American Transit Insurance Company v Sartor
2002 NY Slip Op 30058(U)
January 14, 2002
Supreme Court, New York County
Docket Number: 0108996/2001
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. LELAND DeGRASSE PART 25
Justice

American Transit Co.

INDEX NO. 108996/01
MOTION DATE 10/01/01

- v -

Anthony Sartor

MOTION SEQ. NO. 01
MOTION CAL. NO. 3

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

SCANNED
JAN 18 2002

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE J.S.C.
DATED:

Dated: 1/14/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

. . . . -X
AMERICAN TRANSIT INSURANCE COMPANY

Plaintiff, : Index No.: 108996/01

-against- : Cal. No.: 3 of 10/01/01

ANTHONY SARTOR, UTICA TAXI CENTER, INC.
PIERRE TOUSSAINT and JULIAN MESAMOURS, :

Defendants. :
- -X

DeGRASSE, J.:

Plaintiff American Transit Insurance Company **("American")** moves for summary judgment seeking a judicial declaration upholding its disclaimers of insurance coverage against defendants Utica Taxi Center, Inc. **("Utica"),** Pierre Toussaint and Julian Mesamours. Defendant Anthony Sartor cross-moves for summary judgment seeking a declaration that American is obligated to pay a judgment obtained by him against its insureds.

FACTS

American issued an automobile liability insurance policy to Toussaint, the registered owner of a medallion taxicab. On March 24, 2000, that taxicab, driven by Mesamours, was in an accident with an automobile operated by Anthony Sartor, an Ohio resident. By letter dated October **12,** 2000, Sartor notified American of the accident. On January 18, **2001,** Sartor commenced **a** personal injury action against Utica, Toussaint and Mesamours in the United States District Court. The said defendants failed to appear in that

action and a default judgment in the amount of **$100,000** was rendered in favor of Sartor against Utica, Toussaint and Mesamours on March 30, **2001.** By letter dated April 9, **2001,** Sartor notified American of the default and demanded payment of the judgment. By letter dated April 13, 2001, American disclaimed coverage of Toussaint and Mesamours on the ground that they failed to provide immediate notification that an action had been commenced as required under the terms of the policy. American also disclaimed coverage to Utica by letter dated April 13, **2001,** on the ground that Utica was not covered under the policy. On May 1, 2001, American commenced the present declaratory judgment action to uphold its disclaimers.

DISCUSSION

American moves for summary judgment granting a declaration that it was not obligated to defend or indemnify Toussaint and Mesamours in the underlying personal injury action because **(1)** Sartor, Toussaint and Mesamours failed to timely notify it of the commencement of a lawsuit, and (2) Utica was not insured under its policy.

Sartor cross-moves for summary judgment for an order (1) precluding American from disclaiming liability insurance coverage, **(2)** declaring that defendant Utica is an insured under American's policy, and **(3)** directing American to pay Sartor the **$100,000** judgment entered against defendants Utica, Toussaint and Mesamours, plus interest and costs.

Summary Judgment Standard

The purpose of a summary judgment motion is "[i]ssue-finding, not issue determination" (*see*, *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521). Thus, summary judgment is to be granted only when there are no genuine issues of material fact (*Alvarex* v *Prospect Hosp.*, 68 NY2d 320). In determining whether summary judgment is appropriate, the "Court should draw all reasonable inferences in favor of the nonmoving party" (*see*, *Assaf* v *Ropog Cab Corp.*, *supra*, 153 AD2d at 521).

American's Motion for Summary Judgment

In support of its motion American contends that it was not provided with timely notice that an action had been commenced against its insureds. Paragraph 11 of American's automobile insurance policy provides in relevant part:

> If any suit is brought against the Insured to recover such damages the Insured shall immediately forward to the Company every summons or other process served upon him. *** Notice given by or on behalf of the Insured to any authorized agent of the Company with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give any notice required to be given by this policy within the time specified herein shall not invalidate any claim made by the Insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

It is well settled that timely notice of the commencement of an action is a condition precedent to liability on the part of the insurer (*Tennant v Farm Bur. Mut. Auto. Ins. Co.*, 286 App Div 117). A review of the record shows that no notice of suit was given to

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the insurer by the insured. However, notice was given by Sartor, the injured party, as is authorized under Insurance Law $167. Sartor, as "the injured party, by giving notice himself, can preserve his rights to proceed directly against the insurer. *** The statute having granted the injured person an independent right to give notice and to recover thereafter, he is not to be charged vicariously with the insured's delay" (*Lauritano* v *American Fire Ins. Co.*, 3 AD2d 564, 568 affd 4 NY2d 1028).

A review of the record shows that American received the notice by letter dated April 9, 2001, approximately three months after the commencement of the personal injury action and ten days after the March 30, 2001 default judgment had been entered against Utica, Toussaint and Mesamours. It is clear that noncompliance with the policy's requirement to timely notify American of the commencement of an action changed the position of the parties and resulted in prejudice to the insurer. It deprived American of the "vital and essential right to answer or otherwise move as to the complaint served upon its insureds; to elect whether to defend or to attempt to negotiate a settlement; or in the event of a trial to conduct the defense and litigate issues relating to liability and damage. Clearly the parties never contracted that [American] would pay a default judgment which the insured permitted to be taken against him without any notice to, or knowledge of the insurer of the commencement of the action" (*Tennant* v *Farm Bur. Mut. Auto. Ins. Co.*, *supra*, 286 App Div, at 120).

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"Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy *** and the insurer need not show prejudice before it can assert the defense of noncompliance" (*Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). Here, Sartor offered no excuse for not satisfying the policy's notice requirement. Thus, Sartor's failure to timely notify American of the commencement of an action constitutes a breach of an express condition precedent to coverage, with the result that American is not obligated to pay the judgment that Sartor obtained against Utica, Toussaint, and Mesamours (*see, e.q., Republic New York Corp. v American Home Assur. Co.*, 125 AD2D 247; *see also, Eveready Ins. Co. v Levine*, 145 AD2d 526; *Allstate Ins. v Grant* 185 AD2d 911).

Sartor's Cross-Motion for Summary Judgment

In support of his cross-motion Sartor contends that as title holder, Utica was also an owner of the subject vehicle and thus was entitled to coverage under the insurance policy. Annexed to Sartor's moving papers is a vehicle identification record expansion ("record expansion") which shows that Utica was the title owner of the subject vehicle at the time of the accident. Vehicle and Traffic Law $128 defines the "owner" of a vehicle as a person, other than a lien holder, "having the property in or title to a vehicle." Thus, the record expansion showing title in Utica's name is prima facie evidence that Utica was an owner of the vehicle in addition to Toussaint who was the registered owner (*see*, Vehicle and

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Traffic Law §2108[c]; Sosnowski v Kolovas, 127 AD2d 756). Moreover, paragraph 12 of the insurance policy provides that "[t]he term lawful operator shall be the named Insured or any person using or legally responsible for the use of the motor vehicle." Thus, inasmuch as the policy in question provided coverage for a person "legally responsible for the use of the motor vehicle," Utica, as title owner of the subject vehicle, was an insured under the policy.

Sartor next contends that by repudiating liability coverage to Utica, American released Utica from the provisions of any policy conditions or exclusions. It is well settled that "[w]here an insured brings an action on a policy of insurance without complying with conditions precedent, the action is subject to dismissal on that ground" (*Lentini* Bros. Moving & *Stor.* Co. v New York Prop. Ins. Underwriting Assn., 76 AD2d 759, affd 53 NY2d 835). Moreover, paragraph 11 of the policy provides in pertinent part "[i]f any suit is brought against the Insured to recover such damages the Insured shall immediately forward to the Company every summons or other process served upon him." Here, American first learned of the commencement of the personal injury action when it received a letter dated April 9, 2001, from the injured party, Sartor. The letter informed American that a lawsuit had been commenced on January 18, 2001, and a default judgment had been entered against its insureds on March 30, 2001. Thus, it is clear that a condition precedent to coverage under the policy was not complied with as American did not receive timely notice of the lawsuit.

Sartor's reliance on Vehicle and Traffic Law §370(4) as providing that the insured's failure to give notice of the accident does not affect the liability of the insurance company to the injured third party or judgment creditor is without merit. Vehicle and Traffic Law §370(4) provides "[e]very person operating a motor vehicle *** as to which a bond or policy of insurance is required *** in any manner involved in an accident, shall within five days give written notice of the time and place of the accident to the surety or insurer." As can be seen from its plain meaning, the statute imposes criminal liability on the insured for failure to report an accident within five days, but does not address the policy requirement that timely notice be given of the commencement of a lawsuit which was the basis for American's disclaimer.

In his reply, Sartor further contends that American's untimely disclaimer six months after receiving notice of the accident was unreasonable as a matter of law. It is well settled that "{a} failure by the insurer to give [notice of disclaimer] as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage, precludes effective disclaimer" (*Hartford Ins.* Co. *v County* of *Nassau*, 46 NY2d 1028, 1029; *see also*, *Allstate Ins. Co. V* Gross, 27 NY2d 263). Here, the record shows that by letter dated April 9, 2001, American received notice that a lawsuit had been commenced against Utica, Toussaint and Mesamours on January 18, 2001, and a default judgment had been entered on March 30, 2001. By letter dated April 13, 2001, American disclaimed coverage of defendants

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on the grounds that Toussaint, Mesamours and Sartor failed to provide immediate notification that an action had been commenced and defendant Utica lacked coverage under the policy. Thus, it is clear that American's disclaimer was given within a reasonable time.

CONCLUSION

Accordingly, the motion by American for summary judgment against Anthony Sartor, Utica Taxi Center, Pierre Toussaint and Julian Mesamours is granted. It is hereby DECLARED and ADJUDGED that American's disclaimers of coverage as to Sartor, Utica, Toussaint and Mesamours was proper and American is not required to pay the judgment rendered against Utica, Toussaint and Mesamours. The cross-motion for summary judgment by Sartor is denied. The court has considered the parties' other contentions and find them to be without merit.

Settle judgment.

DATED: 1/14/02

J.S.C.