Government Empls. Ins. Co. v RLI Ins. Co.
2013 NY Slip Op 34037(U)
September 5, 2013
Supreme Court, Nassau County
Docket Number: 020784/2008
Judge: Jerome C. Murphy

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Plaintiff,

- against-

RLI INSURANCE COMPANY, RACHEL E. FREIER, and TZVI FREIER,

Defendants.

RACHEL E. FREIER, and TZVI FREIER,

Third-party Plaintiffs,

- against -

RLI INSURANCE COMPANY,

Third-party Defendant.

TRIAL/IAS PART 24
Index No.: 020784/2008
Motion Date: 8/1/2013
Sequence No.: 002, 003, 004
MG, MG, MD
DECISION AND ORDER

The following papers have been read on this motion:

Sequences #002, 003:

Notice of Motion, Affirmation and Exhibits.....	1
Cross Motion, Affidavits and Exhibits.....	2
Affirmation in Opposition and Exhibit.....	3
Reply Affidavit.....	4

Sequence #004:

Notice of Motion, Affirmation, Memorandum of Law and Exhibits.....	5
Affirmation in Opposition, Memorandum of Law and Exhibits.....	6
Reply Affirmation and Exhibit.....	7

PRELIMINARY STATEMENT

With respect to Sequence #002, defendant RLI makes an application for an order, pursuant to CPLR §§ 3211(a)(3) and (7), dismissing the plaintiff's complaint with prejudice in its entirety. Plaintiff opposes this application.

With respect to Sequence #003, defendants Freier make application for an order of summary judgment, pursuant to CPLR §3212, dismissing plaintiff's complaint against the Freier defendants on the grounds that as GEICO insureds, they are merely nominal defendants, that no relief as against them is sought by GEICO, either in its complaint or its pending summary judgment motion against defendant RLI, that the underlying personal injury action upon which this declaratory judgment action rests has been settled, and the Freier defendants are entitled to summary judgment as a matter of law.

With respect to Sequence #004, plaintiff GEICO makes this application for an order (a) pursuant to CPLR §§3212 and 3001, granting plaintiff summary judgment against the defendant RLI; (b) declaring that coverage attaches under the umbrella policy issued by RLI to the Freiers, namely, Policy #PUP0384562, relative to an underlying action commenced in the Supreme Court, Queens County under Index No. 568947-07; (c) declaring that under the umbrella policy issued to the Freiers, RLI was required to indemnify the Freiers in the underlying action in excess of the $300,000 limits of the automobile policy issued by GEICO, up to the full $1,000,000 limit of the umbrella policy issued by RLI; (d) declaring that RLI breached its obligation to act in good faith relative to the Freiers and GEICO, not only protracting the underlying action but compelling GEICO to make a contribution towards the settlement of the underlying action in excess of its policy limits in order to resolve that action; and (e) declaring that RLI is obligated to reimburse GEICO for the $200,000 paid by GEICO in excess of the limits of its policy to resolve the underlying action. Defendant RLI opposes this application.

BACKGROUND

Plaintiff commenced this action in November 2008. The complaint alleges that defendants Rachel and Tzvi Freier, residents of Brooklyn, where policyholders of both GEICO and RLI. GEICO provided an automobile policy with a limit of $300,000 while RLI issued them an umbrella policy with a limit of $1,000,000.

The underlying action was brought in Kings County, entitled *Bi Bo Chiu v. Rubina K. Malik, Sheeraz A. Malik, Rachel E. Freier, Tzvi D. Freier, HVI, Inc., and Tony V. Chiu,* Index No. 568947/07. (The "Chiu Action").

According to the complaint in this action, the Freiers advised GEICO by sending a copy of the verified complaint on October 30, 2007. GEICO advised both of them, by letters dated October 31, 2007 and November 7, 2007, that they would undertake their defense. On January 17, 2008, defense counsel provided by GEICO advised Rachel that plaintiff was alleging paraplegia as a result of the accident. On that same date, Rachel notified RLI of the underlying action. After two discussions with representatives of RLI, GEICO defense counsel forwarded copies of documentation relating to the underlying action to Robert Handzel of RLI.

