

Nationwide Mut. Fire Ins. Co. v Aquiles

2009 NY Slip Op 32432(U)

September 29, 2009

Supreme Court, Nassau County

Docket Number: 011661/09

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 6
NASSAU COUNTY**

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE ASSURANCE COMPANY and
NATIONWIDE PROPERTY AND CASUALTY
INSURANCE COMPANY,**

Plaintiffs,

**MOTION DATE: 7/21/09
MOTION SEQ. NO.: 001**

-against-

INDEX NO: 011661/09

**THOMAS AQUILES, JR., ALMA RAMOS, ROSA MUNOZ,
MARIANELA MUNOZ, LISANDRA MUNOZ, YOKASTY
MUNOZ, JOSEPH LIN ("Claim One Defendants");**

**ANGELA SOTO, ANDREA ORTIZ-TRINIDAD, AMARILYS
SALAZAR, MARTHA CABRERA, MARLENE SURIEL,
GANDI GUZMAN, SUNCHI LAU ("Claim Two Defendants");**

**JOSELIN PENA, ALEXIS MARTINEZ, DULCE PEREZ,
JENNIE RODESINGO, IRIS RODRIGUEZ, ARIANNY
SUSANA, ARLENE TORRES, YOON SOHN
("Claim Three Defendants");**

**JAQUEZ GALLAHER, YELITZA CASTILLO, MARIEL
CASTILLO, LEONARD ACEVEDO, MI YOUNG PARK
("Claim Four Defendants");**

**JOSE DIAZ, OSCAR SANTIAGO, JOHANNA EUSEBIO,
RAVEL EUSEBIO, HOLQUIDIA ULLOA, DONGSUK LEE
("Claim Five Defendants");**

**CARMEN ORTIZ, ANN SOTO, MAYELIN CACERES,
JESSICA VILLADA, GRACE CALDERON, ZHANG LIN
("Claim Six Defendants");**

**MORDESTINE ALEXANDER, ROBERT BURGOS
ANERI MODERO, JOSE ALVEREZ, CINTRON CRUZ,
ROSARIO ALLVEREZ, SUN TAIYANG CO., LTD.,
("Claim Seven Defendants");**

BRONX PARK MEDICAL, PC, MODERN ART
 MEDICAL, PC, OKSLEN ACUPUNCTURE, P.C.,
 HEALTHY WAY ACUPUNCTURE, PC, PRIME
 PSYCHOLOGICAL SERVICES, P.C., MILAN
 MEDICAL, P.C., BEST CHIROPRACTIC, P.C.,
 BEAL-MEDEA PRODUCTS, INC.,
 HIGH DEFINITION MRI, P.C.,
 THE NEW YORK HOSPITAL MEDICAL CENTER OF
 QUEENS, FLUSHING HOSPITAL AND MEDICAL
 CENTER, MANHATTAN MEDICAL IMAGING, P.C.,
 QUEENS ARTHROSCOPY AND SPORTS MEDICINE, P.C.,
 XERON CLINICAL LABORATORIES, INC., FOREST
 HILLS MEDICAL P.C., ELS MEDICAL SERVICES P.C.,
 SP ORTHOTIC SURGICAL & MEDICAL SUPPLY, INC.,
 QUALITY MEDICAL HEALTHCARE PROVIDER, P.C.,
 SHIEL MEDICAL LABORATORY, INC., MAINLINE
 ANESTHESIA, PLLC, QUEENS MEDICAL
 & DIAGNOSTIC SERVICE, P.C., J & L MEDICAL
 DIAGNOSTIC PC, STANLEY LIEBOWITZ, MD
 HEALTHMAX PHARMACY, KENNETH B. CHAPMAN,
 PLLC, MIKHAIL KANTIUS, MD, CENTRAL QUEENS
 DAY SURGICAL CENTER, INC., NEW YORK
 NEURO & REHAB CENTER, EAST TREMONT
 SURGICAL CENTER and AMBULATORY SURGERY
 CENTER OF EAST TREMONT,
 (“Medical Provider Defendants”)

Defendants.

The following papers having been read on motion (numbered 1-3):

Notice of Motion.....1
 Affirmation in Opposition.....2
 Reply Affirmation.....3

The motion by Nationwide Mutual Fire Insurance Company, Nationwide Mutual Assurance Company and Nationwide Property and Casualty Insurance Company (“Nationwide”) brought by an order to show cause for an order staying an action in queens County, *Lee v Santiago and Diaz*, Index No. 7881/07 (the “Queens action”) is **denied** for the reasons set forth below.

The Nassau County action by Nationwide is seeking a judicial determination that Nationwide is not obligated to provide insurance coverage for seven (7) motor vehicle incidents on the grounds that the incidents were intentional acts and not truly motor vehicle accidents. Nationwide contends it issued standard automobile liability policies to seven individuals and the defendants herein attempted or did "stage" accidents in which "patients," i.e., passengers, drivers, etc., sought to be treated for non-existing injuries.

Nationwide contends its policies do not cover intentional acts where insured (and others) attempt to create losses and injuries in their attempt to give the appearance of a true, bona fide collision when, in fact, the incident/accidents/collisions were staged. Nationwide thus seeks to maintain the status quo since there would be no benefit to proceed with the Queens action if there was no insurance coverage since the issue of insurance coverage is to be resolved in this Nassau County proceeding.

The Queens action involves Nationwide insureds Jose Diaz and Oscar Santiago (set forth in the "Claim Five" defendants in Nationwide's action herein).

Dongsuk Lee is the plaintiff in the Queens action (he is also a defendant in "Claim Five"). Lee's counsel states Lee's vehicle was struck by a vehicle operated by Oscar Santiago on January 23, 2007. Lee contends Nationwide never disclaimed coverage in the Queens action as per Insurance Law § 3420(d). As to staging, Lee states that Santiago in his examination under oath that he, Santiago, was struck by Lee (see Exhibit H, pgs. 28, 29, 36). Lee is indicating the Santiago statements argue against the staging of the Lee-Santiago collision.

It is well settled that an intentional and staged collision caused in the effort to promote an insurance fraud scheme is not a covered "accident" under an automobile policy of insurance (*Matter of G.E.I.CO. v Shaulskaya*, 302 AD2d 522).

A deliberate collision caused in furtherance of an insurance fraud scheme is

[* 4]

not a covered accident (*see Essex Insurance Co. v Oakwood Construction Corp.*, 59 AD3d 591; *Metro Diagnostics v Eagle Insurance co.*, 293 AD2d 751).

As noted by Mr. Lee's counsel, in order to effectively disclaim liability or deny coverage for death or bodily injury under an automobile liability policy, an insurer must give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage; a failure by the insurer to give such notice as soon as is reasonably possible after it first learns of the collision or of grounds for the disclaimer of liability or denial of coverage precludes an effective disclaimer of denial (*Hartford Insurance Co. v County of Nassau*, 46 NY2d 1028).

However, an insurance company that issues an insurance policy is not required by Insurance Law § 3420(d) to issue a disclaimer in a timely fashion because its denial of coverage was based on lack of coverage or a non-covered event in the first instance and not a policy exclusion (*Liberty Mutual Insurance co. v Goddard*, 29 AD3d 698; *State Farm Mutual Automobile Insurance Co. v Laguerre*, 305 AD2d 490; *Central General Hospital v Chubb Group*, 90 NY2d 195).

In opposition to this proposition, Oscar Santiago, one of the defendants in the Queens action, stated in his examination under oath that his, Santiago's, vehicle was struck in the side by that of Dongsuk Lee, the Queens plaintiff (Exhibit H, pgs. 28-29, 26 annexed to Nationwide's motion). While this does seemingly indicate an unorchestrated collision. Also, Santiago had borrowed the vehicle involved in the collision with Lee (see Exhibit H, pgs. 14-15). The vehicle was not Santiago's.

First, a determination of the insurer's duty to defend should be resolved specifically whether the defendant's (offending driver/insured) act was negligent or intentional; then the underlying action should proceed (*Hout v Coffman*, 126 AD2d 973).

Injunctive relief may be used to, once necessity has been demonstrated, preserve the status quo pending trial (*U.S. Ice Cream Corp. v Carvel Corp.*, 136

AD2d 626). Which is the situation here.

Thus resolution of the "staged collision" allegations involving defendants in the Queens action must proceed before this matter is determined since the issue of an insurable incident, can only be resolved in such forum..

This Constitutes the Order of the Court.

Dated: September 29, 2009

A handwritten signature in black ink, appearing to read "J. S. C.", is written over a horizontal line. The signature is stylized and cursive.

J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**