Philadelphia Indem. Ins. Co. v Harleysville Preferred Ins. Co.
2017 NY Slip Op 33236(U)
December 11, 2017
Supreme Court, Orange County
Docket Number: EF001471-2016
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

--X

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiffs,

-against-

HARLEYSVILLE PREFERRED INSURANCE COMPANY,

Defendants.

--X

DECISION AND ORDER
INDEX NO.: EF001471-2016
Motion Date: 10/19/2017
Sequence No. 3 - 5

SCIORTINO, J.

The following papers numbered 1 to 43 were read on the motion (Seq. #3) by Harleysville Preferred Insurance Company (Harleysville) to compel Philadelphia Indemnity Insurance Company (Philadelphia) to respond to all outstanding discovery demands; the motion (Seq. #4) by Philadelphia for summary judgment dismissing the counterclaims of Harleysville, and upon dismissal of the counterclaims, for leave to discontinue the action; and the cross-motion (Seq. #5) by Harleysville for leave to serve and file a Second Amended Answer, asserting an additional counterclaim against Philadelphia:

PAPERS	NUMBERED
Notice of Motion (Seq. #3) / Affirmation in Support (Altman) / Affirmation of Good Faith (Altman) / Exhibits A - H	1 - 11
Affirmation in Opposition (Cassidy) / Exhibits 1 - 4 / Memorandum of Law	12 - 17
Reply Affirmation (Altman) / Exhibit A	18 - 19
Notice of Motion (Seq. #4) / Affirmation (Cassidy) / Exhibits 1 - 5 / Affidavit (Steinbock) / Exhibits 1 - 4 / Memorandum of Law	20 - 31
Notice of Cross-Motion (Seq. #5) / Affirmation (Peiper) / Exhibits A - E	32 - 38
Reply Affirmation (Cassidy) / Exhibits 1 - 3 / Memorandum of Law	39 - 43

Upon the foregoing papers, Philadelphia's motion (Seq. #4) is granted, and Harleysville's motions (Seq. #s 3 and 5) both are denied, as follows:

Background

This is an action between two insurance companies for declaratory judgment regarding coverage in a related personal injury action entitled *Blake v. Nashopa House Crystal Run Village*, Index Number 0294/2015 (the Blake Action). This matter was commenced by the electronic filing of a Summons and Complaint by Philadelphia on March 3, 2016. The Complaint asserts that the Blake Action consists of claims that Ernest Blake was injured on three separate occasions from falls which took place in 2012 and 2013, while he was a resident of a group home operated by Crystal Run. His injuries were alleged to be the result of multiple violations of Crystal Run's duty of due care and negligence in the operation of the group home. Blake's second and third causes of action asserted violations of New York State Public Health Law and Federal Law, respectively.

Philadelphia insured Crystal Run with a Commercial Lines policy effective January 1, 2002, and ending January 1, 2013. Thereafter, Harleysville issued a Commercial Lines Policy, effective January 1, 2013 through January 1, 2014. Philadelphia's Complaint asserts that the injuries which resulted from the third fall, on March 7, 2013, should be covered by Harleysville's policy, but that Harleysville has refused coverage. Harleysville's Answer, asserting denials and eight separate affirmative defenses, was filed April 20, 2016.

By Notice of Motion filed on January 20, 2017, Harleysville sought leave to amend its Answer, to assert four counterclaims against Philadelphia, which Harleysville claimed would establish that insurance coverage in the Blake Action was the sole responsibility of Philadelphia. Prior to the return date of that motion, the Court was advised that the plaintiff's claims in the Blake

Action had been settled, with Philadelphia and Harleysville each contributing a portion of the settlement funds. By Decision and Order dated May 2, 2017, Harleysville was granted leave to amend its Answer to assert two of the four proposed counterclaims, and was directed to electronically file its Amended Answer and counterclaims on or before May 12, 2017.

Harleysville electronically filed its Amended Answer on May 4, 2017. The First Counterclaim asserts that the claims in the Blake Action predate and thus fall outside the coverage of the Harleysville policy. The Second Counterclaim asserts that the Harleysville policy does not provide coverage for intentional acts or for violations of statutes or regulations. Both Counterclaims thus seek a declaration that Harleysville has no obligation to defend, indemnify, or pay any fees, damages, or expenses to Philadelphia or any other party relating to the claims asserted in the Blake Action, and that Philadelphia is solely responsible to indemnify Crystal Run in that action.

Philadelphia's Reply to Counterclaims, asserting denials and nine Affirmative Defenses, was filed on May 24, 2017.

Current Motions

By Notice of Motion (Seq. #3) filed on May 30, 2017, Harleysville seeks an order compelling Philadelphia to fully respond to all outstanding discovery demands. In the interest of judicial economy, and for the reasons set forth below, the arguments of the respective parties on this motion are not discussed herein.

