

Marzan v Liberty Mutual Ins. Co.

2016 NY Slip Op 32211(U)

October 27, 2016

Supreme Court, New York County

Docket Number: 151184/2013

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

JEROME MARZAN,
Plaintiff,

Index No.: 151184/2013

Motion Date: _____

- v -

Motion Seq. No.: 004

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

Motion Cal. No.: E-FILED

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

PAPERS NUMBERED

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exhibits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendant for summary judgment dismissing the complaint, the true nature of which is for a summary declaration in defendant's favor, shall be denied.

The Transition Endorsement of the Personal Automobile Policy No. A07-228-394388-4019 states in pertinent part

Loss Payee: _____

Loss or damage under this policy shall be paid, as interest may appear, to you and the loss payee shown in the Declarations or in this endorsement. This insurance with respect to the loss payee, shall not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of "your covered auto". However we reserve the right to cancel the policy as permitted by policy terms and the cancellation shall terminate this agreement as to the loss payee's interest. We will give the same advance notice of

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

2]

cancellation to the loss payee as we give to the named insured shown in the Declarations. When we pay the loss payee we shall, to the extent of payment, be subrogated to the loss payee's rights of recovery.

Though the Transition Endorsement does not list the name of the Loss Payee, page 3 of the Policy Declarations names Toyota Financial Services, as the Loss Payee under the policy.

However, neither e-filed or attached to any of the parties' working copies of the motion papers is any copy of page 9 of the policy, which according to the policy table of contents, contains the FRAUD provisions of the policy. Such omitted provisions are amended at page 5 of 7 of the AMENDMENT OF POLICY PROVISIONS - NEW YORK, which states "A. The following provision is added to the Fraud provision: FRAUD "However, we will provide overage to such 'insured' for damages sustained by any person who has not...engaged in fraudulent conduct if such damages result from an accident which otherwise is covered under this policy."

In its motion for summary judgment, defendant essentially seeks a summary declaration in its favor that defendant is not obligated to pay plaintiff's claim based upon the theft of his vehicle under the policy. Defendant argues that given the actual or book value of the vehicle being in the amount of \$18,900 and the amount plaintiff still owes non-party loss payee Toyota Financial being in the amount of \$22,000, plaintiff cannot show damages for breach of the policy since the payment the defendant would be required to make to Toyota Financial would exhaust

defendant's obligation under the policy. Defendant argues that plaintiff cannot demonstrate that he suffered any damages on its breach of insurance policy complaint because "Liberty would have paid out \$18,900 to Toyota and nothing to [plaintiff], in accordance with the Liberty Policy's loss payable provision, had Liberty not denied coverage under the Liberty Policy".

Defendant's arguments as to the reason for a declaration in its favor are contradictory since defendant argues both that it is obligated to pay \$18,900 to Toyota Financial, as loss payee under the policy, and that it is not so obligated because it denied coverage based on fraud on the part of plaintiff. Moreover, as argued by plaintiff, he has asserted damages as a result of defendant's failure to pay the claim to Toyota Financial as provided under the policy to the extent that he remains obligated to continue to make car note payments to Toyota Financial.

Accordingly, the issue remains whether defendant properly denied coverage based upon fraudulent conduct on the part of plaintiff. Unlike In American Honda Finance Corp. v Progressive Casualty Ins. Co.¹, 290 AD2d 850 (3d Dept 2002), in its motion

¹The insurance policy in American Honda Finance Corp stated, in pertinent part:

Payment for damage to a covered vehicle will be made according to your interest and the interest of any Loss Payee *** shown on the Declarations Page or designated by you. Payment may be made jointly, or separately, at our discretion. Where fraud, misrepresentation, material omission, or intentional damage has been committed by or at the direction of you or a relative, the Loss Payee *** will not be protected. We will be entitled to the Loss Payee's *** rights of recovery, to the extent of our payments to the Loss Payee.

for summary judgment defendant carrier has not met its burden to come forward with evidence that establishes even prima facie that plaintiff committed fraud by "scorching his own vehicle". Even if it had, by his affidavit in which he categorically denies such contention, plaintiff raises an issue of fact that requires a determination by a fact finder at trial. American Honda Finance Corp., supra, at 852.

Accordingly, it is

ORDERED that defendant's motion for a summary declaration in its favor is denied; and it is further

ORDERED that the parties are directed to appear for a status conference in IAS Part 59, 60 Centre Street, Room 331, on December 6, 2016, 11 AM.

This is the decision and order of the court.

Dated: October 27, 2016

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.