Budget Rent A Car Sys., Inc. v Acampora
2021 NY Slip Op 33831(U)
May 21, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 615326/2020
Judge: Martha L. Luft
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Short Form Order Index No. 615326/2020

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER
CASE DISP

Mot. Seq. No.: 001 - MotD
Orig. Return Date: 01/12/21
Mot. Submit Date: 03/09/21

BUDGET RENT A CAR SYSTEM, INC. and PV HOLDING CORP.,

Plaintiffs,

-against-

JOSEPH ACAMPORA, as Administrator of the Estate of LELAND ACAMPORA,

Defendant,

-and-

DEBRA BERLEY, as Administratrix of the Estate of WOODY MICHAEL ZALMAN, and PAUL WEINGART,

Nominal Defendants.

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Upon the e-filed documents numbered 16 through 54, it is

ORDERED that the motion by the nominal defendants Debra Berley, as Administratrix of the Estate of Woody Michael Zalman and Paul Weingart for, *inter alia*, an order granting summary judgment in their favor dismissing the complaint in its entirety, for a declaratory judgment stating that the plaintiffs Budget Rent A Car System, Inc. and PV Holding Corp. must tender up to the full amount of a certain supplemental liability insurance policy, and granting summary judgment on their counterclaim for attorneys' fees is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of the motion seeking an order dismissing the complaint in its entirety is granted; it is further

ORDERED that the portion of the motion seeking a declaratory judgment is denied, without prejudice to the commencement of a new action by the nominal defendants upon the disposition of the underlying action in Suffolk County Supreme Court bearing index number

4994/2016 and entitled *Paul Weingart and Debra Berley as Administratrix of the Estate of Woody Michael Zalman, plaintiffs, against PV Holding Corp. and Joseph Acampora as Administrator of the Estate of Leland Acampora, defendants*; and it is further

ORDERED that the portion of the motion seeking summary judgment on the nominal defendants' counterclaim for attorneys' fees is denied.

This is an action for declaratory relief as to a motor vehicle accident which occurred on February 2, 2016. This accident is also the subject of another action in Suffolk County Supreme Court, bearing index number 4994/2016 and is currently before the undersigned. In the underlying action, as relevant to the instant motion, on February 1, 2016, Leland Acampora ("Leland") executed an agreement with the plaintiffs to rent a vehicle for 2 days. In conjunction with this rental agreement, Leland purchased a supplemental liability insurance policy that provided up to $2,000,000.00 in coverage if he or a covered driver caused death, bodily injury, or property damage while operating the rented vehicle. However, this policy contained exclusions to liability for such injuries arising out of any "prohibited use of the car," which included operating the vehicle "while the driver is under the influence of alcohol or a controlled substance." By stipulation dated June 23, 2020, the underlying action was discontinued as against PV Holding Corp. only.

On February 2, 2016, Leland was operating the rental car when it left the road and collided with a tree, causing serious injuries to nominal defendant Paul Weingart and the deaths of Leland and Woody Michael Zalman. Mr. Weingart and Mr. Zalman were passengers in Leland's rental car at the time of the accident, and Mr. Zalman's estate is also a nominal defendant in the instant action. On September 2, 2020, the plaintiffs issued a disclaimer of any and all obligation to indemnify Leland's estate in the underlying action, and on October 2, 2020, the plaintiffs informed Leland's estate that, as it found Leland had materially breached the applicable terms of the rental contract and policy, as such, they will provide the estate with indemnity limits of $25,000 per person and $50,000 per accident.

The nominal defendants estate now move for an order granting summary judgment in their favor dismissing the complaint and on their counterclaim for attorneys' fees, arguing, *inter alia*, that the plaintiffs' disclaimer of coverage was untimely, as it was not issued until nearly four and half years after the accident, and that, as the plaintiffs have cast them in a defensive posture, they are entitled to attorneys' fees. In the alternative, the nominal defendants argue that the plaintiffs' commencement of the instant action was frivolous, and as such, they are entitled to attorneys' fees for defending against it. In addition, upon an order granting summary judgment in their favor, the nominal defendants seek a declaratory judgment stating that the plaintiffs are obligated to tender up to the full $2,000,000.00 policy in the underlying action. In support, the nominal defendants submit, among other things, copies of the pleadings in the underlying action, copies of the September 2020 and October 2020 disclaimers of coverage, and an affirmation of their attorney.

