

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

JAMILA Z. WRIGHT and CLAUDETTE X
JENNINGS,

Plaintiffs,

- against -

PROGRESSIVE NORTHEASTERN INSURANCE
COMPANY and DCAP BAYSIDE, INC.,

Defendants.

INDEX NO. 13449/2007

SEQ. NO. 1

BY: WEISS, J.

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Defendant DCAP Bayside, Inc. has moved for, inter alia, an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it. Defendant Progressive Northeastern Insurance Company has cross-moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against it and for summary judgment dismissing the complaint against it.

In or about April 2006, plaintiff Jamila Z. Wright and plaintiff Claudette Jennings purchased a 2002 Lexus automobile for \$28,000. The plaintiffs applied for insurance through defendant DCAP Bayside, Inc., an insurance broker, which alleges that it informed them that they had to obtain a photo inspection of the vehicle in order to have coverage for "physical damage," including theft. The broker allegedly gave the plaintiffs a notice which reads in relevant part: "This notice will also serve as a reminder that the above described vehicle must be inspected by the date

indicated or physical damage coverage will be suspended 12:01 AM on the above inspection completed date. ... If you need to have the photo inspection done please call CARCO at 1-800-969-2272." Plaintiff Jamila Wright signed a document captioned "Acknowledgment of Requirement for Photo Inspection," by means of which the plaintiff admitted that she had been informed of the requirement concerning the photo inspection and the consequences of a failure to comply. The defendant insurer also sent by mail to plaintiff Jamila Wright a confirmation of physical damage coverage with notice of mandatory photo inspection requirement. The plaintiffs did not have their vehicle inspected. On April 25, 2006, defendant Progressive sent plaintiff Wright a "Confirmation of Suspension of Physical Damage Coverage" notifying her that coverage had been suspended but could be restored upon compliance with the inspection requirements. On October 15, 2006, a thief stole the 2002 Lexus automobile owned by plaintiff Jamila Z. Wright and plaintiff Claudette Jennings. The vehicle was never recovered. This law suit ensued after the defendant insurer denied coverage on the ground that the plaintiffs had not obtained a photo inspection of the vehicle. Plaintiff Wright denies that the requirement of a physical inspection was called to her attention in a meaningful manner, and plaintiff Jennings swears that she "never received any information about the need for a photo inspection of any automobile

I owned from Defendant DCAP Bayside, Inc. either orally or in writing”

11 NYCRR Part 67 is captioned “Mandatory Underwriting Requirements for Private Passenger Automobiles.” 11 NYCRR 67.1(c) defines “Automobile physical damage insurance” to include “comprehensive” and “theft.” 11 NYCRR 67.2 essentially prohibits an insurer from issuing a policy covering a private passenger automobile for physical damage “unless the insurer has inspected the automobile.” 11 NYCRR 67.4(c)(1) provides in relevant part : “an insurer shall either immediately confirm physical damage coverage and remind the insured of the inspection requirement on a prescribed confirmation letter or immediately obtain the prescribed acknowledgment signed by the insured (applicant).” 11 NYCRR 67.6 provides in relevant part: “(a) If the mandatory inspection is not conducted prior to the expiration of the five-calendar-day deferral period specified in section 67.4 of this Part, automobile physical damage coverage on the automobile shall be suspended at 12:01 a.m. of the day following the fifth calendar day, and such suspension shall continue until the inspection is effected. ... (c) If the automobile is not inspected pursuant to this Part due to the fault of the insurer, or the insurer fails to give the oral notice required by section 67.4(c) of this Part or mail or deliver the CONFIRMATION OF PHYSICAL DAMAGE COVERAGE--NOTICE OF MANDATORY PHOTO INSPECTION REQUIREMENT (NYS APD form B) or obtain the

ACKNOWLEDGMENT OF REQUIREMENTS FOR PHOTO INSPECTION (NYS APD form D), contained in section 67.11 of this Part, physical damage coverage on the automobile shall not lapse.” (See, Siddiqui v Nationwide Mut. Ins. Co., 282 AD2d 149; Mella v State Farm Ins. Co., 270 AD2d 318; Siddiqui v Nationwide Mut. Ins. Co., 255 AD2d 30.)

The court notes initially that pursuant to CPLR 3211(c), it will treat the defendant broker’s motion as one for summary judgment. The court dispenses with the notice ordinarily required by CPLR 3211(c) because the defendant insurer has made a cross motion for summary judgment involving the same issues, and both sides have already laid bear the proof. (See, Shah v Shah, 215 AD2d 287, 289; Four Seasons Hotels Ltd. v Vinnik, 127 AD2d 310.)

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) Defendant DCAP and defendant Progressive failed to carry this burden. The policy issued by the insurer names both plaintiff Jamila Z. Wright and plaintiff Claudette Jennings as insureds. However, only plaintiff Wright signed the acknowledgment authorized by 11 NYCRR 67.4(c)(1). The insurer sent the “notice of mandatory photo inspection requirement” and subsequent

"confirmation of suspension of physical damage coverage" only to plaintiff Wright. The defendants cited no authority for the proposition that the requirements of 11 NYCRR Part 67 need only be satisfied as to one of two named insureds. Indeed, since the failure to obtain a physical inspection leads in effect to the cancellation of coverage, it would appear that the requirements of 11 NYCRR Part 67 must be satisfied as to both of the two named insureds. "The insurer must give notice [of cancellation] to both of two named insureds, or the entire insurance policy continues in full force and effect as to all parties." (68A NY Jur 2d, Insurance § 910, citing Fifty States Management Corp. v Public Service Mut. Ins. Co., 67 Misc 2d 778; see also, American Casualty Ins. Co. v Walcott, 300 AD2d 478 [automobile insurer was required to give additional driver notice of deletion of automobile from its policy, where it knew or had reason to know that driver was owner of vehicle].) The insurer has a "strict obligation" to comply with 11 NYCRR Part 67. (See, Mella v State Farm Ins. Co., supra.) Under the circumstances, the defendants did not eliminate the issue of fact concerning whether the requirements of 11 NYCRR Part 67 were satisfied as to plaintiff Claudette Jennings.

Accordingly, the motion and the cross motion are denied.

Short form order signed herewith.

11/29/07

J.S.C.