

**Mercury Insurance Group v Gaughan**

2007 NY Slip Op 34170(U)

December 21, 2007

Supreme Court, Suffolk County

Docket Number: 0020594/2006

Judge: Emily Pines

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Short Form Order

Index Number: 20594-2006

**Supreme Court - State of New York**  
**I.A.S. Term, Part 23, Suffolk County**

*Present:***HON. EMILY PINES**

Justice Supreme Court

**Original Motion Date:** 09-26-2007  
**Motion Submit Date:** 11-08-2007  
**Motion Sequence No.:** 004 MOTD  
005 MOTD  
006 MOTD

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**MERCURY INSURANCE GROUP,**

**Plaintiff,****-against-**

**DARLENE L. GAUGHAN, ELRAC, INC., DBA  
ENTERPRISE RENT-A-CAR COMPANY,  
ESTATE OF JOSEPH M. MONTERO,  
STEVEN A. MARTINEZ, INDIVIDUALLY  
AND AS ADMINISTRATOR OF THE  
ESTATE OF STEVEN J. MARTINEZ,  
DIONNE GUTIERREZ, INDIVIDUALLY  
AND AS M/N/G AMANDA M. KING, AN  
INFANT, LAURA K. BROWN, AND NANCY  
A. BROWN,**

**Defendants.**

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Attorney for Plaintiff Mercury Insurance Group

Steven F. Granville, Esq.  
Galvano & Xanthakis, PC  
150 Broadway, Suite 2100  
New York, New York 10038

Attorney for Gaughan

Darlene L. Gaughan, PRO SE  
250 Blair Road  
Walden, New York 12586

Attorney for Defendants Steven A. Martinez,  
individually and as Administrator of the Estate of Steven  
J. Martinez, Dionne Gutierrez, Individually and as  
m/n/g Amanda M. King

Sarah R. Dreyer, Esq.  
Silver, Forrester, Schisano, Lesser & Dreyer  
3250 Route 9W  
New Windsor, New York 12553

Attorney for Defendants Laura Brown & Nancy Brown

George A. Kohl, II, Esq.  
Finkelstein & Partners  
436 Robinson Avenue  
Newburgh, New York 12550

Attorney for Defendants Elrac, Inc., dba Enterprise Rent-  
a-car Company, Estate of Joseph M. Montero

John Silverstein, Esq.  
Brand, Glick & Brand  
600 Old Country Road, Suite 440  
Garden City, New York 11530

In this declaratory judgment action, the Court is considering herein the following:

1. Motion (sequence no. 4) by plaintiff for a default judgment against defendant Darlene L. Gaughan ("Gaughan");
2. Cross-Motion (sequence no. 5) by defendants Steven A. Martinez ("Martinez"), Dionne Gutierrez ("Gutierrez") and Amanda King ("King") for a declaratory judgment; and
3. Cross-Motion (sequence no. 6) by defendants Laura K. Brown and Nancy A. Brown (collectively "Brown") for a declaratory judgment.

Plaintiff commenced this action against defendants seeking a

declaration that it is not obligated to defend and indemnify defendant Gaughan in a personal injury action pending in Supreme Court, Orange County, captioned, **Steven A. Martinez, as Administrator of the Estate of Steven J. Martinez, Steven A. Martinez, individually, Amanda M. King, by her Parent and Natural Guardian, Dionne Gutierrez, and Dionne Gutierrez, individually, against Estate of Joseph M . Montero, Enterprise Rent-A-Car Company, Darlene Gaughan, Laura K. Brown and Nancy A. Brown.** Plaintiff served the Supplemental Summons and Complaint on Gaughan by personal delivery on or about March 23, 2007. Gaughan has not answered or otherwise moved with respect to the Complaint, with the exception of submitting an affidavit in opposition to plaintiff's motion for a default judgment and in support of the cross-motion for a declaratory judgment.

The underlying facts of the personal injury action are essentially undisputed. Gaughan rented a vehicle from defendant Elrac, Inc., d/b/a Enterprise Rent-A-Car Company ("Elrac") because her vehicle was being repaired. Gaughan loaned the vehicle to her daughter, Shannon Gaughan, who then permitted her boyfriend, defendant, Montero to operate the vehicle and the subject accident occurred. Although plaintiff herein initially moved for a default judgment against Gaughan on the ground that she failed to answer the Supplemental Summons and Complaint and defendants have cross-moved for a declaratory judgment, all parties have agreed in the papers that these motions can properly be considered as motions for summary judgment.