The plaintiffs oppose the motion, arguing, *inter alia*, that there is a question of fact as to whether the notice of disclaimer of liability or denial of coverage was sent as soon as is reasonably possible. In opposition, the plaintiffs submit several documents, including a copy of the February 2016 rental agreement; an affidavit of Harry C. Wade III, a litigation consultant with Sedgwick Claims Management Services, Inc., a third-party administrator of claims for the Avis Budget Group, which is affiliated with the plaintiffs; the affirmed report of Mark L. Taff, forensic pathologist; an affirmation of their attorney; and a memorandum of law. In reply, the nominal defendants submit an affirmation of their attorney.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Insurance Law § 3420 (d)(2) requires an insurer to provide its insured and any other claimant with written notice of its disclaimer or denial of coverage "as soon as is reasonably possible" (*see* ***Matter of Worcester Ins. Co. v Bettenhauser***, 95 NY2d 185, 188, 712 NYS2d 433 [2000]; ***Liberty Mutual Insurance Company v Rhone***, 189 AD3d 1241, 124, 134 NYS3d 263 [2d Dept 2020]). The 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 (*see* ***First Financial Ins. Co. v Jetco Contracting Corp.***, 1 NY3d 64, 68-69, 769 NYS2d 459 [2003]; ***Robinson v Global Liberty Ins. Co. of New York***, 164 AD3d 1385, 1387, 84 NYS3d 255 [2d Dept 2018]). While the issue of whether a disclaimer was unreasonably delayed is generally a question of fact, requiring an assessment of all relevant circumstances, an insurer's explanation for the delay in disclaiming coverage is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of delay (*see* ***First Financial Ins. Co. v Jetco Contracting Corp.***, *supra*, at 69; ***Liberty Mutual Insurance Company v Rhone***, *supra*; ***Robinson v Global Liberty Ins. Co. of New York***, *supra*). Moreover, even where the basis is not apparent, an explanation will be inadequate as a matter of law unless the delay is excused by the insurer's showing that its delay was reasonably related to its completion of a thorough and diligent investigation into issues affecting its decision whether to disclaim coverage (*see* ***Liberty Mutual Insurance Company v Rhone***, *supra*; ***Plotkin v Republic-Franklin Ins. Co.***, 177 AD3d 790, 794, 113 NYS3d 133 [2d Dept 2019]; ***Stout v 1 East 66th Street Corp.***, 90 AD3d 898, 902, 935 NYS2d 49 [2d Dept 2011]).

Here, the nominal defendants' submissions establish, as a matter of law, that plaintiffs' notice of their disclaimer of coverage for the February 2016 was untimely (*see* Insurance Law § 3420 [d][2]; ***First Financial Ins. Co. v Jetco Contracting Corp.***, *supra*; ***Robinson v Global Liberty Ins. Co. of New York***, *supra*). The plaintiff PV Holding Corp., as owner of the vehicle in the underlying accident, was named as a party defendant at the outset of litigation in that matter, and it participated in the action for over 4 years before the June 2020 stipulation of

discontinuance. As such, during discovery, PV Holding Corp. received a copy of the certified police report, dated April 7, 2016, for the underlying accident, though the record before the Court does not indicate precisely when this occurred. This report reflects the accounts of the responding police officers, which stated, among other things, that they found 6 clear plastic bags each containing a quantity of a leafy substance, which appeared to be marijuana. Further, PV Holding Corp. participated in the deposition of Mr. Weingart in May 2018, by which he testified, among other things, that he, Mr. Zalman, and Leland had been at a bar prior to the accident. As PV Holding Corp. was aware of the possibility that the rental vehicle may have been engaged in "prohibited use" due to the fact that all three occupants had been at a bar shortly before the accident and that marijuana was possibly found in the vehicle after the accident, the Court finds that the plaintiffs' delay in disclaiming coverage was not reasonable, as the basis for such denial was or should have been readily apparent before the onset of the delay (*see* ***First Financial Ins. Co. v Jetco Contracting Corp.***, *supra*; ***Liberty Mutual Insurance Company v Rhone***, *supra*; ***Robinson v Global Liberty Ins. Co. of New York***, *supra*).

As the Court of Appeals has held that delays of disclaimers of coverage 4 months after receiving a police accident report (*see* ***Firemen's Fund Ins. Co. of Newark v Hopkins***, 88 NY2d 836, 644 NYS2d 481 [2006]), and, more analogous to the instant action, four and a half years after receiving notice of a possible claim (*see* ***Jefferson Ins. Co. of New York v Travelers Indem. Co.***, 92 NY2d 363, 371, 681 NYS2d 208 [1998]) were not reasonable as a matter of law, the Court finds that the plaintiffs' delay was also not reasonable as a matter of law.

The nominal defendants having met their initial burden on the motion, the burden shifted to the plaintiffs to submit evidentiary proof in admissible form to raise a triable issue of fact as to whether their disclaimer of coverage was timely (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). By their submissions, the plaintiffs argue that the delay is disclaiming coverage for the underlying accident was related to its completion of a thorough and diligent investigation as such a decision (*see* ***Liberty Mutual Insurance Company v Rhone***, *supra*; ***Plotkin v Republic-Franklin Ins. Co.***, *supra*; ***Stout v 1 East 66th Street Corp.***, *supra*). Further, the plaintiffs attempt to excuse the four-and-a-half-year delay in disclaiming coverage as being related to the ongoing global pandemic caused by Covid-19. To this end, the plaintiffs submit Dr. Taff's report, dated February 12, 2020, which serves as the basis for their denial of coverage. However, this report is dated about one month before any state or federal executive orders were issued in response to the Covid-19 pandemic. In addition, none of the plaintiffs' submissions in opposition to the motion indicate that they undertook any type of investigation until late 2019 or early 2020. As such, the Court finds that the plaintiffs' explanation for the delay as being related to their investigation of the claim to be inadequate as a matter of law, and that their submissions fail to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Liberty Mutual Insurance Company v Rhone***, *supra*; ***Plotkin v Republic-Franklin Ins. Co.***, *supra*; ***Stout v 1 East 66th Street Corp.***, *supra*).

As to the portion of the motion seeking a declaratory judgment directing the plaintiffs to provide the full amount of coverage in the supplemental liability insurance policy purchased by

Leland, the Court finds that this relief is premature and that it must be sought by plenary action. Insurance Law § 3420 (b) states, in relevant part, "an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance...to recover the amount of a judgment against the insured or his personal representative," and the persons having standing to seek such relief are "any person who, or the personal representative of any person who, has obtained a judgment against the insured or the insured's personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract" (Insurance Law § 3420 [b][1]) and "any person who, or the personal representative of any person who, has obtained a judgment against the insured or the insured's personal representative to enforce a right of contribution or indemnity" (Insurance Law § 3420 [b][2]). The Court finds that, although the nominal defendants may have standing to seek such relief from the plaintiffs in the instant action, no judgment as to liability has been entered in the underlying action (*see* ***Watson v Aetna Casualty & Surety Co.***, 246 AD2d 57, 61, 675 NYS2d 367 [2d Dept 1998]). Further, there has been no determination as to liability in the underlying action at all, and as such, any action for declaratory relief would be premature (*cf.* ***Watson v Aetna Casualty & Surety Co.***, *supra*). Moreover, the statute clearly states that "an *action* may be maintained" by the defined persons (Insurance Law § 3420 [b], emphasis added), and as such, this relief must be sought by the commencement of an action, not by motion.

As to the portion of the nominal defendants' motion seeking summary judgment on its counterclaim for attorneys' fees, although these parties contend that the plaintiffs have cast them in a defensive posture in commencing this action (*see* ***U.S. Underwriters Ins. Co. v City Club Hotel, LLC***, 3 NY3d 592, 598, 789 NYS2d 470 [2004]), the Court finds this argument unavailing. The general rule is that "...an *insured* who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the *insured* may recover attorneys' fees regardless of whether the insurer provided a defense to the *insured*..." (***U.S. Underwriters Ins. Co. v City Club Hotel, LLC***, *supra*, emphasis added). Here, Leland's estate is the insured, the nominal defendants are not, and as such, the portion of the motion seeking summary judgment on the counterclaim for attorneys' fees on this basis. In addition, the Court finds that the plaintiffs' conduct in commencing this litigation was not frivolous, as it was not undertaken primarily to delay or prolong the resolution of the litigation, and as such, this portion of the motion is also denied on that basis (*see* 22 NYCRR 130-1.1 [c][2]).

Accordingly, the motion is granted in part, and denied in part, and the complaint is dismissed.

Dated: May 21, 2021
Riverhead, New York

Martha L. Luft
HON. MARTHA L. LUFT, A.J.S.C.

__X__ Final Disposition _____ Non-Final Disposition