

Armstrong v Nationwide Mut. Fire Ins. Co.
2013 NY Slip Op 31431(U)
July 3, 2013
Supreme Court, Wayne County
Docket Number: 74694-2013
Judge: Daniel G. Barrett
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At a Term of the Supreme Court in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 3rd day of July, 2013.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

MANDY M. ARMSTRONG,

Plaintiff,

-vs-

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, d/b/a
NATIONWIDE INSURANCE,

Defendant

DECISION
Index No. 74694

2013

The Plaintiff, Mandy M. Armstrong, has commenced this action against Defendant, Nationwide Mutual Fire Insurance Company, d/b/a Nationwide Insurance, (hereinafter "Nationwide") to obtain a judgment against the Defendant for the amount of its policy to satisfy a judgment which has been previously entered against its insured, Patrick L. Curran, and for which Defendant has refused to pay.

In this application, Plaintiff seeks summary judgment against the Defendant requesting an Order directing the Defendant to pay the amount of its policy to satisfy the outstanding judgment.

As part of this application, the Defendant has cross-moved seeking a judicial declaration that the Defendant has no obligation to pay the previously entered judgment.

In a letter dated September 18, 2012, the Defendant, Nationwide Mutual Fire Insurance Company, sent a letter to its insured, Patrick L. Curran advising that a default judgment had been entered against him in the amount of \$97,135.00 as a result of injuries sustained by the Plaintiff in a motor vehicle accident which occurred on May 6, 2008. The purpose of this letter was to advise Mr. Curran that the Defendant was disclaiming coverage on the basis that Mr. Curran breached the policy conditions contained in his Nationwide contract, by failing to turn over suit papers to Nationwide.

The letter goes on to state that the Defendant will neither defend nor indemnify Mr. Curran for the judgment which has been rendered against him as a result of the loss.

Defendant, Nationwide Mutual fire Insurance Company, d/b/a Nationwide Insurance Company requests that this Court adjudge and declare that:

1. Defendant, Nationwide, owes no duty to indemnify Patrick L. Curran for the judgment entered June 8, 2012;
2. The Defendant, Nationwide, is not required to satisfy the judgment entered against Patrick L. Curran on June 8, 2012; and

3. Non-party, Patrick L. Curran, failed to forward suit/legal papers as required by the Nationwide policy herein at issue; and
4. The Defendant Nationwide timely disclaimed coverage as a matter of law.

A time line of activities engaged in by the parties and the non-party is helpful for an overview of the facts in order to render a fair and just decision:

1. 7/7/08 - a letter from a representative of the Defendant to the Plaintiff asking her to call about the accident;
2. 7/8/08 - a letter from a representative of the Defendant to the Plaintiff requesting the Plaintiff's help in gathering information and details about the accident. It also asked the Plaintiff to contact the representative immediately;
3. 7/7/08 - a letter from a representative of the Defendant to Patrick Curran asking him to contact her immediately so a recorded statement could be obtained;
4. 7/7/08 - a letter from a representative of the Defendant to Patrick Curran requesting information from him and advising him someone else has made a claim against him and warns him that a failure to cooperate could jeopardize the liability portion of the insurance policy;
5. 8/7/08 - a letter from a representative of the Defendant to USAA Insurance Company advising Defendant is in receipt of USAA's subrogation demand;

6. 8/12/08 - a letter from a representative of the Defendant to the Plaintiff inquiring if the Plaintiff will be processing a claim for personal injury against the policy holder. She also requests the name and number of the Plaintiff's attorney and further indicates that if she does not hear from the Plaintiff by September 19, 2008, she will assume that the Plaintiff is not pursuing the claim for injuries;
7. 9/22/08 - a letter from a representative of the Defendant inquiring if the Plaintiff intends to be presenting bodily injuries for herself and her two children;
8. 10/22/08 - a letter from a representative of the Defendant to the Plaintiff's attorney directing the Plaintiff's attorney to provide the representative with medical authorizations, a list of Plaintiff's injuries, medical treatment and medical facilities attended. It also informs the Plaintiff's attorney that the limits of bodily injury protection are \$25,000.00 per person/\$50,000.00 per occurrence;
9. 12/15/08 - a letter from a representative of the carrier to the Plaintiff's attorney indicating that based on the medical information reviewed on this claim it is apparent that the Plaintiff's injuries do not meet the criteria for a bodily injury settlement. Therefore, Defendant will not make any voluntary offers at this time;
10. 3/21/09 - a letter from a representative of the Defendant to the Plaintiff's attorney advising the file had been re-assigned to her. This representative repeats that the

bodily injury claim presented does not qualify as a serious injury under the insurance law. She further recites that Defendant is unable to consider the Plaintiff's claim for the bodily injury and will not be making any voluntary offers;

11. 4/29/09 - a representative from the Defendant wrote a letter to USAA Insurance Company requesting a complete copy of the no fault file for the Plaintiff relative to the accident of this file;
12. 9/17/09 -a letter from a representative of the Defendant to USAA Insurance Company requesting the no fault file a second time;
13. 3/4/11 - a letter from a representative of the Defendant to the Plaintiff's attorney indicating that the injury of the Plaintiff does not qualify as a "serious injury" under the insurance law. She concludes that the Defendant is unable to consider the Plaintiff's claim for bodily injury and will not be making any voluntary offers;
14. 4/27/11 - the Summons and Complaint in the action Plaintiff, Mandy Armstrong, versus Defendant, Patrick Curran, is filed April 27, 2011 for injuries sustained in a two car motor vehicle accident which occurred on May 6, 2008;

15. 6/2/11 - a letter from Plaintiff's attorney to representative of the Defendant enclosing the Summons and Complaint together with the Affidavit of Service;
16. 7/5/11 - a letter from Plaintiff's attorney to representative of the Defendant indicating that the Patrick Curran has been served and inquiring whether an Answer is going to be interposed on behalf of Mr. Curran;
17. 6/15/12 - a letter from Plaintiff's attorney to the Defendant's representative enclosing a copy of a judgment and order with notice of entry in the Wayne County Clerk's Office on June 8, 2012;
18. 6/21/12 - a letter from Plaintiff's attorney to Patrick Curran enclosing a copy of the judgment and order filed in the Wayne County Clerk's Office;
19. 9/11/12 - a letter from Plaintiff's attorney to a representative of the Defendant enclosing the Summons and Complaint and a copy of a judgment and order filed in the Wayne County Clerk's Office on June 8, 2012;
20. 9/18/12 - a letter from a representative of Defendant to Patrick Curran indicating they are in receipt of the default judgment and order with notice of entry filed in the Wayne County Clerk's Office on June 8, 2012. It further advises the Defendant is issuing this letter of disclaimer on the

basis of an alleged breach of the policy conditions and his Nationwide contract, by failing to turn over suit papers to the company. It further advises the Defendant will not indemnify Mr. Curran for the judgment which has been rendered against him in the amount of \$97,135.00.

TIMELINESS OF DISCLAIMER

As the record demonstrates, the Defendant had ample notice of the two car accident which occurred on May 6, 2008.

The record also demonstrates that the legal/suit papers were forwarded to the Defendant in a cover letter dated June 2, 2011. Prior to receiving the suit papers the Defendant requested the Plaintiff's attorney provide medical authorizations, a list of Plaintiff's injuries, medical treatment and medical facilities attended (10/22/08).

Prior to receiving the suit papers the Defendant advised Plaintiff's attorney on two occasions (12/15/08 and 3/21/09) that Plaintiff's injuries did not meet the criteria for a bodily injury settlement and that the Defendant would not make a voluntary offer.

The record demonstrates that the Defendant had notice of the claim and the legal/suit papers (June, 2011) yet it did not disclaim coverage until September 18, 2012.

The timeliness of Defendant's disclaimer is important both under Insurance Law Section 3420 and the common law doctrine of estoppel. Insurance Law 3420 requires written notice of disclaimer of liability or denial of coverage under a liability insurance policy "as soon as reasonably possible." Reasonableness of any delay in disclaiming under the statute is judged from the time an insurer first learns of the grounds for disclaimer of liability or denial of coverage, New York Central Mutual Insurance Co. v. Aguirre, 7 N.Y. 3d 772, 820 N.Y.S. 2d 848, 854 N.E. 2d 146; First Financial Decisions Co. v. Jetco Contracting Corp., 1 N.Y. 3d 64, 769 N.Y.S. 2d 459, 801 N.E. 2d 835.

The Defendant's failure to disclaim coverage in writing to the insured, Patrick L. Curran, as soon as reasonably possible prevents the Defendant from disclaiming coverage based upon late notice, even where Mr. Curran's notice of claim is untimely, Magistro v. Buttered Bagel, Inc., 79 A.D. 3d 22, 914 N.Y.S. 2d 192. If the grounds for disclaimer were or should have been "readily apparent" to the Defendant when it first learned of the claim, any subsequent delay on the Defendant's issuing the disclaimer is untimely as a matter of law, First Financial Insurance Co. v. Jetco Contracting Corp., *supra*.

The courts frequently decide the issue as a matter of law where the delay approaches or exceeds two months and is not accompanied by an adequate explanation.

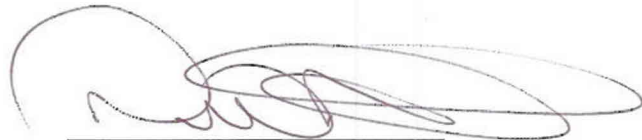
"The rule in the Fourth Department is that unexplained delays of more than two months are unreasonable as a matter of law, Nuzzo v. Griffin Technology, Inc., 220 A.D. 2d 184, 643 N.Y.S. 2d 802; Gill v. Gouchie, 210 A.D. 2d 954, 620 N.Y.S. 2d 679; see Utica Fire Insurance Co. of Oneida County v. Spagnolo, 221 A.D. 2d 921, 634 N.Y.S. 2d 296." NY PJI 4:79 p. 1192, 2nd edition 2013.

Based on the foregoing the Court finds:

1. Defendant owes a duty to indemnify Patrick L. Curran for the judgment entered June 8, 2012 up to the amount of its coverage;
2. Defendant is required to satisfy the judgment entered against Patrick L. Curran on June 8, 2012 up to the limits of its coverage; and
3. Defendant is estopped from denying coverage based on the failure of Patrick L. Curran from forwarding suit/legal papers to the Defendant; and
4. Defendant, as a matter of law, did not disclaim coverage in a timely fashion.

This constitutes the Decision of the Court. Counsel for Plaintiff to prepare an Order consistent with this Decision.

Dated: July 3, 2013
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice