

Baharlias v Allstate Ins. Co.
2022 NY Slip Op 33836(U)
November 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 529800/2021
Judge: Robin S. Garson
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affirmative defenses, including: the second affirmative defense that plaintiff Shoshana Baharlias was herself culpable in causing her injuries, the third affirmative defense that Allstate is entitled to an offset, the sixth affirmative defense that Shoshana Baharlias did not sustain a “serious injury” as defined by Insurance Law § 5102(d), and the ninth affirmative defense that plaintiffs fail to state a cause of action pursuant to Insurance Law §§ 5102 and 5104.

SUM coverage is available where the claimant is a qualified insured as follows: the claimant was involved in a motor vehicle accident; is a named insured; sustained a serious injury as defined by Insurance Law § 5102(d); the underlying tortfeasor’s liability coverage has been exhausted; coverage under the claimant’s SUM policy exceeds the tortfeasor’s available coverage; timely notice was given to the SUM carrier of the intent to make a claim; the SUM carrier was given timely notice of the commencement of a personal injury action, a proposed settlement thereof, and an opportunity to object; and the damages sustained by their insured are in excess of the previously tendered coverage.

Defendant Allstate concedes that Shoshana Baharlias sustained a “serious injury” when she was struck by a vehicle operated by Frank Esposito on February 13, 2019, Shoshana Baharlias is a named insured under the policy, Allstate had timely notice of plaintiffs’ intent to make a claim, Allstate had timely notice of the personal injury action (Sup. Kings Index #510323/2019) and settlement, Allstate did not object to the settlement, and coverage was exhausted by the tender of the tortfeasor’s liability policy (\$100,000) in settlement of the personal injury action.

Plaintiffs contend that the defendant is not entitled to an offset against the policy limit of \$300,000, arguing that Allstate did not provide the requisite notice of offset within the declaration’s sheet (“Dec Sheet”) or in conformity with the guidelines prescribed by the Insurance

Law and its implementing regulations. See 11 NYCRR §§ 60-2.1, 60-2.2, 60-2.3(f). Relying, in part, on plaintiffs' Verified Complaint at paragraph 23, referencing plaintiffs' objection to a deduction, and paragraph 24, wherein plaintiffs quote the actual offset language reflected on the Dec Sheet, the Court concludes that plaintiffs mistakenly conflate a deductible with an offset. Plaintiffs are correct that a deductible is inapplicable to SUM coverage. However, plaintiffs are incorrect in contending that Allstate failed to comply with the notice requirements regarding offset. On the contrary, the Court finds the language and its prominence to be in conformity with that dictated by the regulations. *Id.* 60-2.3(a). Delineated in bold in a separate and obvious section, the following language appears regarding the applicable offset of SUM coverage:

* The maximum amount payable under SUM coverage shall be the policy's SUM limits, reduced and thus offset by motor vehicle bodily injury liability insurance policy or bond payments received from, or on behalf of, any negligent party involved in the accident, as specified in the SUM endorsement.

[The use of an asterisk is superfluous, merely directing the reader to further detail.¹]

The prong of the motion seeking to dismiss defendant's second, third, fifth, sixth, and ninth affirmative defenses—that recovery shall be diminished in proportion to plaintiff's "culpable conduct," that defendant is entitled to an offset, that sole and exclusive recovery is confined and limited by the provisions of the Insurance Law, that the action is barred because plaintiff failed to sustain a "serious injury," and that plaintiffs fail to state a cause of action

¹ Section 5 of the endorsement, titled "SUM Limits and Maximum Payments," states:

(b) Regardless of the number of insureds, our maximum payment under this SUM Endorsement shall be the difference between:

- (1) The SUM limits; and
- (2) The motor vehicle bodily injury liability insurance or bond payments received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured.

Further, Section 10 of the endorsement, titled "Non-Duplication," states:

This SUM coverage shall not duplicate any of the following: . . .

(c) any amounts recovered or recoverable pursuant to New York Insurance Law article fifty-one or any similar motor vehicle insurance payable without regard to fault.

pursuant to Insurance Law §§ 5102, 5104—is granted to the extent of striking the second, third, sixth, and ninth affirmative defenses as to Shoshana Baharlias.

The prong of the motion for judgment as a matter of law is denied as procedurally unavailing.

It is hereby,

ORDERED, that the second, third, sixth, and ninth affirmative defenses are hereby stricken as to Shoshana Baharlias; further it is

ORDERED, that in all other respects, the motion is denied.

Shoshana Baharlias' damages shall be determined at trial.

Plaintiff shall serve a copy of this decision and order, along with notice of entry, on defendant within 20 days of the date of this order.

The above is the Decision and Order of the Court.

ENTER

11/9/22



A.J.S.C

HON. ROBYN S. GARSON
A.J.S.C.