By Notice of Motion (Seq. #4) filed on July 21, 2017, Philadelphia seeks summary judgment and dismissal of Harleysville's counterclaims, and, upon such dismissal, leave to discontinue its own action. Philadelphia submits that its action was brought to obtain a declaration regarding the respective rights and obligations of Philadelphia and Harleysville in connection with the Blake

Action. As the Blake Action has been settled with both insurance companies contributing to the settlement, and without any reservation of rights by Harleysville, Philadelphia contends that neither its own suit nor the counterclaims present a justiciable controversy. Philadelphia further argues that any declaratory judgment issued by the Court in this action would amount to an impermissible advisory opinion.

Philadelphia takes the further position that any future claims Harleysville may assert are barred by the voluntary payment doctrine. Philadelphia contends that Harleysville, after having expressly disclaimed coverage in the Blake Action, a position it maintains to this day, voluntarily contributed to defense costs and to the settlement in that action, without any reservation. Philadelphia thus asserts that Harleysville waived any right to recover the sums it paid on behalf of Crystal Run. Philadelphia thus concludes that the counterclaims should be dismissed, and, upon such dismissal, that Philadelphia should be permitted to discontinue this action.

By Notice of Cross-Motion filed on September 1, 2017, Harleysville again seeks leave to amend its Answer, to assert an additional counterclaim. The proposed Second Amended Answer now includes a counterclaim seeking reimbursement from Philadelphia of the $300,000 Harleysville contributed to the settlement in the Blake Action. Harleysville asserts that the injuries in that action stemmed from a continuous course of conduct that began during the period covered by the Philadelphia policy, and that Philadelphia should have paid the entire settlement amount.

With respect to Philadelphia's motion, Harleysville asserts that the motion must be denied on the basis of the Court's finding in the May 2 Decision that the settlement documents in the Blake Action did not contain an express waiver or release of Harleysville's claims in this matter. Harleysville's attorney further asserts that he personally advised Philadelphia's attorney that any

settlement in the Blake Action would be subject to Harleysville's reservation of its right to recoup any monies paid toward the settlement.

Furthermore, Harleysville asserts that Philadelphia may not raise the issue of voluntary payment on a motion to dismiss as such a motion is based on the pleadings alone, and may not be supported by extrinsic evidence. Finally, Harleysville contends that the voluntary payment doctrine is inapplicable in any event as Harleysville made payments not as a volunteer, but to protect its own interests, and specifically to prevent its insured, Crystal Run, from exposure to potentially greater liability.

Harleysville does not oppose that portion of Philadelphia's motion which seeks to discontinue Philadelphia's claims. However, on the basis of the arguments set forth above, it concludes that the motion to dismiss Harleysville's counterclaims must be denied, and leave should be granted to Harleysville to again amend its Answer to assert an additional counterclaim against Philadelphia for reimbursement of the monies it contributed to the Blake settlement.

In reply, and in opposition to the cross-motion, Philadelphia reiterates its position that Harleysville participated in the settlement of the Blake Action without reservation, and specifically denies that Harleysville's counsel ever notified Philadelphia's counsel of its reservation of any right to pursue a claim for reimbursement. In any event, it is undisputed that there is no writing by which Harleysville conditioned its contribution to the settlement upon its ability to maintain claims against Philadelphia.

Philadelphia reiterates its position that the settlement of the Blake Action renders the respective claims of the parties in this action moot. Philadelphia further submits that Harleysville's new proposed counterclaim is patently without merit, in that it is barred by the voluntary payment

doctrine. Philadelphia thus concludes that its motion should be granted in its entirety, Harleysville's motion for leave to again amend its Answer should be denied, and all claims and counterclaims should be dismissed.

Discussion

Summary Judgment Standard

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact" (*Nash v. Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011]), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The function of the court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and the court is obliged to draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000]).

Voluntary Payment Doctrine

The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). The doctrine of subrogation, upon which a claim for common-law indemnification is based, such as that which Harleysville now seeks to advance, "may not be invoked where the payments sought to be recovered are voluntary" (*Markel Ins. Co. v. American Guarantee and Liability Ins. Co.*, 111 AD3d 678 [2d Dept 2013], *quoting Broadway Houston Mack Dev., LLC v. Kohl*, 71 AD3d 937 [2d Dept 2010]).

"A party seeking subrogation can establish that its payments were not voluntary either by pointing to a contractual obligation or the need to protect its own legal or economic interests" (*Broadway*, 71 AD3d at 937). In the absence of a contractual obligation, "the party seeking subrogation must show that the act is not merely helpful but *necessary* to the protection of its interests" (*id.*)(emphasis added). It is this ground upon which Harleysville rests its proposed counterclaim for indemnification from Philadelphia, by asserting that it contributed to the settlement of the Blake Action in order to prevent Crystal Run from facing potentially greater liability.