By letter dated February 15, 2008 RLI denied coverage based upon late notice. Rachel disputed the disclaimer. By letters dated May 22 and May 23, 2008, RLI advised GEICO of the disclaimer of coverage. By letter dated June 6, 2008, Robert Handzel, on behalf of RLI, stated that it was standing by its disclaimer which was based on the lack of cooperation of GEICO and/or Rachel Freier in providing notice.

The complaint alleged for its First Cause of Action that the Freiers notified RLI as soon as they became aware that the claims being made against them may exceed $300,000 and that the refusal of RLI to acknowledge the policy issued by them was a breach of obligation of RLI under the policy. GEICO claims that it is entitled to judgment declaring that the policy issued by RLI is responsive to the underlying action and that RLI's disclaimer is a breach of its obligations under the policy.

The Second Cause of Action alleges that Rachel and Tzvi Freier, as well as GEICO, have fully complied with the requests for information from RLI and that the claims of lack of cooperation are unwarranted. GEICO claims that it is entitled to a declaratory judgment, that the policy issued by RLI is responsive to the underlying action and that RLI's disclaimer is a breach of its obligations under the policy.

Motion Sequence No. 002

In this motion, RLI moves to dismiss the GEICO complaint with prejudice. The motion asserts that GEICO has no right to sue RLI. The motion sets forth the facts of a June 4, 2007 accident in which the Chiu's vehicle, being driven by her husband, made contact with the Malik vehicle, which was in front of it, forcing it into the rear of the Freier vehicle. Chiu was rendered a paraplegic as a result of the accident. While the Freiers immediately placed GEICO on notice, they did not advise RLI until January 17, 2008. In response to its disclaimer, GEICO initiated the action against RLI.

The Freiers brought their own action against RLI in Supreme, Kings, but discontinued

that action in favor of proceeding as a third-party plaintiff against RLI. The Freiers and Chius failed in their efforts to negotiate a resolution in which the Freiers would consent to a judgment for the fair value of Chiu's injuries, wherein Chiu would waive the right to sue them on the judgment, and the Freiers would assign their claim against RLI. The negotiations allegedly broke down on the issue as to what extent the Freier's personal assets would be reachable in the event Chiu did not succeed on the claim against RLI.

A summary judgment motion on behalf of the Freiers was initially successful, but was vacated upon reargument when it was shown that they were not the first car in line, and had struck a vehicle in front of them. Chiu's attorney offered to settle with them for $200,000, but GEICO refused.

As the underlying case neared trial, counsel for Chiu offered to settle for the extent of both carrier's coverage, $300,000 from GEICO, and $1 million from RLI. There was some discussion of GEICO paying something more than its $300,000 coverage as part of a global settlement, but GEICO refused to participate. An agreement in principle was arrived at, whereby RLI would pay Chiu $500,000 on behalf of itself and the Freiers. The latter would pay no out-of-pocket money, but would assign their "bad faith" claim against GEICO to Chiu. At that point GEICO refused to contribute $300,000 unless the Freiers released independent claims against them.

GEICO thereafter entered into a separate negotiation with counsel for Chiu. Plaintiff agreed to accept $1.2 million, consisting of $300,000 from GEICO, $500,000 from RLI and an additional $400,000. GEICO did not agree to pay the $400,000 on its own but sought contribution from RLI. Effectively, GEICO agreed to pay the $300,000 coverage limit and RLI contributed an additional $200,000 to ensure a global settlement. The parties entered into a settlement on the record in the action.

After the settlement was concluded counsel for GEICO advised the attorney for RLI that GEICO would not discontinue its action against them. Counsel for RLI surmises that GEICO is seeking to recover the $200,000 which it agreed to pay to settle any contingent bad faith claims against them in connection with their handling of the Chiu action on behalf of the Freiers.

RLI states that the only issue is a legal question of whether a primary insurer has a cause of action against an excess insurer for the recovery of the primary insurer's own settlement of bad faith claims against it.

They state that the GEICO complaint does not contain any allegation or claim connected

to the relief which it apparently now seeks. The complaint seeks a determination that the RLI's notice of disclaimer against the Freier's was invalid. The issue of the obligation of RLI to contribute to the settlement has been resolved by their payment of $700,000. In the absence of an assignment, no person other than the Freiers has a right to litigate their coverage with RLI. All issues in GEICO's complaint have been resolved, and there are no unresolved claims. As such, the complaint must be dismissed under CPLR 3211 (a)(7).

Secondly, RLI claims that GEICO has no substantive claim against RLI. The duty of good faith runs from the primary insurer to the excess, not the opposite (*Hartford Accident and Indemnity Co. v. Michigan Mut. Ins. Co.*, 61 N.Y.2d 569 [1984]).

Thirdly, RLI claims that even if a cause of action theoretically existed, it would not lie under the facts of the case. GEICO agreed to pay $200,000 over its coverage limits because they feared a bad faith claim by either the Freiers, or, by assignment, from Chiu, for failure to settle the claim for $200,000, which it had the opportunity to do, and did not convey to the Freiers. The denial of excess coverage was unrelated to the failure of GEICO to settle within the limits of the policy, and GEICO has no basis to seek to recover that money back from RLI or any other person.

If GEICO claims that it did not agree to pay $200,000 in order to settle claims directed to its own acts and omissions, then it was at best a volunteer, with no standing to seek recovery from third parties (*Reliance Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 A.D.2d 456 [2d Dept. 1997]; *Merchants Mut. Ins. Group v. Travelers Ins. Co.*, 24 A.D.3d 1179 [4th Dept. 2005]).

Motion Sequence No. 003

Rachel E. Freier and Tzvi Freier move for summary judgment dismissing the complaint pursuant to CPLR 3212 on the ground that they are merely nominal defendants, and that GEICO seeks no relief against them, either in the complaint or its 3211 (a)(7) motion against RLI.

Motion Sequence No. 004

GEICO moves for summary judgment against RLI Insurance Company, declaring that coverage attached under the umbrella policy issued by RLI to the Freiers with respect to the Chiu action; and that under the umbrella policy RLI was required to indemnify their insurer in the underlying action for payments in excess of the $300,000 limits of the automobile liability policy issued by GEICO up to the full $1 million limit of that umbrella policy. GEICO argues that RLI breached its obligation to act in good faith relative to both the Freiers and GEICO; and requests the Court to declare that RLI is obligated to reimburse GEICO for the $200,000 paid by

GEICO in excess of its policy limits.

GEICO claims that RLI breached its obligations to act in good faith as an umbrella carrier relative to GEICO, which was defending their insureds in the underlying action under its automobile policy. They first claim that RLI's disclaimer was unwarranted and delayed the resolution of the underlying action. Secondly, when RLI agreed to contribute toward a resolution of the underlying action it breached its obligation to act in good faith relative to GEICO, by attempting to condition its contribution on an agreement by the insureds to assign their rights against GEICO to plaintiff in the underlying action. It is also claimed that RLI breached its obligation to act in good faith by contributing only $200,000 of the $400,000 which was necessary to resolve the underlying action, thereby forcing GEICO to contribute $200,000 in excess of the $300,000 limits of the GEICO policy.

In their Memorandum of Law in Opposition, RLI claims that GEICO has no standing to sue them for a declaration of coverage. The RLI policy is a contract between RLI and their insureds and only the insureds have a right to bring action for an alleged breach of the policy. They cite *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004) for the proposition that, with the exception of a statutory direct action, which this is not, only an insured has a right to sue its insurer for breach of contract, regardless of whether some other third-party has an interest in the outcome of this action.

They further point out that the obligation of good faith runs from the primary insurer to the excess carrier, and that this is not a reciprocal obligation (*RLI Ins. Co. v. Steely,* 65 A.D.3d 539 [2d Dept. 2009]). RLI claims that cases relied upon by GEICO (*RLI Ins. Co. v. Steely,* 65 A.D.3d 539 [2d Dept. 2009] and *Russo v. Rochford,* 123 Misc. 2d 55 (Sup.Ct., Queens Co., 1984)), do not stand for the propositions for which they are cited.

Neither, they argue, can GEICO properly bring a claim for equitable subrogation. That concept involves situations in which two carriers have overlapping coverage on a single insured. In this case GEICO was responsible only for primary coverage, and RLI's responsibility was for coverage in excess of $300,000 afforded by GEICO.

As RLI notes, the complaint by GEICO does not allege bad faith against them. Rather, it seeks only a declaration that RLI was obligated to make payment to the Freiers under the terms of the umbrella policy. The matter has been certified for trial, and it is far too late for GEICO to seek to amend its complaint to make such allegations. Even if the Court were to consider an application to amend the complaint, such request should fail as a matter of law. Citing *K2*

Investment Group, LLC v. American Guarantee & Liability Ins. Co., 19 N.Y.3d 886 (2012), they claim that a bad faith denial of coverage requires proof that, but for the denial of coverage, the insured would not have suffered an excess judgment had a defense been provided. In this case a defense was provided, and the insured did not suffer an excess judgment.

RLI also claims that their disclaimer was valid as a matter of law. GEICO's putative claim that had RLI not disclaimed, they would have been able to settle with Chiu for the $300,000 coverage is not substantiated by the record. In fact, when GEICO had the opportunity to settle the claims against the Freiers for $200,000, they refused to do so. Of course, this was at a time when the action against their insureds had been dismissed on summary judgment, and before the action was reinstated on reargument.

Lastly, RLI reiterates the failure of the claims representatives and in-house counsel for GEICO, to recognize and advise the Freiers of the seriousness of the claims against them. When they did advise their insureds of the significance of the injuries, the insured notified RLI on January 17, 2008.

Even if the Court determined that GEICO had standing to make a bad faith claim against RLI, the claim would fail as a matter of law. Even if the disclaimer was in error, they claim that an aggrieved insured cannot state a bad faith claim if there is an arguable basis for the disclaimer (*Sukup v. State of New York*, 19 N.Y.2d 519 [1967]).

DISCUSSION

Motion Sequence #2

In this motion RLI moves for dismissal under CPLR §§ 3211 (a)(3) and (a)(7). These statutes provide as follows:

> **Rule 3211. Motion to dismiss**
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> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> . . .
>
> 3. the party asserting the cause of action has not legal capacity to sue; or
>
> . . .
>
> 7. the pleading fails to state a cause of action;
>
> . . .

The claimed bases for dismissal are interrelated. Movant claims that plaintiff, as the primary insurer, does not have any basis for charging the excess carrier with bad faith. The fundamental basis for bad faith in New York, is the principle that an insurer has exclusive control over a claim against its insured once it assumes defense of the suit, as GEICO did in this case. It has a duty to act in good faith when deciding whether or not to settle and may be held liable for a breach of that duty. The duty also applies where an excess insurer is exposed to liability, and requires a primary insurer to give as much consideration to the excess carrier's interests as it does to its own insured (*Federal Insurance Company v. North American Specialty Insurance Company,* 83 A.D.3d 401, 402 [1 Dept. 2011])(internal citations omitted).

