Infinity Ins. Co. v Nazaire
2016 NY Slip Op 31454(U)
July 22, 2016
Supreme Court, Kings County
Docket Number: 506767/2013
Judge: Wavny Toussaint

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of July, 2016.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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INFINITY INSURANCE COMPANY,
INFINITY AUTO INSURANCE COMPANY,
INFINITY CASUALTY INSURANCE COMPANY,
INFINITY INDEMNITY INSURANCE COMPANY,
INFINITY NATIONAL INSURANCE COMPANY,
INFINITY GROUP,
INFINITY SELECT INSURANCE COMPANY, and
INFINITY STANDARD INSURANCE COMPANY,

Plaintiffs,

- against -

JACK NAZAIRE,
ADEL AIDA PHYSICAL THERAPY, P.C.,
ALLEVIATION MEDICAL SERVICES, P.C.,
CHARLES DENG ACUPUNCTURE, P.C.,
DELTA DIAGNOSTIC RADIOLOGY, P.C.,
ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC,
ISLAND MUSCULOSKELETAL CARE M.D., P.C.,
JAIME G. GUTIERREZ,
JCC MEDICAL, P.C.,
T&J CHIROPRACTIC, P.C.,
TAM MEDICAL SUPPLY CORP., and
VLADIMIR SHUR, M.D.,
Defendants.

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DECISION AND ORDER

Index No. 506767/13

Mot. Seq. No. 1

FILED
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The following e-filed papers read herein:	NYSCEF No.:
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Affirmations in Opposition	54, 56
Affirmation in Reply	58

Plaintiffs Infinity Insurance Company, Infinity Auto Insurance Company, Infinity Casualty Insurance Company, Infinity Indemnity Insurance Company, Infinity National Insurance Company, Infinity Group, Infinity Select Insurance Company, and Infinity Standard Insurance Company (collectively, the plaintiff) move for summary judgment on their second cause of action against defendants Adel Aida Physical Therapy, P.C., Alleviation Medical Services, P.C., Charles Deng Acupuncture, P.C., Delta Diagnostic Radiology, P.C., Island Life Chiropractic Pain Care, PLLC, Island Musculoskeletal Care M.D., P.C., Jaime G. Gutierrez, JCC Medical, P.C., and Tam Medical Supply Corp. (collectively, the provider defendants).

Background

On January 16, 2012, the plaintiff issued automobile insurance policy 137-12041-1893-001 to nonparty Jude Nazaire (Jude) for his vehicles, including a 2001 Acura TL (the Acura). The policy was issued in Pennsylvania based on Jude's representations in his application for the policy that he resided in that state, the Acura was garaged in that state, and only those individuals listed in the application would drive the Acura either regularly or occasionally. Jude's brother, Jack Nazaire (Jack), was not listed as a permitted driver in Jude's application for the subject policy. The policy was for six months ending July 16, 2012, and was paid for in full at the inception.

On February 16, 2012, Jack was allegedly injured while operating Jude's Acura in Brooklyn, New York. According to the Police Accident Report, at about 5:00 AM, Jack was double parked in the Acura, in Brooklyn when another vehicle rear-ended him and fled the

scene, leaving one of its license plates behind. Jack was removed by ambulance from the scene of his accident.

Effective March 5, 2012, the plaintiff canceled the policy on account of Jude's failure to provide it with a work address and a work telephone number, and returned to him the earned premium from the cancellation date of March 5, 2012 to the scheduled policy-expiration date of July 12, 2012. On June 22, 2012, the plaintiff rescinded the policy and, on July 20, 2012, returned the remainder of the premium from the inception date of January 16, 2012 to the cancellation date of March 5, 2012. The rescission was on the grounds of fraud and material misrepresentations in the procurement of the subject policy.

Thereafter, two medical providers, as Jack's assignees, sued the plaintiff in the Kings County Civil Court (*see JCC Medical, P.C. v Infinity Group*, Index No. 714759/13 [the JCC action]; *Island Life Chiropractic, P.C. v Infinity Group*, Index No. 714206/13 [the Island Life action]). The plaintiff herein answered and moved for summary judgment in both actions. The Civil Court granted the plaintiff's motions and dismissed both actions (*see* Decision/Order, dated May 23, 2014, in the *JCC* action; Decision/Order, dated June 26, 2014, in the *Island Life* action). The record before the Court is unclear as to whether Island Life Chiropractic, P.C., which was the plaintiff in the Island Life action, is the same entity as Island Life Chiropractic Pain Care, PLLC, which is one of the provider defendants in this action.

In November 2013, the plaintiff commenced the instant action for a declaratory judgment that it properly rescinded the underlying policy with Jude and that there was no

policy in effect at the time of Jack's accident. The action is against Jack and his medical providers; Jude is not named as a defendant. By decision and order, dated August 13, 2014, the Court granted, on default, the plaintiff's motion for a declaratory judgment as against Jack on its first cause of action and as against T&J Chiropractic, P.C., and Vladimir Shur, M.D., on its second cause of action. After the provider defendants answered the complaint, the plaintiff served the instant motion for summary judgment.

Discussion

As stated, the plaintiff issued the policy in question in Pennsylvania to Jude, who had indicated on his application that he resided in Pennsylvania and that he garaged his Acura in Pennsylvania. As the only connection between the policy and New York is that Jack was allegedly injured in New York in an accident involving the Acura, the Court finds that Pennsylvania law is controlling under New York's conflict of law rules (*see Matter of Government Employees. Ins. Co. v Nichols*, 8 AD3d 564, 565 [2d Dept 2004]; *Compas Med., P.C. v Infinity Group*, 46 Misc 3d 146[A], 2015 NY Slip Op 50219[U], *1 [App Term, 2d, 11th & 13th Jud Dists [2015]).

A legal distinction exists between cancellation of an insurance policy and its rescission. Cancellation is a prospective remedy; it terminates the rights and obligations of the parties in the future. Rescission, on the other hand, is a retroactive remedy, by which the rights and obligations of the parties under the policy are abrogated as if the policy had never been issued (*see Erie Ins. Exchange v Lake*, 543 Pa. 363, 367 [1996]). Here, the plaintiff attempted to do

both: initially, it canceled the policy; later on, it rescinded the policy. Because the plaintiff canceled the policy after Jack had his accident, the cancellation had no effect on the rights of the provider defendants. On the other hand, if the plaintiff properly rescinded the policy, it would have no legal obligation to respond to the demands for coverage made by the provider defendants as a result of Jack's accident.

Pennsylvania law gives an insurer a common-law right to retroactively rescind an automobile insurance policy (*see Klopp v Keystone Ins. Cos.*, 528 Pa. 1, 6 [1991], *rearg denied* [1992]) and, as to an insured who has made a misrepresentation material to the acceptance of risk by the insurer, the insurer may exercise that right within the 60 days of the policy issuance (*see Erie Ins. Exch.*, 543 Pa. at 375; *see also* 40 P.S. § 991.2002 [c] [3]). The insurer's right to rescind the policy beyond 60 days of its issuance is subordinate to the rights of third parties "who are innocent of trickery, and injured through no fault of their own" (*Erie Ins. Exch.*, 543 Pa. at 375). Here, the plaintiff sought to rescind the policy more than 60 days after its issuance, and, hence, it must demonstrate that Jack was not an innocent third party.

While the plaintiff has submitted proof indicating that it properly rescinded the policy pursuant to Pennsylvania law based on misrepresentations made by Jude in the policy application, the plaintiff has failed to demonstrate that the provider defendants' assignor, Jack, who allegedly was injured in the accident involving the insured Acura, was "not an innocent third party" who should be precluded from receiving protection under the policy (*see Delta Diagnostic Radiology, P.C. v Infinity Group*, 43 Misc 3d 130[A], 2014 NY Slip Op 50602[U],

*2 [App Term, 2d, 11th & 13th Jud Dists 2014] [interpreting Pennsylvania law]; *see also Quality Psychological Services v Infinity Prop. & Cas. Co.*, 47 Misc 3d 142[A], 2015 NY Slip Op 50645[U], *1 [App Term, 1st Dept 2015] [same]).

