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

PRESENT: _____ PART _____

Justice

Appeal

- v -

Allstate Ins. Co.

INDEX NO. 115842/02

MOTION DATE 11/17/03

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to/for compel disclosure

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____	4-8
Replying Affidavits _____	9-10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
MAR 26 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/19/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

---X

ROBIN APPEL,

Plaintiff,

-against-

ALLSTATE INSLJRANCE COMPANY,

Defendant.

Index No: 115842/02

DECISION AND ORDER

---X

JANE S. SOLOMON, J.:

Defendant Allstate Insurance Company ("Allstate") moves to compel. plaintiff to appear for a further examination before trial, and plaintiff Robin Appel ("Appel.") cross-moves for a protective order from appearing for a further examination; for summary judgment in this action to collect a judgment entered against Allstate's insured pursuant t.o Insurance Law § 3420(b); and to extend her time to file a notc of issue.

Allstate's motion to compel Appel's deposition, and that branch of her cross-motion seeking a protective order, are moot because Appel appeared in the courthouse for a deposition by Allstate's attorney. Appel's cross-motion for summary judgment also is denied for the reasons below.

This case arises from a personal injury claim by Appel against Allstate's insureds, Paul and Marie Julme ("the Julmes"). Appcl alleges that she was bit by a dog owned by the Julmes in June 2000. Appcl allegedly served a summons and complaint upon

the Julmes in August 2000,[1] and they defaulted. Following their default, an inquest was held on February 27, 2001 in the Supreme Court, Queens County, and the court awarded Appel $100,000 plus costs and disbursements in the amount of $1,069, for a total judgment of $101,069. Appel entered judgment thereon against the Julmes on April 24, 2001.

According Lo Allstate, it first learned of the claim on May 10, 2002, after Appel froze the Julmes' bank account in an effort to collect the judgment. By a letter dated May 21, 2002, Allstate disclaimed liability to the Julmcs under the relevant policy because they failed to promptly notify it of the claim.

At about the same time, the Julmes made a motion (without Allstate's participation) in the Queens County Action to vacate the judgment. In July 2002, Appel and the Julmes entered into a stipulation resolving that motion ("Stipulation") whereby Appel agreed to release the Julmes' bank account and not to undertake any further enforcement of the judgmcnt while she prosecuted this action against Allstate to recover the judgment. They further agreed that in the event Allstate prevails here, Appel agreed to seek vacatur of the judgment: and to permit the Julmcs to answer the complaint in the Queens County Action.

Appcl commenced this action to collect the money due

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[1] Appel v Julne [sic], Queens County Index No. 17949/00 ("Queens County Action").

under the judgment pursuant to Insurance Law § 3420(b). The complaint alleges that copies of the judgment were served upon Allstate pursuant to Insurance Law § 3420(a)(2), which provides that an action to recover a judgment obtained against an insured may be maintained against the insurer if the judgment remains unsatisfied after notice of entry of judgment has been served upon the insured and the insurer. An affirmation of service of Appel's attorney indicates he mailed a Notice of Entry to "Paul Julne and Marie Julne", at an address with no zip code in Jamaica, New York (their home address is in Holliswood, New York 11423), and to Allstate at a post office box in Farmingville, New York on May 29, 2002. This affirmation is behind a copy of the judgment and a document captioned in the Queens County Action titled "Judgement with Notice Of Entry" dated April 24, 2001, signed by Appel's attorney and showing that "Paul Julne and Marie Julne" and Allstate, at the same addresses shown on the affirmation, were the intended recipients.

This document is some evidence that Appel's attorney knew that the Julnes were insured by Allstate on April 24, 2001. There is no evidence, however, that a judgment with notice of entry was sent to Allstate before May 29, 2002.

Appel argues that, to be effective, Allstate was required to send a separate disclaimer to her, in addition to the earlier one sent to its insureds. There is no question that,

based on the facts before the court, Allstate had reasonable grounds for disclaiming coverage as to the Julmes.[2]

Appel relies on the reasoning in the decision of the Appellate Division, First Department in Lauritano v Fidelity Fire Ins. Co., 3 AD2d 564 (1st Dept 1957), aff'd 4 NY2d 1028 (1958), in arguing that Allstate was timely notified of her claim. Lauritano involved the claim of a person injured in an automobile accident who successfully sued the owner of the offending vehicle, and then brought an action against the owner's insurance company to collect the judgment. As relevant, the court stated that:

> The injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured. What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable. Promptness is relative and measured by circumstances.

3 AD2d at 568.[3]

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[2] It appears undisputed that shortly after Appel had her encounter with the dog, both she and the local police precinct made inquiry of the Julme's about the dog's rabies vaccination, and also that at least one copy of the summons and complaint came to Mr. Julme's attention in their yard well before he called Allstate (See motion 001 in related case, Allstate v Julme, N.Y. County Index No. 117744/03).

[3] Notably, although the events in Lauritano pre-date New York's Motor Vehicle Financial Security Act, which first mandated motor vehicle liability insurance, the decision was issued three months after the law became effective on February 1, 1957. Generally, "courts will go far to protect an injured person"

In this case, it is not known when Appel. learned that her claim against the Julmes may have hccn covered by an insurance policy, or learned the identity of the insurer, nor is it. known what efforts (if any) were made to obtain that information. What is known is that (1) Appel. commcnccd the action in August 2000 and entered default judgment against the Julmes on April 24, 2001; (2) Allstate disclaimed as against the Julmcs on May 21, 2002; (3) the Julmes appeared by counsel in thc Queens County Act-ion and made a motion to vacate the default judgment; and (4) Appel and Julmes entered into thc Stipulation in July 2007, which identifies Allstate as the Julmes' insurer.

On this record, it cannot be said as a matter of law that Appel made her claim against Allstate within a reasonable time, taking into consideration what was reasonably possible. Lauritano, supra. Nearly three ycars passed before Allstate was notified of commencement of the action, and it did not learn that a default judgment was entered against its insured for thirteen months. Appel's "Judgment with Notice of Entry", described above, is datcd April 24, 2001 over counsel's signature, and

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whcrc thc policy is required under a compulsory insurance statute. 8 Appleman, Insurance Law and Practice, § 4817, at p. 400-401 (1981 & Supp. 2002). The holding in Lauritano is not entirely applicable to a dog bite claim made against a homeowner's policy, but the idea that the timeliness of an injured third-party's notice to the insurer is measured from when thc injured person learned, or reasonably could have learned, of the policy, is relevant.

shows that Appel was aware of Allstate's involvement. Appel also fails to establish that notice of entry of the judgment was served upon Allstate or its insured as required under Insurance Law § 3420(a)(2). The affirmation of service shows that the Notice of Entry was mailed to "Paul Julne and Marie Julne" at an incomplete and inaccurate address, which clearly is not good service on the Julmes (Allstate does not contest the adequacy of service of the Notice of Entry on it).

Appel notified Allstate of her claim after the disclaimer. It has long been held that: an injured third party making a direct claim against an insurer under insurance Law § 3420(b) stands in the shoes of the insured and cannot recover if the insured has failed to comply with a condition precedent of the policy. Fisher v Hanover Ins. Co., 288 AD2d 806 (3rd Dept 2001); Tennant v Farm Bureau Mutual Auto. Ins. Co., 286 AD2d 117 (4th Dept. 1955). "Timely notice of the commencement of an action is a condition precedent to liability on the part of the insurer." Fusco v Amer. Colonial Ins. Co., 221 AD2d 231 (1st Dept 1995) (citing Tennant, supra). Therefore, in addition to the issue concerning the reasonableness of the delay in notifying Allstate, questions of fact remain as to whether this action is precluded by Allstate's disclaimer against the Julmes.

Appel conjectures, with no supporting evidence, that perhaps the Julmes notified Allstate within a reasonable time

after learning of the claim by calling their insurance agent, so the alleged basis for the May 21, 2002 disclaimer could be incorrect, and the disclaimer itself untimely. To the extent that this presents an issue of fact, it is a further reason for denying Appel's cross-motion.

Allstate further alleges that Appel and the Julmes colluded against it to assist her in collecting the judgment. The record on this motion does not reveal what arguments the Julmes made in their motion to vacate the judgment, but the circumstances of the underlying case indicate that they may have had viable arguments regarding inadequate service of process and a meritorious defense against liability.[1] Where an injured third-party seeks to recover directly against an insurer, "... the insured cannot make any agreement which would operate to impose liability upon the insurer or deprive the insured of use of a valid defense, but that principle will not operate to discharge the insurer's obligations under [a] policy unless the insurer is actually prejudiced or deprived of a valid defense by the actions of the insured." 8 Appleman, Insurance Law and Practice, § 4817, at p. 399-400 (1981 & Supp. 2002). Here, the Julmes agreed to abandon what seem to have been credible efforts

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[1] The transcript of the deposition taken by counsel in this action and submitted in the motion in the related action (supra, at note 2), calls into question whether the summons and complaint were properly served, and indicates that the Julmes may have had no notice of their dog's alleged vicious propensity.

to vacate the default judgment. In sum, issues of fact remain concerning the conduct of the parties.

Finally, that branch of Appel's cross-motion seeking to extend her time to serve and file a note of issue is granted, and she has until April 19, 2004 to do so. A courtesy copy hereof shall be sent by my staff to counsel to notify them of the same. Accordingly, it hereby is

ORDERED that the motion and cross-motion are denied, except for that branch of the cross-motion seeking to extend plaintiff's time to serve and file a note of issue, which is granted, and plaintiff shall serve and file a note of issue by April 19, 2004.

Dated: March 19, 2004

ENTER:

J.S.C.

FILED
MAR 26 2004
COUNTY CLERK'S OFFICE
NEW YORK

[* 6]