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Universal Open MRI of the Bronx, P.C. v State Farm Mut. Auto Ins.
2006 NY Slip Op 50853(U)
Decided on May 11, 2006
Civil Court Of The City Of New York, Kings County
Velasquez, J.
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Civil Court of the City of New York, Kings County

Universal Open MRI of the Bronx, P.C. Assignee of Leovanny Ramirez, Plaintiff,

against

State Farm Mut. Auto Ins., Defendant.

KCV29614/2005

Richard Velasquez, J.

In this action, plaintiff, Universal Open MRI of the Bronx, PC, seeks to recover

first-party no-fault benefits in the amount of $1,842.26 from defendant State Farm Mutual Auto Ins. for health care services rendered to its assignor(s) who were allegedly injured in an automobile accident. Defendant denied plaintiff's claims on the basis that the alleged injuries "do not arise out of an insured incident." The trial was held before this Court on February 14, 2006. At the start of the trial, the parties stipulated to plaintiff's prima facie case and defendant's denial based on the ground of lack of coverage due to no true accident. Defendant State Farm presented one witness, State Farm Special Investigative Unit (SIU) investigator Don Willsey. Plaintiff did not present any witnesses.

The trial then proceeded on defendant's defense of lack of coverage. SIU investigator Willsey testified that after receiving the file on Mr. Julio Garcia, assignor herein, he performed a preliminary investigation of the claim and tried to contact the parties involved in the alleged accident, including the insured in this case and the assignor, Mr. Garcia, with no success. In addition, he testified that as part of his preliminary investigation, he reviewed the police accident report and intended to interview the police officer who arrived at the scene, but did not as someone from his office had previously interviewed said officer. Mr. Willsey also testified that as part of his investigation, he obtained information from the National Insurance Crime Bureau (NICB) which serves as a clearing house for data from insurance companies concerning claims made against insurance policies, and State Farm's Frequency Tracking System, an internal database of all claims made against State Farm policies. As for State Farm's Frequency Tracking System, he testified that data from prior losses may be retrieved using an individual's name, social security number, address, date of birth, and vehicle identification number (VIN), to determine any connection between the parties involved in the current claim with prior claims against State Farm. His research concluded that: "the owner of claimant vehicle had a prior claim history; owner and driver of the vehicle were not insured."

Plaintiff objected to defendant offering this information into evidence and, after voir dire of Mr. Willsey, moved to preclude this testimony on several grounds including [*2] hearsay. This Court ruled in plaintiff's favor on the hearsay objection to

the admittance into evidence of Frequency Tracking System results. Mr. Willsey further testified that he received the file for investigation "shortly" after the alleged accident, sometime in September or October of 2002. When cross-examined about the gap in time (approximately four months) between the incident in question and his receipt of the Garcia file, he stated that a prior investigator had been assigned to the case.

Mr. Willsey also testified that he attempted to interview the parties involved in the incident, but was unable to do so. Having had no success in interviewing the parties, Mr. Willsey recommended to his attorney that Examinations Under Oath (EUO) be scheduled for the parties involved in the incident. According to Mr. Willsey, none of the parties involved in the alleged accident appeared for EUO's.

Based on all of these factors together with the fact that the insured's vehicle was not at the accident scene at the time the police arrived, Mr. Willsey determined that the accident was staged and therefore it was not a covered accident. Thus, he recommended the subject claim be denied.

DISCUSSION

Generally, an insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy. *A.B. Medical Services, PLLC v. State Farm Mutual Automobile Ins. Co.,* 7 Misc 3d 822, 795 NYS2d 843 [Civ. Ct. Kings County 2005] citing *Gongolewski v. Travelers Ins. Co.*, 252 AD2d 569, 675 NYS2d 299 [2d Dept. 1998]. Whatever the risk or loss covered, it has long been the insured's burden to prove coverage under the policy. *A.B. Medical Services*, id. at 825. In an action for first-party no-fault benefits, an insured's proof is relatively simple a properly completed claim by the provider of medical services or supplies makes out a prima facie showing of coverage. *Amaze Medical Supply Inc., v. Eagle Ins. Co.*, 2 Misc 3d 128 (A), 754 NYS2d 918, 2003 NY Slip. Op. 51701[U][App. Term, 2d and 11th Jud. Dists.]. As in the related area of "medical necessity", the plaintiff's prima facie

showing establishes a "presumption of coverage". A.B. Medical Services, id at 825. Once the plaintiff makes a prima facie showing, the burden of explanation or of "going forward with the case" falls upon the defendant. *Mount Sinai Hosp. V. Triboro,* 263 AD2d 11, 699 NYS2d 77 [2d Dept., 1999].