Thus, the duty of good faith runs from the primary carrier to the excess carrier, but this obligation is not reciprocal (*Hartford Accident and Indemnity Co. v. Michigan Mut. Ins. Co.,* 61 N.Y.2d 569 [1984]; *see also, RLI Ins. Co. v. Steely,* 65 A.D.3d 539 [2d Dept. 2009]). In the latter case, although cited by plaintiff, the Court upheld the standing of the excess carrier to bring action against the primary carrier for bad faith in denying primary coverage to their mutual insured. Plaintiff's reliance on cases such as *Russo v. Rochford,* 123 Misc.2d 55 (Sup.Ct. Queens Co. 1984) is misplaced. In that case the Court indicated that the excess carrier had a duty to cooperate with the primary insurer and assist in the defense, but the obligation of good faith was stated to be upon the primary carrier only.

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), the court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated." (*Malik v. Beal,* 54 A.D.3d 910, 911 [2d Dept. 2008]); *See also Simmons v. Edelstein,* 32 A.D.3d 464, 465 [2d Dept.2006]); (*Manfro v. McGivney,* 11 A.D.3d 662, 663 [2d Dept.2004]).

A motion to dismiss under CPLR § 3211 (a)(7), as distinguished from a motion for summary judgment, limits the Court to an examination of the pleadings to determine whether they state a cause of action. Plaintiff may not be penalized for failing to make an evidentiary showing in support of a complaint which states a cause of action on its face (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.,* 20 N.Y.3d 342, 351 [2013]).

The motion by RLI to dismiss the action is granted, on the ground that GEICO, as the primary insurer, does not have standing to commence an action against the excess carrier based

upon their denial of coverage, which was based upon the lateness of notice. Moreover, the complaint by GEICO against RLI, based solely on the content, fails to state a claim upon which relief may be granted. RLI's obligation runs to its insured, not to a primary insurer of the same insured. In this case GEICO claims that had RLI not denied coverage for untimely notice, they would not have been compelled to contribute $200,000 in excess of the policy limits. The simple fact is that GEICO failed to settle for $200,000 as demanded, without advising their insureds, and no one initially placed RLI on notice of the claim.

GEICO was never forced to contribute $200,000 in excess of its coverage. They could simply have offered the policy limits, whether RLI did or did not open its excess coverage coffers. No one could criticize them for doing so. Obviously, therefore, it was the fear of their insured's assignment of their bad faith claims to the injured plaintiff which motivated them to voluntarily contribute an additional $200,000 toward a global settlement. It was not RLI's failure to overlook a late notice defense which caused GEICO to pay an extra $200,000. In short, in this case, the pleadings do not demonstrate that RLI owed GEICO a duty that it breached to GEICO. For the Court to now establish this duty would permit the primary carrier, for its own purposes, to unreasonably be able to reduce the excess coverage, otherwise available to the contracting insured. Logic would dictate that this could also lead to additional future premiums that the insured would be responsible for paying at a later time; or possibly nonrenewal of the excess policy.

Motion Sequence # 003

The motion by the Freier defendants to dismiss the complaint for failure to state a cause of action against them is granted. There is no claim stated against the Freiers. They are no longer involved in the underlying obligation, which has been fully resolved. As it stands, the Freiers sustained no damage.

Motion Sequence #004

GEICO's motion for summary judgment against RLI is denied. As previously noted, GEICO is without standing to compel RLI to provide excess coverage to the Freiers. As part of the settlement agreement in the underlying action, RLI paid $700,000 in excess coverage to plaintiff Chiu. GEICO, based upon its own considerations, paid $500,000. RLI was not required to establish prejudice to justify its disclaimer for late notice. Neither did their disclaimer result in

their insured's being held personally liable for an amount in excess of the policy limits.

RLI's duty was to its insured, not the primary insurer. Even if GEICO were to obtain an assignment of the insured's rights against RLI, the claim would not succeed. The Freiers have not sustained any damages, and they were not required to pay any out-of-pocket funds to settle the action.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
September 5, 2013

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.