

SAFECO Ins. Co. of Indiana v Morel

2010 NY Slip Op 31622(U)

June 25, 2010

Sup Ct, Nassau County

Docket Number:

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

md, mg

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

SAFECO INSURANCE COMPANY OF INDIANA,
Plaintiff,

Motion Sequence #5, #6
Submitted May 19, 2010

-against-

INDEX NO: 2235/09

Safeco Insured Defendant
ANNETTE MOREL,

Individual Claimant Defendants
ALBANIA FRIAS, JOSE CUEVAS,
BARTOLINA FRIAS a/k/a MAGALIS FRIAS,
EVELYN AMARO a/k/a NATALIE AMARO,

Healthcare Provider Defendants
NYU HOSPITAL FOR JOINT DISEASE, ST.
BARNABAS HOSPITAL, SOCRATES MEDICAL
HEALTH, P.C., STANLEY LIEBOWITZ, M.D.,
POMONA MEDICAL DIAGNOSTICS, P.C.,
ANESTHESIOLOGY ASSOCIATES OF MANHATTAN,
SP ORTHOTIC SURGICAL & MEDICAL
SUPPLY, INC., YORK ANESTHESIOLOGIST,
PLLC, ALEXANDER ROZENBERG, M.D., ALROF,
INC., ARIMED ORTHOTICS, PROSTHETICS
AND PEDORTHICS, INC., BETH ISRAEL
MEDICAL CENTER, BRONX PARK MEDICAL,
DANIEL P. KLEIN, M.D., DAVID STEIGER, M.D., EAST
TREMONT MEDICAL CENTER, FRANCIS R. PELHAM,
M.D., FRANKLIN CENTER FOR REHABILITATION
AND NURSING, INC., GERMAN STEINER,
HEALTHCARE RADIOLOGY D/B/A ST. BARNABAS
HOSPITAL, HEALTHY WAY ACUPUNCTURE, P.C.,
INTENSIVE CARE ASSOCIATES, P.C., JOHN MUNGER,
M.D., JUDITH J. BERGER, M.D., P.C., KENNETH EGOL,
M.D., LINDA ROGERS, M.D., LITTLE NECK RADIOLOGY,
P.C., LUIGIA C. ABRAMOVICI, M.D., MEDICAL RECORDS

RETRIEVAL, MONA BASHAR, M.D., NOLIA MEDICAL, P.C., NYU RADIOLOGY ASSOCIATES, MARK E. SCHWEITZER, M.D., PRAKASH KAMALNATH, M.D., QUALITY PSYCHOLOGICAL SERVICES, P.C., QUARRY ROAD EMERGENCY SERVICE, RG PSYCHOLOGICAL SERVICES, P.C., ROY DAVIDOVITCH, M.D., SHIROM ACUPUNCTURE, P.C., TIMOTHY SEGAL, M.D., TRANSCARE NY, INC. d/b/a TRANSCARE, UPTOWN CHIROPRACTIC, P.C., EAST SIDE PRIMARY MEDICAL CARE, P.C.,

Defendants.



The following papers were read on these motions:

Notice of Motion and Affs.....1-3
Affs in Opposition.....4-6
Affs in Reply.....7&8
2nd Notice of Motion and Affs.....9-11
Affs in Opposition.....12&13
Affs in Reply.....14&15
Memoranda of Law.....16-17a

This motion by defendants St. Barnabas Hospital and NYU-Hospital for Joint Diseases (“the movants”) for a protective order pursuant to CPLR 3103 striking the notices of examinations before trial is denied. The motion by plaintiff for an order pursuant to CPLR 3215(d) and CPLR 2221, modifying the prior order dated September 11, 2009, granting plaintiff leave to renew its motion for a default judgment against the non-answering defendants upon the completion of a trial or other disposition of this action against defendants who have answered, and for an order pursuant to CPLR 3025 to amend the caption to delete certain defendants is granted.

This is a declaratory judgment action in which Safeco is seeking a judicial determination that it is not obligated to provide a defense and/or indemnification to any

insured or insured operator named as a defendant herein or to pay any sums, monies, damages, awards and/or benefits to any of the individuals or entities named as a defendant herein.

Issue was joined on March 31, 2009, by St. Barnabas Hospital, NYU-Hospital for Joint Diseases, Luigi Abramovici, M.D., Prakash Kamalnath, M.D., German Steiner, M.D., John Munger, M.D., Linda Rogers, M.D., Francis Pelham, M.D. and NYU Radiology Associates all represented by the law Offices of Joseph Henig, P.C., (hereinafter collectively referred to as the "Henig Defendants").

The following defendants entered into Stipulations of Settlement and Discontinuance with the plaintiff: Beth Israel Medical Center; Arimed Orthotics, Prosthetics and Pedorthics, Inc.; Alexander Rozenberg, M.D.; Daniel P. Klein, M.D.; Judith J. Berger, M.D., P.C.; Kenneth Egol, M.D., Little Neck Radiology, P.C.; RG Psychological Services, P.C.; Transcare NY, Inc. d/b/a Transcare; and East Side Primary Medical Care, P.C.

The following defendants have failed to interpose an answer in this action or enter into a stipulation of discontinuance: Socrates Medical Health, P.C.; Stanley Liebowitz, M.D.; Pomona Medical Diagnostics, P.C.; Anesthesiology Associates of Manhattan; SP Orthotic surgical & Medical Supply, Inc.; York Anesthesiologist, PLLC; Alrof, Inc.; Bronx Park Medical; David Steiger, M.D.; East Tremont Medical Center; Franklin Center for Rehabilitation and Nursing, Inc.; Healthcare Radiology d/b/a St. Barnabas Hospital; Healthy Way Acupuncture, P.C.; Intensive Care Associates; Medical Records Retrieval, Inc.; Mona Bashar, M.D.; Nolia Medical, P.C.; quality Psychological Services, P.C.; Quarry Road Emergency Service; Roy Davidovitch, M.D.; Shirom Acupuncture, P.C.; Timothy Segal, M.D.; and Uptown Chiropractic, P.C. (hereinafter referred to as "Default Defendants")

or “non-answering defendants”).

On or about April 29, 2009, Safeco moved by order to show cause for an order pursuant to CPLR 2201 staying several underlying actions and arbitrations pending the resolution of Safeco’s declaratory judgment action.

Thereafter, the Henig Defendants moved for an order pursuant to CPLR 3212 granting them summary judgment in their favor dismissing the complaint. The Henig Defendants also cross-moved for an order pursuant to CPLR 602 consolidating several underlying No-Fault actions with the subject declaratory judgment action.

Safeco then moved for an order pursuant to CPLR 3215 granting it a default judgment against the Default Defendants.

By order dated September 11, 2009, (“the ‘09 order”), this Court granted Safeco’s application for a stay of the no-fault actions pending the resolution of the declaratory judgment action; granted the cross-motion of the Henig Defendants to consolidate certain pending No-Fault actions; denied Safeco’s motion for a default judgment; denied the Henig Defendants’ motion for summary judgment; and deleted Beth Israel Medical Center and Arimed Orthotics, Prosthetics and Pedorthics, Inc. as parties to this action.

On or about October 2, 2009, Safeco noticed each Henig Defendant for an examination-before-trial (EBT) pursuant to CPLR 3101 and 3107. The Henig Defendants then moved for a Protective Order pursuant to CPLR 3103.

On or about December 9, 2009, Safeco moved for an order to modify the ‘09 order to insert language granting Safeco leave to renew its motion for a default judgment against the non-answering defendants upon the completion of the trial or other disposition of this action. Safeco also sought leave to amend the caption to delete certain defendants.

That portion of Safeco's motion which seeks to amend the caption to delete RG Psychological Services, P.C., East Side Primary Medical Care, P.C., Daniel P. Klein, M.D., Kenneth Egol, M.D., Transcare NY, Inc. d/b/a Transcare, Judith J. Berger, M.D., P.C. and Alexander Rozenberg, MD. as parties to this action is granted since these defendants have entered into stipulations of discontinuance with plaintiff.

So much of Safeco's motion which seeks to modify the order to insert language granting Safeco leave to renew its motion for a default judgment against the non-answering defendants upon the conclusion of the action is granted.

In the '09 order, we noted that "even though these defendants have defaulted, the court declines to grant a declaratory judgment upon default against them." In so holding, the court observed that "the granting of a default judgment 'could potentially lead to fundamentally inconsistent judgments that could impact upon the rights of non-parties' " (citation omitted).

In support of this branch of the motion, Safeco asserts that in the event that Safeco is successful upon the completion of a trial or other disposition of this action against the defendants who have answered, a default judgment entered against the non-answering defendants would not lead to fundamentally inconsistent judgments or impact the rights of a party not in default or any non-party. We find no objection to Safeco's request.

In its memorandum of law, plaintiff argues that inasmuch as the incident of April 22, 2008 was the product of an intentional act on the part of Annette Morel, Safeco is under no legal obligation to honor or pay any claims submitted under the policy of insurance. Plaintiff further asserts that "the outcome of the pending criminal action against Annette Morel is not dispositive of plaintiff's allegations" as plaintiff must only prove its case by a

mere preponderance of the evidence.

Plaintiff's contentions are not properly before this court as plaintiff did not affirmatively request such relief in its motion (see CPLR 2215) nor did it seek leave to reargue our prior order on this ground. (CPLR 2221).

Furthermore, as noted above, criminal charges are still pending against Annette Morel. Thus, Safeco has not satisfied its burden of proving that the subject loss was not an accident as defined by the subject policy and hence, "an issue of fact [still] exists as to whether the incident in question was an accident or the product of an intentional act" (the '09 order).

The Henig Defendants' motion for a protective order with respect to the examinations-before-trial is denied.

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. (*Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403, 406; see also *Spectrum Systems International Corporation v Chemical Bank*, 78 NY2d 371; *Auevedo v Eichner*, 29 AD3d 554. The Court of Appeals in *Allen, supra*, held that "[t]he words 'material and necessary' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Id*; see also *Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740, 746; *Spectrum Systems International Corporation v Chemical Bank, supra*; *Parise v Good Samaritan Hosp.*, 36 AD3d 678). This statute embodies the policy determination that liberal discovery encourages fair and

effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. (*Spectrum Systems International Corporation Chemical Bank, supra* at p. 376 citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶¶ 3101.01-3101.03).

CPLR § 3103(a) provides that “a court may * * * make a protective order conditioning or regulating the use of any disclosure device * * * to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.” The CPLR also establishes three categories of protected materials: 1) privileged matter, which is immune from discovery pursuant to CPLR § 3101(b), 2) attorney’s work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR 3101(d)(2). (*Spectrum Systems International Corporation v Chemical Bank, supra* at p. 376-377). The burden of establishing any right to protection is on the party asserting it. The protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. (*Id.* at 377).

Defendants have not demonstrated that the examinations-before-trial are not material and necessary or are privileged. Accordingly, defendants’ motion for a protective order is denied.

In view of the foregoing, defendants' motion is denied and Safeco's motion is granted.

Dated: June 25, 2010



UTE WOLFF LALLY, J.S.C.

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