

IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE No: 2012-18756 SP 25

GABLES INSURANCE RECOVERY,
INC.,
a/a/o KRISTINE VALDES,
Plaintiff,

v.

Progressive American Insurance
Company,
Defendant.

v.

ALL X RAY DIAGNOSTIC SERVICES,
CORP.,
Third Party Defendant.

**FINAL JUDGMENT AFTER ORDER GRANTING THIRD-PARTY DEFENDANT ALL X-
RAY'S MOTION TO STRIKE PROGRESSIVE'S SHAM PLEADINGS;**

ORDER ENFORCEING APPELLATE COURT ORDER; AND

**ORDER DENYING PROGRESSIVE'S MOTION FOR RECONSIDERATION OF
ORDER DATED OCT. 2, 2015**

THIS CAUSE having come on to be heard on February 20, 2019, and the Court having heard the argument of counsel, having reviewed the record evidence, pleadings, motions and being otherwise advised in the premises; UPON REMAND as directed by the Order Relinquishing Jurisdiction entered on June 5, 2018 and upon Progressive's, (the third-party Plaintiff), motion for reconsideration of this court Oct. 2, 2015 Order the Court finds as follows:

1. Gables Insurance Recovery initially sued Progressive for breach of contract regarding a PIP policy. Progressive defended the action claiming the amounts sought were not reasonable, related to the subject accident, or medically necessary (RRN).
2. Progressive, rather than stipulating to RRN, fought GIR on each of the issues and claimed that All X-Ray was rightfully paid. However, in juxtaposition to its defense in the GIR v. Progressive action, Progressive sued All X-Ray claiming that All X Ray was unjustly enriched.
3. Progressive counter sued All X-Ray for Common Law Indemnity, Unjust Enrichment, Equitable Estoppel, and Detrimental Reliance. All X-Ray denied the allegations and asserted the affirmative defenses of Mutual Mistake, Unilateral Mistake (by each party), Contributory Negligence, Failure to Mitigate, Failure to Make a Demand, Mis-joinder, Unclean Hands, Express Contract Exists, No Contract Exists, and Laches. All X-Ray also sought two counter-claims, Interpleader and Rescission. Progressive's complaint asserted that All X-Ray was unjustly enriched for claiming amounts due to Gables Insurance Recovery (GIR) after it paid benefits to All X-Ray that GIR was entitled to claim.
4. Progressive also asserted that the benefits were exhausted due to a final payment being made to All X-Ray for the balance of the policy benefits.
5. On Oct. 2, 2015 after an evidentiary hearing, an order disposing of all of the counts against All X-Ray was entered by this Court. The court struck Progressive's pleadings declaring them a "sham" and entered Summary Judgment. It was noted that Progressive failed to present any evidence or cite to the total record evidence to refute All X Ray's contention that Progressive knew that no required factual basis existed in support of its claims at the time the claims were pled.

6. No Motion for Rehearing was filed by Progressive. On Oct. 21, 2015, after the expiration of period for re-hearing, the Progressive attempted to appeal the non-final order prior to the entry of a final judgment.
7. On June 6, 2018, the Circuit Court on appeal relinquished jurisdiction for the County Court to render a final judgment in this matter.
8. A motion for re-hearing of the Oct. 2, 2015 order was required within 15 days of the rendering of the order pursuant to Fla. R. Civ. P. 1.530(a) and (b). (The last day to file such a motion was Oct. 19, 2015).
9. The Defendant is precluded from moving to rehear the matter and the appellate court has directed that the final judgment be entered consistent with the Oct. 2, 2015 order granting All X-Ray's Motion to Strike Progressive's pleadings as a sham.
10. During the hearing on Feb. 20, 2019, counsel for Progressive conceded that no evidence existed regarding its indemnity claim against All X-Ray and attempted to argue that such a basis warranted that this court re-consider its Oct. 2, 2015 ruling.
11. Additionally, in Progressive's Answer filed on Sept. 22, 2015 to All X-Ray's Counter-claim filed Aug. 13, 2014, Progressive **admitted that it has received the GIR demand prior** to receiving the All X-Ray Demand. (See #6 of Progressive's Answer and Affirmative Defenses to All X-Ray's Counter-Claims).
12. In the order of relinquishment, the 11th Circuit sought that this final judgment clearly indicate whether Progressive had received and was on notice from Gables Insurance Recovery that All X-Ray had assigned the No Fault claim prior to Progressive's payment of the demand made by All X-Ray.

13. This court made findings in the Order Granting Plaintiff's Motion for Partial Summary Judgment on Standing and Necessity rendered September 12, 2014. Specifically, this court stated: "On or about April 13, 2010, Gables submitted a Notice of Intent to Initiate Litigation ("Pre-Suit Demand Letter") to Progressive along with the initial assignment from Ms. Valdes to All X-Ray and the subsequent assignment from All X-Ray to Gables. Progressive responded to Gables' pre-suit demand letter on May 17, 2010." Additionally, Progressive admitted to receipt of the GIR demand prior to receipt of All X-Ray's demand in #6 of its Answer to All X-Ray's Counter-claims.
14. Thereafter, on Oct. 2, 2015, the court ruled in favor of All X-Ray based on the record evidence which included the finding of Progressive's notice of the assignment from All X-Ray to Gables (and Progressive's admission #6 in its Answer to All X-Ray's Counter-Claim that Progressive was on notice of GIR's claim prior to the payment to All X-Ray).
15. For the sake of clarity, there is no question that Progressive was on notice of the claim by GIR upon receipt of the pre-suit demand by GIR, which is why Progressive responded to GIR on May 17, 2010 and that GIR was the first to make such a claim for the benefits.
16. Additionally, Progressive's insistence that the operative event at issue is receipt of an assignment of benefits form is mis-placed. The operative event is simply that Progressive be placed on notice of the claim being made by GIR, which they were, as evidenced by Progressive's May 17, 2010 response to the GIR pre-suit demand letter. See Boulevard Nat. Bank of Miami v. Air Metal Industries, Inc., 174 So.2d 559, 560 (3rd DCA, 1965) (In affirming summary judgment, the court held, "[T]he assignee who first gives *notice of his claim* to the debtor is preferred and has the prior right." There is no requirement that an assignment be attached, merely the assertion of a claim by an assignee).

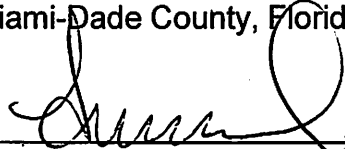
17. In addition to Progressive's stipulation in its Answer to All X-Ray's counterclaim, the record evidence in the form of Progressive's corporate representative and litigation adjuster conceded that Progressive received the pre-suit demand letter and responded to it, thereby acknowledging it was on notice of GIR's claim. (See Lisa Campbell deposition, Dec. 11, 2012 page 26:21-24 and Lisa Campbell as corporate representative on March 5, 2015, page 40:19-25, 41:1-12.)

18. On Sept. 12, 2014 it was previously determined by competent and substantial evidence that Progressive was aware of the claim by GIR and by virtue of the receipt and response from Progressive, and there is conclusive, competent, and substantial evidence to support this court's finding in the form of the un rebutted deposition testimony of Progressive's corporate representative and its admission to All X-Ray's counter-claims;

Accordingly it is **ORDERED and ADJUDGED** that Progressive's Motion for Reconsideration is hereby **DENIED**. A Final Judgment is hereby entered against Plaintiff Progressive American Insurance Co., whose address is 6300 Wilson Mills Rd., Mayfield Village, OH 44143 shall take nothing by this action and in favor of defendant All X Ray Diagnostic Services Corporation, whose address is 4210 NW 4th Street, Miami, FL 33126; The court retains jurisdiction to award attorney's fees and costs upon timely motion.

DONE AND ORDERED in Chambers, at Miami-Dade County, Florida this 19th day of March, 2019.

FINAL ORDER AS TO ALL PARTIES
SRS DISPOSITION
NUMBER 12


Honorable Judge Linda Diaz
County Court Judge

SIGNED AND DATED
MAR 19 2019

JUDGE LINDA DIAZ

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