Brito v Allstate Ins. Co.
2014 NY Slip Op 31084(U)
March 17, 2014
Sup Ct, Bronx County
Docket Number: 309362/2011
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X
GREGORIO BRITO,
Plaintiff,

Index No.: 309362/2011

-against-
ALLSTATE INSURANCE COMPANY,
Defendant.
--X
HON. LAURA DOUGLAS:

Defendant Allstate Insurance Company ("Allstate") moves to dismiss this action for plaintiff's purported failure to provide discovery. This motion is granted solely to the extent ordered below, and is otherwise denied. Plaintiff Gregorio Brito ("Brito") cross-moves under CPLR § 3103 [a] for a protective order precluding Allstate from obtaining certain discovery. The cross-motion is denied.

This is an action pursuant to Insurance Law § 3420 [a] [2], whereby an injured plaintiff may sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor. Here, Brito demands that Allstate pay a judgment entered in Brito's favor against Elba Robles ("Robles"), Allstate's insured. The judgment was obtained on default in July 2011 in an action entitled Gregorio Brito v. Elba Robles, Index No. 28084/2006, venued in Queens County Supreme Court and seeking monetary damages for personal injuries allegedly sustained in a motor vehicle

accident. The judgment amount was $35,883.56.[1]

Insurance Law § 3420(a)(2) "Liability insurance; standard provisions; right of injured person", requires that every insurance policy issued in New York contain a provision that:

> "**in case judgment against the insured** ... in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract **shall remain unsatisfied** at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, **then an action may ... be maintained against the insurer under the terms of the policy or contract for the amount of such judgment** not exceeding the amount of the applicable limit of coverage under such policy or contract." [emphasis supplied]

The instant motion practice involves a discovery dispute, wherein Brito objects to providing Allstate with certain discovery pertaining to Brito's claim(s) against Robles in the underlying personal injury action. Brito has refused to provide documents and responses pertaining to the merits of that action, namely, the liability and the injuries allegedly sustained, and has failed to provide certain documents regarding the default judgment obtained in the Queens Supreme Court.

The Court of Appeals has addressed the issue by holding that, if an insurance company chooses to disclaim coverage, and declines to defend or indemnify an insured in an underlying lawsuit, then, "*under those circumstances, having chosen*

[1]At the Inquest held on Dec.15, 2008, Plaintiff was awarded the principal sum of $25,000.

not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment" [emphasis supplied] *Lang v. Hanover Ins. Co.*, 3 NY3d 350, 356 (Ct App 2004).

The cases relied upon by the parties are consistent with this proposition. Brito invokes the case of *Rucaj v. Progressive Ins. Co.*, 19 AD3d 270 (1st Dept 2005), decided shortly after *Lang, supra*. However, the First Department in *Rucaj* merely reiterated that an insurer who "*disclaimed its duty to defend its insured in the underlying action*, ... may not ... raise defenses extending to the merits of plaintiff's claim against the insured" [emphasis supplied] *Rucaj v. Progressive Ins. Co.*, 19 AD3d at 273. The pertinent facts in *Rucaj* include that: "Plaintiff's counsel [had] informed [defendant insurer] Progressive of the scheduled inquest on damages; however, rather than seek to appear at the inquest or to vacate the default, Progressive allowed the inquest to proceed unopposed, and served a disclaimer of coverage on the ground of [its insured] Garcia's asserted noncooperation" *Rucaj v. Progressive Ins. Co.*, 19 AD3d at 273.

The instant matter is materially distinguishable from *Rucaj* in that it appears that Allstate did not receive notice of the underlying action until *after* the default judgment was entered in the underlying lawsuit. In this regard, Brito concedes in his

Bill of Particulars, that: "Plaintiff's counsel is not aware of any notice by the person [disbarred attorney Jose R. Mendez] who was his [Plaintiff's] counsel at the time, advising Allstate before the inquest that the insured had been served with process."[2] Brito acknowledges that it was not until *after* the default judgment was entered on July 25, 2011 in this matter that his attorney allegedly caused a copy of it to be served on Allstate by mail on the following day. Allstate maintains that it never received notice of the underlying action until December 2011, when it was served with process in the instant action.

It appears that Allstate did not receive notice of the underlying action until *after* the default judgment was entered. Such is evident from the decision made by the Appellate Division on the prior appeal had in this matter, wherein the Court ruled that "Allstate [had] rebutted the presumption that it received a copy of the default judgment on July 26, 2011, by submitting an affidavit by its claims examiner detailing its mail-handling and record-keeping procedures and denying that it received a copy of the judgment or indeed of any notice of the underlying action before December 8, 2011, when it was served with process in the instant action (*see Jimenez v New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 637, 639, 897 NYS2d 143 [2d

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[2] (See Plaintiff's Bill of Particulars, dated Jan. 30, 2013, p. 3, in response to Defendant's Demand for a Bill of Particulars, Question 22E).

Dept 2010])" *Brito v. Allstate Ins. Co.*, 102 A.D.3d 477, 478 (1st Dept 2013). Thus, the First Department already favorably cited the recent case of *Jimenez v. New York Cent. Mut. Fire Ins. Co.*, 71 A.D.3d 637 [2d Dept 2010], in reference to the issues previously appealed in this case.

In *Jimenez*, which is on point herein, the Court held that where an insurer did not receive notice of the underlying action until after the entry of judgment against its insured, it is not collaterally estopped from litigating the merits of the underlying action, and, significantly, is entitled to conduct appropriate discovery thereon. Specifically, the Court stated:

> "while an insurance carrier that knowingly chooses not to participate in an underlying action "may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment" (Lang v Hanover Ins. Co., 3 NY3d 350, 356, 820 NE2d 855, 787 NYS2d 211 [2004] [emphasis added]; Insurance Law § 3420 [a] [2]), **here, NYCM asserts it did not receive notice of the commencement of the underlying action until after the entry of judgment against its insured. Under these circumstances, NYCM is not collaterally estopped from litigating the merits of the underlying action, as it was not provided "a full and fair opportunity to contest the decision now said to be controlling"** (Tydings v Greenfield, Stein & Senior, LLP, 11 NY3d 195, 199, 897 NE2d 1044, 868 NYS2d 563 [2008], quoting Buechel v Bain, 97 NY2d 295, 304, 766 NE2d 914, 740 NYS2d 252 [2001], cert denied 535 US 1096, 122 S Ct 2293, 152 L Ed 2d 1051 [2002]). Although summary judgment in favor of the plaintiff should have been denied in light of the existence of the triable issues of fact described above, the award of summary judgment in the plaintiff's favor was premature in any event since NYCM **is entitled to raise affirmative defenses, receive responses to its outstanding discovery requests, and conduct additional appropriate discovery relating to the extent of the plaintiff's**

> **injuries** (see CPLR 3212 [f]; Kiernan v DaimlerChrysler Corp., 65 AD3d 614, 883 NYS2d 729 [2009]; Desena v City of New York, 65 AD3d 562, 884 NYS2d 138 [2009])." [emphasis supplied]

Jimenez v. New York Cent. Mut. Fire Ins. Co., 71 A.D.3d at 640 (2d Dept. 2010).[3]

Additionally, the instant matter is distinguishable from *Rucaj* since Brito's attorney in the underlying action was disbarred because, *inter alia*, according to the Court, in "**a litigated matter .... he allegedly engaged in fraudulent conduct by making false representations to the court that his client was entitled to a default judgment and by concealing relevant facts from the court.** Mr. Mendez acknowledges his inability to successfully defend himself on the merits against charges predicated upon the professional misconduct under investigation" [emphasis supplied] *Matter of Mendez*, 64 AD3d 263, 264 [2nd Dept 2009].

Coincidently, this same attorney represented the appellants in a case which addressed the fact that a judgment obtained through fraud practiced on the court is a nullity and is subject to collateral attack. *Hernandez v. Am. Transit Ins. Co.*, 2 AD3d 584 [2nd Dept 2003]. In said case, the Court held that:

> "A valid and enforceable judgment is a condition precedent to maintaining an action pursuant to Insurance Law § 3420 (a) (2) (see Braddy v Allcity Ins. Co., 282 A.D.2d 637, 723 N.Y.S.2d 690 [2001]). **A judgment entered through fraud, misrepresentation, or other misconduct practiced on the court is a**

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[3] Brito's present attorney, Linda Ziatz, Esq., was the attorney for Respondents in the case of *Jimenez v. New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 637 [2nd Dept 2010].

> **nullity and is subject to collateral attack** (see Sirota v Kloogman, 140 A.D.2d 426, 528 N.Y.S.2d 127 [1988]; Shaw v Shaw, 97 A.D.2d 403, 467 N.Y.S.2d 231 [1983]). The evidence presented by the defendant in opposition to the plaintiffs' motion for summary judgment was sufficient to raise a triable issue of fact as to whether the plaintiffs had a basis upon which to enter the judgments. Accordingly, the plaintiffs' motion for summary judgment was properly denied." [emphasis supplied]

Hernandez v. Am. Transit Ins. Co., 2 AD3d 584, 585 [2nd Dept 2003].

Likewise, the evidence presented in the instant matter is sufficient to raise material issues as to whether Brito's prior attorney had a basis upon which to enter a default judgment against Robles. Such evidence includes the above-quoted disbarment proceedings wherein the Appellate Division referenced false representations made to the court by Mr. Mendez that his client was entitled to a default judgment, and in concealing relevant facts from the court.

Accordingly, Allstate is entitled to the discovery it seeks, including as to the liability, damages, and the obtaining of the default judgment in the underlying action. Allstate should be able to obtain such information so that it may ascertain, for example, whether there were any irregularities in the underlying proceedings. However, this Court does not make any rulings as to the admissibility of such evidence at trial, since that will be determined by the trial judge.

Accordingly, Brito's cross-motion for a protective order is denied in its entirety. Allstate's motion is granted to the extent that Brito shall provide the

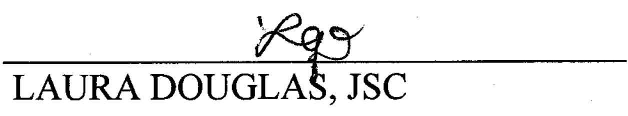
outstanding discovery, as follows:

Within twenty (20) days from the date that Plaintiff is served with a copy of this Order with notice of entry, Plaintiff shall provide the outstanding documentary evidence, including the responses, documents, and authorizations that Defendant had requested in its Demand for a Bill of Particulars and in its Discovery Demands[4], and the documents that this Court had previously ordered that the Plaintiff provide at the Preliminary and Compliance Conferences.[5]

Counsel shall appear for a Compliance Conference on **June 24, 2014**, at 9:30 a.m. in Part 11, Room 711, bringing with them a copy of all Court Orders in this case.

This constitutes the decision and order of this Court.

Dated: March 17, 2014



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[4] See Mr. Barnett's Letter, dated February 1, 2013, to Plaintiff's Counsel, Ms. Ziatz, which summarizes the missing information–which Plaintiff should now furnish

[5] See Preliminary Conference Order dated July 19, 2012 and the Compliance Conference Order dated November 16, 2012