

**Cicero v Great Am. Ins. Co.**

2008 NY Slip Op 30032(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 0600737/2005

Judge: Joan Madden

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

HON. JOAN A. MADDEN

PRESENT:

J.S.C.

PART 11

Justice

Index Number : 600737/2005

CICERO, LYDIA

VS.

GREAT AMERICAN INSURANCE

SEQUENCE NUMBER : # 003

AMEND

INDEX NO. 60073725

MOTION DATE

MOTION SEQ. NO. #023

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is determined in accordance with the annexed decision and order.*

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

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 3, 2008

HON. JOAN A. MADDEN s.c.

J.S.C.

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: PART 11

-----X  
LYDIA CICERO AND MARK CICERO,

Plaintiffs,

INDEX NO. 600737/05

-against-

GREAT AMERICAN INSURANCE COMPANY,  
AMERICAN NATIONAL FIRE INSURANCE  
COMPANY, and GREAT AMERICAN INSURANCE  
COMPANY OF NEW YORK,

Defendants.

-----X

JOAN A. MADDEN, J.:

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Great American Insurance Company, American National Fire Insurance  
Company, and Great American Insurance Company of New York (collectively "Great  
American") move for an order pursuant to CPLR 3025(b) granting leave to amend their answer  
to add the defense of res judicata, and an order pursuant to CPLR 3212 granting summary  
judgment dismissing the complaint on the grounds of res judicata. The motion is denied in its  
entirety.

Under CPLR 3025(b), motions to amend are freely granted in the absence of prejudice or  
unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit.  
See Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 NY2d 166 (1989). To  
demonstrate merit, the "proponent must allege legally sufficient facts to establish a prima facie  
cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent  
with the legal theory relied on by the proponent, the proposed amendment must fail as a matter of

law.” Daniels v. Empire-Orr, Inc., 151 AD2d 370, 371 (1<sup>st</sup> Dept 1989). When the proponent meets this initial burden, the “merit of the proposed amended pleading must be sustained . . . unless the alleged insufficiency or lack of merit is clear and free from doubt.” Id.

The doctrine of res judicata or “claim preclusion” provides that “as to parties in a litigation . . . a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.” Singleton Management, Inc. v. Compere, 243 AD2d 213, 215 (1<sup>st</sup> Dept 1998)(quoting Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481[1979]). Under the transactional approach to res judicata adopted by New York courts, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transaction are barred, even if based upon different theories or if seeking a different remedy.” Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 AD2d 1, 5 (1<sup>st</sup> Dept 2000)(quoting O’Brien v. City of Syracuse, 54 NY2d 353, 357 [1981]).

In the underlying action, the Ciceros sued Western Beef for damages for personal injuries Lydia Cicero sustained when she slipped and fell in a supermarket owned by Western Beef (Lydia Cicero and Mark Cicero v. Western Beef, Inc., Index No. 21716-98, Supreme Court, Queens County). Western Beef appeared in that action through counsel retained by its primary insurer Zurich North American Insurance Group. Great American, Western Beef’s excess carrier, disclaimed coverage based its failure to receive timely notice from Western Beef. As a result, Western Beef commenced an action against Great American and other defendants for a declaratory judgment as to the rights and obligations of the parties under the excess insurance policy issued by Great American (Western Beef, Inc. v. J&H Marsh & McLennan, Inc., Johnson

& Higgins, Marsh USA, Inc., Great American National Fire Insurance Company, Great American Insurance Company of New York, Index No. 9364/04, Supreme Court, Queens County).

In the meanwhile, the Ciceros settled their personal injury action with Western Beef, and as part of the settlement Western Beef assigned to the Ciceros, its rights against Great American and the other defendants in the declaratory judgment action. The Ciceros' counsel then took over the prosecution of Western Beef's declaratory judgment action. The Ciceros also commenced the instant action against Great American, pursuant to Insurance Law §3420(b)(1), which permits a injured party to maintain a direct action against an insurer.

Now, Great American contends that it should be permitted to amend its answer to add the defense of res judicata, based the August 14, 2006 order of the Hon. Weiss which dismissed the complaint in Western Beef's declaratory judgment action. Judge Weiss held that Great American did not receive timely notice of the claim from Western Beef and issued a judgment declaring that "Great American has no obligation to satisfy the judgment in the underlying action" Western Beef had argued that timely notice to its insurance broker constituted timely notice to Great American, but Judge Weiss found that Western Beef had failed to submit any competent proof that the broker was also the agent of Great American. In seeking to assert a res judicata defense, Great American argues that the Ciceros' claims in the instant action arise out of the same transaction or series of transaction as the claims asserted in Western Beef's declaratory judgment action, which the Ciceros "controlled, and are therefore barred by res judicata since the only difference between the claims asserted in both action is that they were brought in the name of different parties."

As indicated above, it is not disputed that when the underlying personal injury action was

settled, Western Beef assigned to the Ciceros its rights against Great American and the other defendants in the declaratory judgment, and that the Ciceros' counsel assumed the prosecution of Western Beef's claims. The instant action, however, is separate and distinct from Western Beef's declaratory judgment action, as here the Ciceros are asserting their own independent statutory rights under Insurance Law §3420(b)(2), which permits them, as injured parties, to maintain a direct action against Great American on the policy of excess insurance provided to the judgment debtor, Western Beef. See D'Arata v. New York Central Mutual Fire Insurance Co., 76 NY2d 659, 665 (1990). Under Insurance Law §3420(b)(1), notwithstanding Western Beef's failure to give timely notice to Great American, the Ciceros, as the injured parties, have a right to give notice themselves, thereby preserving their separate statutory right to proceed directly against Great American. See Allstate Insurance Co. v. Marcone, 29 AD3d 715, 717 (2<sup>nd</sup> Dept), lv app dism 7 NY3d 841 (2006); Appel v. Allstate Insurance Co., 20 AD3d 367 (1<sup>st</sup> Dept 2005).

Although "a valid final judgment bars future actions between the same parties on the same cause of action, a subsequent action will not be barred by res judicata where the nature or object of the second action is distinct from that in the prior action in which the judgment was rendered." GTFM, LLC v. Nagy, 18 AD3d 266, 268 (1<sup>st</sup> Dept 2005)(quoting Purcell v. Regan, 126 AD2d 849 [3<sup>rd</sup> Dept], app den 69 NY2d 613 [1987]). Since the nature of instant action is separate and distinct from Western Beef's declaratory judgment action, the instant action is not barred based on the Ciceros' failure to assert their Insurance Law §3420(b)(2) claims in the Western Beef action.

Thus, as the proposed defense of res judicata is totally lacking in merit, Great American is not entitled to amend its answer and is not entitled to summary judgment.


Accordingly, it is hereby

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on February 7, 2008 at 3:30 pm, Part 11, Room 351, 60 Centre Street.

DATED: January 3, 2008

ENTER:

  
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J.S.C.

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE