

Preferred Mut. Ins. Co. v Emrich

2021 NY Slip Op 33817(U)

April 13, 2021

Supreme Court, Chenango County

Docket Number: Index No. 2020-5264

Judge: Joseph A. McBride

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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 Chenango County Courthouse, Norwich, New York, on the 29th of January 2021.

PRESENT: HON. JOSEPH A. MCBRIDE
STATE OF NEW YORK
SUPREME COURT : CHENANGO COUNTY

PREFERRED MUTUAL INSURANCE COMPANY

Plaintiff,

-vs-

ALLEN R. EMRICH, individually and d/b/a ARE BUILDERS; TAMMIE S. EMRICH, individually and d/b/a ARE BUILDERS; MARTIN L. LOGSDON, SR., as administrator of THE ESTATE OF MARTIN L. LOGSDON, JR.; and CATENA UNLIMITED, LLC d/b/a LAKE STREET LANES

Defendant(s).

DECISION AND ORDER

Index No. 2020-5264

APPEARANCES:

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Catena Unlimited d/b/a Lake Street Lanes, SRL (did not appear)

JOSEPH A. MCBRIDE, J.S.C.

The case at hand follows a complaint by Plaintiff, Preferred Mutual Insurance Company (“Preferred Mutual”) seeking a declaratory judgment that Preferred Mutual has no duty to defend or indemnify Defendants, Allen R. Emrich individually and d/b/a ARE Builders and Tammie S. Emrich, individually and d/b/a ARE Builders (collectively “Defendants Emrich”) under the Umbrella Policy for any claims that may be asserted against Defendants Emrich by Defendants Martin L. Logsdon Sr., as administrator of the Estate of Martin L. Logsdon Jr. (“Defendants Logsdon”) or Defendants Catena Unlimited LLC d/b/a Lake Street Lanes (“Defendants Catena”) as a result of a October 19, 2019, accident. On this motion, Preferred Mutual seeks summary judgment pursuant CPLR §3212 against Defendants Emrich and Defendants Logsdon and a default judgment against Defendants Catena. Defendants Logsdon each a response in opposition. Neither Defendants Emrich nor Defendants Catena submitted opposition to said motion. Court received and reviewed said motions and decided; as discussed below.¹

BACKGROUND FACTS

Defendants Emrich secured an umbrella insurance policy from Preferred Mutual effective December 18, 2018 through December 19, 2019. On October 19, 2019, there was a car accident in Columbus, New York in which Allen Emrich, when operating his motor vehicle struck and killed Martin L. Logsdon, Jr., who was riding a bicycle. On the night of the accident, Mr. Emrich left the Lake Street Lanes Bowling Alley, owned by Defendant Catena and drove home. At the time of the accident, he was intoxicated and traveling at a high rate of speed. On July 31, 2020, Mr. Emrich pled guilty to Vehicular Manslaughter in the Second Degree, a class D Felony, and Operating a Motor Vehicle Under the Influence of Drug or Alcohol, an unclassified misdemeanor. When Mr. Emrich pled guilty, he admitted that at the time of the accident, he was operating his motor vehicle in an intoxicated condition at a rate of speed of 98 miles per hour when he struck Mr. Logsdon Jr., who was operating his bicycle and this action did cause the death of Mr. Logsdon Jr. Mr. Emrich admitted that he consumed alcohol at the Bowling Alley,

¹ All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

got in his vehicle, drove home, and his BAC was .14 at the time of the accident. Mr. Emrich’s relevant umbrella policy contained a coverage exclusion paragraph that excluded coverage for personal injury resulting from a criminal act of the insured. Preferred Mutual learned of the accident on October 21, 2019 and on October 29, 2019 sent a letter denying coverage.

On July 31, 2020, Preferred Mutual filed this current suit for declaratory judgment claiming they have no duty to defend or indemnify Defendant s Emrich under the umbrella policy, because the accident was a result of Mr. Emrich’s criminal acts, which unambiguously excludes coverage. Both Defendants Emrich and Defendants Logsdon filed respective answers to the claim. Defendant Catena has yet to answer or appear in this action. On December 10, 2020, Preferred Mutual filed this current motion for summary judgment pursuant §3212 seeking judgment as a matter of law against Defendants Emrich and Defendants Logsdon as well as a motion for default judgment against Defendant Catena. Defendant Logsdon submitted opposition thereto, Defendant Emrich take no position on the issue. The matter was scheduled for oral argument on January 29, 2021. Subsequently, parties were given additional time to submit additional submissions, with the final submission received by the Court on February 5, 2021.

In support of the motion, Preferred Mutual argued that they should receive judgment as a matter of law as this is a straightforward case based on an unambiguous reading of the contract and therefore, judgment should be determined by the Court at this stage of the proceeding. In opposition, Defendants Logsdon argued that the motion for summary judgment is premature as the parties have not conducted any discovery as of yet, and parties are entitled to discovery because “what if” the accident and ultimate death was not caused by the criminal conduct. The Court considered the arguments and relevant controlling law and decided as described below.

LEGAL DISCUSSION AND ANALYSIS

Summary Judgment

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking

summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 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 [Ct. of App. 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. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). Mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, 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 (Ct. of App. 2012).

Case law depicts that “construing an unambiguous contract is a function of the court, rather than a jury” where “the Court must give a plain and unambiguous provisions their ordinary meaning.” United Specialty Ins. Co. v. Barry Inn Realty, Inc., 130 F. Supp. 3d 834, 838 (USDC for SDNY 2015); citing Teitelbaum Holdings, Ltd. V. Gold, 48 NY2d 51, 56 (Ct. of App. 1979). Further, the Court of Appeals directs that “an insurance contract’s language ‘must be given its ordinary meaning,’ and ‘common words’ in a policy are not ‘used as words of art with legalistic implications’.” Lexington Park Realty LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, 120 AD3d 413, 414 (1st Dept. 2013); quoting Abrams v. Great Am. Ins. Co., 269 NY 90, 92 (Ct. of App. 1935).

In the case at bar, Preferred Mutual, as the moving party, must establish a *prima facie* case that they are entitled to a declaratory judgment as a matter of law. In support, Preferred

Mutual submitted admissible proof, namely Mr. Emrich's guilty plea and allocution under oath, that criminal conduct was the cause of Mr. Logsdon Jr.'s death. As it is clear from the unambiguous reading of the insurance umbrella policy that personal injury resulting from criminal acts is a bar from coverage, Preferred Mutual met their burden that they are entitled to a declaratory judgment as a matter of law.

Next, the burden shifts to Defendants, the non-moving party, to submit admissible evidence showing a material issue of fact exists. Looking at the motion in the light most favorable to the non-moving party, Defendants Logsdon are unsuccessful to that point. As an initial matter, no other named defendant offered opposition to the current motion, therefore, the Court will only discuss the motion as it applies to Defendants Logsdon. Based on the record before the Court, no issue of fact exists. Upon a clear indication from a plain reading of the insurance umbrella policy, and the uncontroverted facts surrounding the accident, Mr. Emrich's criminal conduct caused the personal injury and ultimate death of Mr. Logsdon Jr. Defendants Logsdon argued that "what if" the accident was caused by something other than Mr. Emrich's criminal acts. However, the Court cannot deny summary judgment based on "what ifs" as mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement. See Zuckerman, 49 N.Y.2d 557. The law is clear that in support for a motion for summary judgment, the party must submit proof in the form of admissible evidence to be considered. In opposition, Defendants Logsdon argued that Preferred Mutual's motion should still be denied because the Third Department has ruled that granting summary judgment prior to the opportunity for discovery is premature, citing Abulhasan v. Uniroyal-Goodrich Tire Co. (258 AD2d 728 (3rd Dept. 1999)). While that might be generally true, the Court finds that the case at hand can be distinguished from the cited third department case as admissible evidence is still required to advance an alternative theory. In Abulhasan, the Third Department recognized that "in opposition to the motion, plaintiff submitted the affidavit of an expert" as evidence in admissible form in support of the theory, and that is when the motion was denied as premature and allowed to proceed to the discovery stage. 258 AD2d at 729. Here, Defendants Logsdon submit pure speculation and expressions of hope in the form of an attorney affidavit without any evidence in admissible form that would support their theories. Therefore, the Court finds that

Defendants Logsdon failed to meet their burden, there are no outstanding issues of fact and the Motion for Summary Judgment must be GRANTED.

Duty to Defend

Further, Preferred Mutual moves this court to declare that they have no duty to defend or indemnify Defendants Emrich as a matter of law. "If an insurer is to be relieved of a duty to defend, it is obligated to demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation." International Paper Co. v. Continental Casualty Co., 35 N.Y.2d 322, 325 (Ct. of App. 1974). "The insurer is cloaked with the burden of proving that the incident and claim thereunder came within the exclusions of the policy." Id. at 327. New York Courts have consistently upheld that if shown that the applicable facts support the assertion, insurance companies have no duty to defend or indemnify if the personal injury is based upon a criminal acts exclusion. See N.Y. Cent. Mut. Fire Ins. Co. v. Nationwide Mut. Ins. Co., 307 A.D.2d 449 (3rd Dept. 2003) (The Third Department held that this exclusion is not against public policy and as the motor vehicle and the criminal acts exclusions applied, the insurer had no obligation to defend or indemnify the owner and his sons for the injury that was a result of a convicted criminal act.); see also Slayko v. Sec. Mut. Ins. Co., 98 N.Y.2d 289 (Ct. of App. 2002) (Defendant insurance company has no duty to defend and indemnify plaintiff in the underlying personal injury action that results from criminal conduct because the Insurance Law explicitly permits carriers of personal lines insurance--a term that includes the policy at issue here--to cancel policies if the insured is convicted "of a crime arising out of acts increasing the hazard insured against.)

Therefore, in accordance with the long line of case law that supports judgment for Preferred Mutual, and because the motion remains unopposed by Defendants Emrich, the Court finds that because Preferred Mutual submitted evidence that shows that Mr. Logsdon Jr.'s personal injury is a direct result from Mr. Emrich's admitted criminal activity. Therefore, the criminal exclusion section applies and Preferred Mutual has no duty to defend or indemnify Defendants Emrich. Preferred Mutual's motion is GRANTED and Preferred Mutual is entitled to judgment.

Default Judgment

To be successful on a motion for default judgment within the scope of an action for a declaratory judgement, the Court must look further than just a failure to answer the pleadings but must also determine if the moving party will succeed on the merits. See Levy v. Blue Cross & Blue Shield, 124 A.D.2d 900, 902 (3rd Dept. 1986).

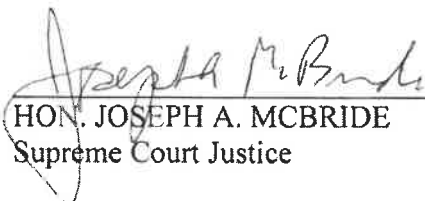
Here, Defendants Catena failed to submit an answer or response contradicting Preferred Mutual's claim. Further, for the reasons described above, the Court finds that Preferred Mutual has submitted evidence to succeed on the merits. Therefore, the Motion for Default Judgment is GRANTED.

CONCLUSION

Based on all the foregoing, the Court finds that both Preferred Mutual's motion for summary judgment must be GRANTED on all causes of action including ruling that Preferred Mutual has no duty to indemnify or defend Defendants Emrich under the umbrella policy. Further, Preferred Mutual's motion for Default against Defendants Catena must be GRANTED. Preferred Mutual is awarded declaratory judgment against Defendants Emrich, Defendants Logsdon, and Defendants Catena as a matter of law.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this **DECISION AND ORDER** by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 4/13, 2020
Norwich, New York


HON. JOSEPH A. MCBRIDE
Supreme Court Justice

Entered April 13, 2021 at 4:38PM


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Deputy County Clerk