

14-2773-cv

Catlin Specialty Insurance Co. v. QA3 Financial Corp.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the
3 3rd day November, of two thousand fifteen.
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5 Present:

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7 DEBRA ANN LIVINGSTON ,
8 CHRISTOPHER F. DRONEY,
9 *Circuit Judges,*
10 ANALISA TORRES
11 *District Judge.**
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14 _____
15 CATLIN SPECIALTY INSURANCE CO.

16 *Plaintiff-Counter-Defendant-Appellee,*

17
18 v.

14-2773-cv

19
20 QA3 FINANCIAL CORP.

21 *Defendant-Counter-Claimant-Appellant*
22
23 _____
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25 For Plaintiff-Appellee:

Jonathan Harwood, TRAUB LIEBERMAN STRAUS &
SHREWSBERRY, LLP, Hawthorne, N.Y.

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* The Honorable Analisa Torres of the United States District Court for the Southern District of New York, sitting by designation.

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2 For Defendant-Appellant: Andrew Bourne, BOURNE & ZAKHEIM LLP, New York,
3 N.Y.
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5 **UPON DUE CONSIDERATION WHEREOF it is hereby ORDERED, ADJUDGED,**
6 **AND DECREED** that the judgments of the district court are **AFFIRMED**.

7 On November 23, 2010, Catlin Specialty Insurance Company (“Catlin”), the Appellee in
8 this case, brought an action in the United States District Court for the Southern District of New
9 York seeking a declaratory judgment as to the meaning of its insurance contract with QA3
10 Financial Corporation (“QA3”), the Appellant. The parties agree that the pertinent insurance
11 contract in this diversity action is governed by New York law. In particular, Catlin asked the court
12 to determine whether, under the Policy’s Amended Definition of Securities Endorsement (the
13 “Endorsement”), the aggregate limit for claims arising out of all private placements was
14 \$1,000,000, or whether, as QA3 contends, this limit applied only to specific, enumerated private
15 placements, and a limit of \$7,500,000 applied to private placements more generally. QA3 filed,
16 *inter alia*, a counterclaim for bad faith, which the district court (Furman, *J.*) subsequently
17 dismissed on December 19, 2012. After a jury trial, during which QA3 and Catlin presented
18 evidence as to the intended meaning of the Endorsement, the jury found for Catlin. The district
19 court (Schofield, *J.*) subsequently denied QA3’s motion for a new trial on the basis of erroneous
20 jury instructions. QA3 now appeals from the district court’s dismissal of its counterclaim and from
21 the district court’s denial of its motion for a new trial. As it will prove clearer to do so, we begin by
22 discussing the motion for a new trial and then proceed to the motion to dismiss. We assume the
23 parties’ familiarity with the underlying facts and procedural history in this case.

24 This Court reviews a claim of error in jury instructions *de novo*, “reversing only where,
25 viewing the charge as a whole, there was a prejudicial error.” *Terra Firma Invs. (GP) 2 Ltd. v.*

1 *Citigroup Inc.*, 716 F.3d 296, 299 (2d Cir. 2013) (quoting *United States v. Quattrone*, 441 F.3d
2 153, 177 (2d Cir. 2006)). “A jury instruction is erroneous ‘if the instruction misleads the jury as to
3 the proper legal standard, or it does not adequately inform the jury of the law,’ but such an error
4 will not be grounds for reversal unless ‘taken as a whole, the jury instructions gave a misleading
5 impression or inadequate understanding of the law.’” *Owen v. Thermatool Corp.*, 155 F.3d 137,
6 139 (2d Cir. 1998) (quoting *BAll Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 696 (2d Cir. 1993)).
7 “Absent fundamental error, we are loath to overturn a jury verdict in a civil case.” *Terra Firma*,
8 716 F.3d at 298.

9 QA3 argues that the district court committed prejudicial error in two ways: first, by
10 refusing to instruct the jury on *contra proferentem*, a rule of contract interpretation, generally, and
11 insurance contract interpretation, specifically, *see Parks Real Estate Purchasing Grp. v. St. Paul*
12 *Fire & Marine Ins. Co.*, 472 F.3d 33, 43 (2d Cir. 2006), and second, in refusing to instruct the jury
13 that Catlin had to meet the heavy burden articulated in *Seaboard Surety Co. v. Gillette Co.*, 476
14 N.E.2d 272 (N.Y. 1984), when an insurer seeks to invoke an exclusion, *id.* at 275 (“[B]efore an
15 insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears
16 of establishing that the exclusions or exemptions apply in the particular case, and that they are
17 subject to no other reasonable interpretation.” (citations omitted)). We find both arguments
18 unavailing.

19 First, assuming, *arguendo*, that QA3 is correct that *contra proferentem*, as a canon of
20 textual or legal construction, is applicable to the jury’s factual analysis of extrinsic evidence, the
21 judge’s refusal to provide QA3’s instruction to the jury did not mislead the jury as to the proper
22 legal standard. Many courts have articulated the contours of *contra proferentem*, or the
23 “contra-insurer rule,” *see McCostis v. Home Ins. Co. of Ind.*, 31 F.3d 110, 113 (2d Cir. 1994), in

1 different terms, so we assume, for this analysis, that the text requested by QA3 in its proposed
2 instruction accurately describes the canon: “Where an ambiguity in an insurance policy cannot be
3 resolved by examining extrinsic evidence of the parties’ intent, you must construe the ambiguous
4 language in accordance with the rule of *contra proferentem*, a rule of contract construction which,
5 in the insurance context, requires you to construe the contract against the drafter.” J.A. 848. The
6 district court refused to give QA3’s requested instruction to the jury, but it nevertheless instructed
7 them that Catlin bore the burden of proving by a “preponderance of the evidence,” J.A. 1959, that
8 Catlin’s “interpretation regarding language limiting coverage [was] the correct one,” J.A. 1964.
9 The court further instructed that if the jury found that the evidence “didn’t tip [the scale] either way
10 . . . then [it] must decide [this] issue against [Catlin].” J.A. 1959. When determining if an
11 instruction misled a jury as to the proper legal standard, “the particular words used in a jury
12 instruction may (depending on the circumstances) be less important than the meaning or substance
13 of the charge as a whole.” *Owen*, 155 F.3d at 139 n.1. Here, the jury understood that, were it to find
14 that Catlin had not met its burden of proving its interpretation was the correct one, the jury would
15 have to ultimately resolve the presumptively inconclusive extrinsic evidence in favor of QA3.
16 Assuming *contra proferentem* applied, then, the jury understood the essence of the rule: that if it
17 found the evidence inconclusive, it should find in favor of the Appellant. We thus discern no error
18 in the court’s instruction, even assuming the legal correctness of QA3’s request.

19 As to the second instruction, even if we assume, again *arguendo*, that the burden
20 articulated in *Seaboard Surety* is a heightened one (beyond the general civil burden of a
21 preponderance of the evidence) and that it applies not simply when a court determines the meaning
22 of a contract as a matter of law, but also when a jury analyzes extrinsic evidence to discern the
23 parties’ intent as a matter of fact, the burden would be inapplicable here. QA3 concedes that the

1 Endorsement is not formally an exclusion, but points to New York case law to suggest that New
2 York considers any limiting language concerning “the nature and extent of coverage” to
3 nevertheless constitute a functional exclusion. Appellant Br. at 33 (quoting *Elacqua v. Physicians’*
4 *Reciprocal Insurers*, 21 A.D.3d 702, 705 (N.Y. App. Div. 2005) (quoting *Jefferson Ins. Co. of N.Y.*
5 *v. Travelers Indem. Co.*, 92 N.Y.2d 363, 371 (N.Y. 1998)). No case QA3 cites in fact holds as
6 much, including *Elacqua*, but we need not speculate as to New York law here: New York’s highest
7 court recently affirmed that New York law does *not* construe language limiting the amount or
8 extent of liability as an exclusion. See *Roman Catholic Diocese of Brooklyn v. Nat’l Union Fire*
9 *Ins. Co. of Pittsburgh*, 21 N.Y.3d 139, 147 (2013) (“[T]he defenses at issue do not relate to an
10 argument of exclusion or disclaimer, but rather, focus on the extent of alleged liability under the
11 various policies. Put simply, they are not subject to the notice requirements of section 3420(d)
12 [regarding exclusions] because they ‘do[] not bar coverage or implicate policy exclusions.’”) (quoting *Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 A.D.3d 287, 288 ((N.Y. App. Div. 2008)). Thus,
13 assuming the *Seaboard Surety* standard to work precisely as QA3 argues, it would nevertheless not
14 have been proper for the district court to instruct the jury that it was applicable: a limitation of
15 liability is *not* an exclusion, and New York law does not permit us to find otherwise.
16

17 Finally, in affirming the district court’s denial for a motion for a new trial, we have *a*
18 *fortiori* affirmed the district court’s dismissal of the bad faith counterclaim. Assuming, *arguendo*,
19 that QA3 sufficiently alleged the existence of a settlement offer, see *Pavia v. State Farm Mut.*
20 *Auto. Ins. Co.*, 82 N.Y.2d 445, 454 (N.Y. 1993) (“Naturally, proof that a demand for settlement
21 was made is a prerequisite to a bad-faith action for failure to settle.”), QA3 nevertheless concedes
22 that it alleged, at best, a settlement offer within the \$7,500,000, rather than the \$1,000,000, limit of
23 liability. See Appellant Reply Br. at 21 (“Catlin is correct in asserting that QA3 did not make a

1 settlement demand within the \$1,000,000 limit of liability that Catlin believed was applicable.”).
2 Insofar, then, as Catlin refused to settle, it did so in reliance on its interpretation of the
3 Endorsement. “It has been recognized that bad faith cannot be established when the insurer has an
4 arguable basis for denying coverage.” *Redcross v. Aetna Cas. & Sur. Co.*, 260 A.D.2d 908, 913
5 (N.Y. App. Div. 1999); *see also Zurich Ins. Co. v. Texasgulf, Inc.*, 233 A.D.2d 180, 181 (N.Y.
6 App. Div. 1996); *Dawn Frosted Meats, Inc. v. Ins. Co. of N. Am.*, 99 A.D.2d 448, 448 (N.Y. App.
7 Div. 1984). Given that we have affirmed the denial of QA3’s motion for a new trial, the jury
8 determination that Catlin’s interpretation was in fact *correct* would preclude QA3 from alleging
9 that this interpretation was less than *arguable*. As such, we affirm the district court’s dismissal of
10 the bad faith counterclaim.

11 Accordingly, we **AFFIRM** the judgments of the district court.

12
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FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk


The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".