[*1]

Berman v Country-Wide Ins. Co.
2006 NY Slip Op 50977(U)
Decided on May 23, 2006
Civil Court, Queens County
Dufficy, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 23, 2006

Civil Court, Queens County

Glenn Berman, a/a/o Osiris Torres, and Deepika Bajaj, a/a/o Osiris Torres, Plaintiffs,

against

Country-Wide Insurance Company, Defendant.

650959/03

Timothy J. Dufficy, J.

A non-jury trial was held on November 4, 2005. The issue before the court is whether plaintiff's claim for no-fault benefits should be denied as untimely, since it was filed beyond the 90-day period.

Plaintiff contends it was impossible to submit the claim to the correct insurance company because the driver (the insured) supplied the wrong carrier to the police and by the time plaintiff realized this error the 90-day period to properly file had run.

Defendant contends that although plaintiff timely filed a claim for no-fault benefits within the 90-day period, plaintiff filed with the wrong carrier, therefore it did not receive notice until after the 90-day period had run. Defendant contends the plaintiff must be barred from enforcing the claim due to late notice. Defendant further contends that plaintiff did not prove it was impossible to timely file the claim with the defendant's insurance carrier Country-Wide Ins. Co.

STIPULATION OF FACTS

Defendant stipulated to plaintiff's prima facie case and plaintiff stipulated to defendant's timely mailing of the denial of the claim. At the time of the trial, the court directed that briefs be submitted to the court and it was stipulated that any exhibits attached to the briefs would be admitted into evidence so long as it was exchanged in the course of discovery. In addition an un-redacted copy of the Country-Wide Ins. Co. file was submitted to the court for in-camera review (hereinafter referred to as Bates file).

The following facts are undisputed:

1) an accident took place on October 27, 1998. Osiris Torres, a bicyclist was involved in an auto accident with Stephen Kempisty the insured and owner operator under a valid Country-Wide insurance policy.

2) the New York City Police accident report in evidence shows that the insurance company code was 385 (All-City Insurance Company).

3) Plaintiff filed a timely claim dated December 12, 1998 with All-City Insurance Company.

4) the claim was denied on April 20, l999 by All-City Insurance Company. The

denial [*2]states the policy was not in force on the date of the accident and the policy was cancelled on January 7, 1997.

5) Plaintiff then filed a claim with MVAIC shortly after the All-City Insurance denied the claim. On May 20, 1999 MVAIC denied the claim. The basis of the denial by MVAIC was that there was available insurance and that Merchant and Businessmen/Country was then the current insurance company for Stephen Kempisty. When the matter was reported to MVAIC it generated notice to Countrywide on notice dated February 19, 1999 (Bates file Page number 305). The court finds pursuant to the documents submitted to the court in-camera, that All-City was named on the accident report and at that time and all relevant times remained on New York State Department of Motor Vehicles computer as the carrier of record as far as the three digit code is concerned (computer printouts pages, Bates file pages 313,314) submitted in-camera to the court which indicates valid insurance from All City from November 18,1997 to July 6,1999.

6) a claim was filed with Country-Wide on July 30, 1999 explaining why the late claim was submitted indicating such circumstances outside claimants control.

7) the court notes that the MVAIC claim was denied on May 20, 1999, upon learning the correct carrier, plaintiff filed a claim on July 30, 1999, well within 90-days of the MVAIC denial.

On August 12, 1999, County-Wide Insurance Company issued a denial of claim. The reason set forth for this denial was as follows:

"As per regulation 68 of the New York State No-Fault Insurance Law:

In the event of an accident, written notice setting forth details sufficient to identify the eligible insured person along with reasonable obtainable information

regarding the time, place & circumstances of the accident shall be

given to the company or the company's authorized agents as soon as

practicable, but in no event more than 90 days after the date of accident

pursuant to the above all No-fault benefits are denied."

ISSUES

The two issues before the Court are: (1) Whether the plaintiffs can maintain an action for No-Fault insurance benefits against the insurer, absent notice to the insurer within 90days after the date of accident and (2) Whether the subsequent denials issued by the defendant insurance company were proper?

APPLICABLE LAW

The No-Fault regulation in effect at the time of accident which gave rise to the claim was 11 NYCRR65.11(m)(2). This regulation provided in pertinent part that a notice of claim to the insurer must be filed within 90-days of the accident. Late filings were permitted upon "written proof that it was impossible to comply with such limitation due to the specific circumstances beyond the claimant's control."

CONCLUSIONS OF LAW

It is well settled that delay on the part of an injured party to give notice may be excused, upon a showing of diligence, where he had difficulty ascertaining the identity of the insured or insurer (*see Subia v. Cosmopolitan Mutual Ins. Co.*, 80 Misc 2d 1090[1975]). Here the court [*3]has substantial evidence before it that the injured party exercised utmost diligence in pursuing the claim by first presenting its claim to All-City Insurance, then to MVIAC, and upon learning that insurance was available, further researching the claim until ultimately establishing Country Wide Ins. Co. as the responsible insurer. Timely notice requirement will not be applied as strictly against the injured party as it would be against the insured. See, *Hartford Accident & Indemnity Co. V. CNA Insurance Companies, Sued Herein as CNA Insurance, et al*, 99 AD2d 310 [1984]. Therefore, the claim is deemed timely.

The court also notes that it has limited equity jurisdiction pursuant to NY City

Civ Ct Act sec. 213 and sec. 905 (*e.g. Kuchen v. Daimler Chrysler,* 9 Misc 3d 45 [Sup. Ct. App. Term 2nd &11th J.D. Dists.2005]). Thus, the doctrine of equitable estoppel would apply to the fact pattern at hand. Equitable estoppel is the principle by which a party is absolutely precluded both at law and equity from denying or asserting the contrary of any material fact, which by his words or conduct affirmative or negative, intentionally or through culpable negligence, he has induced others or another, who was excusably ignorant of the true facts and who had the right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed. The doctrine prohibits a person upon principles of honesty and fair and open dealing, from asserting rights the enforcement of which would, through his omissions or commission, cause fraud or injustice to be committed (*75 NY Jur 2d, Limitations and Laches § 40*). It is the holding of the court that the doctrine of equitable estoppel is appropriate in the case at bar. Plaintiff demonstrated he relied on the information provided on the police report by Country Wide's insured. A claim for no fault benefits was sent to the carrier plaintiff's had notice of, All-City, diligently within the 90-day period. Plaintiff then acted appropriately and diligently by reporting the claim to MVIAC. By the time the plaintiff received the correct information, the strict 90-day rule has passed. To hold the plaintiff in violation of the 90-day rule would be injustice especially since defendant Country-Wide was aware of a possible claim as early as February 19,1999 (Bates file page 305).

Defendant has not shown how it was prejudiced by the allowance of the filing of such late claim when it was aware of such claim prior to the filing of plaintiffs' claim. The facts of this specific case clearly document that compliance with the deadline to file a claim within 90 days was impossible due to specific circumstances beyond the claimant's control (*In the Matter of Medical Society of the State of New York et al v. Gregory Sergio as Superintendent of Insurance of the State of New York et al* 100 NY2d 854[2003]; *Mantor v General Accident Insurance et.al*, 129AD2d 998 [4th dept 1987]; *Persaud v Rahman et. al.* ,262 AD2d 542 [2nd Dept 1999] and *Hackensack University Medical Center, et. al v New York City Transit Authority* 10

AD2d 675 [2nd Dept 2004])

Accordingly, the court having found that the plaintiff timely notified the defendant of its claim, grants judgment in favor of plaintiff on the first cause of action in the amount of $3,669.03 plus statutory interest, costs and attorney fees.

Judgment is also granted in favor of plaintiff on the second cause of action in the amount of $2,919.24 plus statutory interest, costs, and attorney fees.

TIMOTHY J. DUFFICY, J.C.C. [*4]

Dated: May 23, 2006