M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

TONY ABRAHAM, Plaintiff, - against - HERMITAGE INSURANCE COMPANY, et al., Defendant.	BY: KELLY, J DATED: October 17, 2005 INDEX NUMBER: 23756/2003 MOTION DATE: July 12, 2005

On January 22, 1996, pursuant to an order of the New York City Marshal (Marshal), a 1984 Chevrolet (vehicle) was towed by Aabis Towing and Storage, Inc. (Aabis) to a premises owned and/or leased by Aabis.

At the time, there was a towing agreement in effect between Aabis and the Marshal. Pursuant to Article 4, Sections 4.1[A] and 4.2 of that agreement, neither Aabis employees nor employees of the Marshal constituted employees of the City of New York (City) and, instead, they were deemed independent contractors. Pursuant to Sections 4.1[B] and 4.3, Aabis and the Marshal were solely responsible for all property damage and physical injuries sustained during operations and work under the agreement, and Aabis was to carry paid-up insurance in the minimum amount of $500,000 for such claims and damage.

On March 1, 1996, the plaintiff Tony Abraham (Abraham) attended an

vehicle suddenly began traveling in circles without a driver and struck numerous pedestrians, including Abraham.

On or about March 13, 1996, Abraham gave notice of his claim to Aabis, which forwarded the notice to its automobile insurer, the defendant Eagle Insurance Company (Eagle), to its commercial general liability insurer, the defendant Hermitage Insurance Company (Hermitage), and to its insurer of specified vehicles, the John Deere Insurance Company (John Deere).

By letter dated April 8, 1996, Hermitage disclaimed based upon the following exclusion:

"This insurance does not apply to:

g. Aircraft, Auto or Watercraft

Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading or unloading.

This exclusion does not apply to:

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(3) Parking an 'auto' on, or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured; . . ."

On June 27, 1996, Eagle disclaimed based on several exclusions, including that: (1) the vehicle did not constitute a non-owned vehicle leased, hired, rented or borrowed and used in connection with Aabis'

business; and, (2) the towing of the vehicle was completed prior to the accident.

By letter dated November 20, 1996, John Deere disclaimed, asserting that its policy covered only specifically described vehicles owned by Aabis.

In September 1996, Abraham commenced an action in this court against the City of New York, Aabis and Suarez (See, Abraham v City of New York, et al., Index No. 19910/96), seeking damages for personal injuries based on negligence (personal injury action).

In the personal injury action: (1) by order dated February 25, 1997, this court (Polizzi, J.) granted that branch of a motion by Abraham for a default judgment against Suarez, but denied that branch seeking a default judgment against Aabis, with leave to renew upon the submission of additional proof including an affidavit of additional mailing of the summons pursuant to CPLR 3215[g][4]; (2) by order dated May 5, 1997, this court (Polizzi, J.), granted a renewed motion by Abraham for a default judgment against Aabis; and, (3) by order dated July 27, 2001, this court (Flug, J.), granted a motion by the City for summary judgment dismissing the complaint finding that the City did not own, maintain and control the vehicle, and the Marshal was in charge of the vehicle.

In a separate action commenced by Abraham against the Marshal individually and in her capacity as Marshal, by decision dated November 17, 1998, this court (Goldstein, J.) dismissed the action based on the statute of limitations, without opposition (See, Tony Abraham v Catherine Stringer, et al., Index No. 19754/98).

In June 1999, Eagle commenced an action in the Supreme Court, Nassau County against Aabis, Suarez and Abraham, seeking a declaratory judgment that it was not obligated to defend and indemnify Aabis in the personal injury action. By order dated December 16, 1999 and entered December 29, 1999, the Supreme Court, Nassau County (Lockman, J.) granted Eagle that relief, without opposition (Nassau County judgment).[1]

On or about December 29, 1999, Aabis formally dissolved.

Following an inquest held on October 8, 2002 in the personal injury action, by judgment entered February 11, 2003, Abraham was awarded $1 million in compensatory damages, plus interest of $30,821.92 and costs of $1,105.00. In March 2003, Abraham demanded payment of the judgment by Aabis and Suarez, and notified them that the judgment had been entered.

In this action commenced pursuant to Insurance Law § 3420[a][2], Abraham seeks to enforce the judgment obtained in the personal injury action against Hermitage, Eagle, John Deere and another insurer.

In response to the complaint, Eagle interposed various defenses including timely and proper disclaimer, noncoverage and collateral estoppel based on the Nassau County judgment, and it cross-claimed against Hermitage and John Deere seeking contribution and/or indemnification. Hermitage and John Deere interposed similar defenses of noncoverage and timely disclaimer; in addition, Hermitage asserted that the judgment in the personal injury action was unenforceable and subject to vacatur.

Eagle now moves for summary judgment contending, inter alia, that the Nassau County judgment was res judicata on the issue of coverage.

Hermitage also moves for summary judgment contending that Abraham failed to meet various conditions precedent in that Abraham: (1) failed to serve Aabis at its last known address, and the required CPLR 3215[g] notice was defective and was not filed with the judgment; (2) served the judgment at an incorrect address, and the judgment was unsigned and bore an incorrect entry date; (3) failed to give Aabis proper notice of the inquest; and, (4) delayed almost five years between obtaining the default judgment and proceeding to inquest. Hermitage also asserts that it timely disclaimed.

John Deere cross-moves for summary judgment contending that because the vehicle was not specified in its policy there was no coverage.

Abraham cross-moves for summary judgment on the issue of the liability of Hermitage and Eagle, asserting that: (1) the motion by Hermitage was not made within 120 days of the filing of the note of issue; (2) Hermitage's claims concerning the propriety of the judgment lack merit; (3) the exclusion relied upon by Hermitage is inapplicable as the vehicle was not owned, maintained, used or entrusted by Aabis to others and, instead, Aabis towed the vehicle and stored it at its premises for the purpose of the public auction; (4) the Hermitage policy does not contain an exclusion for non-owned, maintained, used and/or entrusted vehicles; (5) Hermitage sent a notice of disclaimer only to Aabis and Aabis' broker, and failed to disclaim as to him; (6) Hermitage never moved to vacate the default judgment entered in the personal injury action, and Aabis is now dissolved; (7) Eagle is obligated to provide coverage for non-owned vehicles which are not leased, hired, rented or borrowed by Aabis; (8) Eagle must provide coverage as the

vehicle was on Aabis' premises pursuant to Aabis' business; and, (9) Eagle had sufficient information concerning the claim by March 13, 1996, and failed to disclaim until June 27, 1996.

Hermitage replies, inter alia, that its motion was timely made within the 120-day period.

There has been no opposition to the cross motion by John Deere, and since its policy is inapplicable, John Deere is entitled to summary judgment dismissing the complaint and all cross claims interposed against it.

The prior Nassau County judgment rendered in favor of Eagle and against Aabis and Abraham, without opposition, is res judicata on the issue of whether there is coverage under the Eagle policy (See, Eagle v Facey, 272 AD2d 399 [2000]; New York Cent. Mut. Fire Ins. Co. v Kilmurray, 181 AD2d 40 [1992]). As a result, the motion by Eagle for summary judgment dismissing the complaint interposed against it must be granted, and the branch of the cross motion by Abraham seeking summary judgment on the issue of Eagle's liability for the judgment must be denied.

The motion by Hermitage was timely interposed (see CPLR 3212[a]) and will be considered.

Insurance Law §3420[a][2] permits the holder of an unsatisfied judgment in an action to recover damages for personal injuries against an insured to maintain an action against the latter's insurer to collect the judgment (See, Kleynshvag v GAN Ins. Co., __ AD3d __, 2005 NY App Div LEXIS 9198 [2d Dept, Sept. 19, 2005]). Such an action is permitted following a 30-day waiting period after service upon the insurer of

notice of entry of the judgment, assuming the insurer does not satisfy the judgment in the interim (See, Kleynshvag, 2005 NY App Div LEXIS at 9198). The statute permits the injured party to collect "under the terms of the [insurance] policy" for the amount of the judgment; however, the recovery may not exceed the applicable policy limit (see id.). The judgment creditor has the burden to establish that coverage exists under the policy (See, Fliegman v Traveler's Prop. Ca. Ins. Co., 15 AD3d 536 [2005]).

A valid and enforceable judgment is a condition precedent to maintaining an action pursuant to Insurance Law § 3420[a][2] (See, Hernandez v American Transit Ins. Co., 2 AD3d 584 [2003]). A judgment rendered without jurisdiction or entered through fraud, misrepresentation, or other misconduct practiced on the court is a nullity and is subject to collateral attack (See, Hernandez, 2 AD3d at 585; Vaccarino v Allstate Ins. Co., 270 AD2d 411 [2000]; Berger v American Transit Ins. Co., 3 Misc 3d 130A [2004]; See also, Woodson v Mendon Leasing Corp., 100 NY2d 62, 67-68 [2003]).

Hermitage has failed to demonstrate that the judgment was rendered without jurisdiction or is otherwise subject to collateral attack (cf. Vaccarino, 270 AD2d at 411; Berger, 3 Misc 3d at 130A). Hermitage has also failed to demonstrate the applicability of the exclusion upon which it relied when it disclaimed coverage. Abraham's claim does not arise out of Aabis' ownership, maintenance, use or entrustment to others of an automobile that Aabis owned, operated, rented or loaned, and the vehicle was not being loaded or unloaded at the time of the accident (cf. Duncan Petroleum Transp., Inc. v Aetna Ins. Co., 61 NY2d 665 [1983]).

Moreover, the exclusion does not apply to the vehicle which was parked on the premises owned by Aabis when its gear engaged.

As a result, Hermitage has not established its entitlement to the requested relief. However, Abraham is entitled to summary judgment on the issue of the liability of Hermitage for the judgment at issue, to the limits of Hermitage's policy.

Consequently the motion by the defendant Eagle for summary judgment dismissing the complaint and all cross claims interposed against it is granted and the complaint and all cross claims interposed against Eagle are dismissed.

The motion by the defendant Hermitage for summary judgment dismissing the complaint and all cross claims interposed against it is denied.

The cross motion by the defendant John Deere for summary judgment dismissing the complaint and all cross claims interposed against it is granted, without opposition and the complaint and all cross claims interposed against John Deere are dismissed.

The branch of the cross motion by the plaintiff for summary judgment on the issue of the liability of the defendants Hermitage, to pay a judgment held by the plaintiff is granted and the plaintiff is granted summary judgment on the issue of the liability of the defendant Hermitage on the first cause of action seeking enforcement of the judgment to the limits of that defendant's policy. The balance of plaintiff's cross motion for summary judgment is denied.

Peter J. Kelly, J.S.C.

[1] Although the order issued by the Supreme Court, Nassau County

refers to a pending action in the Supreme Court, Kings County, the order recites the index number for the personal injury action pending in this court at that time.