Allstate Ins. Co. v Bunn
2017 NY Slip Op 31815(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 160348/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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ALLSTATE INSURANCE COMPANY, Index No. 160348/2014

Plaintiff

- against -

MARYELLIS BUNN, PORT MOTORS LINCOLN-MERCURY, INC., ALDAIR LEMOS, LUCEMI LOVE, MERCHANTS MUTUAL INSURANCE COMPANY, and CITY OF NEW YORK,

Defendants

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MERCHANTS INSURANCE GROUP, Index No. 160835/2014

Plaintiff

- against -

ALLSTATE INSURANCE COMPANY, LUCEMI LOVE, ANTHONY LOVE, and ALDAIR LEMOS,

Defendants

--------------------------------------x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

In a separate action in this court, Maryellis Bunn sues Port Motors Lincoln-Mercury, Inc., Lucemi Love, Aldair Lemos, and other defendants for personal injuries Bunn sustained when a 2011 Nissan Maxima bearing New York registration number 8132526 and operated by Lemos hit a metal traffic control barrier and propelled it into Bunn December 16, 2012. Bunn was standing on the adjacent sidewalk at 8th Street and 6th Avenue in New York County. In this consolidated action involving insurers as well

as the four parties named above, plaintiff Allstate Insurance Company in the first action seeks a declaratory judgment that Allstate Insurance is not obligated to defend or indemnify its insured, Love, or her son, Lemos, against Bunn's claims in her action. Co-defendant Bunn in the first action moves for summary judgment declaring that Merchants Mutual Insurance Company, also a co-defendant in the first action, is obligated to defend and indemnify Lemos in Bunn's action. C.P.L.R. §§ 3001, 3212(b).

I. UNDISPUTED EVIDENCE

The parties do not dispute that on December 15, 2012, automobile dealer Port Motors Lincoln-Mercury owned the 2011 Nissan Maxima and that the dealer's insurance policy from Merchants Mutual Insurance covered all motor vehicles owned by the dealer. On that date Love and Lemos visited the dealer and expressed interest in purchasing the Nissan Maxima to Port Motors Lincoln-Mercury's salesperson McGriff. The undisputed deposition testimony by Love and Lemos establishes that Love deposited $9,500.00 toward the purchase price of approximately $24,000.00, but advised McGriff that she would not enter any financial arrangement that required payments of more than $450.00 per month. McGriff promised to secure favorable financing for her by December 17, 2012, but did not indicate what the interest rate, duration of the loan, or monthly payment would be. Nor did he proceed to address whether she carried insurance that would cover the vehicle, as required by New York Vehicle and Traffic Law § 312. In fact, Port Motors Lincoln-Mercury's witness and general

manager David Baron conceded at his deposition that on December 15, 2012, Love signed a document presented to her by Port Motors Lincoln-Mercury, providing that, if Love did not obtain the financing she wanted, her deposit was fully refundable:

> If you agree to assist me in obtaining financing for any part of the purchase price, this order shall not be binding on you or me until all of the credit terms are presented to me in accordance with Regulation Z (truth in lending) and are accepted by me. If I do not accept the credit terms when presented I may cancel this order and my deposit will be refunded.

Aff. of Edward Gersowitz Ex. H, at 96.

The undisputed deposition testimony by Love, Lemos, and Baron also establishes that McGriff handed Lemos the keys to the Nissan Maxima, still bearing Port Motors Lincoln-Mercury's license plates, gave Lemos permission to drive the vehicle until December 17, 2012, and showed him the card signifying the dealer's insurance coverage for the vehicle. Between December 15 and 16, 2012, neither Love nor Lemos obtained any financing, warranty, odometer statement, insurance, inspection sticker, registration, or license plates for the vehicle. According to Baron, all these requirements for ownership would be completed upon the sale of the vehicle, but the single document Love signed was the non-binding agreement. Only on December 17, 2012, a day after the vehicle's collision with the metal traffic control barrier that seriously injured Bunn, were the credit terms available to be presented to Love. After the collision, however, McGriff took responsibility for repairing the vehicle, and Port Motors Lincoln-Mercury sold the vehicle to another purchaser in

January 2013 and repaid Love her deposit after deducting repair and storage expenses.

II. MERCHANTS MUTUAL INSURANCE'S POLICY COVERING THE VEHICLE OPERATED BY LEMOS

The undisputed facts recited above establish that Port Motors Lincoln-Mercury owned the 2011 Nissan Maxima operated by Lemos December 16, 2012, when it hit the barrier, causing Bunn's injury. The next question is whether Port Motors Lincoln-Mercury's insurance policy covering the vehicle, issued by Merchants Mutual Insurance, protects the insured vehicle owner from liability for injury resulting from the use of the covered vehicle. The parties stipulated on the record June 30, 2016, that the policy issued by Merchants Mutual Insurance covering Port Motors Lincoln-Mercury's vehicles and attached to Bunn's motion as Exhibit J is authenticated and admissible for purposes of her motion.

The policy specifies "Who Is An Insured":

a. The following are "insureds" for covered "autos":

(1) You for any covered "auto."

(2) Anyone else while using with your permission a covered "auto" you own . . . except: . . .

(d) Your customers.

Id. Ex. K, form CA00050306 at 3 of 16. "You" and "your" refer to the insured, Port Motors Lincoln-Mercury. Based on the established facts, Lemos was using Port Motors Lincoln-Mercury's covered vehicle with its permission, but no evidence indicates he, as opposed to his mother Love, was its customer.

III. MERCHANTS MUTUAL INSURANCE'S DISCLAIMERS

In correspondence dated January 22, 2013, Merchants Mutual Insurance disclaimed coverage to Love because:

> at the time of the accident you were a customer who had our insured's vehicle in your possession and are not considered an Insured under the policy as stated above. The vehicle was sold to you by Port Motors Lincoln Mercury, Inc. on 12/15/12 and . . . you had a current Personal Automobile Policy in effect with Allstate Insurance Company . . . .

Id. Ex. L, at 3. Although no evidence indicates Port Motors Lincoln-Mercury sold the 2011 Nissan Maxima to Love December 15, 2012, or that she, as opposed to Lemos, even possessed the vehicle, absent any definition of "customers" in the policy, the evidence does raise an issue whether she met that exception to the policy's provision of "Who Is An Insured."

In correspondence dated November 6, 2013, Merchants Mutual Insurance disclaimed coverage to both Love and Lemos because: "at the time of the accident you had taken possession of the vehicle involved in the accident," id. Ex. Q, at 3-4, and "are not considered an Insured under the policy as stated above." Id. at 4. Although no evidence indicates Love had taken possession of the vehicle involved in the collision, the evidence does establish that Lemos had taken possession of the vehicle. Nevertheless, his possession does not disqualify him as an "Insured" under Port Motors Lincoln-Mercury's policy issued by Merchants Mutual Insurance covering the vehicle if, as the evidence further establishes, he, as opposed to Love, was using the vehicle with Port Motors Lincoln-Mercury's permission and was not its customer.

Merchants Mutual Insurance's disclaimer did not even suggest that Lemos was using the 2011 Nissan Maxima without the dealer's permission, or that he was its customer, or that he was using a vehicle owned by Love, rather than the dealer, or even in her possession, as the dealer's customer. Merchants Mutual Insurance failed to raise any of these grounds for its disclaimer "as soon as is reasonably possible" after receiving notice of the collision and Bunn's injury, investigating the circumstances, and receiving her complaint in her underlying action. Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa., 21 N.Y.3d 139, 146 (2013). This failure precludes the insurer from now raising Lemos's use of the vehicle without the dealer's permission, his status as a customer, or his use of the vehicle through Love's permission. Id.; Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556, 563 (2008); Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 319 (2007); 20-35 86th St. Realty, LLC v. Tower Ins. Co. of N.Y., 106 A.D.3d 478, 480 (1st Dep't 2013). Having set forth the grounds for the disclaimers to Love and Lemos in the correspondence dated January 22, 2013, and November 6, 2013, Merchants Mutual Insurance waived its other grounds for disclaiming coverage to them. Estee Lauder Inc. v. OneBeacon Ins. Group, LLC, 130 A.D.3d 497, 497-98 (1st Dep't 2015). See KeySpan Gas E. Corp. v. Munich Reins. Am., Inc., 23 N.Y.3d 583, 590-91 (2014); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P., 7 N.Y.3d 96, 104-105 (2006).

IV. BUNN'S ENTITLEMENT TO A DECLARATION OF COVERAGE

The parties do not dispute that, even though Bunn was not a party to the insurance contract between Port Motors Lincoln-Mercury and Merchants Mutual Insurance, she is a potential beneficiary of the insurance policy and therefore may seek a determination of the rights and obligations of the parties to the contract. RLI Ins. Co. v. Steely, 65 A.D.3d 539, 540 (2d Dep't 2009); Mortillaro v. Public Serv. Mut. Ins. Co., 285 A.D.2d 586, 587 (2d Dep't 2001). See Government Empls. Ins. Co. v. RLI Ins. Co., 133 A.D.3d 819, 820 (2d Dep't 2015). Even were Merchants Mutual Insurance permitted now to claim that Lemos was using the 2011 Nissan Maxima without Port Motors Lincoln-Mercury's permission, or that he was its customer, or that he was using a vehicle owned by Love, rather than the dealer, or in her possession, as the dealer's customer, as set forth above, no evidence supports any such conclusion. No evidence suggests that she had purchased or even taken possession of the 2011 Nissan Maxima as of December 16, 2012 and then permitted Lemos to take possession of the vehicle and use it December 16, 2012.

Without presenting, let alone authenticating a purchase contract, Merchant Mutual Insurance claims she executed such a contract, but when presented such a contract at her deposition, Love testified without contradiction that document did not bear her signature. Merchants Mutual Insurance also relies heavily on the proposition that the title to a motor vehicle passes when the parties to the sale intend the title to pass, citing Dorizas v.

Island Insulation Corp., 254 A.D.2d 246, 248 (2d Dep't 1998), but points to no evidence that either Port Motors Lincoln-Mercury or Love intended that the title to the 2011 Nissan Maxima pass to Love before December 17, 2012, if ever.

No evidence suggests that Lemos had taken possession of the 2011 Nissan Maxima from Port Motors Lincoln-Mercury without its salesperson McGriff's permission. Finally, no evidence suggests that Lemos contributed to Love's deposit toward the purchase of the vehicle, signed the non-binding agreement between Love and Port Motors Lincoln-Mercury or any other document concerning the prospective purchase, or assisted in any way to effectuate such a purchase. Love and only she was a prospective purchaser of the dealer's vehicle. Her status as its customer, however, is irrelevant to the relief Bunn seeks, particularly when the evidence demonstrates only that the dealer's salesperson permitted Lemos to use its vehicle, not that Love as its customer permitted him to do so. The uncontroverted deposition testimony demonstrates only that the <u>salesperson</u> McGriff handed the keys to the vehicle to <u>Lemos</u>, and the <u>salesperson</u> gave <u>Lemos</u> permission to drive the vehicle until December 17, 2012. Love may have been involved in a prospective purchase of the vehicle, but was uninvolved in its use between December 15 and 16, 2012.

Neither Merchant Mutual Insurance nor any evidence raises an issue regarding McGriff's authority to permit Lemos's use of the 2011 Nissan Maxima, as Baron testified that McGriff worked in a managerial capacity running a sales department and knew how to

close a sale: let the purchaser's son become attached to the vehicle and persuade his mother to finalize her purchase. Insofar as the testimony by Love and Lemos regarding McGriff's permission to Lemos to use the vehicle relies on McGriff's statements to Lemos, they are not offered for their truth: "take the keys"; "drive the vehicle until December 17." They are the res gestae of granting permission. Jiminian v. St. Barnabas Hosp., 84 A.D.3d 647, 648 (1st Dep't 2011); People v. Davis, 270 A.D.2d 118, 118 (1st Dep't 2000); People v. Rivera, 192 A.D.2d 363, 364 (1st Dep't 1993). See Murdza v. Zimmerman, 99 N.Y.2d 375, 380-81 (2003); Bernard v. Mumuni, 22 A.D.3d 186, 188-89 (1st Dep't 2005), aff'd, 6 N.Y.3d 881, 882 (2006); Travelers Prop. Cas. Corp. v. Maxwell-Singleton, 300 A.D.2d 225, 226 (1st Dep't 2002); Hamilton v. Hunt, 288 A.D.2d 86, 87 (1st Dep't 2001). Even if McGriff's statements are hearsay, they are co-defendant Port Motors Lincoln-Mercury's admissions, through its managerial employee in charge of the transaction and not disavowed by its general manager Baron, of its ownership of a vehicle involved in a collision and its permission to the driver to use the vehicle when the collision occurred. DeSimone v. City of New York, 121 A.D.3d 420, 422 (1st Dep't 2014); Candela v. City of New York, 8 A.D.3d 45, 48 (1st Dep't 2004); Navedo v. 250 Willis Ave. Supermarket, 290 A.D.2d 246, 247 (1st Dep't 2002). See People v. Woodward, 50 N.Y.2d 922, 923 (1980); People v. Gomez, 21 A.D.3d 827, 828 (1st Dep't 2005).

Consequently, the court grants defendant Bunn's motion for

summary judgment declaring that co-defendant Merchants Mutual Insurance Company's disclaimer of insurance coverage to co-defendant Lemos November 6, 2013, under Commercial General Liability Insurance Policy No. CMP9150118, effective November 1, 2012, is invalid. The court further declares and adjudges that Merchants Mutual Insurance Company is obligated to defend and indemnify Lemos for Bunn's claims in Bunn v. City of New York, et al., Index No. 158770/2013 (Sup. Ct. N.Y. Co.). C.P.L.R. §§ 3001, 3212(b).

DATED: August 17, 2017

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.