

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33916
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_____AD3d_____

Argued - January 17, 2012

PETER B. SKELOS, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2011-03636

DECISION & ORDER

Xuan Qian, plaintiff, v New York College of Traditional Chinese Medicine, defendant third-party plaintiff-respondent-appellant, et al., defendant; Allied Professionals Insurance Company, third-party defendant, State Farm Fire & Casualty Company, third-party defendant-appellant-respondent.

(Index No. 8665/09)

Kelly, Rode & Kelly, LLP, Mineola, N.Y. (Susan M. Ulrich of counsel), for third-party defendant-appellant-respondent.

Steven G. Legum, Mineola, N.Y. (Gina Biasi of counsel), for defendant third-party plaintiff-respondent-appellant.

In an action to recover damages for personal injuries, and a third-party action, inter alia, for a judgment declaring that the third-party defendant State Farm Fire & Casualty Company is obligated to defend and indemnify the defendant third-party plaintiff in the main action, the third-party defendant State Farm Fire & Casualty Company appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Hart, J.), entered February 24, 2011, as denied its motion for summary judgment declaring that it is not obligated to defend and indemnify the defendant third-party plaintiff in the main action, and the defendant third-party plaintiff cross-appeals from so much of the same order as denied its cross motion for summary judgment declaring that the third-party defendant State Farm Fire & Casualty Company is obligated to defend and indemnify it in the main action.

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ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that the order is reversed insofar as cross-appealed from, on the law, the motion of the defendant third-party plaintiff for summary judgment declaring that the third-party defendant State Farm Fire & Casualty Company is obligated to defend and indemnify it in the main action is granted, and the matter is remitted to the Supreme Court, Queens County, for the entry of a judgment, inter alia, declaring that the third-party defendant State Farm Fire & Casualty Company is obligated to defend and indemnify the defendant third-party plaintiff in the main action; and it is further,

ORDERED that one bill of costs is awarded to the defendant third-party plaintiff.

In response to the defendant third-party plaintiff's prima facie showing of entitlement to judgment as a matter of law, the third-party defendant insurer State Farm Fire & Casualty Company (hereinafter State Farm) failed to raise a triable issue of fact as to the applicability of an exclusion in the relevant insurance policy pertaining to injuries inflicted during the provision of "professional services or treatments." Accordingly, the defendant third-party plaintiff's cross motion for summary judgment declaring that State Farm is obligated to defend and indemnify it in the main action should have been granted (*see Merchants Mut. Ins. Co. v Rutgers Cas. Ins. Co.*, 84 AD3d 756, 756-757; *Peerless Ins. Co. v Micro Fibertek, Inc.*, 67 AD3d 978, 979; *ACE Fire Underwriters Ins. Co. v Orange-Ulster Bd. of Coop. Educ. Servs.*, 8 AD3d 593, 595). For the same reason, State Farm also failed to demonstrate its prima facie entitlement to judgment as a matter of law, as it failed to demonstrate that the above-referenced policy exclusion was applicable. Therefore, its motion for summary judgment was properly denied.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Queens County, for the entry of a judgment, inter alia, declaring that State Farm is obligated to defend and indemnify the defendant third-party plaintiff in the main action (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

SKELOS, J.P., BALKIN, AUSTIN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court