

**Hirsch v Prudential Prop. & Cas. Ins.
Co.**

2007 NY Slip Op 30134(U)

February 22, 2007

Supreme Court, Suffolk County

Docket Number: 0014203

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

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PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/20/06
ADJ. DATES 11/24/06
Mot. Seq. # 001 - MD

-----X
ANNE MARIE HIRSCH and MARC HIRSCH, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 PRUDENTIAL PROPERTY & CASUALTY :
 INSURANCE COMPANY, :
 :
 Defendant. :
-----X

JAKUBOWSKI, ROBERTSON ET AL
Attys. For Plaintiffs
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JOHN H. MULVEHILL, ESQ.
Atty. For Defendant
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Upon the following papers numbered 1 to 7 read on this motion to dismiss
_____; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ;
Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 4-5; 6-7 ;
Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and
opposed to the motion) it is,

ORDERED that this motion by defendant for an Order dismissing the complaint and for the entry of a judgment, is denied; and it is further

ORDERED that the caption is amended to reflect that Liberty Mutual Insurance Company is the successor to Prudential Property and Casualty Insurance Company and shall be so named as the defendant on all future correspondence and documentation submitted to the Court; and it is further

ORDERED that a Preliminary Conference is scheduled for **March 20, 2007**, at 9:30 a.m., in the DCM Part, located at 1 Court Street, Riverhead, New York; and it is further

ORDERED that movant is directed to serve a copy of this Order with Notice of Entry upon counsel for plaintiff, within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

Plaintiffs brought this declaratory judgment action pursuant to Insurance Law § 3420 when the defendant in the underlying personal injury action defaulted. Plaintiffs obtained a default judgment against the defendant in the underlying civil action. Liberty Mutual Insurance Company (hereinafter "Liberty Mutual") is the successor to defendant, Prudential Property and Casualty Insurance Company and moves to dismiss the plaintiffs' complaint on grounds that Liberty Mutual denies there is a legitimate dispute as to whether the defendant in the underlying personal injury action could have received coverage under its policy of insurance with Liberty Mutual's predecessor or in interest. Liberty Mutual also seeks to dismiss

the complaint based upon the fact that plaintiffs did not bring their action against Liberty Mutual as a special proceeding under the provisions of CPLR 403(c)(d), 5225(b) and 5227.

Upon Liberty Mutual's predecessor's insured's default, plaintiffs moved to assert a claim against their liability insurance carrier pursuant to Insurance Law § 3420 (see *Lang v Hanover Ins. Co.*, 3 NY3d 350, 787 NYS2d 211 [2004]). The Appellate Division, Second Department has restated the rules governing a motion to dismiss in *State of New York v Grecco*, 13 AD3d 350, 786 NYS2d 197 [2d Dept 2004]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, that a cause of action against one or more defendants has been stated (see *Sirlin v Town of New Castle*, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2006]; *Dunleavy v Hilton Hall Apts. Co., LLC*, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]).

In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see *Fast Track Funding Corp. v Perrone*, 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; *Paterno v CYC, LLC*, 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; *McGee v City of Rensselaer*, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Morone v Morone*, 50 NY2d 481, 429 NYS2d 592 [1980]; see also *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 746 NYS2d 131 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 729 NYS2d 425 [2000]).

While Liberty Mutual's counsel, in his affirmation in support of the motion, states that there is no legitimate dispute as to whether the defendant in the underlying action was entitled to insurance coverage, the Court finds that under this liberal approach and upon a review of the complaint, plaintiffs have set forth a cognizable legal theory under Insurance Law § 3420.

Liberty Mutual is correct in stating that the plaintiffs should have brought their action as against it as a special proceeding, however, this mistake/defect by plaintiffs is not fatal because CPLR 103(b) permits a Court to convert an improperly brought motion for a declaratory judgment into a special proceeding (see Alexander, Supp Practice Commentaries; McKinneys's Con Laws of NY Book 7B C103:3 2007 Supp Pamph at 4; Seigal N.Y. Prac § 4, at 5-6 (4th Ed.); *Kelsch v Town Bd. Of the Town of Davenport*, ___ AD3d ___, ___ NYS2d ___ [3d Dept 2007]; *Steel Los III, LP v Power Auth. of State of New York*, 33 AD3d 990, 823 NYS2d 490 [2d Dept 2006]; see also *Lewin v County of Suffolk*, 239 AD2d 345, 657 NYS2d 734 [2d Dept 1997]). Accordingly, the motion by plaintiffs is converted to a special proceeding and as plaintiffs have paid a fee for a new index number, there is no fee issue to impede the CPLR 103(c) conversion from a motion to a special proceeding.

Accordingly, the motion is denied as indicated herein. This constitutes the Order and decision of the Court.

DATED: 2/22/07



THOMAS F. WHELAN, J.S.C.