

**Thomas Dodge Corp. of N.Y. v Universal
Underwriters Ins. Servs., Inc.**

2007 NY Slip Op 30866(U)

April 10, 2007

Supreme Court, Suffolk County

Docket Number: 0010554/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-30-06
ADJ. DATE 1-31-07
Mot. Seq. # 001 - MD
002 - XMD

-----X	
THOMAS DODGE CORP. OF NEW YORK and	:
THOMAS MOTOR SPORTS, INC.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
UNIVERSAL UNDERWRITERS INSURANCE	:
SERVICES, INC.,	:
	:
Defendant.	:
-----X	

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Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 23; Answering Affidavits and supporting papers 24 - 25; Replying Affidavits and supporting papers 26-28; 29-30; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment on their claim for a declaration that defendant insurance company wrongfully disc aimed coverage is denied; and it is further

ORDERED that the cross motion by defendant for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiffs' complaint is denied as untimely.

Initially, the Court notes that plaintiffs' note of issue was filed on July 12, 2006 and that defendant's cross motion for summary judgment was made on December 20, 2006, more than 120 days after the filing of the note of issue, which expired on November 11, 2006. Therefore, the cross motion is procedurally defective because it was not interposed within the time limitation prescribed by the amendment to CPLR 3212(a)(L. 1996 Ch. 492) which states, *inter alia*, "such motion shall be made no later than one hundred twenty (120) days after the filing of the note of issue, except with leave of court on good cause shown." In *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d

379 (2004), the Court of Appeals underscored its holding in *Brill v City of New York*, 2 NY3d 64, 781 NYS2d 261 (2004) and made it clear “that [the] statutory time frames,” of CPLR 3212, are “not options, they are requirements, to be taken seriously by the parties.” Here, defendant offered no good cause for its untimely motion, and the Court is constrained by the cross motion’s lateness (*Long v Children’s Vil.*, 24 AD3d 518, 805 NYS2d 286 [2005]). Accordingly, the cross motion is denied as untimely.

Plaintiffs commenced this declaratory judgment action when their insurance carrier disclaimed coverage for losses incurred when Thomas Dodge Corp. paid for certain vehicles but never received them. Thomas Mammolito, the president of Thomas Dodge Corp., testified at his examination before trial that he negotiated the purchase price of seven vehicles with M.A.P. Auto of Lewiston, located in Lewiston, New York, an importer of used vehicles from Canada. Although he had never dealt with M.A.P. before, he had prior transactions with the wholesaler who referred him to M.A.P. The price agreed upon was \$13,200.00 for each 2002 Dodge Caravan, the seven cars totaled \$92,400.00. On July 24, 2003, after Mr. Mammolito received fax transmissions of a copy of a bill of sale, as well as copies of Canadian documents listing the vehicles’ identification numbers, he wired M.A.P. the money. Thereafter, Mr. Mammolito made repeated inquiries to M.A.P. as to why the vehicles had not arrived. He was assured that they were on their way and offered various excuses. On August 21, 2003, Mr. Mammolito checked the Chrysler computer network and found that the vehicles were registered in Tennessee and Iowa. The vehicles never arrived at plaintiff’s dealership and by letter dated September 22, 2003, defendant disclaimed coverage because the vehicles were not yet “covered autos” under the policy. Plaintiff learned, after testifying before the Grand Jury in Buffalo, N.Y. in 2004, that M.A.P. never had possession of or title to any of the vehicles, and M.A.P.’s principal was convicted of grand larceny.

Plaintiffs now seeks summary judgment on their claim for a declaration that the defendant insurance company wrongfully disclaimed coverage. The multi-peril policy in dispute was issued to plaintiffs in April of 2003, there is no dispute that it was in effect at the time of the loss. Plaintiffs argue that the policy provides for inventory coverage and that, since Thomas Dodge was the owner of the vehicles, they were, in fact, “covered autos.” Plaintiffs assert that their ownership is established by the copy of the bill of sale and the Canadian registration forms received by fax.

The policy provides, in relevant part, Auto Inventory Unicover Coverage Part 300, page 9:

Definitions-

“COVERED AUTO” means an AUTO (1) owned by or acquired by You or (2) not owned by YOU but in Your care, custody, or control.

“EXTENDED THEFT” means:

(1) YOUR voluntary parting with evidence of title to or possession of a COVERED AUTO when induced by:

(a) a forged or counterfeit instrument received in payment;

(b) a check or other instrument written on an account closed before the instrument is presented for payment;

(c) a credit application, rental agreement or lease agreement on which the name, social security number or signature of the applicant, rentee or leasee is false or forged;

(d) any other criminal scheme, criminal trick or criminal device which induces YOU, at that time, to part with evidence of title to or possession of the COVERED AUTO;

(2) YOUR having acquired possession of an AUTO that is stolen or which has a forged, altered, or counterfeit title or invalid duplicate title;

* * *

The gravamen of plaintiffs' argument is that the faxed copies of a bill of sale and the Canadian forms establish that Thomas Dodge "owned or acquired" the vehicles or, at the very least, that the terms "owned or acquired," which are not defined in the policy, create an ambiguity which should be construed against the drafter of the policy, the carrier. Among plaintiffs' arguments is that the Canadian documents are title documents. However, Mr. Mammolito testified that he wasn't sure what the documents were, although they did state the VIN and where the cars were coming from. When he had previously purchased vehicles originating in Canada, they had titles which included the signatures of the seller. Mr. Mammolito also stated that he was aware that in order to file a title with the New York State Dept. of Motor Vehicles, such document must be signed by the seller. The copies of the documents submitted herein are not clear and do not appear to have any signatures. They read at top "Plate Owner Address Change Notice" and in the middle on the left side "Province of Ontario - Permit - Vehicle Portion/Cert ficat D'imm (?)-Vechule"; and on the right side "Permit - Plate Portion/Certificat D'imm." They contain what appears to be VIN , make, model, year, cylinders and color information, but no signatures. They more closely resemble registration information.

It is well settled that title to a motor vehicle is transferred when the parties intend such transfer to occur (*Alvarado v Cristal*, 11 Misc3d 33, 816 NYS2d 274 [2006]; *Potter v Keefe*, 261 AD2d 864, 864, 690 NYS2d 361 [1999]). Here, the purported seller never owned or possessed the vehicles, he was convicted of grand larceny for taking money for vehicles which he clearly did not own or possess. The documents faxed to plaintiff did not convey title to plaintiff. Plaintiff's own testimony was that he was not sure what the documents were. Further, the Court is unpersuaded by plaintiffs' argument that the terms "owned or acquired" are ambiguous. Plaintiffs have not established that they owned the vehicles nor did they establish that they acquired possession of them. Accordingly, plaintiffs have not established their entitlement to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]) and the motion is denied.

Date: APR 10 2007

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION