

**United States Fire Ins. Co. v American
Home Assur. Co.**

2007 NY Slip Op 31112(U)

May 5, 2007

Supreme Court, New York County

Docket Number: 0401335/2003

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE
Justice

PART 25

Index Number : 401335/2003
UNITED STATES FIRE INSURANCE
vs
AMERICAN HOME ASSURANCE
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
accompanying Memorandum Decision.

MAY 05 2007

Dated: _____

J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 401335/03

AMERICAN HOME ASSURANCE COMPANY,

Defendant.

-----X

DeGrasse, J.:

Motion sequences seven and eight are consolidated. Plaintiff, United States Fire Insurance Company (US Fire), and defendant, American Home Assurance Company, move for summary judgment. Approved Ambulance & Oxygen Service, Inc. Provides ambulette service. US Fire insured Approved under an automobile liability insurance policy with a limit of \$1 million per occurrence. American Home insured Approved under a hospital professional liability policy with an identical limit. On October 6, 1999, Approved's employee, Dennis Nazario had a motor vehicle accident while transporting Egbert Fisher Gouldbourne, Sr. from his home to a hospital for outpatient dialysis. While driving down a hill, Nazario suddenly stopped the ambulette, causing Gouldbourne, a double amputee, to be thrown from his wheelchair and injured. The spinal fracture Gouldbourne sustained caused his death 13 days later. In April 2000, the executor of Gouldbourne's estate brought an action against Approved, Nazario, the dialysis provider, a home attendant service and the City of New York in the Supreme Court, Bronx County. The executor alleged in his complaint that Nazario was negligent in failing to secure the wheelchair and in operating the ambulette in a reckless manner at an excessive rate of speed. The executor also alleged that Approved was negligent in its hiring, training, retaining, monitoring and supervision of its employees. In March 2000, American Home and US Fire agreed to share Approved's defense costs. By letter dated April 3, 2000, American Home

transporting disabled passengers. For example, *Cunningham v Vincent* (234 AD2d 648 [1996]) involves a paraplegic passenger's fall from his wheelchair while being lowered to the ground by a van's electro-hydraulic lift. The Court said the following with respect to the duty owed by Liberty Wheelchair, the carrier:

“Liberty also argues that it owed no duty to plaintiff to supply him with a wheelchair seat belt during transportation and, therefore, could not be found negligent for failing to furnish one. We disagree. As a common carrier engaged in the transportation of disabled passengers, Liberty not only had a duty to exercise reasonable care for plaintiff's safety " 'in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated' " (*O'Leary v American Airlines*, 100 AD2d 959, 960, quoting PJI 2:161), but a duty to exercise additional care for his safety as was reasonably required for his disabilities of cerebral palsy and paraplegia (*see, O'Leary v American Airlines, supra*, at 960-961)” (234 AD2d at 651).

Thus the service rendered by Approved to Gouldbourne is within the ordinary course of a common carrier's business. In addition, the quoted language refutes US Fire's contention that Nazario's failure to properly secure Gouldbourne's wheelchair constituted a failure to furnish proper health care services. As found by the *Cunningham* Court, Liberty, in its capacity as a common carrier, was required to furnish a wheelchair seat belt. US Fire also claims there is evidence that Approved “did not have two individuals assigned to assist and safeguard Mr. Gouldbourne (as is required under the standard of care).” The claim lacks merit due to the critical absence of the affidavit of an expert familiar with the alleged standard of care (*see e. g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 327 [1986]). US Fire cites *United States Fidelity and Guaranty Company* (194 AD2d 1028 [1993]) and *Western World Insurance Company v Empire Fire and Marine Insurance Company* (____ F Supp 2d____, 2006 WL 3337427 [DSC]) in support of its argument that coverage exists under American Home's policy. Both cases are distinguishable because their facts do not involve the ownership or use of motor vehicles, causes excluded under American Home's policy. The underlying loss is therefore not covered under American Home's policy. It does not avail US Fire to argue that American Home has not timely disclaimed coverage. Insurance Law § 3420 (d) requires insurers to give timely notices

of disclaimer. Other insurers, however, are not protected by the statute (*Bovis Lend Lease LMB v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 90-91 [2005]).

US Fire's claim that the carriers verbally agreed to share Approved's indemnity costs is precluded by the statute of frauds. A special promise to answer for the debt of another must be in writing (General Obligations Law § 5-701). Moreover, Patricia Havican, US Fire's former claims specialist, states in her affidavit that the alleged agreement was entered into on June 5, 2001. The affidavit lacks probative value because it contradicts her deposition testimony that she did not remember when the agreement was made (*see e. g., Concepcion v Walsh*, 38 AD3d 317 [2007]). For the foregoing reasons, American Home's motion is granted and US Fire's denied. It is adjudged and declared that the underlying accident and the claims brought by the Gouldbourne estate are not covered under the policy issued by American Home to Approved. The complaint is dismissed in all other respects.

Settle judgment.

Dated: May 5, 2007



J. S. C.

HON. LELAND DeGRASSE