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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No.: 2022-001455

Crystal Webb Appellant,

v.

Dana Thomas Slaughter,

Progressive Northern Insurance Company

Respondents.

FINAL BRIEF OF RESPONDENT PROGRESSIVE NORTHERN INSURANCE COMPANY

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I. STATEMENT OF THE ISSUES ON APPEAL

1) DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE NON-JURY DEFAULT JUDGMENT WAS NOT BINDING ON THE UIM CARRIER?

II. STATEMENT OF THE CASE

This lawsuit arises out of an automobile accident that occurred on or about August 20, 2020. Appellant, Crystal Webb filed her Complaint against Respondent, Dana Thomas Slaughter on December 31, 2020. (Summons and Complaint R. pp. 30-33). Thereafter, Ms. Webb filed a Proof of Service on January 15, 2021 indicating that the Summons and Complaint was mailed to Mr. Slaughter and that service of the Complaint was perfected on January 8, 2021. On March 9, 2021, Ms. Webb filed an Affidavit of Default against Defendant, Mr. Slaughter. (Affidavit of Default R. pp. 117-118). An Entry of Default was entered on March 11, 2021. (Entry of Default R. pp. 5-6). The Entry of Default was against Mr. Slaughter and did not apply to Progressive Northern Insurance Company (hereinafter "Progressive") as underinsured motorist carrier.

On March 19, 2021, Mr. Slaughter filed an Answer and moved for relief from Default. (Motion for Relief from Default R. pp. 90-91). Ms. Webb filed a Notice of Motion and Motion for Damages on April 6, 2021. (Motion for Damages R. pp. 92-95). On April 16, 2021, Ms. Webb agreed to settle with Mr. Slaughter's liability carrier and executed a Covenant Not to Execute. (Signed Covenant Not to Execute R. pp. 119-121). At the time the Covenant Not to Execute was signed, Mr. Slaughter's Motion for Relief from Default was still pending. Further, Ms. Webb did not alert the court that there would be no need for a damages hearing after signing the Covenant Not to Execute.

On March 15, 2021, fourteen (14) days after Entry of Default and several weeks before the Covenant Not to Execute was entered into, Ms. Webb served Progressive with the Complaint. Progressive properly and timely answered the Complaint on April 23, 2021. In its Answer, Progressive demanded a jury trial pursuant to its constitutional and statutory right. (Progressive's Answer R. pp. 37-41). Progressive served written discovery requests on Ms. Webb on June 7,

2021. When no responses were received, Progressive sent Ms. Webb a Rule 11 Letter demanding responses to Progressive's discovery requests. However, Ms. Webb did not respond to the requests.

On June 30, 2021, counsel for Progressive was substituted for Mr. Slaughter's counsel to defend the case as the underinsured motorist carrier. (Consent Order to Substitute Counsel R. pp. 7-8; 13-14).

Approximately eight months after signing the Covenant Not to Execute, on December 3, 2021, Ms. Webb moved forward with her default damages hearing. Counsel for Progressive attended the hearing, but did not participate because Progressive was not in default. While the undersigned did not participate in the hearing, the undersigned put Progressive's position that it was not in default on the record. (Damages Hearing Transcript R. p. 47, lines 3-20-p.48, lines 18-21). Ms. Webb obtained a default judgment against Mr. Slaughter, and the Default Judgment was entered on December 16, 2021. (Default Judgment R. pp. 16-22).

Ms. Webb then sought to enforce against Progressive the Default Judgment she obtained against Mr. Slaughter. Thereafter, counsel for Mr. Slaughter filed a notice of appearance and filed a motion to have the judgment marked as satisfied pursuant to the signed Covenant Not to Execute. (Slaughter's Motion to Mark Judgment as Satisfied R. pp. 96-98). Progressive filed a separate Motion to Mark the Judgment as Satisfied. (Progressive's Motion to Mark Judgment as Satisfied R. pp. 99-105). A hearing on the motions was held on June 14, 2022 before the Honorable Jennifer B. McCoy.

On August 9, 2022, Judge McCoy granted Progressive and Mr. Slaughter's motions. (Order Granting Motion to Mark Judgment Satisfied R. pp. 23-26). In the Order, Judge McCoy ruled that the non-jury default judgment was not binding on Progressive, who exercised its rights to defend the case and demanded a jury trial. Id.

Subsequently, Ms. Webb filed a Motion to Reconsider, which was opposed by both Progressive and Mr. Slaughter. (Webb's Motion to Reconsider; Progressive's Motion in Opposition; and Slaughter's Motion in Opposition R. pp. 106-114). Ms. Webb's Motion to Reconsider was denied, and this appeal followed.

III. STATEMENT OF THE FACTS

The procedural history set out above constitutes the facts of this case. However, the Entry of Default entered was against Mr. Slaughter, and not Progressive. Progressive, as the UIM carrier, steps into the shoes of Mr. Slaughter but has separate and distinct rights. As the facts above indicate, a Covenant Not to Execute was signed by Ms. Webb. Once the Covenant Not to Execute was signed, there was no need for Ms. Webb to proceed with a damages hearing to obtain a default judgment against Mr. Slaughter. However, Ms. Webb's counsel proceeded with the damages hearing regardless.

At the damages hearing, counsel for Progressive attended but did not participate because Progressive was not the party in default. At the damages hearing, the undersigned expressed to the court that it was not under any obligation to oppose the default because the undersigned's client, Progressive Insurance, was not the party in default. Therefore, any judgment against Mr. Slaughter would not affect Progressive. Instead, the judgment would be a judgment personally against Mr. Slaughter, who had settled out of the case prior to the hearing. Further, Progressive asserted its right to a jury trial in its Answer.

IV. STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c),

SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496–97, 662 S.E.2d 606, 607–08 (Ct. App. 2008), aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010).

V. ARGUMENT

A. The Circuit Court Correctly Held That The Non-Jury Default Judgment Was Not Binding On The UIM Carrier.

In the Order granting Progressive's and Mr. Slaughter's Motion to Mark the Judgment as Satisfied, Judge McCoy correctly ruled that "[t]his non-jury default judgment is not binding upon the UIM carrier, which has exercised its right to defend the case and has demanded a jury trial." (Order Marking Judgment as Satisfied R. p. 24). In the Order, Judge McCoy cites S.C. Code Ann. § 38-77-160 as the controlling authority for such ruling. South Carolina has repeatedly held that a UIM carrier and the individual defendant are separate and distinct entities, with separate and distinct rights.

i. Progressive is not bound by the default judgment because Progressive and the individual Defendant are separate and distinct entities.

South Carolina law provides an underinsured motorist carrier, such as Progressive, with an independent right to defend in the name of the underinsured motorist. S.C. Code Ann. § 38-77-160. "The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear." Id. Section § 38-77-160 further provides that "[i]n the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense for its own benefit." Id. "Significantly, our Supreme Court has

held that the rights of the UIM carrier and the named defendant are not synonymous." Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204, 208 (Ct. App. 2003).

"Clearly, once the named defendant has settled for his liability policy limits, he no longer has a stake in the outcome of litigation. The UIM carrier, on the other hand, still has a viable, financial interest in the case. As a result, the attorney for the UIM carrier represents the carrier and not the named defendant." Id. at 209. This well-settled law is best highlighted in Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995).

In Broome, the plaintiffs sued Mr. Watts for injuries sustained in a motor vehicle accident. The plaintiffs sued Mr. Watts, who had liability insurance with Nationwide. The plaintiffs also served their underinsured motorist carrier, USAA, with copies of the complaint pursuant to § 38-77-160. Shortly after USAA appeared in the lawsuit, the plaintiffs entered into a settlement agreement in which Nationwide agreed to pay its liability limits. Pursuant to the settlement agreement, Ms. Watts waived her right to a jury trial and a covenant not to execute was signed by the plaintiffs. However, the plaintiffs proceeded with the lawsuit to determine damages for purposes of UIM coverage. Importantly, USAA timely answered and requested a jury trial. The trial judge ordered a jury trial, and the plaintiffs appealed arguing that USAA was bound by Ms. Watts's waiver.

On appeal, this Court found that a waiver by Ms. Watts was not "tantamount to a waiver by USAA, because it blurs the distinction between the named defendant (Watts) and the actual defendant (USAA) which must pay damages on behalf of the named defendant in the event of liability." Id. at 340. This Court concluded that, "[a]lthough the UIM carrier 'steps into the shoes'

of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." Id.

Here, Progressive timely answered Ms. Webb's Complaint and was not in default. In fact, Progressive was served with the Complaint approximately fourteen (14) days after an entry of default was entered against Mr. Slaughter. At that time, Ms. Webb and Mr. Slaughter had not yet entered into a settlement agreement. As such, the time for Progressive to assume the defense in the name of Mr. Slaughter had not yet come to fruition. Even when Progressive did assume the defense, Progressive maintained that it was not in default, but rather, the default was entered against Mr. Slaughter.

In Ms. Webb's Initial Brief, she contends that:

> "Progressive, despite being served almost nine months prior to the hearing, chose not to participate in the hearing. Progressive did not call witnesses, cross-examine witnesses, present evidence, or enter mitigating evidence." [See Appellants Initial Brief; P. 14].

At the damages hearing, the following exchange occurred:

THE COURT: Who's in default?

MR. CRUDUP: The defendants, Your Honor. The actual defendants.

THE COURT: Right. Not Progressive.

MR. CRUDUP: No.

(Transcript of Damages Hearing R. p. 47, lines 23-25-p. 48, lines 1-2).

As South Carolina law clearly establishes, the rights of Mr. Slaughter and Progressive are completely separate, and any actions or omissions by Mr. Slaughter in defending the case do not

bind or affect Progressive. Like in Broome, where the UIM carrier timely answered and the actions of the actual defendant did not affect the insurer's rights, the default against Mr. Slaughter did not bind Progressive. Once Ms. Webb and Mr. Slaughter entered into a settlement agreement and the Covenant Not to Execute was signed, Ms. Webb should not have proceeded with the damages hearing to obtain a judgment, personally, against Mr. Slaughter. Mr. Slaughter was no longer a party to the lawsuit, and the defense was assumed by Progressive, which was appearing only in the name of Mr. Slaughter and not on behalf of Mr. Slaughter himself. As a result, a default judgment against Mr. Slaughter was meaningless. The intention of doing so was to take advantage of the default entered against Mr. Slaughter, and use it to bind Progressive and thwart the rights afforded to an UIM carrier.

ii. Progressive was not afforded its right to appear and defend, as well as it's right to a jury trial.

As stated, because the underinsured motorist carrier and the actual defendant are separate and distinct entities, the underinsured motorist carrier does not forgo any of its rights when stepping into the defendant's position in order to defend the case. In Williams v. Selective Ins. Co. of Se., 315 S.C. 532, 446 S.E.2d 402, 535 (1994) our Supreme Court held that "the intent of § 38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits." These rights include the right to conduct discovery, right to depose parties, the right to mandatory mediation, and most importantly, the right to a jury trial.

In Ex parte Allstate Ins. Co., 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000), the claimant filed suit against the alleged underinsured motorist carrier and pursued the case through a jury trial before serving the UIM carrier. Id. at 680. However, the UIM carrier was served while the defendant's post-trial motions were still pending. Id. This Court held that "[t]o allow service on a

UIM carrier after that action has been tried would defeat the purpose of granting the UIM carrier the right to 'appear and defend.'" Id. at 681. This Court further held that, even if the UIM carrier had the right to participate in the post-trial motions, this would have been a "far cry" from the right to protect itself during the early stages of the lawsuit. Id. at 681. This Court ruled that a UIM carrier has rights separate and distinct from those of the defendant, including the independent right to a jury trial. Id.

Progressive was not afforded its right to defend, despite answering the Complaint in a timely manner. Progressive served discovery requests to Ms. Webb before the damages hearing, which went unanswered. After Ms. Webb and Mr. Slaughter entered into the settlement agreement, Progressive sent Ms. Webb a letter demanding discovery responses. (Progressive's Rule 11 Letter R. p. 122). However, those responses were not provided. Despite the fact that Progressive was not in default, Ms. Webb expected Progressive to defend itself at the damages hearing without being afforded its right to defend in the early stages of litigation. The deprivation of this right is contrary to South Carolina law pursuant to § 38-77-160. Any abrogation of these rights unfairly prejudices the UIM carrier.

In her Initial Brief, Ms. Webb contends that Progressive did not argue that it was entitled to a jury trial at the damages hearing and, therefore, waived this right. However, Progressive properly asserted its right to a jury trial by demanding such in its Answer, which again, was filed timely. (Progressive's Answer to Complaint R. pp. 37-41). A waiver of a jury trial, in the absence of an express agreement or consent, will not be presumed. *See* Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). Not to belabor what has become obvious by the facts of this case, but Progressive was not in default and the damages hearing was not applicable to Progressive. Progressive was not under any obligation to attempt to participate, let alone object to the mode of

"trial" being implemented against Mr. Slaughter. Ms. Webb appears to believe that just because Progressive would defend the case in the name of Mr. Slaughter, that it should be stripped of its rights to appear and defend, as well as its right to a jury trial because Mr. Slaughter failed to timely answer the Complaint.

The courts in Ex parte Allstate, Crawford, and Broome, have established that the UIM carrier has a right to protect its interests, which are completely separate of that of the named defendant. Further, these holdings have established that the individual named defendant could not give up a UIM carrier's properly possessed rights, including the right to a jury trial. Here, Mr. Slaughter's failure to timely answer the Complaint would not deprive Progressive of its properly possessed rights. Moreover, nor was there any waiver of such rights by Progressive.

VI. CONCLUSION

The circuit court properly granted Progressive's and Mr. Slaughter's Motion to Mark the Judgment as Satisfied and properly found that the default judgment is not binding on Progressive. Therefore, Progressive respectfully requests that the circuit court's August 9, 2022 Order granting marking the judgment as satisfied be affirmed.

Respectfully Submitted by:

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