No-fault insurance policies cover only vehicular *accidents.* A deliberate collision is not a covered accident. *State Farm Mutual Automobile Ins. Co. V. Laguerre,* 305 AD2nd490, 759 NYS2nd 531 [2nd Dept.2003]; *Allstate Insurance Co.v. Massre,* 14 AD3rd 610, 789 NYS2d 206 [2nd Dept. 2005]. When a collision is an intentional act, not an accident, there is no coverage "regardless of whether the intentional collision was motivated by fraud or malice." *Government Employees Ins. Co. v. Shaulskaya,* 302 AD2nd 522, 523, 756 NYS2nd 79 [2nd Dept. 2003].

Standard of Proof in Summary Judgment Context

The law is well settled in a no-fault summary judgment context that the insurer need only demonstrate to the court that it had a "founded belief" that the alleged accident was intentionally caused in order to survive a summary judgment motion by plaintiff-provider. *Amaze Medical Supply Inc. V. Lumbermens Mutual Cas. Co.*, 10 Misc 3d 127(A), 809 NYS2d 480 (Table), 2005 WL 3115289 citing *Central Gen. Hosp. V. Chubb Group of Ins. Cos*., 90 NYS2d 195, 199 (1997). However, defendant-insurer's founded belief is usually [*3]not enough to obtain judgment on its own. To win on its summary judgment motion, defendant must make a prima facie "lack of coverage" showing and if plaintiff does not come forward to rebut defendant-insurer wins. *Central Gen. Hosp*., id at 199; *A.B.Medical Services, PLLC,* supra at 825. In addition, this Court recognizes that for the purposes of summary judgment motions, parties are permitted, within limits, to rely on otherwise inadmissible information. *Zuilkowski v. Sentry Insurance A Mutual Company*, 114 AD2d 453, 494 NYS2d 363 [1985]. However, what is admissible at this stage of litigation will not necessarily be admissible at trial.

Standard of Proof at Trial

At trial, the question remains just how much "admissible evidence" the defendant-insurer must produce to satisfy its evidentiary burden where nonpayment of a no-fault claim is based on a collision being a non-covered event. The second question concerning this Court is whether the elements of fraud must be proved where a claim has been denied based on 11 NYCRR 65-3.8 (e)(2) "circumstances of the accident not covered by no-fault".

There have been several recent well-reasoned decisions regarding the standards of proof for "fraud" or "no true accident", as well as a discussion of whether allegations of fraud are necessary in the context of a no-fault denial based on "no true accident". Three of these decisions have been particularly helpful in analyzing the complexities involved in no-fault cases where the defense against payment of claims is lack of coverage based on allegations of fraud or that the collision was intentionally caused: *A.B. Medical Services, PLLC v. State Farm Mutual Automobile Ins. Co.*, supra ; *JSI Expert Service v. Liberty Mutual Ins. Co.*, 7 Misc 3d 1009(A), 801 NYS2d 235 [Civ. Ct., Kings County 2005]; and *V.S. Medical Services, P.C. v. Allstate Insurance Company*, 11 Misc 3d 334, 2006 WL 16289 [Civ. Ct., Kings County 2006]. After thorough review and consideration of each of these opinions, this Court has decided that it must determine first whether the tort of common law fraud must be proved where a denial is based on 11 NYCRR§65-3.8(e)(2) "circumstance of the accident not covered by no-fault"; and second, the standard of proof for a staged accident, or "no true accident".

Should Fraud be Litigated in a No-Fault Trial?

In *JSI Expert Service v. Liberty Mutual Ins. Co.*, supra , the defense raised for nonpayment of claims was fraud.[FN1] There, citing *Rudman v. Cowles Communications*, 30 NY2d 1 (1972), Judge Bailey-Schiffman found that "proof of fraud must be made by clear and convincing evidence." Indeed, the standard of proof for the tort of common law fraud has long been viewed as requiring proof beyond a preponderance of the evidence as will be discussed below. This Court is concerned, however, that proving the elements of common law fraud by clear and convincing

evidence where nonpayment of a no-fault claim is based on a collision being an intentional act, is not what 11 NYCRR §65-3.8 envisioned.

The intent of the no-fault law as found at 70A NY Jur.2d Insurance § 1774 (updated March 2006) is as follows:

The purposes of this statute were to remove a vast majority of claims arising from [*4] vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic loss suffered as a result of such accidents. [emphasis added].

Our Court of Appeals has upheld the constitutionality of the No-Fault law and in so doing stated, inter alia: ..."it was concluded in all reports that the tort system was plagued by long delays in claim payment. The tort system places an inordinate strain on the State's court systems and judicial resources. The No-Fault law sought to cure these ills by guaranteeing prompt and full compensation for economic losses...and to reduce the long delays experienced under judicial procedures and to lessen the burden on our State Courts." *Montgomery v Daniels*, 38 NY2d 41, 378 NYS2d 1, 340 NE2d 444 [1975].

A review of the elements of the tort of common law fraud demonstrates why proving fraud by clear and convincing evidence in a no-fault trial is inconsistent with the purposes of No-Fault law, and why it is not necessary to allege fraud as a defense for refusal to pay a no-fault claim.

To sustain a cause of action based on actual fraud, the plaintiff had to establish that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations. *Cerbanono v.Price*, 7 AD3d 479, 775 NYS2d 585 [2d Dept. 2004]. (See also, *Giurdanella v. Giurdanella*, 226 AD2d 342, 640 NYS2d 211; *Matter of Garvin*, 210 AD2d 332, 620

NYS2d 400).

Clearly, proving these elements (and proving them by clear and convincing evidence) will consume a significant amount of trial time and could be very costly.

Clear and Convincing Standard vs. Preponderance of the Credible Evidence

While common law fraud must be proved by clear and convincing evidence, as Judge Bailey-Schiffman found in *JSI Expert Service*, the standard common to most civil cases is a preponderance of the credible evidence. What, then, distinguishes civil cases where a preponderance of the credible evidence standard of proof is sufficient, and those where the issue to be decided must meet the clear and convincing standard?

The case of *In the Matter of Father Philip K. Eichner v. Dillon*, 73 AD2d 431, 426 NYS2d 517 [2d Dept. 1980] sheds light on the distinction between the two types of civil cases. In *Eichner*, a priest brought a proceeding to have a religious brother (in a chronic vegetative state) declared incompetent, and to obtain judicial approval for withdrawal of extraordinary life-sustaining measure consisting of a respirator. The *Eichne*r court grappled with the standard of proof necessary to determine whether the Priest, Eichner, had the requisite legal authority to make the decision that life-support should be removed from the religious brother. There the court reasoned:

[W]e cannot abide by the suggestion that a preponderance of the credible evidence' standard, common to most civil proceedings, would be sufficient here. Rather we elect the [*5]middle tier standard of proof, that of clear and convincing evidence. ...[T]his standard is appropriate where the interests at stake are deemed to be more substantial than mere loss of money.' Similarly, the clear, unequivocal and convincing standard of proof [is used] to protect particularly important individual interests in various civil cases. Id. at 523.

Eichner cites to examples of cases where "the clear and convincing evidence"

standard is utilized only where the "interests at stake" are deemed more significant than ordinary": **reformation of a contract** (*Ross v. Food Specialities*, 6 NY2d 336, 189 NYS2d 857, 160 NE2d 618); **a filiation proceeding** (*Commissioner of Public Welfare of City of NY v. Ryan*, 238 App. Div. 607, 265 NYS 286); **an action based upon a claim against a deceased**, (*Matter of Cady*, 211 App. Div. 373, 207 NYS 385); in **deportation proceedings** (*Woodby v. Immigration and Naturalization Serv*., 385 US 278, 87 S.Ct. 483, 17 L.Ed.2d 362); and for a claim of **fraud** (*United States v. American Bell Tel. Co.*, 167 US 2224, 17 S.Ct. 809, 42 L.Ed. 144).

No-Fault Regulation 11NYCRR 65-3.8(e)(2)

No-fault regulations provide for a denial of a claim for the following reasons:

(1) no coverage on the date of accident;
(2) circumstances of the accident not covered by no-fault; or
(3) statutory exclusions pursuant to section 5103(b) of the insurance law. Id. at 11 NYCRR 65-3.8 (e).*(*emphasis added*)*

If an insurer has a "founded belief" that the alleged accident was not a true accident, it can deny the claim based on 11 NYCRR 65-3.8(e)(2). At trial, the insurer must show, through admissible evidence, facts and circumstances leading a trier of fact to conclude that more likely than not, the circumstances of the collision are not covered by no-fault. If this threshold is reached, the burden shifts to the plaintiff to rebut the defendant's case. Nowhere in the no-fault statute or regulations is there a requirement that in order to prevail on denial of a claim pursuant to 11 NYCRR 65-3.8(e), common law fraud must be proved. In fact, as Judge Jack Battaglia in *A.B. Medical Services, PLLC v. State Farm Mutual Automobile Insurance company*, supra , and Judge Arlene Bluth in *V.S. Medical Services, P.C. v. Allstate Insurance Company*, supra , point out: "Damages resulting from a deliberate collision are not covered by no-fault insurance regardless of the existence of fraudulent motivation." *V.S. Medical Services*, Id. At 3. Judge Bluth goes on to state: "Put another way, the no-fault policy only covers accidents; it does not cover deliberate incidents. It does not matter whether the incident was a deliberate mugging, an attempted murder, a product of

road rage, or a cold calculated scheme to defraud the insurance company. If it was deliberate, it is not a covered incident under the no-fault policy."

While our appellate courts commonly invoke the term "fraud" when discussing the defense of "staged accident", it is a "lack of coverage" they are discussing not necessarily fraud. It seems to make no difference why the incident occurred. If it were made to happen, then it is not an accident and therefore not a covered accident. See *State Farm V. Laguerre*, 305 AD2d 490, 491, 759 NYS2d 531 [2d Dept. 2003].

In the instant matter, defendant contends that the evidentiary burden for defeating a summary judgment motion "founded belief" (incident was staged) should apply in a trial context. This Court disagrees. As mentioned earlier, to win on its own summary [*6] judgment motion, defendant must make a prima facie "lack of coverage" showing and if plaintiff does not go forward to rebut, then summary judgment is granted to defendant-insurer. *Central General Hospital v. Chubb Group of Ins. Co.*,90 NY2d 195, 199 [1997].. Moreover, this court is concerned that "fact or founded belief" as the evidentiary burden in no true accident cases contravenes the intent of the No-Fault insurance law. Such a minimal showing would allow routine denial of claims by insurers and open the floodgates to permit insurers who have not timely denied a claim to use a "no true accident" defense (understanding that the standard of proof is minimal) and defeat the primary purposes of the no fault law.

As far as the shifting burdens of proof in a no-fault staged accident or intentional collision case, Judge Jack Battaglia provides an excellent analysis in *A.B. Medical Services.* The bottom line is that in a "staged accident" case, the defendant has the burden of "coming forward" with proof in admissible form that a staged accident occurred; The plaintiff bears the burden of persuasion and rebutting defendant's evidence, or the plaintiff "succumbs". This Court finds that the standard of proof is "preponderance of the evidence", often defined as the existence of the "fact" being more probable than its non-existence. After all the evidence has been presented, the trier of fact must decide whether the evidence preponderates in favor of the plaintiff or defendant.

CONCLUSION

In this trial, defendant failed to come forward with proof in "admissible form" to establish the "fact" or the evidentiary "foundation" to buttress its belief that the injuries alleged by the assignor did not arise from an insured accident. Defendant failed to adduce sufficient admissible evidence to rebut the presumption of coverage that attaches to the plaintiff's properly completed claim form.

While SUI investigator Willsey's testimony is entitled to some weight (see *Travelers Indemnity Co. V. Morales*, 188 AD2d 350, 351, 591 NYS2d 27 [1st. Dept. 1992], it is clear to this Court that much of the information that SUI investigator Willsey relied upon in his testimony was hearsay and was not admissible due to the lack of appropriate foundation. The defendant sought to introduce information obtained from the National Insurance Crime Bureau (NICB) in establishing its case of intentional collision, but failed to lay any foundation or make any showing that would support the admissibility of this information.

In addition, Mr. Willsey testified that as part of his investigation, he utilized State Farm's Frequency Tracking System to determine any prior loss history of any of the parties and/or any of the vehicles involved in the present incident. His search revealed that the owner of claimant vehicle had a prior claim history with State Farm and that the owner and driver were not insured. Again, this Court concluded that without the requisite foundation, this information is inadmissible hearsay.

Defendant also asserts an inference of intentional collision should be made by the alleged failure to cooperate by the assignor and /or other parties involved in this incident and the fact that the insured vehicle was not at the scene of the accident at the time police arrived. The fact that the vehicle was not at the scene of the accident is not determinative of anything. Even though defendant-insurer may wish to use failure to cooperate as one indicia of "no true accident" instead of as a defense, it did not offer any admissible evidence as to plaintiff's assignors' failure to cooperate.

Based upon the testimony at trial and the acts discussed above, this Court [*7] concludes that the defendant has failed to come forward with evidence of a staged

accident or that the loss giving rise to this action was intentional, and thus the burden of persuasion was never shifted to plaintiff. Accordingly, judgment for plaintiff in the sum of $1,842.26, together with statutory interest and attorney's fees. This constitutes the decision and order of the Court.

Dated: May 11, 2006 _____

RICHARD VELASQUEZ, J.C.C.

Footnotes

Footnote 1:"Defendant denied plaintiff's claims on the basis that [w]e do not provide coverage for any insured' who has made fraudulent statements or engaged in fraudulent conduct in connection with the accident or loss for which coverage is sought under this policy.'" JSI Expert Service, id at 237.