Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

----------X

DORIS JIMENEZ,
Plaintiffs,

Index No.: 7983/07
Motion Date: 6/13/07
Motion Cal. No.:32

-against-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
Defendant.

----------X

The following papers numbered 1 to 19 read on this motion by defendant for an order pursuant to CPLR§ 3012 (d), compelling plaintiff to accept defendant's answer and extending the time to serve an answer, or an order dismissing the complaint pursuant to CPLR 3211(a) (7), or an order pursuant to CPLR 317 and CPLR 5015 (a)(1) vacating the Judgment o f this Court dated February 5, 2007; and cross-motion by plaintiff for an order pursuant to CPLR 3211(c) and CPLR 3212 granting plaintiff summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion-Affirmations-Exhibits.....	1-4
Affidavit-Exhibit.....	5-6
Memorandum of Law.....	7
Affidavit of Service.....	8
Notice of Cross-Motion-Affirmation-Exhibits.....	9-12
Affirmation in Opposition.....	13-15
Reply Affirmation.....	16-17
Reply Affirmation.....	18-19

Upon the foregoing papers it is ordered that the motion by defendant for an order pursuant to CPLR§ 3012 (d), compelling plaintiff to accept defendant's answer and extending the time to serve an answer, or an order dismissing the complaint pursuant to CPLR 3211(a) (7), or an order pursuant to CPLR 317 and CPLR 5015 (a)(1) vacating the Judgment of this Court dated February 5, 2007; and cross-motion by plaintiff for an order pursuant to CPLR 3211(c) and CPLR 3212 granting plaintiff summary judgment on the issue of liability by defendant is decided as follows:

This action stems from an underling personal injury action involving plaintiff, Doris Jimenez against Roxane Sanchez in the Queens County Civil Court. According to the

summons and complaint in that action, on November 26, 2003, the vehicle in which plaintiff was traveling as a passenger in and operated by defendant struck the vehicle in front of it and allegedly caused plaintiff's injuries. Sanchez did not appear in the action and after an Inquest on November 6, 2006,, plaintiff was awarded a Judgment in the sum of $25,000 with interest from November 11, 2003 and statutory costs and disbursements. On February 5, 2007, plaintiff filed the Judgment with the Judgment Clerk of the Civil Court. Thereafter, on or about March 19, 2007, plaintiff commenced the instant action against the New York Central Mutual Fire Insurance Company, (hereinafter, "NYCM"), by serving . On April 2, 2007, the Summons and Verified Complaint were served upon the State of New York Insurance Department pursuant to Insurance Law § 1212 and on April 12, 2007, NYCM received a copy of the Summons and Complaint. Following receipt of the Complaint, NYCM forwarded a disclaimer letter to defendant, Roxana Sanchez, based upon her alleged failure to promptly send NYCM copies of any notices or legal papers received in connection with the underlying accident or loss. NYCM claims that, at no time was it advised of the commencement of the underlying action or the subsequent default. In support of this claim, NYCM has submitted an affidavit of Cynthia Winton, Casualty Department Supervisor for NYCM.

The branch of the motion seeking this Court's leave to hear the late motion to dismiss the complaint, for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), due to plaintiff's failure to comply with the provisions of Insurance Law § 3420(a)(2), and its having given a valid disclaimer, is granted. Pursuant to CPLR 3012(d), "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Based upon the short period of delay in filing this application and the lack of a showing of prejudice by the plaintiff, it is appropriate for this Court to hear this untimely application.

Upon granting such leave, the motion is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7),

the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

Based on this standard, the complaint sets forth a cause of action pursuant to Insurance Law §3420 (a)(2). Section 3420(a)(2) of the Insurance Law states the following:

> (a) No policy or contract insuring against liability for injury to person, except as provided in subsection (g) hereof, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:
>
> (2) A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

Contrary to defendant's claims, plaintiff has satisfied the conditions precedent to the instant action. First, under the circumstances of this case, there was no requirement for plaintiff to have served the summons and complaint in the underlying action upon defendant. There is no indication that plaintiff knew or had reason to know that defendant was the insurer of the defendant in the underlying action. In any event, the Court is not aware of any requirement that a plaintiff serve the insurer in an action against its insured. *See*, Hurtado v Liberty Mut. Ins. Co. 195 Misc. 2d 616 (App. Term. 2002.) Second, plaintiff has submitted an affidavit of service that it served the insurer with the default Judgment entered against the insurer's insured. *See*, Best v. Progressive Cas. Ins. Co., 29 A.D.3d 503 (2d Dep't 2006).

Finally, assuming that defendant is correct and CPLR 3420 allows plaintiff to stand in the shoes of defendant in the underlying action and plaintiff's claim is subject to a valid disclaimer due to the defendant/insured's failure to timely notify NYCM of the pending claim, defendant has failed to show a valid disclaimer under Insurance Law § 3420(d). This section provides that:

> "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a

> motor vehicle accident, or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

Here, the disclaimer of coverage by NYCM was given to the insured after NYCM received the instant complaint. Furthermore, defendant did not give written notice "as soon as is reasonably possible" since NYCM did not disclaim based upon plaintiff's failure to provide it with proper notice of the Judgment until the instant motion, which was well after its having received a copy of the instant action's complaint. As such, the disclaimer was not valid as against plaintiff in the instant action. Based upon the above, the motion pursuant to CPLR 3211 is denied.

The branch of the motion seeking to allow NYCM time to interpose an Answer is granted. To prevail on its motion to compel acceptance of its late answer, the defendant is obligated to demonstrate a reasonable excuse for the delay. CPLR 3012 [d]); Frank Mar Construction Corporation, v Precision Partners Realty Corporation, 284 AD2d 496, (2d Dept 2001.) Defendant's excuse for the failure to timely serve the answer is that due to the circumstances that delayed it receiving timely notice of the claim, it could not timely answer the complaint. Moreover, defendant was further delayed in serving an answer due to time spent in seeking plaintiff's consent for an extension to serve a late answer. The court finds defendant's excuse to be reasonable, especially in light of the short delay involved and the lack of prejudice to plaintiff. Defendant must serve an answer upon plaintiff within 20 days of receiving a copy of this order.

The branch of the motion seeking to vacate the default judgment entered in the underlying action in the Queens Civil Court is denied. Defendant must seek to vacate that Judgment in the Civil Court; this Court does not have appropriate jurisdiction.

In light of the above decision and order, the motion by plaintiff seeking an order pursuant to CPLR 3211 (c) is denied, with permission to renew after NYCM serves its Answer on plaintiff or seeks to vacate the underlying Judgment in Civil Court.

Dated: June 20, 2007

.....

ORIN R. KITZES, J.S.C.