In its original moving papers, plaintiff simply argues that it is not obligated to defend and/or indemnify Gaughan because she was not the driver or owner of the vehicle involved in the April 8, 2006 accident. Plaintiff further states that Gaughan did not answer or otherwise respond to the Supplemental Summons and Complaint and is therefore entitled to a default judgment. However, Gaughan did provide an Affidavit in response to plaintiff's motion. In view of the preference for determinations of legal matters on the merits, this Court will deem Gaughan's Pro Se Affidavit as that defendant's Answer to the plaintiff's complaint.

Defendants Martinez, Gutierrez and King and defendants Brown

oppose the motion for a default judgment and cross-move for a declaratory judgment that plaintiff is obligated to defend and indemnify Gaughan in the personal injury action. Defendants argue that 11 NYCRR §60-1.1 compels a declaration that plaintiff is obligated to defend and indemnify Gaughan. Specifically, defendants refer to the following provisions:

11 N.Y.C.R.R. §60-1.1 Mandatory provisions.

An "owner's policy of liability insurance", as defined in section 311 of the Vehicle and Traffic Law, shall contain in substance the following minimum provisions or provisions which are equally or more favorable to the insured and judgment creditors, so far as such provisions relate to judgment creditors:

(d)(1)

A provision that, if the named insured is an individual or husband or wife and the policy affords insurance with respect to a private passenger automobile owned by either, such policy shall afford bodily injury and property damage liability insurance for:

(ii)

any automobile, used with the permission of the owner, and not owned by the named insured or his spouse or any resident of the same household, which is temporarily substituted for the said automobile while withdrawn from service because of breakdown, servicing, repair, loss or destruction.

Defendants argue that pursuant to this provision, plaintiff is obligated to defend and indemnify Gaughan because the Elrac vehicle was a "temporary substitute" for her vehicle, which was undisputably being repaired. Defendants argue that Montero was operating this substitute vehicle with permission of Gaughan, via her daughter and thus, plaintiff must defend and indemnify Gaughan in the personal injury action. Defendants assert that to the extent the plaintiff's insurance policy does not provide the coverage as stated above, it is not valid. Defendants also point to the provision in the plaintiff's insurance policy which affords coverage for all permissive uses of rental vehicles.

Defendants also submit an affidavit by Gaughan in which she states that on the date of the accident, her vehicle was undergoing repair work and so she rented a substitute from Elrac. She states that on the date of the accident, she gave her daughter, Shannon, permission to operate the rental vehicle and that her daughter, in turn gave permission for Montero to operate the vehicle. She states the only reason she rented the vehicle is because her vehicle, which was insured by plaintiff, was in the shop for repair, that she gave express permission to her daughter to operate the automobile and her daughter had implied permission to let Montero operate the vehicle.

In opposition to the cross-motions, plaintiff argues that defendants' reliance on 11 NYCRR 60-1.1 is misplaced. Plaintiff relies on the following provisions of the subject insurance policy:

#### GENERAL DEFINITIONS

7. "Non-owned automobile" means an automobile that is used with the express or implied permission of the owner of the automobile and is not owned by, registered to or available for the regular use by
  - a. you;
  - b. a relative;
  - c. a resident;
  - d. your non-resident spouse; or
  - e. the employer of any person listed in a, b, c or d above.

#### INSURING AGREEMENT - BODILY INJURY

We will pay damages, other than punitive or exemplary damages, for bodily injury for which an insured person becomes legally liable because of an accident arising out of the ownership or use of an owned automobile or non-owned automobile.

ADDITIONAL DEFINITION

When used in Part I, with respect to a non-owned automobile, "insured" means:

1. You;
2. relatives listed as drivers on the declarations provided that such relative or such relative spouse does not own an automobile other than an automobile listed in the declarations.

Plaintiff argues that the insurance policy complies with the provisions of the **NYCRR** and that the plain language of the policy demonstrates it is not required to defend and indemnify Gaughan. Specifically, plaintiff asserts that pursuant to the express terms of the policy, Montero was not an "insured person" with respect to a "non-owned automobile" because he was not a relative of a driver listed on the declarations. Plaintiff also notes that Montero was insured by GMAC, who has tendered its policy limits in the underlying personal injury action. Plaintiff argues that the subject insurance policy complies with the NYCRR provisions in that it provides coverage for temporarily substituted or non-owned vehicles, albeit only when such non-owned vehicle is driven by a named insured. Based on these arguments, plaintiff argues that it is entitled to summary judgment declaring that it is not obligated to defend or indemnify Gaughan in the underlying personal injury action.

In reply, defendants reiterate that the subject insurance policy does not comply with the insurance regulations contained in the **NYCRR**. Defendants assert that the **11 NYCRR §60-1.1** requires coverage for a temporarily substituted vehicle to be equivalent to that of the insured vehicle and not limited as a "non-owned" vehicle to the policy holder and their relatives. Defendants argue that because Gaughan's vehicle was unequivocally in the shop being repaired, the rental vehicle stood in the place of the insured vehicle as an owned vehicle and any person using such vehicle with permission, express or implied, of the owner, is an insured person. Therefore, they assert that plaintiff be obligated to defend and indemnify Gaughan.

The Court agrees with defendants herein that the plaintiff's insurance policy does not comply with the mandates of 11 N.Y.C.R.R. §60-1.1. That regulation unequivocally requires that insurance policies contain provisions insuring temporary substitute vehicles, which are being used because the vehicle listed in the insurance policy is out of service due to repair, breakdown, etc. The Second Department has recognized that:

The purpose of substitution clause is to afford continuous coverage to the insured during the period that a vehicle scheduled under the policy is out of commission, and at the same time limit the risk of the insurer to one operating automobile at a time for a single, fair premium. The protection is limited to the occasional or infrequent use of a vehicle not owned by the insured; it is not intended as a substitute for insurance on vehicles regularly used by the insured.

***Elrac, Inc., v. Mehlinger***, 258 A.D.2d 500, 684 N.Y.S.2d 625 (2d Dept. 1999)(internal citations omitted).

Here, the policy at issue does not afford coverage for a "substitute vehicle", rather only for non-owned vehicles, and in limited instances, to wit, coverage only for the named insured and relatives. That is, the policy, in the "non-owned vehicle" coverage provision, does not cover those required to be covered under the regulation. The regulation clearly mandates that coverage for "**any automobile, used with the permission of the owner**" and which is being used as a temporary substitute for the covered automobile afford bodily injury and property damage protection. Gaughan rented the car from Elrac because her car was being repaired and permitted her daughter to use the vehicle. Her daughter, in turn, permitted defendant Montero to operate the vehicle, thus, Montero had implied permission to use the vehicle. Plaintiff does not dispute that Montero had permission to operate the motor vehicle and since Gaughan had permission from Elrac to operate the vehicle, Elrac is deemed to have constructively consented to Montero's use of the vehicle. ***Lancer Insurance Co., v. Republic Franklin Insurance Co.***, 304 A.D.2d 794, 759 N.Y.S.2d 734 (2d Dept. 2003). ***See also, Murdza v. Zimmerman***, 99 N.Y.2d 375, 756 N.Y.S.2d 505, 786 N.E.2d 440 (2003). In ***Murdza***, the Court of Appeals recognized that where the lessee of a rental vehicle permits another person to

operate the vehicle, the rental company is deemed to have constructively consented to such use, even in a situation where such use violates the terms of the rental agreement executed by the lessor. Such "constructive permission" arises from the concern is that by restricting a rental company's liability as owner of the vehicle to the negligence of authorized drivers could leave an injured victim without recourse.

Based upon the foregoing, defendants are granted summary judgment declaring that plaintiff is obligated to defend and indemnify Gaughan in the underlying personal injury action. Plaintiff's motion for a default judgment and/or summary judgment is denied. The cross-motions of defendant for summary judgment are granted in accordance with the determination herein.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: December 21, 2007  
Riverhead, New York

  
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EMILY PINES  
J. S. C.