

**Matter of New York Cent. Mut. Fire Ins.
Co. v Steiert**

2008 NY Slip Op 32083(U)

July 17, 2008

Supreme Court, Nassau County

Docket Number: 1975-04/

Judge: Kenneth A. Davis

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

Present:

HON. KENNETH A. DAVIS
Justice

x TRIAL/IAS, PART 3

In the Matter of the Application for an Order
Staying the Arbitration between
New York Central Mutual Fire Insurance
Company,

Petitioner,

INDEX NO.:04/11975

-against-

DAWN STEIERT,

Respondent,

-and-

KEMPER AUTO and HOME INSURANCE COMPANY,
ERICH JOHN BOHN, ERICH A. BOHN, and ERICH
M. BOHN,

Additional Respondents.

x

The following papers were read on this motion:

Petitioner's Memorandum of Law x
Respondent Steiert's Memorandum of Law x
Respondent Kemper's Memorandum of Law x

The petitioner, submits a memorandum of law, after a framed issue hearing, seeking an order permanently staying the SUM arbitration sought by respondents, and declaring that respondent Kemper is obligated to provide coverage and indemnify defendant Erich John Bohn.

Respondents, Steiert and KEMPER Auto and Home Insurance Company (hereinafter "Kemper"), submit memoranda of law in opposition seeking an order denying petitioners' application for a stay of the arbitration and directing the petitioner to proceed to supplementary Underinsured Motorist Arbitration.

In support of its application, the petitioner, New York Central Mutual Fire Insurance Company (hereinafter "NYCM") asserts that Kemper's disclaimer of coverage is invalid because it was untimely. The Petitioner argues that the factual inquiries that Kemper required could have been obtained through mechanisms other than Examinations Under Oath. The Petitioner claims that the examinations were conducted on January 2, 2002, but the disclaimer of coverage was not issued until February 27, 2002. NYCM maintains that Kemper knew of all the relevant facts necessary to disclaim coverage as early as January 2, 2002. According to the petitioner, Kemper did not disclaim until approximately four months and nine days from the time the first notice was received in October 2001, which was unreasonable. According to the petitioner, Kemper was under an absolute duty to timely disclaim coverage as soon as reasonably possible in light of the fact that disclaimer of coverage was based on a policy exclusion.

Finally, NYCM maintains that Kemper bore the burden of justifying its delay in disclaiming coverage. The petitioner asserts that Kemper's delay in disclaiming coverage was unexcused, and therefore invalid.

In opposition to petitioner's application, respondent Steiert, asserts that Kemper's 36-day delay in disclaiming was not untimely. According to Steiert, the vehicle involved in the accident was insured by Eagle Insurance Company, and had a primary coverage policy in the amount of \$50,000. After preliminary discovery, a claim letter was sent to Kemper Insurance, the insurer of a separate motor vehicle owned by the defendant's grandfather, in an attempt to ascertain whether there was excess coverage. Kemper disclaimed coverage on February 27, 2002. In March 2004, Justice Palmieri issued an order declaring that Kemper was not obligated to indemnify, nor provide excess coverage to the defendants. According to respondent Steiert, the only issue before this court is New York Central Mutual's claim that Kemper did not timely disclaim coverage. The respondent maintains that a valid claim was filed with New York Central Mutual, and if the court rules in NYCM's favor, then NYCM will not be obligated to provide coverage. The respondent maintains that the court should order the parties to proceed to arbitration on the additional coverage of the SUM claim in the interest of reaching a fair and equitable resolution.

Respondent, KEMPER AUTO and HOME INSURANCE COMPANY, also submits a memorandum of law in opposition. Arguing that it's disclaimer was timely, Kemper claims that it disclaimed in compliance with the requirements of Insurance Law §3420 (d). KEMPER maintains that the disclaimer was issued after a complete and diligent investigation, which was required in order to

ascertain whether or not the defendant was covered by the KEMPER policy.

According to Kemper, an investigation into the claims was necessary to form the basis of the disclaimer. Kemper maintains that a reservation of rights letter was sent to all interested parties on October 26, 2001. Examinations Under Oath were conducted on the defendant and his grandfather on January 2, 2002. Kemper received the report summarizing the testimony on January 21, 2002. Thereafter, Kemper conducted an additional investigation regarding the propriety of the claim and issued the disclaimer on February 27, 2002, 36 days after receipt of the Examination Under Oath report. KEMPER maintains that once the investigation was completed a disclaimer was sent to all interested parties.

In response to the petitioner's assertion that the investigation of the claims could have been conducted in a different manner, Kemper maintains that Examinations Under Oath are reasonable and the most reliable form of investigation. Kemper also maintains that its actions were undertaken on a good faith basis, and were reasonable. Finally, Kemper argues that the delay did not result in prejudice to the petitioner.

Upon the foregoing the petitioner's application to permanently stay arbitration is denied. By Order of Justice Daniel Palmieri, March 22, 2004 Kemper was not obligated to indemnify or provide excess coverage to the defendant Erich John Bohn. The issue currently before this court is whether Kemper timely disclaimed. Where, as here, Insurance Law § 3420 (d) is applicable and a disclaimer is based on a policy exclusion, a timely disclaimer of coverage is required. Given that Kemper's disclaimer of coverage rested on an exclusion in the insured's policy, Kemper had a statutory duty to timely disclaim. On the facts presented, the court finds that Kemper credibly testified that it did not have "sufficient knowledge of the facts entitling it to disclaim" until after receipt of the Examinations Under Oath report. As such, we conclude that Kemper's disclaimer of coverage, made approximately 36 days after receipt of the report, satisfied the statute and was timely as matter of law.

Insurance Law §3420 (d) requires an insurer to provide a written disclaimer of coverage "as soon as is reasonably possible." An insurer's obligation to give written notice of disclaimer as soon as reasonably possible applies not only to an insurer's disclaimer of primary insurance coverage, but to a disclaimer of excess coverage as well. Insurance Law § 3420(d); Reyes v. Diamond State Ins. Co., 827 N.Y.S.2d 263 (2nd Dept., 2006). Reasonableness of the delay to disclaim is measured from the time when the insurer "has sufficient knowledge of facts entitling it to disclaim, or

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knows that it will disclaim coverage." First Fin. Ins. Co. v. Jetco Contr. Corp., 1 NY3d 64 (Ct. of App., 2003); Sirius America Ins. Co. v. Vigo Const. Corp., 852 N.Y.S.2d 176 (2nd Dept., 2008); Tex Development Co., LLC v. Greenwich Ins. Co., 858 NYS2d 682 (2nd Dept., 2008). The insurer bears the burden of justifying any delay, Zappone v. Home Ins. Co., 55 NY2d 131 (Ct. of App., 1982). Although notice should be given as soon as is reasonably possible, investigation into issues affecting an insurer's decision whether to disclaim coverage may excuse delay in notifying the policyholder of a disclaimer. Insurance Law § 3420(d); Delphi Restoration Corp. v. Sunshine Restoration Corp., 841 NYS 2d 684 (2nd Dept., 2007); Schulman v. Indian Harbor Ins. Co., 836 NYS2d 682 (2nd Dept., 2007). If grounds to disclaim coverage are not readily apparent, the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted. Insurance Law § 3420(d); Those Certain Underwriters at Lloyds, London v. Gray, 856 NYS2d 1 (1st Dept., 2007).

The determination of whether a notice of disclaimer is untimely often is a question of fact dependent on all the circumstances of the case, First Fin. Ins. Co. v. Jetco Contr. Corp., 1 NY3d 64 (Ct. of App., 2003), especially the length of and the reason for the delay. Hartford Ins. Co. v. County of Nassau, 46 NY2d 1028 (Ct. of App., 1979). "It is the responsibility of the insurer to explain its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law, First Fin. Ins. Co. v. Jetco Contr. Corp. Id. "It is perfectly reasonable that the insurer verify the surrounding facts so that, if it chooses to disclaim, it does so on the basis of concrete evidence." Mount Vernon Fire Ins. Co. v. Harris, 193 F. Supp 2d 674 (E.D.N.Y., 2002).

In the instant case, the claim against Kemper was for excess coverage, and respondent Steiert had a viable primary claim against Eagle and NYCM. Kemper issued a reservation of rights letter twelve days after receiving first notice of the claim. Kemper then initiated an investigation in order to flesh out the basis for denying coverage. This investigation, which according to the testimony of the senior claim representative handling the litigated first and third-party claims William Lavoie, included Examinations Under Oath of both the defendant/grandson, Erich John Bohn, and the insured/grandfather, was needed to attain the facts providing the basis on which to disclaim. Contrary to petitioner's contention that Kemper could have used a method other than Examination Under Oath, Mr. Lavoie credibly testified that examinations are the primary tool used by Kemper to determine coverage in these types of instances. Mr. Lavoie also credibly testified that in accordance with Kemper's internal policy, the next step in the investigation into the propriety of the claim was to refer the claim to the

technical claim manager who consults with the home office liability executive, who ultimately makes the decision whether to approve or deny coverage.

The investigation here was initiated with examinations on January 2, 2002. Kemper received the report on January 21, 2002 and sent the disclaimer on February 27, 2002, 56 days later. There is no question that during the period in question, KEMPER engaged in a reasonably prompt, thorough, and diligent investigation of the claim. While New York courts have held that unexplained delays of two months or more are unreasonable as a matter of law, see Hartford, New York courts have also consistently recognized that a prompt, good faith investigation of the claim by the insurer may justify a delay that would normally be deemed unreasonable absent explanation. Matter of Prudential Property & Cas. Ins. Co., 213 A.D.2d 408 (2nd Dept., 1995) (delay of "slightly more than two months" to conduct an investigation deemed reasonable); Vesta Fire Ins. Corp. v. Seymour, 1996 WL 1057158 (E.D.N.Y. 1996) (delay for a period of "just over three months" deemed reasonable); U.S. Underwriters Ins. Co. v. Congregation B'Nai Israel, 900 F. Supp. 641 (E.D.N.Y. 1995) (delay for a period of "over two months" deemed reasonable); Wilczak v. Ruda & Capozzi, Inc., 203 AD2d 944 (4th Dept., 1994) (reversing summary judgment for insured where insurer's two-month delay was the result of investigation regarding coverage).

In this case, the respondent is able to justify its delay in notifying the petitioner that it was disclaiming coverage. Given that Kemper submits that the primary reason for disclaiming coverage was not readily apparent upon receipt of notice of the accident, and the fact that Kemper engaged in a prompt investigation of the claim, the court finds that the respondent's explained delay in disclaiming coverage was reasonable as a matter of law. Brooklyn Hosp. Ctr. v. Centennial Ins. Co., 258 A.D.2d 491 (2nd Dept., 1999); Hartford Ins. Co. v. County of Nassau, 46 NY2d 1028 (Ct. of App., 1979). Kemper offered a sufficiently reasonable explanation for the delay, accounting for the time that the insurer took to issue the disclaimer.

Moreover, the Court finds that the insurer's denial of coverage, based on the policy's exclusion for "family members" was sufficiently specific to render notice of disclaimer timely; the denial of coverage identified the applicable policy exclusion and set forth the factual basis for the insurer's position that the claim fell within such exclusion.

Further, by Order of Supreme Court Justice Palmieri, KEMPER was not obligated to indemnify, or to provide coverage for the accidents or to provide excess insurance coverage to the defendants Erich John Bohn. In light of the fact that the defendant was not a covered person under the subject policy, KEMPER had no statutory

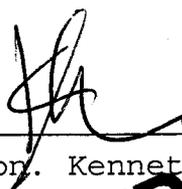
obligation to provide him with prompt notification of disclaimer. A disclaimer is unnecessary when a claim does not fall within the coverage terms of a liability policy. McKinney's Insurance Law § 3420 (d); 47 Mamaroneck Ave. Corp. v. Hartford Fire Ins. Co., 50 A.D.3d 952 (2nd dept., 2008); Markevics v. Liberty Mut. Ins. Co., 97 NY2d 646 (2001); Zaccari v. Progressive Northwestern Ins. Co., 35 AD3d 597 (2nd Dept., 2006); Zappone v. Home Ins. Co., 55 NY2d 131 (1982); National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570 (1st Dept., 2006). Since the claims in the underlying action were not covered by the policy, no disclaimer was required.

Accordingly, the application to permanently stay the arbitration is denied. The Court finds that Kemper required, and had a right to, an investigation regarding the propriety of the claim in order to attain sufficient knowledge of the facts entitling it to disclaim. Kemper attained those facts, after receipt of the report, and additional consultation with managers. Based on these facts, the issuance of the disclaimer after attainment of those facts entitling it to disclaim was not an unreasonable delay. The petitioner is ordered to proceed with the supplementary underinsured motorist arbitration.

This constitutes the Decision and Order of the court.

DATED:

JUL 17 2008



Hon. Kenneth A. Davis

ENTERED

JUL 22 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE