SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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TODD TULS,

Plaintiff,

-against-

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Defendants.

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DECISION AND ORDER

Index No. 652106/2014

Mot. Seq. 005

HON. ANIL C. SINGH, J.:

In this action for recovery under Insurance Law §3420, New York Marine and General Insurance Company ("New York Marine" or "defendant") moves pursuant to CPLR 3212 for summary judgment arguing, *inter alia,* that (i) the nature of the loss suffered by plaintiff, a pure economic loss, ought not be construed by the court as "property" under Insurance Law § 3420; (ii) this court's previous order satisfies the defendant's burden in the first instance that they made a prima facie case for fraudulent misrepresentation permitting voiding the policy; and (iii) that damages related to market making activity is not covered under plaintiff's professional liability insurance policy, even if the court deems pure economic loss inclusive in the language of § 3420 (Mot. Seq. 005). Tod Tuls ("Tuls" or "plaintiff") opposes.

Facts

John Thomas Financial, Inc. ("JTF") was a Wall Street investment brokerage

founded in 2007 headed by Anastasios Belesis that built its business by day trading and raising convertible debt for startups and new companies. It is not contested by either party that JTF was eventually shut down by government regulators over numerous securities violations. Relevant to this action, on April 15, 2013, the Department of Enforcement at FINRA filed a complaint against JTF, Mr. Belesis and JTF employees Michele Misiti, John Ward, Joseph Castellano and Ronald Cantalupo relating to investments that JTF had its clients make in a coal mining company by the name of AWR. Goodman Aff., Ex. D.

FINRA's complaint alleged that JTF failed to disclose the "investment banking" relationship it had with AWR to customers to whom JTF recommended purchasing AWR equities. Id. at ¶ 16. According to FINRA, AWR's stock prices soared resulting in large proceeds for JTF, but almost no gains for any of its customers. FINRA alleged that JTF, Mr. Beleis, and other JTF personnel engaged in fraud, improper trading, breach of the duty of best execution, failure to follow customer instructions and failure to reasonably supervise, along with a slew of other accusations. This FINRA investigation and complaint resulted in claims being made against JTF by its brokerage clients alleging fraudulent conduct as a broker-dealer, resulting in compensatory damages for which JTF here seeks relief.

On February 8, 2012, while this FINRA investigation was taking place, ATB Holding LLC ("ATB") applied for a securities broker-dealer processional liability

insurance policy to New York Marine, with the named insured to be JTF. Among other representations made in the application, ATB stated that it was unaware of any "fact, error, omission, circumstance or situation, that might provide grounds for any claim under the proposed insurance and that neither the proposed insured nor any related entity or person had "been involved in or had knowledge of any pending or completed governmental regulatory, investigative or administrative proceeding." Goodman Aff., Ex. B at 10, Question 26.

On March 1, 2012, ATB requested the named insured under the policy be changed from JTF to ATB Holding LLC – the parent company as listed on the application. Subsequently, New York Marine issued a broker-dealer professional liability policy to cover the period from March 1, 2012 to March 1, 2013. In 2013, ATB submitted an application to renew the policy. Based upon information that significantly changed the risks underwritten by the ATB policy, New York Marine declined to renew the policy.

On August 14, 2014, this court granted New York Marine's declaratory judgment and held that (1) the policy is and was *void ab initio* due to ATB's failure to provide truthful and accurate responses on its application for coverage, (2) the policy does not provide any insurance for the claims tendered to New York Marine or arising from the same or similar facts or circumstances giving rise to those claims because none of those claims arise from "Professional Services," as that term is

defined in the policy that were performed by, for or on behalf of ATB and (3) the policy's exclusions bar coverage for all claims that have arisen or could arise as a result of the conduct alleged in the claims tendered to New York Marine. See Decision and Order dated August 14, 2014.

On March 27, 2014, pursuant to the filing of an arbitration proceeding with FINRA in which Tuls claimed that he lost a substantial amount of money due to JTF's improper handling of his investment account, Tuls entered into a settlement agreement with JTF in the amount of $650,000. Tuls thereby became a judgment creditor of JTF.

Plaintiff instituted this action seeking payment of the arbitration award from New York Marine. New York Marine has subsequently filed this motion for summary judgment on the basis that Insurance Law §3420 precludes the instant lawsuit, and alternatively, that this court's prior decision precludes plaintiff's recovery as a matter of law. Plaintiff opposes.

Analysis

Legal Standard

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64

N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted)).

Whether Insurance Law § 3420 precludes the instant lawsuit

Defendant's motion for summary judgment pursuant to CPLR 3212(b) is granted.

As a preliminary matter, plaintiff argues that defendant has waived its argument that plaintiff lacks standing under Insurance Law §3420. Plaintiff contends that defendant has not raised lack of standing in either its motion to dismiss nor as

an affirmative defense in its answer. See CPLR 3211(e) ("Any objection or defense based upon a ground set forth in paragraphs one, three [the party asserting the cause of action has not legal capacity to sue], four, five and six of subdivision (a) is waived unless raised either by such motion [to dismiss] or in the responsive pleading.") However, in the answer, defendant asserted that the plaintiff could maintain a direct action against [New York Marine] pursuant to Insurance Law §3420. See Answer, ¶15. Additionally, defendant asserted affirmative defenses on the basis that plaintiff's failed to state a claim. Id. at ¶¶18, 22. Therefore, defendant has not waived any claims as related to Insurance Law §3420.

Plaintiff also contends that Insurance Law § 3420 does not preclude the instant lawsuit because the dollar loss from plaintiff's JTF investment account should be construed as "injury to... property" under § 3420. This court disagrees. Insurance Law § 3420, provides:

> (a) No policy or contract insuring against liability for *injury to person* ... or against liability for *injury to, or destruction of, property* shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors: . . .
> (b) Subject to the limitations and conditions of paragraph two of subsection (a) of this section, an action may be maintained by the following persons against the insurer *upon any policy or contract of liability insurance that is governed by such paragraph*, to recover the amount of a judgment against the insured or his personal representative: . . .

The purpose of former § 109 (predecessor to former § 167, now § 3420) is to protect an injured person. Larkin v. Munson S.S. Line, 100 F.2d 393, 394 (2d Cir. 1938). Considerations of fairness and public policy originally led to the enactment of § 109 of the Insurance Law. Hansen v. Cont'l Ins. Co. of City of New York, 262 N.Y. 136, 139 (1933). The statute provides certain judgment creditors with a limited right to litigate coverage issues against a policyholder/judgment debtor's insurer as though that party were a third-party beneficiary to the insurance contract. Clarendon Place Corp. v. Landmark Ins. Co., 182 A.D.2d 6, 9 (1st Dept 1992). However, this statute is subject to strict construction. Id.

Plaintiff argues that the diminished value of his investment account with JTF constitutes "property damage" within the meaning of § 3420. Plaintiff contends that because Insurance law §107 does not define the term "property," that "[i]n situations where, as here, a term does not have a controlling statutory definition, courts should construe the term using its 'usual and commonly understood meaning'." Belgrave v. City of New York, 137 A.D.3d 439, 441 (1st Dept 2016) (internal citations omitted). Plaintiff then goes on to site numerous cases, all but one deriving from New York State case law, where types of securities are referred to as "property," to intertextually conclude that securities are a form of property in our case law, that they should therefore be a form of property in § 3420, and that therefore "injury to" any and all securities should be covered under § 3420.

Although not binding, this court finds the decisions in Spengemann v. Twin City Fire Ins. Co., 2014 WL 5302253 (Sup. Ct. N.Y. Cnty. Sep. 29, 2014) and XL Specialty Ins. Co. v. Lakian, 2015 WL 273660 (S.D.N.Y. Jan. 15, 2015), to be persuasive. The Spengemann court granted the insurer's motion to dismiss holding that § 3420 did not apply to the investors' claims because, in part, the nature of the investors' underlying injury did not involve any personal injury or property damage loss. Id. at *3. The Spengemann court found that it could not be reasonably argued that "§ 3420 was intended by the New York Legislature to serve as a type of safety net for sophisticated investors to recoup their losses on speculative business ventures once the business fails." Id. It is clear that plaintiff's claim, which was brought as a result of the same *kind* of loss in Spengemann, should not be covered under § 3420.

