SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Steven Padovani v. Progressive Northern Insurance Company
C.A. No. 09C-04-244 RRC

Submitted: October 12, 2010
Decided: December 21, 2010

On Defendant Progressive Northern Insurance Company's Motion for Summary Judgment.
DENIED.

Dear Counsel:

INTRODUCTION

This case arises from a December 3, 2002 automobile accident in Philadelphia, Pennsylvania. Defendant's motion for summary judgment, made pursuant to Delaware Superior Court Rule of Civil Procedure 56(c), asserts that there are no issues of material fact in dispute and that Defendant is entitled to judgment as a matter of law.

Plaintiff instituted the instant action to recover Underinsured Motorist benefits from Defendant subsequent to Plaintiff's receipt of a $16,000 settlement from the tortfeasor's liability insurance carrier. On the present record, it is not clear whether Plaintiff also had a viable claim against the City of Philadelphia, as an alternative tortfeasor (apparently based upon nonfunctioning traffic signals at the time of the accident), although this issue is now moot. [1] Defendant now moves for summary judgment on the following grounds: 1) Plaintiff has not exhausted the tortfeasor's liability limits, because the $6,000 that Defendant received in settlement of a subrogation suit was not demanded by Plaintiff; and 2) Plaintiff is no longer "legally entitled to recover," as required by 18 Del. C. § 3902 by virtue of the release executed to resolve the underlying liability claims.

Plaintiff counters that the tortfeasor's liability policy was in fact exhausted, as the entire $35,000 policy limit was paid to resolve claims arising from this accident. Plaintiff contends that, notwithstanding Plaintiff's failure to demand the $6,000 that Defendant received from the tortfeasor's insurance carrier to settle a subrogation suit, the underlying liability policy is exhausted. According to Plaintiff, the doctrines of estoppel, unclean hands, and unjust enrichment should preclude Defendant from using Plaintiff's failure to demand this $6,000 as a defense to Plaintiff's UIM claim, because Defendant accepted the $6,000 in settlement of its subrogation claim, but did not express its intent to rely on its receipt of these funds to preclude Plaintiff from seeking UIM benefits. Plaintiff argues that these unresolved factual issues preclude summary judgment at this time.

Given that this is a motion for summary judgment, the facts and all reasonable inferences flowing therefrom must be viewed in the light most favorable to Plaintiff, the non-moving party. On the present record, the extent to which Plaintiff's equitable defenses may preclude Defendant from denying Plaintiff's UIM claim cannot be ascertained. Although the Plaintiff ultimately

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[1] Defendant's initial motion for summary judgment also alleged that Plaintiff did not exhaust all available liability coverage because the City of Philadelphia was a putative tortfeasor, but there was no indication that the City paid any or all of its liability limits. Def's Mot. For Summ. J. at 1. However, subsequent to the production of an affidavit executed by Plaintiff's counsel in the underlying liability action affirming that the City of Philadelphia was not a viable tortfeasor, Defendant has voluntarily dismissed this portion of its motion for summary judgment. *See* October 19, 2010 Letter to the Honorable Richard R. Cooch Regarding Motion for Summary Judgment (Lexis Transaction No. 33893291).

may not be able to prove the foregoing equitable defenses or an entitlement to recover, Plaintiff has nonetheless met the necessary threshold and established reasonable circumstances and inferences wherein Plaintiff could recover. Thus, Plaintiff was entitled to develop these facts in discovery. The discovery period ended December 3, 2010.

Upon review of the facts, the law, and the parties' submissions, Defendant's motion for summary judgment is **DENIED**.

FACTS AND PROCEDURAL HISTORY

This case arises out of a December 3, 2002 automobile accident in Philadelphia, Pennsylvania.[2] Plaintiff Steven Padovani was involved in a collision with a taxicab driven by Felhi Bennani and owned by Sidhu, Inc.; at the time of the collision, the cab contained one passenger, Bernadette Ladson ("Ladson"), and Plaintiff's car contained one passenger, Anthony Quinn ("Quinn").[3] According to the "Police Crash Reporting Form," this accident occurred at 11th & Lombard Streets, and all traffic signals at this intersection were not functioning at the time of the accident.[4]

At the time of this accident, the taxicab was insured by American Safety Casualty Company ("American") with a limit of $35,000 for bodily injury liability coverage, and Padovani was insured under a policy issued by Defendant, Progressive Northern Insurance Company ("Progressive"), which provided Underinsured Motorist Insurance (UIM) in the amount of $100,000 per person and $300,000 per accident.[5] Defendant paid Padovani $8,900 in collision coverage prior to suit being filed and commenced a subrogation lawsuit against American ("subrogation suit").[6]

Plaintiff instituted an action in the Philadelphia Court of Common Pleas against Sidhu, Bennani, and the City of Philadelphia ("City") for the injuries he sustained in this accident ("Underlying Action").[7] To settle this

[2] Def's Mot. For Summ. J. at 1.
[3] *Id.*
[4] Def.'s Mot. for Summ. J. Ex. A at 8.
[5] *Id.* at 1.
[6] *Id.* at 2.
[7] Although Plaintiff's claims against the City of Philadelphia are not clarified in the instant record, it is assumed that these potential claims were based on the nonfunctional traffic signals at the intersection.

action, American tendered its liability limits as follows: $16,000 to Plaintiff, $10,000 Ladson, and $3,000 to Quinn; the remaining $6,000 of the $35,000 limit was tendered to Defendant to settle the subrogation suit.[8] As part of this settlement, Plaintiff executed a release against all known tortfeasors and "any other person, corporation, association or partnership, which might be charged with responsibilities for injuries to the person or property, or both, of the Undersigned" for accident "which occurred on or about the 2nd day of December, 2002, which gave rise to [the underlying action]."[9] The disposition of any potential claims against the City is not clarified in the terms of the settlement or the docket for the underlying action.[10]

Plaintiff now pursues UIM benefits from Defendant in the instant action. Defendant moves for summary judgment on the following grounds: 1) Plaintiff has not exhausted American's liability limits, because the $6,000 that Defendant received in settlement of the subrogation suit was not demanded by Plaintiff; and 2) Plaintiff is no longer "legally entitled to recover," as required by 18 Del. C. § 3902, in light of Plaintiff's alleged failure to include a reservation of rights in the release executed in settlement of the underlying action.[11] As noted, Defendant's motion for summary judgment also argued that Plaintiff is ineligible under § 3902(b) because there is no evidence that the City, a potential tortfeasor, exhausted any or all of its liability limits in the underlying action; Defendant has subsequently dismissed this portion of its motion for summary judgment.[12]

Plaintiff responds that Defendant, after being presented with a draft of the release in the underlying action, "said nothing about its intention to preclude Padovani from receiving UIM benefits under his policy should be BI policy be disbursed as indicated [on the release]."[13] Plaintiff states that Defendant "stood idly by, lulling [Plaintiff's counsel in the underlying action]

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[8] Def's Mot. For Summ. J. at 1.
[9] *Id.* Ex. H at 8. The Police Crash Reporting Form indicates that the accident occurred on December 3, 2002, while the release states "on or about the 2nd day of December, 2002. . . ."
[10] *Id.* at 3.
[11] Plaintiff's moving papers do not directly address Defendant's argument with respect to the release language precluding Plaintiff from recovering. However, it is assumed for the purposes of this motion that the Plaintiff's assertion of potential equitable defenses herein is addressed to this point.
[12] October 19, 2010 Letter to the Honorable Richard R. Cooch Regarding Motion for Summary Judgment (Lexis Transaction No. 33893291).
[13] Pltf.'s Resp. to Def.'s Mot. for Summ. J. at 3.

into disbursing the BI policy limits" pursuant to the terms stipulated in the release. Plaintiff asserts that the underlying liability policy has in fact been exhausted by virtue of the payment of the $35,000 limits, thus Defendant has been unjustly enriched by retaining the $6,000 subrogation suit settlement payment, rather than forwarding it to Plaintiff.[14] It is Plaintiff's contention that, as a result of Defendant's "unclean hands" throughout the underlying action, Defendant is now estopped from raising Plaintiff's failure to exhaust the underlying liability policy's limits or the issue of Plaintiff's legal entitlement to recover, and that further discovery is necessary for Plaintiff to develop these equitable defenses.

Plaintiff initially cited the need for further discovery to determine whether the City was in fact a tortfeasor in the underlying action, whether the City was immune under principles of sovereign immunity, and any other facts which might clarify the extent of the City's liability and the circumstances of its dismissal from the underlying action.[15] In support of these factual contentions, Plaintiff supplemented its "Second Response to Defendant, Progressive Northern Insurance Company's, Motion for Summary Judgment" on October 15, 2010 with of an affidavit executed by Stacy Kendall, Esquire, the attorney who represented Plaintiff in the underlying action. According to Ms. Kendall, "all parties involved in the underlying action *Padovani, et al vs. Sidhu, Inc. et al*, agreed that the City of Philadelphia was not a tortfeasor."[16] Ms. Kendall stated that Sidhu, Inc. maintained only one liability insurance policy (the American policy); she further stated: "it is my practice in all cases involving third party coverage and claims for personal injury, to investigate (and attempt to recover from) all possible liability policies the tortfeasor may have in effect at the time of the accident" and "to the best of my knowledge, belief and recollection, I conducted such an investigation in the underlying case and no additional liability policies were found."[17]

On October 19, 2010, subsequent to the filing of Ms. Kendall's affidavit, Defendant conceded via letter filing that the City did not qualify as a tortfeasor for purposes of 18 Del. C. § 3902(b) and thus dismissed that portion of its motion for summary judgment.[18] In light of Defendant's

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[14] Pltf.'s Resp. to Def.'s Mot. for Summ. J. at 6.
[15] Pltf.'s Second Resp. to Def.'s Mot. for Summ. J. at 2.
[16] Aff. Of Stacy Kendall, Esquire ¶ 2.
[17] *Id.* ¶¶ 6-7.
[18] October 19, 2010 Letter to the Honorable Richard R. Cooch Regarding Motion for Summary Judgment (Lexis Transaction No. 33893291).

dismissal of this portion of its motion for summary judgment, the parties' contentions on this issue are now moot. Accordingly, this opinion is limited to the Plaintiff's factual and legal contentions with respect to the alleged equitable defenses.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[19] A genuine issue of material fact exists when "the parties are in disagreement concerning the factual predicate for the legal principles they advance."[20] The moving party bears the burden of demonstrating that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law.[21] The Court must view the record in a light most favorable to the non-moving party.[22] A motion for summary judgment "must be denied if there is any reasonable hypothesis by which the opposing party may recover. . . ."[23]

DISCUSSION

The facts of this case, as set forth in the moving papers and exhibits, are not entirely clear on certain operative issues herein. Plaintiff submits that the circumstances surrounding the settlement of the underlying claim coupled with certain contemporaneous correspondence with Defendant raises factual issues with respect to the Defendant's knowledge and intent during the negotiation and execution of said settlement; these factual issues would be an integral part of the foregoing equitable defenses.[24] Viewing these factual issues in the light most favorable to Plaintiff, Plaintiff has established a "reasonable hypothesis by which [Plaintiff] may recover."[25] Therefore, Plaintiff was entitled to develop the facts for the remainder of the discovery period.

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[19] Super. Ct. Civ. R. 56(c).
[20] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).
[21] *Sterling v. Beneficial Nat'l Bank, N.A.*, Del. Super., C.A. No. 91C-12-005, Ridgely, P.J. (Apr. 13, 1994) (Mem. Op.).
[22] *Hammond v. Colt Ind. Op. Corp.*, 565 A.2d 558, 560 (Del. Super. Ct. 1989).
[23] *Vanaman v. Milford*, 272 A.2d 718, 720 (Del. 1970).
[24] *See* Pltf.'s Second Resp. to Def.'s Mot. for Summ. J. at 3-4.
[25] *Id.* at 720.

As noted above, the current factual record ultimately may be insufficient for Plaintiff to carry the necessary burden for establishing the noted equitable defenses. However, there is nonetheless a sufficient record to support a "reasonable hypothesis" by which Plaintiff may prevail herein.

Accordingly, for all the reasons stated above, Defendant's motion for summary judgment is **DENIED**.

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Richard R. Cooch, R.J.

oc: Prothonotary