Allied World Assur. Co. (U.S.) Inc. v Greater N.Y. Mut. Ins. Co.

2023 NY Slip Op 31698(U)

May 16, 2023

Supreme Court, New York County

Docket Number: Index No. 651635/2021

Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.,
Plaintiff,

- v -

GREATER NEW YORK MUTUAL INSURANCE COMPANY,
Defendant.

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INDEX NO. 651635/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for **SUMMARY JUDGMENT**.

On August 19, 2014, non-party Jose Pagan ("Pagan") was injured on the job when he slipped and fell at the premises located at 39 Davenport Avenue, New Rochelle, New York ("premises"). On or about July 27, 2016, Pagan commenced an action in Supreme Court, Bronx County, entitled *Jose Pagan v Goldfarb Properties, Inc. et al.*, Index No. 302599/2016 ("Pagan action"), against Goldfarb Properties, Inc. and Harbor One Company (collectively, "the Pagan defendants"), the owners of the premises (NYSCEF Doc. No. 10, *Pagan's complaint*). Greater New York Mutual Insurance Company ("GNY" or "defendant") issued a commercial general insurance policy to the Pagan defendants, for the policy period from July 9, 2014 to July 9, 2015, with policy limits of $1 million each occurrence. Allied World Assurance Company (U.S.) Inc. ("Allied World" or "plaintiff") issued to the Pagan defendants an umbrella liability insurance policy, for the policy period from July 9, 2014 to July 9, 2015, with policy limits of $10 million each occurrence, excess over the GNY policy.

The Pagan action proceeded to trial, and, on February 10, 2020, a jury awarded a verdict in favor of Pagan in the amount of $3.3 million. On February 12, 2020, defendant sent plaintiff a letter indicating the following:

> "[I]n consideration of the verdict, we hereby tender our $1,000,000 to Allied World. This tender should be construed as an offer to settle under the terms of the policy, but if you would rather we make our offer directly to plaintiff's counsel please advise. We presume Allied World would rather be in control of the money should you decide to negotiate a settlement with the plaintiff attorney. . . Of course, this offer is contingent upon your agreement in writing that Allied World will be responsible for all post judgment interest and GNY's exposure is limited to our $1,000,000 policy limit."

A judgment was entered on July 27, 2020, in the amount of $3,439,406.00. (NYSCEF Doc. No. 11, *judgment*). Thereafter, counsel for plaintiff demanded that GNY contribute towards a settlement/judgment and GNY and Allied World entered into an agreement wherein GNY agreed to pay $1 million of the settlement, and Allied World would pay $2,150,000.00 of

the settlement, subject to a reservation of rights that Allied World could seek reimbursement of $187,565.61 from GNY, representing statutory pre-judgment interest accruing on the GNY policy's limits, the costs included in the judgment, and the post-judgment interest on the judgment until the date of the Pagan settlement. The Pagan action ultimately settled for $3,150,000.00 and a release was executed in February 2021. Plaintiff contends that GNY has refused to acknowledge its obligation under the supplemental payments provision of the GNY policy to contribute $187,565.61 toward the Pagan settlement.

Plaintiff now moves, pursuant to CPLR 3001 and 3212, for an order awarding it summary judgment and declaring that GNY is obligated to contribute the amount of $187,565.61, plus statutory interest from February 26, 2021, toward the Pagan settlement, in addition to the $1 million policy limits of the GNY policy and awarding plaintiff damages against GNY in the amount of $187,565.61, plus statutory interest from February 26, 2021 (NYSCEF Doc. No. 8, *notice of motion*). In the instant application, plaintiff argues that GNY is obligated to pay pre-judgment interest on its policy limits and all post-judgment interest under the supplementary payments provision of the GNY's policy because GNY never paid, offered to pay, or deposited with the court the part of the judgment that is within the applicable limit of insurance. To the extent GNY erroneously relies on its February 2020 letter to argue that an unconditional "offer to pay" was made, plaintiff insists this argument should be rejected because the letter was sent to Allied World, not to Pagan. Therefore, no offer to pay its policy limit was made to Pagan. It further argues that the letter was "an offer to settle" and not "an offer to pay." Additionally, plaintiff claims that, on August 24, 2020, GNY filed a notice of appeal from the judgment, which bolsters its claim that GNY never attempted to unconditionally pay or offer to pay its policy limits to Pagan. Thus, plaintiff maintains GNY must reimburse plaintiff for the costs included in the judgment, the pre-judgment interest which accrued on the primary policy limits, and all the post-judgment interest accruing from the date of the judgment to the date of the settlement of the underlying Pagan action. Plaintiff also claims it is entitled to 9% statutory interest on the principal amount owed by GNY from February 26, 2021, the date of payment by plaintiff. (NYSCEF Doc. No. 26, *memorandum of law*).

GNY opposes the motion and cross-moves, pursuant to CPLR 3212, for an order declaring that GNY owes no obligation to pay plaintiff any monies and dismissing the complaint against GNY, with prejudice. Specifically, GNY argues that plaintiff now claims, with no support whatsoever, that the settlement monies paid to plaintiff included interest. According to defendant, the release with Pagan does not include an itemization of the damages to determine whether Pagan was in fact paid interest. GNY further contends that it complied with the terms of its policy when it tendered its policy and, thus, that it is entitled to summary judgment dismissing the complaint. GNY argues that there was no obligation that its offer be directed at Pagan; the reference to "contingency" in its letter was not in fact a contingency because, by law, GNY's exposure was limited to its policy limit, given that it made an offer to pay its limit prior to any judgment; and that its offer to settle was, indeed, a clear offer to pay. In the alternative, defendant maintains that plaintiff's motion for summary judgment should be denied, allowing for discovery to determine why plaintiff believes interest was included in the settlement amount. GNY asserts that interest paid on damages awarded in connection with personal injury claims is taxable and not excludable from income and, thus, that Pagan would need to be deposed to ascertain whether he will be paying tax on any portion of the settlement amount as interest or

whether the entire amount qualifies as non-taxed personal injury damages. (NYSCEF Doc. No. 34, *memorandum of law in opposition*).

In reply, plaintiff argues that it is equitably subrogated to the rights of its insureds against GNY; that GNY's letter to plaintiff was not an unconditional offer to pay policy limits; GNY's offer was made to the wrong party, plaintiff Allied World, and not to the underlying plaintiff; the post-judgment settlement necessarily included accrued pre and post-judgment interest; plaintiff had no obligation to respond to GNY's February 12, 2020 letter; and it refutes GNY's claim that further discovery is needed in this case, arguing that the motion before the court involves a legal question rather than a question of fact (NYSCEF Doc. No. 42, *memorandum of law in reply*).

Although GNY filed a sur-reply (NYSCEF Doc. Nos. 43-50), GNY is not entitled to a sur-reply as of right and, therefore, it shall not be considered in the court's determination of this motion.

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (see *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment insofar as it has demonstrated that, pursuant to the GNY policy, GNY is responsible for pre/post-judgment interest, as well as costs, relating to the judgment issued in the underlying action. As relevant here, GNY's policy contains the following provision:

> "SUPPLEMENTARY PAYMENTS - COVERAGES A AND B
>
> 1. We will pay, with respect to any claim we investigate or settle, or any; 'suit' against an insured we defend:
>
> e. All court costs taxed against the insured in the 'suit'. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
>
> f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
>
> g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
>
> These payments will not reduce the limits of insurance."

This court rejects GNY's contention that the "offer to settle" in the February 2020 letter, made after the verdict but before the entry of the judgment, terminated its obligation to pay interest, given that "the subject provision contemplates the existence of a judgment before the [GNY]'s obligation to pay interest could be terminated by the payment of, offer to pay, or depositing in court of, its share of that judgment" (*Lancer Ins. Co. v Sunrise Removal, Inc.*, 78 AD3d 1128, 1129 [2d Dept 2010]; see also *Cincinnati Ins. Co. v MVP Delivery & Logistics, Inc.*, 2012 WL 13041990, 2012 US Dist LEXIS 200949, *8 [WDNY Sep. 25, 2012, No. 11-CV-00506(A)(M)]) and GNY has failed to show that its policy provided "a mechanism for the extinguishment of [its] obligation to pay interest before the existence of a final judgment in the action" (*Lancer Ins. Co. v Sunrise Removal, Inc.*, 78 AD3d at 1129). Furthermore, GNY's purported offer to settle was not an unconditional offer such that it would stop the accrual of interest, insofar as the February 2020 letter specifically stated: the "offer is contingent upon your agreement in writing that Allied World will be responsible for all post judgment interest and GNY's exposure is limited to our $1,000,000 policy limit." GNY does not contend that any such agreement with Allied World was reached; thus, GNY's claim that it made an offer in February 2020 that would absolve it of an obligation to pay any interest lacks merit. (see *Cohen v Transcontinental Ins. Co.*, 262 AD2d 189, 190-191 [1st Dept 1999].) Thus, upon this court's review of the subject policy, the motion papers, and the relevant case law, this court finds that plaintiff is entitled to reimbursement of $187,565.81, which GNY is responsible for paying pursuant to the supplemental payments provision of the policy. As follows, defendant's cross-motion seeking, among other things, dismissal of the complaint, is denied. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 3001 and 3212, is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $187,565.81, plus interest from February 26, 2021, together with costs and disbursements as calculated by the Clerk of the Court; and it is further

ORDERED that defendant's cross-motion is denied; and it is further

ORDERED that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, upon plaintiff, as well as, upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

May 16, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE: [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**

[ ] **GRANTED** [ ] **DENIED** [X] **GRANTED IN PART** [ ] **OTHER**