Harleysville's disclaimer of coverage in the Blake Action is fatal to its proposed counterclaim. Harleysville expressly disclaimed coverage, and continues, to this day, to assert that it never had any obligation to defend or indemnify Crystal Run in that action. *Vigilant Ins. Co. v. Travelers Prop. Cas. Co. of Am.*, 243 F.Supp.3d 405 [SDNY 2017], cited by Harleysville, recites the applicable rule here: "An insurer which pays a loss for which it is not liable thereby becomes a mere volunteer, and is not entitled to subrogation, in the absence of an agreement therefor" (243 F.Supp.3d at 422, *quoting Nat'l Union Fire Ins. Co. v. Ranger Ins. Co.*, 190 AD2d 395 [4th Dept 1993]). By Harleysville's own assertion, it made payments toward the defense and settlement of the Blake Action which it had no obligation to make.

Harleysville's reliance on cases in which insurers made payments in order to limit their own liability in the underlying action is misplaced. In each of the cases cited by Harleysville, the insurer which sought to recover payments it had made *was* required to indemnify its insured in the underlying action, and sought repayment from another insurer which was also required to indemnify the insured but refused to do so. Such is not the case here. Rather, Harleysville maintains that it *was not* required to indemnify Crystal Run in the Blake Action, and has presented no evidence that

Philadelphia ever refused to indemnify the insured.

Furthermore, Harleysville's attempt to avoid the voluntary payment doctrine by asserting that it contributed to the settlement of the Blake Action in order to protect its insured, Crystal Run, from potentially greater liability, necessarily fails. On this issue, Harleysville must establish that its contribution to the settlement was "not merely helpful but necessary to the protection of its interests" (*Broadway*, 71 AD3d at 937). Harleysville asserts that it made payments to protect the interests of Crystal Run, and makes no argument that its own interests were protected in any way by the settlement of the Blake Action. Any such argument would be illogical, as Harleysville continues to assert that it was under no obligation to indemnify Crystal Run, and any damages suffered by Crystal Run thus would have no impact on Harleysville.

Harleysville's continued insistence that it had no obligation to indemnify Crystal Run is dispositive of both Harleysville's motion for leave to amend its Answer and Philadelphia's motion for summary judgment dismissing the counterclaims. Harleysville expressly denies any contractual obligation to contribute to the Blake settlement, and asserts that it made payments to protect Crystal Run's interests, not its own (*cf. Broadway*, 71 AD3d at 937).

Harleysville thus cannot invoke the doctrine of subrogation, upon which its proposed counterclaim for common-law indemnification against Philadelphia is based. Harleysville's proposed counterclaim is therefore barred by the voluntary payment doctrine, and is patently devoid of merit. Under the circumstances, the motion for leave to amend should be denied (*see Strunk v. Paterson*, 145 Ad3d 700 [2d Dept 2016]).

As the voluntary payment doctrine bars Harleysville's attempt to recover from Philadelphia, the remaining counterclaims, and the complaint in this action, all of which seek a declaration of the

rights and obligations of the respective parties, no longer present a justiciable controversy. Philadelphia has never disputed its obligation to indemnify its insured, and it contributed to the settlement of the Blake Action in satisfaction of that obligation. Harleysville contributed to that settlement as a volunteer, and thus cannot recover the sums it paid. The matter is moot, and any further declaration by the Court as to the rights of the parties herein would have no real, practical effect (*cf. Goodman v. Reisch*, 220 AD2d 383 [2d Dept 1995]).

On the basis of the foregoing, it is hereby ORDERED that Harleysville's cross-motion (Seq. #5) for leave to again amend its Answer is denied; and it is further

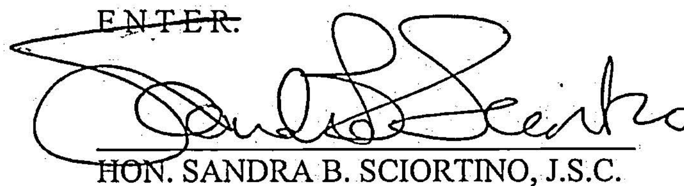
ORDERED that Philadelphia's motion (Seq. #4) is in all respects granted, the counterclaims asserted in Harleysville's Anemded Answer filed on May 4, 2017 are dismissed, and this action is hereby discontinued; and it is further

ORDERED that Harleysville's motion (Seq. #3) to compel Philadelphia to respond to outstanding discovery demands is denied as moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 11, 2017
Goshen, New York

E N T E R:



HON. SANDRA B. SCIORTINO, J.S.C.

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VIA NYSCEF