New S. Ins. Co. v Dobbins
2007 NY Slip Op 33965(U)
November 21, 2007
Supreme Court, Nassau County
Docket Number: 5432-07/
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,
Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

NEW SOUTH INSURANCE COMPANY

Plaintiff,

-against-

JAMES DOBBINS, SR., JAMES DOBBINS, JR., FELITA DOBBINS, JAMIE DOBBINS, ADRIENNE DORNS,

Defendant.

MOTION DATE: 8/21/07

MOTION SEQ. NO.: 001
INDEX NO.: 05432/07

The following papers read on this motion (numbered 1):
Notice of Motion 1

Upon the foregoing papers, plaintiff's motion for a default judgment pursuant to **CPLR §3215** is determined as follows.

This is a declaratory judgment action in which plaintiff NEW SOUTH INSURANCE COMPANY seeks to be relieved of its obligation to provide automobile insurance coverage, pursuant to a policy issued to defendant ADRIENNE DORNS ("DORNS"), in connection with the incident that occurred on July 31, 2006 (the "Incident"). According to plaintiff, on July 31, 2006, a collision occurred between the insured vehicle, owned by DORNS and operated by defendant JAMES DOBBINS, SR., and the adverse vehicle, owned by Quadrozzi Concrete Corp. and operated by Emanuel Paradiso, neither of whom are parties herein. Defendants JAMES DOBBINS, SR., JAMES DOBBINS, JR., FELITA DOBBINS and JAMIE DOBBINS (the "DOBBINS defendants") have filed applications for No-Fault benefits in connection with injuries allegedly sustained in the Incident. Based upon its investigation, plaintiff concludes that DORNS and the DOBBINS defendants have made material misrepresentations and false claims for insurance benefits in furtherance of a common scheme to defraud plaintiff. Plaintiff now moves for a default judgment pursuant to **CPLR §3215** against all of the defendants, declaring that: (1) the automobile insurance policy issued by plaintiff is null and void with respect to the Incident; (2) plaintiff has no duty to provide liability or indemnity coverage in connection with the Incident; (3) plaintiff has no duty to defend

any of the defendants in any action that may be brought as a result of the Incident; (4) plaintiff has no duty to provide No-Fault or uninsured motorist benefits to any claimant in connection with the Incident. Plaintiff also seeks damages, including costs and attorneys fees. The motion is unopposed.

Plaintiff has presented (i) proof of service of the Summons and Complaint upon all defendants, (ii) the affirmation of plaintiff's attorney attesting to the defendants' default, and (iii) the affidavit of plaintiff's investigator, Brinton Esty, attesting to the facts upon which this application is based. On its face, this submission meets the evidentiary requirements of **CPLR §3215(f)**. That does not, however, end the inquiry. To grant a default judgment, particularly in a declaratory judgment action, the Court must be satisfied that the plaintiff has established, *prima facie*, its right to the relief sought. *See* **Merchants Insurance Company of New Hampshire Inc. v. Long Island Pet Cemetery**, 206 AD2d 827; **Joosten v. Gale,** 129 AD2d 531.

At the outset, the Court notes that plaintiff has failed to attach a copy of the insurance policy in question. Insofar as plaintiff asserts that the policy does not provide coverage for the Incident or excludes coverage on the basis of defendants' conduct, this failure constitutes a fatal defect in proof. "Any recitation of the contract's terms through testimony or other documents in evidence is rank hearsay and contrary to the best evidence rule." **Matter of Allstate Ins. Co. v Ganesh**, 8 Misc.3d 922. Notwithstanding the foregoing, the Court will address the merits of plaintiff's application, assuming that the affirmation of plaintiff's counsel accurately recites the policy's terms, in order to highlight a more fundamental deficiency in plaintiff's case.

Courts interpreting automobile insurance policies such as the one at issue here have consistently held that the obligation to provide insurance benefits applies only to an accidental event or occurrence. To be relieved of the obligation to provide coverage, an insurer must demonstrate *prima facie* that the incident in question was deliberate or intentional. **State Farm Mut. Automobile Ins. Co. v. Langan,** 18 AD3d 860; **Matter of Government Empls. Ins. Co. v. Shaulskaya,** 302 AD2d 522; **State Farm Mut. Automobile Ins. Co. v. LaGuerre**, 305 AD2d 490; **Matter of Metro Medical Diagnostics., P.C., v. Eagle Ins. Co.,** 293 AD2d 751. Although appellate courts commonly speak in terms of "fraud" as a basis for vitiating coverage, they do so in the context of the "staged accident" cases, where the collisions in question were deliberately caused for purposes of generating fraudulent insurance claims. *See* **LaGuerre**, 305 AD2d 490; **Metro Medical,** 293 AD2d 751. It is not the fraudulent intent, but rather, the deliberate, non-accidental character of the event that vitiates coverage *ab initio*. *See* **Langan,** 18 AD3d 860; **Progressive N. Ins. Co. v. Rafferty,** 17 AD3d 888; **Shaulskaya,** 302 AD2d 522. *See also,* **V.S. Medical Services, P.C. v. Allstate Ins. Co.,** 11 Misc.3d

334. Evidence of fraud is relevant, but only insofar as it bears on the question of whether or not the collision was an accident. *See* **Matter of Government Empls. Ins. Co. v. Spence,** 23 AD3d 466; **Matter of Eagle Ins. Co. v. Davis,** 22 AD3d 846.

In this case, plaintiff does not allege, and there is no evidence suggesting, that the Incident was intentional. Circumstantial evidence that an accident was "staged" generally includes, among other things, a series of collisions, involving the same parties, occurring in the same manner, within a short time of purchasing of a new policy. *See* **LaGuerre,** 305 AD2d 490. *See also,* **Allstate Ins. Co. v. Ganesh**, 799 N.Y.S.2d 365, 367+, 8 Misc.3d 922; **A.B. Medical Services, PLLC v. State Farm Mut. Auto. Ins. Co.**, 795 N.Y.S.2d 843, 846+, 7 Misc.3d 822. No such circumstances are alleged in the instant case. Nor is there any other evidence or testimony suggesting that the collision was deliberate.

Plaintiff alleges that the DOBBINS defendants made material misrepresentations in their No-Fault examinations under oath with respect to the identity and number of persons in the vehicle at the time of the accident. Plaintiff also alleges that defendant DORNS made material misrepresentations in her application for insurance. Plaintiff cites a policy provision that permits cancellation of the policy "for discovery of fraud or material misrepresentation in (1) obtaining the policy; or (2) presenting a claim." Affirmation of Robert J. Schwerdt, dated July 20, 2007, ¶ 16. That provision is unavailing here. Assuming that plaintiff accurately recites the policy terms, and that plaintiff's allegations are true regarding defendants' misrepresentations, the policy may only be cancelled prospectively on the basis of fraud. It may not be cancelled retroactively to abrogate coverage of the Incident. *See* **Matter of Metlife Auto & Home v. Agudelo,** 8 AD3d 571.

Insofar as there is no evidence of intentionality, and no evidence that the policy was effectively cancelled on the basis of fraud before the date of the Incident, plaintiff is not entitled to a declaration that the policy is void or that there is no coverage with respect to the Incident.

That is not to say that plaintiff may not disclaim coverage of individual claims on the basis that a particular defendant is not a "covered person" or "eligible injured person" under the policy, or that coverage is excluded on the basis of fraud. *See* Affirmation of Robert J. Schwerdt, dated July 20, 2007, ¶ 16. The Court cannot, however, afford declaratory relief on such grounds without complete and competent evidence of the contractual terms and definitions. The Court also notes that, although the DOBBINS defendants' testimony seems evasive and inconsistent, and is contradicted, in some respects, by the accident reports, the record to date does not unequivocally demonstrate

that any individual defendant was not in the vehicle at the time of the accident. Plaintiff has not sufficiently established that it is entitled to wholesale relief from its obligations under the policy with respect to any individual defendant. To the extent that plaintiff asserts that a particular claim is fraudulent, its remedy is to issue a disclaimer pursuant to the Insurance Law and applicable regulations, or to defend against such claim in any proceeding in which coverage is sought.

Based upon the foregoing, it is

ORDERED, that plaintiff's application for a default judgment pursuant to **CPLR §3215** is **denied**. Plaintiff shall serve a copy of this Order upon all defendants within 15 days of entry. Proof of such service shall be a condition precedent to any subsequent application by or on behalf of plaintiff in this action.

This constitutes the Order of the Court.

ENTER:

Dated: Nov 21, 2007

J.S.C.

ENTERED

DEC 05 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE