Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.

2011 NY Slip Op 32214(U)

August 10, 2011

Supreme Court, New York County

Docket Number: 101844/09

Judge: Marcy S. Friedman

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SCANNED ON 8/12/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART _____

Index Number : 101844/2009

COUNTRY-WIDE INSURANCE

vs

PREFERRED TRUCKING SERVICES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Cross-motion for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with this court's decision/order dated 8-10-11.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8-10-11

Marcy S. Friedman J.S.C.

MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff(s), Index No.: 101844/09

- against -

PREFERRED TRUCKING SERVICES CORP., CARLOS ARIAS, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, EDWARDS AND KELCEY, INC., FILIPPO GALLINA and SHERRI GALLINA,

Defendant(s).

DECISION/ORDER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In this declaratory judgment action, plaintiff Countrywide Insurance Company (Countrywide) seeks a judgment, pursuant to CPLR 3001, declaring that it is not obligated to defend and/or indemnify Preferred Trucking Services Corp. (Preferred) and Carlos Arias in an underlying personal injury action entitled Gallina v The Port Authority of New York and New Jersey et al., Index No. 103075/2007 (the Gallina Action). Defendants Filippo Gallina and Sherri Gallina (collectively Gallina) move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint. Plaintiff Countrywide cross-moves for summary judgment for the relief demanded in the complaint.

The following relevant facts are undisputed: In the Gallina action, Gallina sued for serious injuries sustained at a construction site, in an accident caused by a truck operated by Arias and owned by Preferred. On the date of the accident, September 27, 2006, Preferred and Arias were insured by Countrywide pursuant to business auto policy no. UCA 0500014 05. (See

Countrywide Policy [Gallina Motion, Ex. C].)

Countrywide's policy provides in pertinent part that in the event of an accident, the insured shall "[c]ooperate with us in the investigation or settlement of the claim or defense against the 'suit.'" (Countrywide Policy, § IV[A][2][b][3].) The policy also requires the insured to "[i]mmediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or 'suit' as soon as reasonably possible." (Id., § IV[A[2][b][2].)

By order of this court dated June 5, 2009, the Gallinas were awarded judgment by default as to liability against Preferred and Arias. (Countrywide Cross-Motion, Ex. R.) After inquest, judgment was entered in favor of Filippo Gallina for $2,300,000, and Sherri Gallina for $250,000.00, against Preferred and Arias. (Judgment, filed July 15, 2010 [Gallina Motion, Ex. M].)

Countrywide twice disclaimed coverage in the Gallina action. First, by letter dated October 10, 2007 (first disclaimer), Countrywide disclaimed coverage based on late notice of suit, stating: "This first notice of suit was provided approximately seven months after the lawsuit was commenced herein. . . . We now exercise our right to issue a disclaimer of indemnity and reserve our right to disclaim any duty to defend you at a later date." In the same letter, Countrywide disclaimed coverage and reserved the right to disclaim a duty to defend "based on the separate and distinct grounds of [its insureds'] lack of cooperation." (First Disclaimer at 2 [Gallina Motion, Ex. G].) Second, by letter dated November 6, 2008 (second disclaimer), Countrywide disclaimed coverage in its entirety and stated that it would no longer provide a defense in the Gallina action. Countrywide based this disclaimer on Preferred's "willful avowed noncooperation" – in particular, its failure to appear for an examination before trial scheduled for

October 14, 2008. (Second Disclaimer at 3 [Gallina Motion, Ex. K].)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Insurance Law § 3420(d)(2) provides that where a liability insurer disclaims liability for an accident occurring in this State, "it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." It is settled that "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Moreover, an insurer's explanation [for its delay] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay." (First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 68-69 [2003] [internal quotation marks and citations omitted].)

"[I]nvestigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer." (Id. at 69. See also Public Serv. Mut. Ins. Co. v Harlen Hous. Assocs., 7 AD3d 421 [1st Dept 2004].) It is reasonable for an insurer to investigate before deciding whether to disclaim, at least where the grounds for

the disclaimer are not evident from the face of the notice of claim or supporting documents, or where the investigation is necessary to determine whether the insured had a reasonable excuse for its delay in giving notice of claim. (See, e.g., Public Serv. Mut. Ins. Co., 7 AD3d at 423; West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278 [1st Dept 2002], lv denied 98 NY2d 605; Heegan v United Intl. Ins. Co., 2 AD3d 403 [2d Dept 2003], lv denied 2 NY3d 704 [2004]; Matter of Prudential Prop. & Cas. Ins. Co. (Mathieu), 213 AD2d 408 [2d Dept 1995]. See generally First Fin. Ins. Co., 1 NY3d at 69.)

A delay in commencing or completing an investigation must be explained. (See Heegan v United Intl. Ins. Co., 2 AD3d 403, supra; Farmbrew Realty Corp. v Tower Ins. Co., 289 AD2d 284 [2d Dept 2001], lv denied 98 NY2d 601 [2002].) The question of whether notice has been given within a reasonable period of time is ordinarily one of fact for the jury. (See First Fin. Ins. Co., 1 NY3d at 70; Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 AD3d 84 [1st Dept 2005]; Morris Park Contr. Corp. v National Union Fire Ins. Co., 33 AD3d 763, 764-765 [2d Dept 2006].) However, "[i]t is the responsibility of the insurer to explain its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law." (Danna Constr. Corp. v Utica First Ins. Co., 17 AD3d 622, 623 [2d Dept 2005], lv denied 5 NY3d 714. See also Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 AD3d 84, supra.)

It is further settled that when the insurance company disclaims based upon the insured's alleged non-cooperation,

> "[t]he burden of proving lack of co-operation of the insured is placed upon the insurer. Since the defense of lack of co-operation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this State that innocent victims . . . be recompensed for the injuries inflicted upon them, the courts have consistently held that the burden of

> proving the lack of co-operation is a heavy one indeed. Thus, the insurer must demonstrate that it acted diligently in seeking to bring about the insured's co-operation; that the efforts employed by the insurer were reasonably calculated to obtain the insured's co-operation; and that the attitude of the insured, after his co-operation was sought, was one of willful and avowed obstruction."

(Thrasher v United States Liab. Ins. Co., 19 NY2d 159, 168 [1967][internal quotation marks and citations omitted][involving motor vehicle accident]; Matter of New York Cent. Mut. Fire Ins. Co. v Salomon, 11 AD3d 315, 316 [1st Dept 2004]; Continental Cas. Co. v Stradford, 11 NY3d 443 [2008].) "Fixing the time from which an insurer's obligation to disclaim runs is difficult. That period begins when an insurer first becomes aware of the ground for its disclaimer. But unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured's noncooperative attitude is often not readily apparent." (Continental Cas. Co., 11 NY3d at 449 [internal citations omitted].)

First Disclaimer

Countrywide acknowledges that it received its first notice of Gallina's underlying claim in or about February 2007 and commenced an investigation at that time. (See Countrywide Memo. In Support of Cross-Motion at 3 [Countrywide Memo].) By letters dated March 2 and 5, 2007, Countrywide first sought the cooperation of Arias and Preferred, respectively. (Id. at 4; Gallina Motion, Ex. E.) Throughout March and April 2007, Countrywide made telephone calls and visits to the addresses of Andrew Markos, Preferred's principal, and Arias. (See Gallina Motion, Ex. E.) By letters dated April 30, 2007, Countrywide informed Markos and Arias that their failure to cooperate could prejudice Countrywide's investigation and result in a disclaimer of coverage. (See id.) In a document dated May 18, 2007 and characterized by Countrywide as a "Final Report," Countrywide's Special Investigation Unit (SIU) recommended that the SIU

investigation be closed based on the lack of response from Markos and Arias to date. (Countrywide Memo at 7; Gallina Motion, Ex. E [Final Report].) Countrywide received no response from either insured, and closed its file on May 18, 2007. (See Torto Reply Aff., ¶ 9.)

The Gallina action was commenced on March 5, 2007. Countrywide claims that its first notice of the action was its receipt of Gallina's motion for a default judgment against Preferred and Arias on October 4, 2007. (Countrywide Memo at 7.) Countrywide's first disclaimer was issued six days after its first notice of the Gallina lawsuit.

On this record, the court finds that Countrywide's first disclaimer is untimely to the extent that it is based on Preferred's and Arias' non-cooperation. The October 10, 2007 disclaimer on this ground states in full:

> "Furthermore, we also now exercise our right to issue a disclaimer of indemnity and reserve our right to disclaim any duty to defend you at a later date, based on the separate and distinct grounds of lack of cooperation. As you are aware, we have been attempting to secure the cooperation of both Preferred Trucking Service Corp. and Carlos Arias for several months, and have been repeatedly rebuffed in these efforts. This willful failure of Preferred Trucking Service Corp. and Carlos Arias to cooperate with us in investigating this matter is prejudicial to our ability to defend and evaluate this matter, and thus serves as an additional basis of disclaimer."

As review of the above-quoted paragraph shows, Countrywide's disclaimer on the ground of its insureds' non-cooperation was based on their lack of cooperation with Countrywide's investigation. Indeed, Countrywide expressly acknowledges that its first disclaimer was "based upon its insureds' lack of cooperation with its "investigation," not with its defense of the Gallina action. (See Countrywide Memo at 30.)

It is undisputed that Countrywide took no action in the five months between May 18, 2007, when it closed its file due to the insureds' lack of cooperation with the investigation, and

October 10, 2007, when it issued the first disclaimer. Countrywide contends that it was not required to disclaim for non-cooperation until it received its first notice of the commencement of the lawsuit in October 2007. (Countrywide Memo at 30-31.) However, Countrywide submits no legal authority in support of this contention. Moreover, this contention blatantly ignores that Countrywide's policy required the cooperation of the insureds not only with the defense of the suit but also with the investigation or settlement of the claim (see supra at 2), and that Countrywide's first disclaimer was expressly based on the insureds' lack of cooperation with the investigation, not with the defense.

The insureds' lack of cooperation with the investigation was readily apparent as of May 18, 2007 when Countrywide's investigator recommended closing of the file on this basis, notwithstanding that Countrywide had received a notice of claim in February 2007. (See Gallina Motion, Ex. E [Final Report].) The court accordingly holds that it was unreasonable as a matter of law for Countrywide to wait five months, until October 2007, to issue the disclaimer based on non-cooperation. (See Consolidated Edison Co. v Hartford Ins. Co., 203 AD2d 83, 84-85 [4 ½ month delay from time insurer became aware of sufficient facts on which to base disclaimer held unreasonable as a matter of law].)

In moving for summary judgment, the Gallina defendants also argue that the October 10, 2007 disclaimer, to the extent based on late notice of the lawsuit, is invalid due to Countrywide's failure to demonstrate prejudice as a result of such lateness. (See Gallina Memo of Law In Support of Motion [Gallina Memo] at 10-14.) In opposition, Countrywide merely asserts that its disclaimer was timely as a matter of law. (Countrywide Memo at 30.) Significantly, both in opposing the Gallina motion for summary judgment dismissing its complaint, and in moving for

summary judgment on its claim for a declaration that it is not obligated to defend or indemnify its insureds, Countrywide focuses exclusively on the validity and timeliness of its disclaimer based on its insureds' non-cooperation. Countrywide completely fails to address its independent ground for disclaimer based on late notice of the lawsuit.

Moreover, as the Gallina defendants correctly argue, under the law applicable to the policy at issue, an insurer was not entitled to disclaim based on late notice of commencement of a lawsuit, absent a showing of prejudice, where the notice of claim was timely. (See Matter of Brandon [Nationwide Mut. Ins. Co.], 97 NY2d 491 [2002]; American Tr. Ins. Co. v B.O. Astra Mgt. Corp., 39 AD3d 432 [1st Dept 2007], lv denied 9 NY3d 802; City of New York v Continental Cas. Co., 27 AD3d 28 [1st Dept 2005].)[1]

Here, Countrywide does not contend that the notice of claim was untimely and does not assert, let alone submit evidence, that it was prejudiced by the late notice of lawsuit. Nor does it appear that it could make such a showing. As noted above, the Gallina action was commenced on March 5, 2007, and Countrywide claims that its first notice of the action was its receipt, on October 4, 2007, of the Gallina motion for a default judgment against Preferred and Arias. (Countrywide Memo at 7.) Countrywide's October 10, 2007 disclaimer stated: "This late notice of suit has prejudiced our rights, including but not limited to our ability to defend the legal action herein, as the Default Motion has been filed and the matter is now subject to entry of a default." (First Disclaimer at 3.) However, by stipulation dated November 13, 2007, the Gallinas

[1]The amendment to Insurance Law § 3420(a)(5), which abrogates the common law no-prejudice rule as to all disclaimers based on late notice, is inapplicable to this case, as it applies to policies issued on or after January 17, 2009. (See Briggs Ave. LLC v Insurance Corp. of Hanover, 11 NY3d 377 [2008].)

withdrew their motion for a default judgment. (See Gallina Motion, Ex. H.) Countrywide then participated in extensive discovery proceedings. (See Countrywide Motion, Exs. H, J, and L-N [discovery orders].)

The court accordingly holds that Countrywide's first disclaimer was ineffective in its entirety.

Second Disclaimer

The court now turns to review of Countrywide's second disclaimer. In October 2007, after receipt of notice of the Gallina action, Countrywide assumed the defense of defendants Preferred and Arias. A preliminary conference was held on October 18, 2007. (Countrywide Cross-Motion, Ex. H.) Countrywide resumed its efforts to obtain the cooperation of the insureds and their participation and appearance for depositions in the Gallina action.

As to defendant Arias, on October 29, 2007, Countrywide's investigator visited his home, and followed up with a letter sent on October 30, 2007. (See Status Report dated Jan. 2, 2008 [Status Report][Gallina Motion, Ex. I].) Countrywide made telephone calls and sent additional letters to Arias starting in November 2007. (See id.) Investigators visited Arias at various addresses in December 2007 (see Status Report), and on May 13 and July 28, 2008. (Barrett Aff. In Support of Cross-Motion, ¶¶ 10, 14 [Barrett Aff.][Countrywide Cross-Motion, Ex. K].) A Countrywide investigator reports that he spoke with Arias on August 18, 2008, and that Arias told him he would cooperate with the deposition in the Gallina action. (Toribio Note dated Oct. 15, 2008 [Gallina Motion, Ex. I].) Countrywide's counsel sent letters to Arias between November 2007 and October 2008, attempting to schedule his deposition. (Countrywide Cross-Motion, Ex. I.) On October 13, 2008, Arias informed an investigator that he did not care about

the deposition due to a family situation. (Toribio Note [Gallina Motion, Ex. I].) By compliance conference order dated October 16, 2008, the court granted the Gallinas leave to move to strike Preferred's and Arias' answer due to their failure to comply with discovery deadlines. (Countrywide Cross-Motion, Ex. N.) Countrywide's second disclaimer followed on November 6, 2008.

The court holds that this evidence demonstrates that Countrywide's efforts were reasonably calculated to obtain Arias' cooperation, and that he engaged in willful and avowed obstruction as a matter of law. (See State Farm Indem. Co. v Moore, 58 AD3d 429 [1st Dept 2009]; Preferred Mut. Ins. Co. v SAV Carpentry, Inc., 44 AD3d 921 [2d Dept 2007].) The court further finds that Countrywide's second disclaimer, made 24 days after he said he would not cooperate with the deposition, and 21 days after Gallina was given leave to move to strike defendants' answer, was timely. Accordingly, Countrywide is not obligated to defend or indemnify Arias in the Gallina action.[2]

The court reaches a different conclusion as to defendant Preferred. Countrywide and its counsel sent numerous letters, made numerous phone calls, and repeatedly visited the last known addresses of Preferred and its principal, Andrew Markos, throughout the period from October 2007 through July 2008. (See Status Report at 1-2; Barrett Aff.) On October 19, 2007, a Countrywide investigator spoke with Markos on the phone. At that time, Markos asked the investigator to call back to set up a meeting. (See Status Report at 1.) However, Markos did not respond or communicate with Countrywide after that point. A Countrywide investigator went to Markos' Long Island home on April 23, May 4, and July 7, 2008. (Barrett Aff., ¶¶ 4,7.)

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[2] In so holding, the court rejects Gallina's contention that Countrywide's first disclaimer constituted a repudiation of the policy, obviating the insureds' obligation to participate. (See Seward Park Hous. Corp. v Greater New York Mut. Ins. Co., 43 AD3d 23 [1st Dept 2007].)

Countrywide also attempted to locate Markos at Preferred's last known address. (Id., ¶ 12.) Countrywide's last attempt to communicate directly with Markos occurred on July 7, 2008, when a Countrywide investigator met Markos' wife at her home, and requested that Markos call the investigator. (See id., ¶ 13.)

The undisputed evidence is that after Countrywide reached Markos in October 2007, he failed to respond to any of Countrywide's attempts to obtain his cooperation in defense of the action. It was or should have been clear, as of July 2008 when Countrywide last attempted to contact Markos, that he would not participate in the defense. However, Countrywide does not offer any explanation for its delay of four months, until November 2008, in issuing the second disclaimer. The court accordingly holds as a matter of law that Countrywide's November 6, 2008 disclaimer was invalid as to Preferred.

It is accordingly hereby ORDERED that the motion of the Gallina defendants for summary judgment is granted to the extent that it is

ORDERED that the complaint is dismissed as to Preferred Trucking; and it is further

ADJUDGED and DECLARED that Countrywide is obligated to indemnify Preferred Trucking in the underlying personal injury action, entitled Gallina v Port Auth. of New York & New Jersey, Sup Ct, New York County, Index No. 103075/07, up to its policy limit of $500,000; and it is further

ORDERED that the cross-motion of Countrywide for summary judgment is granted to the extent that it is

ADJUDGED and DECLARED that Countrywide is not obligated to indemnify Carlos Arias in the above personal injury action.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
August 10, 2011

MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT

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