Westport Ins. Corp. v Certain Underwriters at Lloyd's of London
2008 NY Slip Op 33689(U)
December 5, 2008
Supreme Court, New York County
Docket Number: 107158/06
Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

WESTPORT INSURANCE CORPORATION,
Individually and as Subrogee of JERROLD S. PARKER,
JERROLD S. PARKER, P.C., HERBERT L. WAICHMAN,
HERBERT L. WAICHMAN, ESQ., P.C., and PARKER &
WAICHMAN, L.L.P.,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON,

Defendant.

And Third-Party Action.

INDEX NO. 107158/06

MOTION DATE

MOTION SEQ. NO. 004

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: In this subrogation action, the plaintiff, Westport Insurance Corporation, seeks to recover the payments which it made pursuant to the settlement of a lawsuit brought against its insureds, Jerrold S. Parker, Jerrold S. Parker, P.C., Herbert L. Waichman, Herbert L. Waichman, Esq., P.C., and Parker & Waichman, L.L.P ("P&W defendants"), pursuant to a legal malpractice insurance policy which it had issued to them.

The P&W defendants were retained by Gloria Bakmezian to represent her in a medical malpractice lawsuit arising from the death of her husband in a hospital emergency room. In turn, the P&W defendants retained Bruce D. Katz to serve as trial counsel and assigned him the responsibility of handling the entire prosecution of the case, including the discovery process. The medical malpractice action was commenced in January, 1995. Beginning in 1997, Katz regularly failed to attend court conferences and failed to comply with an order directing that he file a note of issue. In August, 1997, the court in that case issued an order precluding Katz from deposing the defendants because of his discovery-related failures. Katz, who was suffering through a period of cascading personal tragedies, subsequently failed to appear at a previously-scheduled conference in December, 1998. Later that month, the defendants in that case moved for an order dismissing the complaint. Katz defaulted on the motion and, by order dated January 6, 1999, the court dismissed the complaint. On January 24, 2000, Ms. Bakmezian moved to vacate the default. By order dated February 2, 2000, the court denied the motion. The order denying vacatur was later affirmed on appeal. *See Bakmezian v. St. Luke's Hosp.*, 280 AD2d 503 (2nd Dept 2001).

On February 10, 1999, one month after Bakmezian's medical malpractice action was dismissed because of Katz's discovery failures, Katz applied for a legal malpractice insurance policy from the defendant, Certain Underwriters at Lloyd's of London. The application included the question "Does any attorney.....for whom coverage is sought know of any circumstances, act, error or omission that could result in a claim or suit against the applicant?" Katz answered "No" to the question. Under Insurance Law § 3105, an insurer may rescind an insurance contract if the insured made a false material representation of past or present fact. Under the statute, a representation is "material" only if "knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to issue a policy."

Katz's application was approved and a policy was issued to him a few days later. The term of the policy was from February 16, 1999 to February 16, 2000. There is no indication that, at the time the policy

was issued, the defendant was aware that Katz's discovery failures and failure to oppose the motion to dismiss had resulted in the dismissal of Ms. Bakmezian's medical malpractice complaint. Nor is there any evidence that when the defendant, in December, 1999, sent Katz an application to renew the policy, it was aware of these failures.

However, soon after Ms. Bakmezian's motion to vacate the default was denied, the P&W defendants sent the defendant's agent a letter, dated February 10, 2000, advising of Mr. Katz's failures in the medical malpractice case, of the court's order of dismissal and of the order denying vacatur. A copy of all of the papers submitted on the motion to vacate was included. The letter specifically stated that there was a distinct possibility that Katz had committed legal malpractice and that, if they themselves were sued for malpractice, they would seek indemnification and/or contribution from Katz. It appears that this letter was received by the defendant's agent on February 15, 2000.

The following day, February 16, 2000, the defendant issued a renewal policy to Katz and received a $1,000 initial payment on an annual premium of $4,160. As to the balance of the premium, Katz opted to pay it through 10 monthly installments which were made to the defendant's agent, presumably through at least December, 2000.

Thereafter, in April, 2001, the defendant's agent issued cancellation endorsements which retroactively canceled the Katz policy on the date of its inception, February 16, 1999. By letter dated June 29, 2001, the defendant notified Katz that it was rescinding his policy on the ground that his failure to disclose, *inter alia*, Ms. Bakmezian's potential claim against him for legal malpractice constituted a material misrepresentation and that the defendant would not have issued him the policy had it been aware of Katz's conduct in her medical malpractice action.

In November, 2002, the P&W defendants and Katz were sued for legal malpractice by Ms. Bakmezian. Westport provided the P&W defendants with a defense and indemnification. Believing that Katz was responsible for any liability they may suffer, the P&W defendants asserted cross claims against him for indemnification and/or contribution. Although Katz never tendered a defense to Lloyd's, Ms. Bakmezian's counsel did provide it with a copy of the complaint. The defendant thereafter sent Katz a letter reaffirming its prior rescission. Ultimately, the *Bakmezian* action was settled for $650,000. As part of the settlement, Katz, appearing pro se, agreed to the entry of a judgment against him on the P&W defendants' cross claims for the entire $650,000. After Westport paid the $650,000 judgment, it brought this subrogation action against Lloyd's to recover these monies. In turn, Lloyd's brought a third-party action against Katz seeking a declaration that it had properly rescinded the policy which it had issued to him and that it was therefore not responsible for reimbursing Westport.

The plaintiff has now moved for summary judgment granting the relief sought in the complaint.

Discussion

On its summary judgment motion, Westport argues at length that the rescission was invalid under Insurance Law § 3105 because there was no intentional misrepresentation in Katz's February 10, 1999 insurance application since Katz, in distress over a number of personal tragedies occurring at or about the same time, was not paying any attention to the Bakmezian medical malpractice action and, at the time of the application, was unaware that the action had been dismissed, that there had been a motion to vacate and that the motion to vacate had been denied. The court need not address this issue since it has otherwise concluded that the rescission is invalid because the defendant waived its right to rescind.

It is well settled that the continued acceptance of premiums by an insurance carrier after learning of facts which allow for rescission of the policy "constitutes a waiver of, or more properly an estoppel against, the right to rescind." *See Bible v. John Hancokc Mut. Life Ins. Co.*, 256 NY 458, 462 (1931); *Briggs v. Allstate Ins. Co.* 1 AD3d 392 (1st Dept 2003); *Scalia v. Equitable Life Assur. Soc. of U.S.*, 251 AD2d 315 (2nd Dept 1998); *Contientnal Ins. Co. v. Helmsley Enters.*, 211 AD2d 589 (1st Dept 1995). Here, despite the fact that, by letter dated February 10, 2000, the defendant was provided with detailed

information about how Katz's discovery-related failures and his default on a motion to dismiss had led to the dismissal of Ms. Bakmezian's medical malpractice claim. The letter specifically advised the defendant that, on account of his conduct, Katz may have committed legal malpractice. Notably, a copy of the papers on the motion to vacate the default were attached thereto. Clearly, this letter provided the defendant with all of the information it needed to determine that had Katz disclosed this matter in his application, Lloyd's would have refused to issue him a legal malpractice insurance policy. Indeed, the defendant has not pointed to any information existing at the time of Katz's application that it learned about during the 18 months after the February 10, 2000 letter which made any difference in its ultimate determination to rescind. Although the First Department did not affirm the denial of the motion to vacate until February, 2001, this decision is not relevant since the defendant's determination to rescind necessarily turned on whether it would have issued a policy had Katz disclosed all relevant information about the Bakezian medical malpractice case that were known at the time of his application in February, 2000.

Despite learning in February, 2000 of facts which provided it with a sufficient basis for rescinding the policy, the defendant nevertheless accepted Katz's installment payments on the premium for the following ten months. By accepting these payments, the defendant waived its right to rescind.

The defendant, however, argues that, irrespective of whether its rescission of the policy is invalid, it is not liable on the judgment against Katz because the policy contains an exclusion which precludes coverage. Indeed, the defendant has asserted an affirmative defense based on this exclusion, which provides that the defendant is not liable for any claims "arising out of any acts, errors or omissions which took place prior to the effective date of the insurance, if any insured on the effective date knew or could have reasonably foreseen that such acts, errors or omissions might be expected to be the basis of a claim." In opposing the plaintiff's motion for summary judgment, the defendant thus argues that, at the very least, there is a factual issue as to whether Katz knew or could have foreseen that his conduct in the medical malpractice action prior to February 16, 1999 might be expected to be the basis of a legal malpractice claim.

Faced with this exclusion, the plaintiff argues that the defendant has waived its right to now rely on the provision since it has never before been invoked with respect to the Bakmezian matter. It relies on the line of cases holding that an insurer which denies liability on a specified ground may not thereafter shift the basis for its disclaimer to a policy exclusion which could been, but was not, previously invoked. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d 185, 188-89 (2000); *Zappone v. Home Ins. Co.*, 55 NY2d 131 (1982). The Court of Appeals, however, has pointed out that this line of cases only covers claims involving death or bodily injury where notice of disclaimer is required under Insurance Law § 3420(d). *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d at 188, fn. As to other types of claims, it is well settled that where the issue is the existence or nonexistence of coverage under the insuring clause of a policy and its exclusions, the doctrine of waiver is inapplicable. *See Schiff Assocs. v. Flack*, 51 NY2d 692, 638 (1980); *Guberman v. Willima Penn Life Ins. Co.*, 146 AD2d 8, 11 (2nd Dept 1989).

In any event, the defendant never disclaimed coverage on the basis of any provision in the policy. Rather, it rescinded the policy pursuant to Insurance Law § 3105. In this respect, the plaintiff has not cited any case, and the court has found none, which holds that once an insurer is found to have invalidly rescinded a policy, it is precluded from denying coverage on the basis of otherwise applicable exclusions which it had not previously invoked. Indeed, where an insurer, such as the plaintiff herein, rescinds a policy so that the policy is deemed to have never been in effect, it makes little sense to require that, at the same time, it act as if the policy is still in effect and, if otherwise applicable, invoke a particular provision of the policy as another basis for the disclaimer. If, in fact, the plaintiff could establish that Katz was prejudiced by the defendant's failure to previously invoke the exclusion, the defendant might be equitably estopped from now denying coverage on the basis of the cited provision. *See Schiff Assocs. v. Flack*, 51 NY2d at 699; *First Union National Bank v. Tecklenburg*, 2 AD3d 575, 576-77 (2nd Dept 2003). Since the plaintiff has made no such showing, the court is persuaded that the defendant may properly invoke the exclusion

at issue as a basis for its defense. Since there is clearly a factual issue as to whether the exclusion applies, the plaintiff's motion for summary judgment must be denied.

Accordingly, the plaintiff's motion for summary judgment is hereby denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on January 20, 2009 at 10:005 a.m. to pick a trial date.

ENTER ORDER

Dated: 12-5-08

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION