STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MOLLY A. NEWMAN

Plaintiff

V.

Index No. 200118224

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY and RICHARD B. HUGHES

Defendants

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Attomeys for Plaintiff

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Attorneys for Defendants

MEMORANDUM DECISION

FAHEY, J.

Plaintiff, Molly A. Newman, brings this action against Defendant, Richard B. Hughes, for injuries suffered as the result of an automobile accident on April 7, 1999. In a second cause of action against Defendant Hughes' insurer, Defendant, New York Central Mutual Fire Insurance Company, Plaintiff Newman seeks a declaratory judgment that New York Central is obligated to provide coverage under an automobile insurance policy issued by it to Hughes.

In his Answer, Defendant Hughes asserts a cross-claim against Defendant New York Central Mutual, for indemnification.

Now, Defendant New York Central moves to dismiss any claims or cross claims made against it pursuant to CPLR §3212 and New York Insurance Law §3420(b)(1).

Plaintiff Newman cross-moves for summary judgment on her declaratory judgment action against Defendant New York Central Mutual.

Defendant New York Central Mutual's motion to dismiss is granted as to the declaratory judgment claim raised by Plaintiff Newman, which is premature pursuant to ***Clamndon Place Corp.*** *v.* ***Landmark Ins. Co.,*** 182 A.D.2d 6 (1st Dept. 1992) and Insurance Law **§3420(b)(1)**. Defendant New York Central Mutual's motion to dismiss Defendant Hughes' cross-claim against it which sounds in declaratory judgment and contract breach is denied; there is no lack of privity to that cross-claim.

Plaintiff Newman's cross-motion for summary judgment on its declaratory judgment action against Defendant New York Central Mutual is denied.

Upon its review of the record, thoroughly aired in the motion practice between Plaintiff Newman and Defendant New York Central Mutual, the Court grants summary judgment to Defendant Hughes on its cross-claim against Defendant New York Central Mutual: Defendant New York Central Mutual is obligated to defend and indemnify Defendant Hughes pursuant to the automobile insurance policy issued by it to Hughes.

Facts

Defendant Hughes has testified that he was the owner of a 1987 Cadillac and a 1981 Ford pick-up truck in 1999 which were the vehicles listed on his insurance policy. He was also the friend of a woman named Sherry Kraff, who was living in Amherst, New York, until she got divorced and decided to move back to Kentucky in February, 1999. At the time, she was in possession of a BMW, which she drove back to Kentucky.

Sherry Kraff was also in possession of a 1995 Chrysler, titled and registered to Edward Meyer of Kentucky, her father, who had purchased the car for her.

Defendant Hughes also testified that Kraft left the Chrysler with him so that he could store it for her in his garage with permission to drive it whenever he wanted to use it. He further testified that he drove his pick-up for work and his Cadillac for leisure, but drove his pick-up that winter if it was inclement, but otherwise his Cadillac. He only drove the Chrysler a couple of times before the accident on April 7, 1999.

It is clear that Defendant New York Central Mutual was not immediately notified of this accident, but that it was notified on or about November 17, 1999. Its adjuster attempted to interview Defendant Hughes, who failed to keep one appointment in December, failed to respond to phone calls thereafter, and was finally interviewed on January 25,2000.

By letter dated January 31, 2000 to Defendant Hughes, Defendant New York Central Mutual disclaimed coverage under the policy, citing subsection "B" to Part A, "Exclusions", which reads, in pertinent part:

> 'We do not provide Liability Coverage for the...use of...any vehicle, other than 'your covered auto', which is...furnished or available for your regular use."

The Court notes that Plaintiff Newman, who was a passenger in the car driven by Hughes on the date of the accident, has settled with State Farm Insurance, Mr. Meyer's insurer, for $50,000.00, the full amount of its coverage.

Conclusions of Law

I.

Plaintiff Newman's declaratory judgment action against Defendant

Hughes' insurer is premature in the Fourth Department.

In ***Hershberger*** v. ***Schwartz***, 198 A.D.2d 859 (1994), the Fourth Department followed ***Clarendon Place,*** supra, in holding that plaintiffs cannot maintain a direct action against a defendant's insured because they are strangers to the policy, that they may not seek enforcement of the insurer's obligation of the policy's terms, that plaintiffs may only commence a direct action against the insurer pursuant to the terms of Insurance Law §3420(b)(1), that is, with judgment rendered against defendant and unsatisfied thirty days after entry.

The Court notes this is **not** the rule in the Second Department, which chose to abandon its following of ***Clarendon Place,*** supra, in ***Watson v. Aetna*** Casualty, 246 A.D.2d 57 (1998), holding the Section 3420 only barred money actions against the insurer until after final judgment against defendants, but in no way barred declaratory judgment actions which stand on their own feet pursuant to the court's reading of CPLR §3001 and the common law.

The Court finds the reasoning of the Second Department persuasive, but it is not our province to overrule Fourth Department precedent.

Thus, that cause of action must be dismissed as premature.

II.

There is no bar to Defendant Hughes' cross-claim against Defendant New York Central Mutual.

The Court takes Defendant Hughes' cross-claim for indemnification against Defendant New York Central Mutual as sounding in both declaratory judgment and contract breach. Given that there is privity between the Defendants, there is no bar to the cross-claim. And given that the issue of the propriety of Defendant New York

Central Mutual's disclaimer has been thoroughly aired in the exchanges between Plaintiff Newman and Defendant New York Central Mutual concerning the question of Plaintiff Newman's entitlement to summary judgment on the coverage question, the Court is prepared to conclude it can examine the question in terms of Defendant Hughes' entitlement to summary judgment on his cross-claim, even though there is no motion (see, CPLR §3212(b)).

III.

Although the disclaimer was timely, the basis for the denial - that the Chrysler was fumished or available for Defendant Hughes' regular use - is without merit.

The Court notes Defendant New York Central Mutual's characterization of the standard on page four of its Memorandum of Law:

> "To determine whether a vehicle is furnished for regular use, as contrasted with casual or incidental use, courts should consider general availability of the vehicle. ***Federal Insurance*** Co. ***v. Allstate Ins. Co.,*** 111 A.D.2d **146,** ...(2d Dept. **1995).**"

The paraphrase is misleading. The Court takes the liberty of quoting the entire paragraph from the case.

> " As previously noted, the defendant's policy defined a 'non-owned vehicle' as one 'not owned by, or furnished or available for the regular use of the named insurer'. **The** purpose of such a **provision** in an insurance contract is to provide protection to the insured for the occasional or infreauent use of a

> vehicle not owned by him (emphasis added) and is not intended as a substitute for insurance on vehicles furnished for the insured's regular use ***(see, Sperling*** v. ***Great Am. Indem. Co.,*** **7** NY2d **442**; ***McMahon*** v. ***Boston Old Colony Ins. Co.,*** **67** AD2d **757, 758). To** determine whether a vehicle is furnished for regular use, as contrasted with casual or incidental use, the court should consider the general availability of the vehicle and the frequency of its use by the insured (emphasis added) ***(see, McMahon v. Boston Old Colony Ins. Co., supra,*** p **758; *Simon*** v. ***Lumbermens Mut. Cas. Co.*****, 107** Misc 2d **816, 819) *(Federal, supra*** at **147)."**

In our case, the testimony is that the vehicle was used by Defendant Hughes "a couple of times" plus the use on the date of the accident, during the three months it was stored in his garage. Such an infrequency of regular operation by Defendant Hughes takes it far away from the "many times" of operation in ***Federal, supra.***

Our facts are much closer to the facts in New York ***Central Mutual Fire v. Jennings,*** **195** A.D.2d **543** (2d Dept. **1993)** where the defendant used his uncle's car approximately five times in six weeks, when the car was left at the residence for repairs, and the court determined New York Central Mutual was obligated to defend and indemntfy.

The Court notes that Defendant New York Central Mutual speculates that

Defendant Hughes might have used the Chrysler, a convertible, once the weather improved. This is utterly irrelevant to his actual use.

The Court is persuaded that Defendant New York Central Mutual has failed to demonstrate how Defendant Hughes' use of the Chrysler was anything other than occasional or infrequent, precisely the sort of protected use envisioned as the purpose of the provision in question. It is therefore obligated to defend and indemnify pursuant to the terms of the policy.

Defendant New York Central Mutual's motion to dismiss is granted as to Plaintiff Newman's declaratory judgment claim. Its motion to dismiss as to Defendant Hughes' cross-claim is denied.

Plaintiff Norman's cross-motion for summary judgment on its declaratory judgment action against Defendant New York Central Mutual is denied.

On its own motion, the Court grants summary judgment to Defendant Hughes on its cross-claim against Defendant New York Central Mutual: Defendant New York Central Mutual is obligated to defend and indemntfy Defendant Hughes pursuant to the automobile insurance policy issued by it to Hughes.

Submit order upon notice to opposing counsel.

EUGENE M. FAHEY, J.S.C.

Dated: August 14, 2003