Toribio v Mendez
2007 NY Slip Op 32434(U)
July 27, 2007
Supreme Court, New York County
Docket Number: 0121619/2002
Judge: Deborah A. Kaplan
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SCANNED ON 8/7/2007
[* 1]

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

CLAUDIO TORIBIO, MARIA ELENA VASQUEZ and LILLIANA FRANCO

- v -

CONSTANTINO A. MENDEZ, FLOWER PORT, INC. and AUTOMOTIVE FINANCE CORP.

INDEX NO. 121619/2002

MOTION DATE ______

MOTION SEQ. NO. 003

MOTION CAL. NO. 120

The following papers, numbered 1 to 4, were read on this motion by the plaintiffs for, *inter alia,* an order vacating a stay and directing non-party Frontier Insurance Company or the New York State Superintendent of Insurance to appear at a framed issue hearing.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2,3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

This is an action for damages arising from a motor vehicle accident in which a vehicle driven by defendant Constantino Mendez and owned by defendants Flower Port, Inc. struck the rear of a van at an intersection in Yonkers, New York. The three plaintiffs were passengers in the defendants' vehicle. On the day of the accident, September 12, 2000, the defendants' vehicle was purportedly insured by a policy issued by Frontier Insurance Company.

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On November 6, 2000, the plaintiffs filed claims with the Motor Vehicle Accident Indemnification Corporation (MVAIC), asserting that the defendants' vehicle was uninsured. The claims were denied by MVAIC on June 13, 2001, on the ground that the plaintiffs were not "qualified persons" as defined in Article 52 of the Insurance Law since the defendants' vehicle was covered by a liability policy issued by Frontier.

By an order of the Supreme Court, New York County (Lehner, J.), dated October 10, 2001, Frontier was declared insolvent and placed in rehabilitation pursuant to Article 74 of the Insurance Law. Pursuant to the statute, the Superintendent of Insurance of the State of New York was appointed the rehabilitator. Paragraph 7 of the Order of Rehabilitation enjoins all persons from "commencing or prosecuting any actions, lawsuits or proceedings against Frontier or the Superintendent of Insurance." Paragraph 9 provides that "all parties to actions, lawsuits, and special or other proceedings in which Frontier is obligated to defend a party pursuant to an insurance policy, bond or contract or otherwise are enjoined and restrained from

[* 2]

proceeding with discovery, court conferences... trial .. for a period of 180 days of entry of this order." [The rehabilitation proceeding was subsequently transferred to the Supreme Court, Albany County (McCarthy, J.)].

The plaintiffs commenced the instant action against Mendez, Flower Port and Automotive Finance Corp. in October 2002. In February 2004, the plaintiffs moved for a default judgment against Mendez and Flower Port, to discontinue the action against Automotive Finance Corp., who was named as a defendant in error, and to direct MVAIC to answer on behalf of the Mendez and Flower Port or, in the alternative, directing a framed issue hearing to determine coverage.

By a so-ordered stipulation dated April 14, 2004, this court (Tingling, J.) granted the plaintiffs' motion to the extent of discontinuing the action against Automotive Finance Corp., directing respondent MVAIC to file a Note of Issue "to set the matter down for a framed issue hearing to determine insurance coverage" and holding the motion for a default judgment against Mendez and Flower Port in abeyance pending the hearing. No hearing was held.

In a letter to plaintiffs' attorney, dated December 8, 2004, counsel to the rehabilitator disclaimed coverage of the defendants' vehicle, asserted that any No-Fault benefits paid by Frontier in connection with the accident were paid in error and stated that "all actions against Frontier are enjoined" by the Order of Rehabilitation. Counsel added that a search of the records of the Department of Motor Vehicles reveals that the vehicle may have been covered by a policy issued by Legion Insurance Company. Legion was declared insolvent in August 2003.

The plaintiffs moved to vacate the order dated April 14, 2004, and direct MVAIC to answer for the defaulting defendants. By an order dated January 13, 2005, this court (Tingling, J.) stayed the action until such time as Frontier, which was, and still is, in rehabilitation, "is able to appear for the framed issue hearing."

Now before the court is a motion by the plaintiffs for an order (1) vacating the stay imposed by the January 13, 2005, order, (2) directing that the framed issue hearing be held and (3) adding Frontier or the Superintendent of Insurance of the State of New York as additional parties to the hearing or, in the alternative, directing MVAIC to answer on behalf of the defaulting defendants. The plaintiffs argue that since it has been seven years since the accident and they have still not been able to confirm coverage and Frontier's rehabilitation may continue indefinitely, they will be unduly prejudiced if the stay of this action is not vacated. They argue that the insolvency of an insurance carrier is tantamount to a disclaimer or denial of coverage, triggering MVAIC's involvement.

Frontier opposes the motion insofar as it seeks relief against it. Frontier argues that since it is still in rehabilitation, the stay contained in the Order of Rehabilitation is still in effect and, therefore, the plaintiffs' motion seeks relief which would violate that order.

MVAIC opposes that portion of the motion which seeks to compel it to

interpose an answer on behalf of defendants Mendez and Flower Port. MVAIC maintains that Frontier insured the vehicle on the date of the accident, and argues, contrary to the plaintiffs' contention, that the insolvency of an insurer does not trigger MVAIC coverage under the provisions of article 52 of the Insurance Law. Thus, MVAIC argues, it is simply not a proper party in this case, regardless of the outcome of Frontier's rehabilitation proceeding. MVAIC further argues that the plaintiffs failed to timely file claims within 180 days as required by Insurance Law §5208. They argue that since the defendants' vehicle was covered at the time of the accident, the forms they sent to MVAIC in November 2002 cannot be considered an uninsured motorist claim. MVAIC maintains that the plaintiffs are guilty of laches for failing to involve it the case until February 2004, when they first moved to compel MVAIC to answer for Mendez and Flower Port.

The plaintiffs' motion is granted to the extent that the stay of this action imposed by the order dated January 13, 2005, is vacated, and that the plaintiffs, defendants Mendez and Flower Port, the Superintendent of Insurance of the State of New York and MVAIC are directed to appear for a framed issue hearing before a Special Referee who will hear and determine, *inter alia*, whether the defendants' vehicle was covered by a policy of insurance at the time of the accident, whether Frontier's denial of coverage was valid and effective and whether entry of a default judgment against defendant Mendez and Flower Port is proper.

Frontier's position is correct to the extent that it argues that this court cannot vacate a stay imposed in the Order of Rehabilitation. See Insurance Law 7419; Powell v All City Insurance Co., 74 AD2d 942 (3rd Dept. 1980). In keeping with the legislative intent of Article 74, such a motion would have to be brought before the court which issued the Order of Rehabilitation. See CPLR 2221. However, since the instant action is not one against Frontier or its rehabilitator, but against one of its purported insureds, it falls within paragraph 9 rather than paragraph 7 of the Order of Rehabilitation, such that the stay was in effect for only 180 days after entry of that order.

Indeed, when the Superintendent of Insurance is appointed as a rehabilitator of an insolvent insurance company, he or she steps in to "conduct its business" Matter of All City Insurance Company, 66 AD2d 531, 534 (1st Dept. 1979). The Superintendent acts as a court-appointed receiver and "undertakes to fulfill the distressed company's obligations to its policy holders," while the "authority to decide claims against the assets of the insurer remains with the court." Serio v Hevesi, 40 AD3d 72, 74 (1st Dept. 2007); see Insurance Law §7403(a). "Any claim against an insurer in rehabilitation must be brought against the Superintendent himself as the statutory receiver of the assets." Matter of All City Insurance Company, supra at 538. Therefore, this action can proceed against these defendants, with the Superintendent of Insurance appearing on behalf of Frontier at the hearing.

MVAIC correctly argues that the insolvency of an insurer does not trigger MVAIC coverage under article 52 of the Insurance Law, since protection is provided elsewhere in the Insurance Law. Where an insurer becomes insolvent after an accident, the insurance policy itself survives and the insurer's obligations to its insured are assumed by the New York Property and Liability Insurance Security Fund (the "Security

Fund")[1] See Insurance Law 7604; Statewide Insurance Co. v Curry, 43 NY2d 298 (1977); American Transit v Barger, 13 Misc 3d 386 (Sup Ct, NY County 2006); Mejia v Santos, 10 Misc3d 831 (Sup Ct, Bronx County 2005). As such, "courts have found that where there is a motorist carrying insurance at the time of the accident and the insurance provider is later declared insolvent, the protections of the uninsured motorist provision of Insurance Law § 3420(f)(1) are not triggered." American Transit v Barger, supra at 389. Insurance Law § 3420(f)(1) provides that an uninsured motorist or vehicle exists when a motorist *is without liability insurance at the time of the accident*, a stolen vehicle is involved in an accident, unknown vehicles are involved in a hit and run accident, *or where an insurer disclaims liability or denies coverage*. American Transit v Barger, supra at 389. Furthermore, an insurer's insolvency does not constitute a disclaimer or denial of coverage of a vehicle which is insured at the time of the accident but whose insurer thereafter becomes insolvent. Such a vehicle is neither an "uninsured motor vehicle" nor "an insured motor vehicle where the insurer disclaims liability or denies coverage" within the meaning of the Insurance Law. See Statewide Insurance Co. v Curry, supra at 303.

Here, however, Frontier claims that, even before it became insolvent, it denied coverage of the defendants' vehicle, an act which, if valid and effective, would trigger MVAIC's involvement under the statutory scheme. The timeliness and validity of the denial are issues to be determined at the hearing. In any event, in light of the order dated April 14, 2004, and the facts now before the court, MVAIC is directed to appear at the framed issue hearing.

The court notes that the belated allegation of Frontier and MVAIC that the defendant's vehicle may have been insured by Legion Insurance Company is not supported by competent proof and does not effect the disposition of this motion.

For these reason and upon the foregoing papers, it is,

ORDERED that the plaintiffs' motion is granted to the extent that the stay of this action imposed by the order dated January 13, 2005, is hereby vacated, and it is further,

ORDERED that the issues of whether the defendants' vehicle was covered by a

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[1]The Security Fund was initially created as a special benefit to protect New York insureds from the insolvency of companies underwriting automobile liability insurance. See Matter of Union Indemnity Insurance Co., 92 NY2d 107, 113 (1998). In Statewide Insurance, supra, the Court of Appeals distinguished Matter of Taub (MVAIC), 31 AD2d 378 (1st Dept. 1969), a case relied upon by the plaintiff herein, which held that insolvency was tantamount to a disclaimer of liability or a denial of coverage. The Court of Appeals explained that the case gave an overly broad interpretation to [former] Insurance Law § 167(2-a), but was correctly decided on its facts since the insurer there was not licensed to do business in New York and did not contribute to the Security Fund. The plaintiffs do not allege that Frontier was not licensed to do business in New York or did not pay into the Security Fund. See also Matter of Travis (General Acc. Group), 31 AD2d 20 (3rd Dept. 1968); Pomerico v Elrac Inc., 1 Misc 3d 908(A), (Civil Ct, NY County 2004).

policy of insurance at the time of the accident, whether Frontier's denial of coverage was valid and effective and the propriety of entry of a default judgment against defendant Mendez and Flower Port are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further,

ORDERED that the balance of the plaintiffs' motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange for the reference to a special referee.

ORDERED that MVAIC shall appear at the hearing and the Superintendent of Insurance of the State of New York shall appear on behalf of Frontier Insurance Company, and it is further,

ORDERED that the plaintiff's motion is otherwise denied; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order upon all the defendants, the Superintendent of Insurance of the State of New York and MVAIC within thirty days, and it is further,

ORDERED that all parties shall appear for a status conference on October 11, 2007, at 9:30 a.m. in Part 22, 80 Centre Street, Room 139.

This constitutes the Decision and Order of the Court.

July 27, 2007

Dated: ~~**July 7, 2007**~~

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Deborah Kaplan

Deborah A. Kaplan *J.S.C.*

DEBORAH A. KAPLAN
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**