In support of the motion, the plaintiff's litigation specialist states in her affidavit what Jack told the plaintiff's investigators; what he testified to at his examination under oath; and what the plaintiff's investigators discovered at the New York State Department of Motor Vehicles regarding the prior ownership of the Acura. Her averments do not reveal that she had personal knowledge of the facts obtained through investigation but merely recites what other persons had recorded in the plaintiff's file for this claim.[1] Her averments, therefore, constitute inadmissible hearsay (*see Santos v ACA Waste Servs., Inc.*, 103 AD3d 788, 789 [2d Dept 2013]). More importantly, the plaintiff has not submitted to the Court the affidavits from its investigators or the transcript of Jack's examination under oath. As the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law, the Court need not

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[1] The affidavit of the plaintiff's litigation specialist appears to be, in the antiquated words of one court, a "mere mechanical job of paste pot and shears" (*T.C. Theatre Corp. v Warner Bros. Pictures*, 113 F Supp 265, 271 [SD NY 1953], *rearg denied* 125 F Supp 233 [SD NY 1953]). The boilerplate text of her affidavit is formatted in regular size font, while the variables are highlighted in bold size font to make it easier for her to make changes depending on the facts of a particular claim. Her affidavit here does not have all of the correct variables. Notably, ¶ 23 of her affidavit refers to one Nandslie Jean Louis as the policyholder, rather than Jude.

address the sufficiency of the provider defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).[2]

Although the plaintiff has failed to make the requisite showing, it is entitled to the benefit of the prior decision and order of the Civil Court in the JCC action adjudging, as to JCC Medical, P.C., that the policy was properly rescinded. All of the elements supporting the doctrine of collateral estoppel are met here, since (1) the issues in the JCC action and in this action are identical, (2) the issue in the JCC action was actually litigated and decided, (3) there was a full and fair opportunity for JCC Medical, P.C., to litigate in the JCC action, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits in this action (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015], *rearg denied* 25 NY3d 1193 [2015]). The same cannot be said about the Island Life action because, as noted, nothing in the record indicates that Island Life Chiropractic Pain Care, PLLC, the plaintiff in that action, is the same entity as Island Life Chiropractic, P.C., which is one of the provider defendants in this action. In light of a silent record, the Court may not assume that the same entity was involved in both actions.

Lastly, the plaintiff's reliance on *W.H.O. Acupuncture, P.C. v Infinity Prop. & Cas. Co.* (36 Misc 3d 4 [App Term, 2d, 11th & 13th Jud Dists 2012]), is misplaced. That case was

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decided under Florida law, which, unlike Pennsylvania law, permits an insurer to rescind the policy "within a reasonable time after the discovery of the grounds for avoiding the policy."

Conclusion

The plaintiff's motion for summary judgment on its second cause of action against the provider defendants is granted as to the provider defendant JCC Medical P.C. and is denied as to all other provider defendants.

To reflect the stipulation of discontinuance of this action against defendant Island Musculoskeletal Care M.D., P.C., dated Nov. 22, 2013, the name of that provider defendant is stricken from the caption.

The plaintiff's counsel is directed to serve a copy of this decision and order with notice of entry on counsel to the remaining provider defendants and to file an affidavit of said service with the Kings County Clerk.

The parties are directed to appear for a preliminary conference in the Intake Part in Room 282 on September 21, 2016, at 9:30 a.m.

This constitutes the decision and order of the Court.

E N T E R,

Hon. Wavny Toussaint
J.S.C.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of July, 2016.

P R E S E N T:

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