FILED
United States Court of Appeals
Tenth Circuit

APR 25 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARLOS P. CANDELARIA,

Plaintiff-Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY, a Corporation; and AMERICAN ALLIANCE INSURANCE COMPANY, a Corporation,

Defendants-Appellees.

No. 89-2068
(D.C. No. 87-1428-JP)
(D. N.M.)

ORDER AND JUDGMENT*

Before McKAY, BARRETT, Circuit Judges, and KANE,** District Judge.

**Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

Plaintiff-appellant appeals the district court's order of February 15, 1989, entering summary judgment against him on his claims against defendants-appellees. At the time plaintiff filed this appeal, a counterclaim against him remained unresolved by the

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

district court. Accordingly, on February 20, 1990, we issued an order to plaintiff directing him to lodge with this court within thirty days either the determination and direction called for by Fed. R. Civ. P. 54(b) or an order and judgment finally adjudicating all remaining claims. Plaintiff subsequently filed a copy of an order entered by the district court on March 8, 1990, dismissing the outstanding counterclaim. Since a final judgment now has been entered in this case by the district court, we have jurisdiction to consider the merits of plaintiff's appeal and shall proceed to do so. See Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645-46 (10th Cir. 1988); Federal Sav. & Loan Ins. Corp. v. Huff, 851 F.2d 316, 320-21 (10th Cir. 1988).

On or about August 9, 1984, plaintiff was a passenger in a car that was involved in a multiple car accident, as a result of which plaintiff suffered injuries. The accident was caused by the acts of another driver, David C. Smith. At the time of the accident, plaintiff had a policy of insurance issued by defendant Great American Insurance Company through its subsidiary, defendant American Alliance Insurance Company. Defendants will be referred to collectively as "Great American."

Plaintiff's policy with Great American provided for underinsured motorist benefits. On September 24, 1985, plaintiff's counsel sent Great American a letter informing it that plaintiff intended to make a claim for uninsured or underinsured motorist benefits under his policy because the available funds from the insurance policy the tort-feasor, Mr. Smith, had with Allstate Insurance Company (Allstate), would not be enough to cover plaintiff's damages. The letter also informed Great American that the driver of the car in which plaintiff had been a passenger had commenced a lawsuit against the tort-feasor and plaintiff was contemplating intervening in that lawsuit.

From the spring of 1986 through the spring of 1987, plaintiff and Great American were unable to agree as to the extent of plaintiff's injuries and, therefore, the amount of benefits payable to plaintiff under the policy over and above the $3,318.00 Great American already had paid plaintiff. Great American, therefore, suggested that the parties submit their dispute to arbitration under the terms of the policy.

On June 19, 1986, unbeknownst to Great American, plaintiff settled with the tort-feasor and Allstate for half the remaining Allstate policy limits. A portion of the settlement was in the form of a check issued by Allstate to plaintiff and Great American, jointly, for the total amount of benefits Great American had paid plaintiff as of that date. As part of the settlement, plaintiff executed a release which discharged the tort-feasor and Allstate from all further liability.

Sometime thereafter, Great American learned of the settlement and release and refused to pay plaintiff any underinsured motorist benefits or to arbitrate the amount of plaintiff's damages. Plaintiff then instituted this action against Great American alleging breach of contract, bad faith, and "wilful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent" conduct by Great American. R. Vol. I, Doc. 1.

Great American answered plaintiff's complaint and subsequently filed a motion for summary judgment asserting that plaintiff's claims were barred under New Mexico law because plaintiff's settlement with the tort-feasor without Great American's knowledge or consent, in violation of the terms of plaintiff's policy, destroyed Great American's subrogation rights, thereby nullifying plaintiff's right to receive underinsured motorist benefits under his policy. The district court ultimately agreed with Great American and entered summary judgment against plaintiff.

We review the granting of a motion for summary judgment de novo and apply the same standards as the district court under Fed. R. Civ. P. 56. See Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988).

Plaintiff raises the same arguments on appeal that he did below, as well as an argument that because Great American did not demonstrate that it was prejudiced by plaintiff's settlement with Allstate and Mr. Smith, Great American was not entitled to summary judgment. Since the latter argument was not raised below or considered by the district court, we will not consider it on appeal. See Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (10th Cir. 1989).

Based upon our review of the record on appeal, the parties' briefs, and the pertinent law, we conclude that plaintiff's settlement with the tort-feasor destroyed Great American's subrogation rights as to the underinsured motorist benefits and, therefore, relieved Great American of the responsibility of paying plaintiff such benefits. See Farmers Ins. Group of Cos. v. Martinez, 752 P.2d 797, 798-99 (N.M. Ct. App. 1988). Therefore, the district court properly entered summary judgment against plaintiff on his claims.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED, and Great American's motion to strike portions of plaintiff's reply brief is DENIED as moot.

ENTERED FOR THE COURT
PER CURIAM