Similarly, in XL Specialty, XL Specialty Ins. Co. ("XL") issued a financial services insurance policy to Capital L Group, LLC ("Capital L"). Capital L and its principals were accused of illicitly siphoning investor money for personal use, which resulted in two investor lawsuits against Capital L, together with claims for unpaid defense costs by Capital L's and the principals' attorneys. XL filed an interpleader action in the S.D.N.Y. to determine who was the proper recipient(s) of the remaining money to be paid under the policy, as the outstanding claims exceeded the policy limits. The unpaid attorneys, an unpaid e-discovery firm, and two judgment creditors of Capital L – Knox, LLC and DJW Advisors, LLC (collectively, "Knox and DJW")

– all moved to intervene in the interpleader action to obtain a portion of the remaining insurance policy proceeds. Only Knox and DJW's motion was opposed.

The district court held that 1) Knox and DJW failed to show that Capital L is entitled to coverage under the Policy, since Capital L had breached the policy rendering it not entitled to coverage thereunder, and thus, standing in its shoes, Knox and DJW could not collect thereunder; and 2) Insurance Law § 3420 did not provide them with a direct right of action against XL because it did not arise from a policy for personal injury or property damage. The district court specifically rejected the argument that § 3420 should be read expansively to include professional liability insurance policies, noting that no New York court had ever adopted such a view given the strict construction of the statute and the rigidly narrow cause of action it created. XL Specialty Ins. Co. v. Lakian, 2015 WL 273660, at *8-9 (S.D.N.Y. Jan. 15, 2015).

Plaintiff's allegations that the Second Circuit reversed the trial court's ruling in XL Specialty *sub silentio*, is misguided. The Second Circuit did not rule on Insurance Law §3420 and did not disagree with the lower court's evaluation of the scope of the statute. Instead, the Second Circuit held that the district court erred by reaching the merits as it related to coverage issues on the intervenors' claims and the insurer's defenses, at the interpleader stage. XL Specialty Ins. Co. v. Lakian, 2015 WL 8124033 (2d Cir. June 2, 2015). In other words, there is nothing in the decision

or on the record that supports plaintiff's contention that the Second Circuit intended to reverse the lower court's ruling *sub silentio* as it related to its ruling regarding §3420.

Therefore, this court rejects plaintiffs expansive reading of § 3420 and defendant has made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. As such, defendant's motion for summary judgment is granted.

Even if this court were to deny defendant's motion for summary judgment under Insurance Law § 3420, by ruling that pure economic loss on risky security offerings is covered under the statute, summary judgment would still be granted on the grounds that it is not covered under the contract between ATB and NYM. The party claiming insurance coverage bears the burden of proving entitlement to claims under the policy at issue. Tribeca Broadway Assoc. v. Mount Vernon Fire Ins. Co., 774 N.Y.S.2d 11 (2012); Moleon v. Kreisler Borg Florman Gen. Constr. Co., 304 A.D.2d 337, 758 N.Y.S.2d 621 (2003). An element proving entitlement is showing that the policy itself, to which plaintiff claims entitlement, does not specifically exclude recovery for the damages sought.

Plaintiff has failed to meet his burden. The underlying policy expressly excludes coverage for losses resulting from the insured acting as Market Maker. A "Market Maker" is defined as "an entity that quotes both a buy or bid price and a

sell or offer price for a financial instrument or security, in order to make a profit on the spread between the buy/bid and sell/offer price" Id. at Part III, ¶ L. Plaintiff readily admits that he suffered nearly $800,000 in losses, for which he seeks relief from NYM, relating to securities trading that occurred in Mr. Tuls's JTF account. Securities trading involves making investments in debt or equity that management (here, JTF) actively trades for profit in the current period. Securities trading is market making. Plaintiff argues that the *way* in which the market making activity was conducted was negligent, and that damages for ordinary negligence *are* covered under the contract, but that does not negate the fact that the underlying activity that JTF allegedly mismanaged was a market making activity, which is expressly excluded in the underlying policy Id. at Part II, ¶ N.

Plaintiff does not defeat defendant's motion on the grounds that he fails to prove that the activity for which he seeks recovery is covered under the policy. JTF was engaged, using Mr. Tuls' account, in market making activity. Market Making is expressly excluded under the ATB-NYM policy. Therefore, defendant's motion for summary judgment is granted.

Even if this court were to deny defendant's motion for summary judgment under Insurance Law § 3420 *and* read that losses suffered due to market making activity *is* covered under the contract between ATB and NYM, this court would still grant defendant's motion for summary judgment because it has been declared that

the underlying policy is void *ab initio*. A third-party beneficiary under an insurance policy has no greater rights than those that the insured would have. New York Life Ins. Co. v. Faillace, 244 N.Y.S. 426 (1930), aff'd, 246 N.Y.S. 893 (1930); Gaston v. Am. Transit Ins. Co., 835 N.Y.S.2d 369 (2007). The judgment creditor "stands in the shoes" of the insured.

Here, plaintiff is a creditor of JTF, not ATB; the potential insured, including JTF, has no rights under the policy because the policy is *void ab initio*. The court's Amended Judgment states that the Judgment "does not preclude judgment creditors of [JTF] from instituting their own actions against [New York Marine] directly," but this simply gives Plaintiff the opportunity to present a claim to institute an action – it does *not* mean that any claim will be valid. Plaintiff can claim no greater rights than those that JTF would have under the New York Marine policy. The Court concluded that JTF has no rights under the policy, and this court will not rule that plaintiff, standing in the shoes of JTF, has rights that JTF does not.

Plaintiff's claim that summary judgment should be denied on the basis of outstanding discovery requests is meritless. The basis of a claim for outstanding discovery is that plaintiff has shown a "good faith factual basis," informed by admissible evidence, that the additional discovery claimed to be necessary is either essential to his case or would defeat the motion for summary judgment, and that

defendant is the exclusive source of that information. See Marino v. City of New York, 686 N.Y.S.2d 77 (1999); Spatola v. Gelco Corp., 773 N.Y.S.2d 101 (2004).

Further, it is a well-settled principle that a claim of incomplete discovery cannot defeat a motion for summary judgment where the party opposing summary judgment has voiced no objection to the manner in which discovery was proceeding or filed any discovery motions until after the motion for summary judgment was filed. Matuszak v. B.R.K. Brands, Inc., 804 N.Y.S.2d 814 (2d Dept 2005); Guarino v. Mohawk Containers Co., 59 N.Y.2d 753 (1983); Kraeling v. Leading Edge Elec.; 2 A.D.3d 789 (2d Dept 2003); Federoff v. Camperlengo, 215 A.D.2d 806 (3d Dept 1995). Where there has been a delay in discovery, the party opposing summary judgment and seeking discovery must proffer a convincing excuse for not having taken the desired action sooner. Sloane v. Repsher, 693 N.Y.S.2d 327 (3d Dept 1999); Hughes Training, Link Div. v. Pegasus Real–Time, 255 A.D.2d 729 (3d Dept 1998). Evidence sought through alleged incomplete discovery that serves no more than a "mere hope" that essential evidence "might be uncovered through the discovery process" is insufficient to deny defendant's motion for summary judgment. Goldes v. City of New York, 19 A.D.3d 448 (2d Dept 2005).

Plaintiff has failed to show that defendant has any outstanding discovery obligations. Here, the only discovery claims that may reveal critical evidence related to any number of plaintiff's claims, as far as this court is concerned, are the alleged

missing interrogatories. However, defendant replied to plaintiff's interrogatories in November, 2015. Plaintiff only now expresses dissatisfaction with defendant's replies to those interrogatories, and failed to file a motion to compel at any prior time during the discovery period. Moreover, plaintiff's outstanding discovery requests are far from certain to reveal essential evidence central to his claims. Rather, they assert but a "mere hope" that doing so may enhance his case, which itself this court is not convinced of. Furthermore, the discovery deadline for this case has passed. Plaintiff does not meet any requirements set forth above to defeat a motion for summary judgment on the basis of outstanding discovery. Therefore, plaintiff's outstanding discovery claim does not defeat defendant's motion for summary judgment, and is denied.

Accordingly, it is hereby

ORDERED that New York Marine and General Insurance Company's motion for summary judgment is granted.

Date: November 15, 2016
New York, New York

Anil C. Singh