never have to pay any portion of the judgment.”

Countryway claims this evidence establishes collusion between Bahnuk and Williams, whereby she agreed to accept liability, but would never have to pay the amount. Instead, Bahnuk would attempt to collect through the insurance carrier. Further, Countryway contends that the evidence supports its disclaimer because the evidence shows Williams did not reside at the Tremont Avenue premises and the amount of the property rental would exclude it from coverage.

Where a judgment was the product of collusion and “offends ... a sense of justice and propriety [it] cannot be condoned.” *Bond v. Giebel*, 101 AD3d 1340, 1343 (3rd Dept. 2012). Countryway points to multiple circumstances that it claims prove the underlying judgment was the product of collusion. There was no meaningful discovery or motion practice in the underlying action, and save for a few settlement conference (several of which were not even attended by Williams or her attorney), there was little activity in the litigation. In addition, the Confession of Judgment was for \$100,000, the exact amount of Countryway’s insurance policy. The settlement stipulation provided that Bahnuk would file a Satisfaction of Judgment when the action against Countryway was concluded, and that Bahnuk would not attempt to enforce the judgment during the pendency of the current action. In effect, it removed any financial risk to Williams.

The Court concludes that the evidence submitted by Countryway raises a triable issue of fact with respect to the validity of the underlying judgment. There are facts which call into question whether the Confession of Judgment was executed in order to shift the potential liability from Williams to Countryway. The current action against the insurance carrier must be based on a valid and enforceable judgment. The circumstances in this case show there is some possibility

that settlement in the underlying matter may have been reached to pass liability from the insured to the insurance carrier. Therefore, Plaintiff's motion for summary judgment must be denied because there is a question of fact concerning the *bona fides* of the underlying judgment.

However, the Court also concludes that Countryway failed to properly disclaim and cannot use those exclusions to escape responsibility.

COUNTRYWAY'S CROSS-MOTION FOR SUMMARY JUDGMENT

In addition to opposing Bahnuk's motion for summary judgment, Countryway also seeks summary judgment in its favor. First, Countryway argues that the Confession of Judgment was a product of collusion, and therefore, cannot form the basis of this direct against the insurance carrier. Although the Court concluded above that Countryway had rebutted Bahnuk's entitlement to summary judgment by raising a question of fact as to the motive for the Confession of Judgment and validity of the underlying judgment, the evidence supplied by Countryway does not establish there was collusion as a matter of law. Rather, it simply raises a question as to whether the resolution of the Bahnuk/Williams lawsuit was the result of collusion that cannot support insurer liability under Insurance Law § 3420(a)(2). In effect, all settlements have a degree of "collusion" in that both sides agree to the terms. Not all settlements offend notions of fairness and justice. Even though Countryway points to circumstances it claims constitute irregularities calling into question the settlement, Countryway has proffered no independent evidence as to the true value of the underlying claim. In order to substantiate its position, Countryway would have to produce some evidence that the amount or terms of the judgment is not reasonable. The fact that Williams would not incur personal liability is a factor to be considered. However, if, in fact, the negotiated settlement and judgment was a fair and just resolution, Countryway has no basis to argue collusion. Even if Bahnuk agreed not to pursue collection against Williams, it does not necessarily follow that the underlying judgment is not appropriate or enforceable. In fact, the judgment for \$100,000 may be entirely appropriate. Since Countryway has not produced any evidence as to the proper amount of damages, it has not made a *prima facie* showing of an entitlement to summary judgment on the basis of collusion.

Countryway also seeks summary judgment on the basis that the notice of disclaimer provided to Bahnuk was sufficient, and that even if it was not sufficient, Bahnuk must prove that

the policy covered this incident. The Court has already found above that the notice was not sufficient, and that defect precludes Countryway from relying upon those exclusions. Contrary to Countryway's position, Bahnuk does not have to prove coverage or that the incident should have been covered, because Countryway is precluded from defending on those grounds. Therefore, the Court need not give further consideration to Countryway's arguments supporting a disclaimer.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Bahnuk's motion for summary judgment is DENIED, and it is further

ORDERED, that Countryway's motion for summary judgment is DENIED, and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on OCTOBER 27, 2021 AT 2:00 PM, which will be conducted virtually, by Microsoft Teams. Chambers will provide the link for the parties to join the conference.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 28, 2021
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice