

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITAN INDEMNITY COMPANY : CIVIL ACTION
v. :
SCOTT C. CAMERON, et al. : NO. 01-5435

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

February 19, 2002

Before the court is a request by defendant, Andrew Rapp (hereinafter “Rapp”), for reconsideration of this court’s order dated January 8, 2002, sustaining plaintiff’s objections to certain discovery requests made to it by Rapp. For the reasons that follow, the motion is DENIED.

I. BACKGROUND

This insurance coverage dispute arose out of the death of John E. Rapp (“the decedent”). On December 24, 1998, defendant, Scott E. Cameron (“Cameron”), was a police officer for the City of Easton, Pennsylvania (“the City”). In the course of his duties Officer Cameron shot and killed John E. Rapp. In his capacity as the Executor of his brother’s estate, Andrew Rapp filed a wrongful death action against Officer Cameron alleging violations of 42 U.S.C. § 1983 and related Pennsylvania statutes (Civil Action No. 00-1396). After a trial held in August, 2001, the jury returned a verdict for Rapp and against Officer Cameron in the amount of \$472,955.00, finding that defendant Cameron used excessive force in violation of the decedent’s constitutional rights.

At the time of John Rapp's death on December 24, 1998, the City of Easton maintained a Law Enforcement Officer's Liability Policy with Titan Insurance Company ("Titan") (No. 90-HP-01971) which policy was in effect on that date. Titan provided a defense to Officer Cameron but defended under a reservation of rights letter. In particular, Titan claims that the policy specifically excludes coverage for Officer Cameron's actions on December 24, 1998.

On October 18, 2001, this court granted Titan's motion to intervene pursuant to Fed.R.Civ.P. 24(b)(2), Rapp v. Cameron, 2001 WL 1295606 (E.D. Pa. Oct. 18, 2001). Titan filed a declaratory judgment action on October 26, 2001, and requested the court to find that it has no duty to indemnify Cameron for the judgment entered against him by this court. By Memorandum Order dated January 8, 2002, this court sustained in part, and overruled in part certain objections Titan made to discovery requests of Rapp. Rapp requested documents and oral depositions from the following persons:

1. Person from Titan, or their agent, who negotiated the contracts of insurance with the City, including copies of their file which are not protected by any type of privilege;
2. The supervisor of the file from Titan from the time the suit was instituted until the time that the Motion for Declaratory Judgment was entered, as well as the entire file with respect to this matter that pertains to coverage by Titan and not just general handling of the file and all decisions pertaining to coverage and the considerations of such.

In its Memorandum Order, the court permitted Rapp to take the deposition of the person from Titan or its agent who negotiated the contracts of insurance with the City of Easton limited to questioning the representative as to information he/she received from the City as to the types of coverage the City requested. The court also ordered Titan to produce documents reflecting and

memorializing any information it received from the City regarding the types of coverage it requested from Titan.

With respect to Rapp's second discovery request -- to take the deposition of the Titan claims supervisor and to have him/her produce the claims file -- the court denied the request at that time. Rapp justified his discovery request by offering that claims information was relevant to establish his claim that Titan should be estopped from denying coverage pursuant to the theory of estoppel recognized in Brugnoli v. United Nat. Ins. Co., 426 A.2d 164 (Pa. Super. Ct. 1981). This court required Rapp "to develop some information during Mr. Cameron's deposition, to support his equitable estoppel claim" before the court "will allow plaintiff to take the unusual steps of deposing the claims supervisor and reviewing his or her file in an insurance coverage case." (Order, p.2).

By letter dated January 29, 2002, counsel for Andrew Rapp requested reconsideration of this court's January 8th Order. In support of the request, counsel submitted an affidavit of Scott Cameron in lieu of his deposition. Counsel for Titan responded to this request for reconsideration by letter dated January 30, 2002. Counsel for Andrew Rapp sent a reply letter on February 1, 2002.

II. DISCUSSION

Generally, under Pennsylvania law,¹ when a liability insurer "voluntarily manages the insured's defense to final judgment or settlement, the carrier cannot later disclaim liability under the policy." Draft Systems, Inc., v. Alspach, 756 F.2d 293, 296 (3d Cir. 1985)(citations omitted). However, this general rule of estoppel "does not apply when

¹ The parties agree that Pennsylvania law governs this action.

coverage defenses are disclosed and specifically preserved.” Id. Insurance companies typically preserve coverage defenses “by sending the insured a letter preserving its position on disputed policy issues.” Id. at 296 n.2. Courts approve the use of these letters and have acknowledged the benefits to the insured and the judicial system. Id. at 296. In Pennsylvania, these “reservation of rights” letters do not require the consent of the insured and generally prevent the operation of an estoppel against the insurer. Id. at 296 n.2 (citing Brugnoli v. United Nat’l Ins. Co., 426 A.2d 164 (Pa. Super. Ct. 1981)).²

In the case at bar, Titan provided Cameron with a defense, by paying for defense counsel, Daniel J. Dugan, Esquire. On May 2, 2000, Titan sent Cameron a reservation of rights letter. In the letter, Titan advised Cameron that in addition to Mr. Dugan, he should consider retaining an additional attorney to protect his interests: “You may wish to associate this litigation with any attorney of your own choice and at your own expense to protect your interest for any damages that might be awarded that are either in excess of our policy limits or not covered by the policy.”

Under Pennsylvania law, to find an estoppel, “there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party

² Reservation of rights letters, to be effective, must fairly inform the insured of the insurer’s position and must be timely. Brugnoli v. United Nat’l Ins. Co., 426 A.2d 164, 167 (Pa. Super. Ct. 1981). In his request for reconsideration, Rapp questions the adequacy of the reservation of rights letter, claiming that it did not fairly inform Cameron of the legal position that Titan was adopting related to its contractual obligations (Letter from M. Cohen, 1/29/02). The adequacy of the reservation of rights letter, however, must be decided solely on the basis of the language in the letter. In his affidavit, Mr. Cameron concedes that the “only direct communication from the insurance company was the reservation of rights letter . . .” (Aff. ¶ 1). Therefore, a deposition of the claims supervisor will not provide any information on whether the letter fairly informed Cameron of Titan’s position on coverage. The adequacy of the reservation of rights letter is a question reserved for a later time should Rapp raise the issue again.

who has taken or neglected to take some action to his own prejudice in reliance thereon.

Accordingly, an insurer is not estoppel to deny liability on a policy where the [insured] was not misled by the [insurer's] conduct.” Wasilko v. Home Mut. Cas. Co., 232 A.2d 60, 63 (Pa. Super. Ct. 1967). Thus, to demonstrate an estoppel, Cameron “must establish the following: (1) an inducement whether by act, representation, or silence when one ought to speak, that causes one to believe the existence of certain facts; (2) justifiable reliance on that inducement; and (3) prejudice to the one who relies if the inducer is permitted to deny the existence of such facts.” Argonaut Great Central Ins. Co. v. The Phil’s Tavern, Inc., 2001 WL 1346327, at *4 (E.D. Pa. Oct. 29, 2001)(citations omitted).

To support his claim of estoppel, Rapp submitted the affidavit of Mr. Cameron in which he states (1) at no time prior to trial was he advised that Titan intended to deny coverage of any potential verdict (Aff. ¶ 4); (2) he received the May 2, 2000 letter from Titan reserving its rights and that the “letter was the only direct communication that [he] had with any representative of Titan” (Aff. ¶ 1); (3) he learned prior to the verdict that during a settlement conference, a Titan representative “raised the issue of whether Titan would provide coverage for any verdict that might be returned against [him]” and that “Titan was willing to offer \$125,000.00 to settle the lawsuit” (Aff. ¶ 2); and (4) after the verdict, his attorney, Mr. Dugan advised that Titan “would probably pay” the \$472,955.00 judgment entered against him (Aff. ¶ 5).

The above information, if true, clearly does not establish an estoppel against Titan. First, Cameron’s affidavit does not allege any misrepresentations made by the insurer or

its agents. Prior to verdict, Cameron was advised that Titan had reservations about coverage, and Titan suggested to Cameron that he may wish to retain his own counsel. At no time did Titan tell Cameron it would provide coverage. The fact that Titan was willing to offer \$125,000.00 to settle the lawsuit cannot be construed to be an agreement to provide coverage or a waiver of Titan's right to contest coverage. Under Pennsylvania law, in order to establish waiver by an insurer, "the evidence must show that acts of the insurance company constituted a voluntary, intentional relinquishment of a known right and the insurer had full knowledge of all pertinent facts." Wasilko, 232 A.2d at 63. Under this strict standard, a waiver cannot be implied from an offer of settlement made during a mediation session before the court. See also Fed.R.Evid. 408 (offers of settlement are not admissible to prove "liability for or invalidity of the claim").

Furthermore, Cameron's affidavit does not establish that he relied upon any of Titan's actions to his detriment. Rapp appears to argue that because Titan did not inform Cameron that it was denying coverage until after the verdict, this induced Cameron not to employ his own attorney for trial. Assuming, arguendo, this is true, Rapp has made no showing how Cameron was prejudiced. As Rapp concedes, "Mr. Dugan did a fine job" (Letter from M. Cohen, 1/29/02 at 2). He does not claim that another attorney would have achieved a better result for Cameron at trial or that his defense of this coverage case has been prejudiced by Mr. Dugan's representation. Since Cameron has not been prejudiced by Titan's conduct prior to verdict, there can be no estoppel against Titan. See Argonaut, 2001 WL 1346327, at *5 (insured failed to establish prejudice as result of any act or failure to act on part of insurer so that estoppel could not be applied against insurer); Laroche v. Farm Bureau Mut. Auto. Ins.

Co., 7 A.2d 361, 363 (Pa. 1939)(“[I]t is an essential element of estoppel that the person invoking it has been influenced by or has relied upon the representation or conduct of the person sought to be estopped. Whereas the insured loses substantial rights when he surrenders to his insurer the control of the litigation, plaintiff surrendered no rights and was in no way misled or damaged merely because it was the insurer who conducted the defense against her claim.”).

The Cameron affidavit also does not establish that Cameron relied upon any misrepresentations of Titan after the verdict to his detriment. Even if you could impute to Titan Mr. Dugan’s prediction to Cameron that Titan would probably pay the verdict, there is no showing how Cameron was prejudiced by this comment. In short, Rapp has not shown how a deposition of a claims supervisor will provide any information to prove the detrimental reliance requirement which is essential to establish an estoppel claim. Rapp argues that a deposition of the Titan claims supervisor may show that Titan had decided to deny coverage prior to verdict and this would contradict its pre-trial communications to Cameron. Even if this were the case, Titan still would not be estopped to deny coverage without a showing of prejudice to Cameron.

Finally, Rapp’s reliance on Brugnoli does not support his request for discovery from the claims supervisor. In Brugnoli v. United Nat’l Ins. Co., 426 A.2d 164 (Pa. Super. Ct. 1981), the insured sought to estop her insurer from denying liability coverage because the insurance company retained an attorney for the insured who participated in the defense of the case. The Superior Court refused to find that the insurer was estopped to deny coverage for two reasons. First, the facts did not show that the insurer required the insured to relinquish to

the insurer the management of the case. Id. at 167. Second, the insurer sent a timely reservation of rights letter to the insured. The Brugnoli court stated that a “liability insurer will not be estopped to set up the defense that the insured’s loss was not covered by the insurance policy, notwithstanding the insurer’s participation in the defense of an action against the insured, if the insurer gives timely notice to the insured that it has not waived the benefit of its defense under the policy.” Id. at 167 (quoting 14 G. Couch, Cyclopedia of Insurance Law § 51:83 (2d ed. 1965)).

Here, the Cameron affidavit does not challenge the adequacy or timeliness of the reservation of rights letter. Furthermore, the information in the affidavit does not allege that Titan defended Cameron in such a self-interested way so that Titan subjugated Cameron’s interests to his detriment so that the equitable principle of estoppel should be applied. See Brugnoli, 426 A.2d at 167 (“[T]his is not a case in which the insurance company ‘substituted itself and its judgment for that of the defendant’ only to later disclaim liability under the policy.”)(citations omitted).

For all the above reasons, the Cameron affidavit clearly does not allege facts that would suggest that the principle announced in Brugnoli would apply in this case, and, therefore, Rapp’s Motion for Reconsideration of the Court’s Order of January 8, 2002 is

DENIED. An appropriate Order follows.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

