

O'Donnell v Silverstein

2008 NY Slip Op 30061(U)

January 11, 2008

Supreme Court, Suffolk County

Docket Number: 0010721/2004

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-13-07
ADJ. DATE 8-27-07
Mot. Seq. # 006 - MG
007 - XMG

-----X
KATHLEEN O'DONNELL, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 STEVEN S. SILVERSTEIN, ROBERT :
 SILVERSTEIN and GEICO INSURANCE :
 COMPANY, :
 :
 Defendants. :
-----X

GREGORY JAMES VOLPE, ESQ.
Attorneys for Plaintiff
300 Old Country Road, Suite 311
Mineola, New York 11501

RUSSO & APOZNANSKI
Attorneys for Defendant Robert Silverstein
875 Merrick Avenue
Westbury, New York 11590

MONTFORT, HEALY, McGUIRE, et al.
Attorneys for Defendant Geico Insurance
1140 Franklin Avenue, P.O. Box 7677
Garden City, New York 11530-7677

DeSENA & SWEENEY, LLP
Attorneys for Defendant Steven Silverstein
1383 Veterans Memorial Highway, Suite 32
Hauppauge, New York 11788

Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 32; Answering Affidavits and supporting papers 33 - 43; Replying Affidavits and supporting papers 44 - 45; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that, after careful review of the court file, the Court, *sua sponte*, hereby recalls and vacates its prior order dated December 6, 2007; and it is further

ORDERED that the Court now issues the following order in its place and stead:

ORDERED that this motion by defendant Robert Silverstein for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that this cross motion by defendant GEICO Insurance Company ("GEICO") for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

O'Donnell v Silverstein

Index No. 04-10721

Page No. 2

On August 24, 2003, plaintiff Kathleen O'Donnell and defendant Steven Silverstein ("Steven") were involved in a motor vehicle accident on Route 27A, at or near its intersection with Bellview Avenue, County of Suffolk, New York. At the time of the accident, Steven was operating a vehicle owned by plaintiff, and plaintiff was riding as the front seat passenger in such vehicle. Plaintiff, thereafter, commenced a personal injury action, index number 10721-04, against Steven to recover damages for injuries she sustained as a result of the subject motor vehicle accident. Plaintiff also filed the instant action, index number 23446-04, against defendants GEICO, Robert Silverstein, and Steven Silverstein seeking a judgment declaring that Steven was a resident of Robert Silverstein's household at the time of the subject accident and, therefore, GEICO is obligated to defend and indemnify Steven in connection with the underlying personal injury action. Robert Silverstein is the father of Steven Silverstein and is insured under an automobile insurance policy issued by GEICO in the amount of \$100,000. By court order dated April 4, 2005 (Emerson, J.), both actions were consolidated under index number 10721-04 with the amended caption, *Kathleen O'Donnell, plaintiff, against Steven S. Silverstein, Robert Silverstein, and GEICO Insurance Company, defendants.*

Robert Silverstein now seeks summary judgment on the claim against him on the basis that Steven Silverstein did not reside in his home at the time of the subject accident. Defendant submits copies of the pleadings, correspondence to GEICO, dated September 11, 1998 and May 15, 2000 from his attorney, Michael L. Weinstein, and his wife, Robin Silverstein; and copies of the deposition transcripts of plaintiff and defendants Robert and Steven Silverstein.

Defendant GEICO cross moves for summary judgment on the basis that it is not obligated to indemnify in connection with the subject motor vehicle accident, because Steven does not qualify as an insured motorist under the insurance policy. More particularly, defendant GEICO asserts that under its policy with Robert Silverstein, "you" and "your relatives" is defined as "you" being the policyholder and his or her spouse, if occupying the same household and "relatives" is defined as "a person related to [the insured] who resides in [the insured's] household," and no proof has been submitted to show that Steven was a member of Robert Silverstein's household at the time of the accident. Defendant GEICO further asserts that since the plaintiff's claim falls outside the scope of its coverage with Robert Silverstein, plaintiff's claim that it failed to timely disclaim is inapplicable. Defendant submits, in support of its cross motion, the pleadings and a copy of Robert Silverstein's automobile insurance policy in effect on the day of the accident.

Plaintiff opposes both motions on the grounds that there is a question of fact as to whether Steven Silverstein was a member of Robert Silverstein's household on the day of the accident. In opposition, plaintiff submits photographs of the subject vehicle, a copy of defendant Silverstein's effective policy at the time of the accident, and a copy of plaintiff's deposition transcript. In addition, plaintiff submits a copy of an employment application for Steven Silverstein filed with the Town of Brookhaven, a copy of John Jay La Valle's letter to Steven authorizing employment with the Town of Brookhaven, a copy of Steven Silverstein's driver's license and a copy of a letter stating Steven's address while employed with Uno Chicago Grill.

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden will then shift to the nonmoving party to demonstrate

O'Donnell v Silverstein

Index No. 04-10721

Page No. 3

that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]) and the court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]).

It is well established that the standard for determining residency for purposes of insurance coverage must be predicated on something more than temporal or physical presence and requires at least some degree of permanence and intention to remain (*see, Matter of Aetna Cas. & Sur. Co. v Gutstein*, 80 NY2d 773, 587 NYS2d 268 [1992]; *Linder v Wilkerson*, 2 AD3d 500, 769 NYS2d 551 [2003]; *Government. Empls. Ins. Co. v Paolicelli*, 303 AD2d 633, 756 NYS2d 653 [2003]). Furthermore, even where a person has used a particular address for the purposes of his or her driver's license, voter's registration card, or the filing of tax returns, those incidents, standing by themselves, are insufficient to establish residence (*see, Matter of State Farm Mut. Auto. Ins. Co. v Nicoletti*, 11 AD3d 702, 784 NYS2d 702 [2004]; *Matter of American. Natl. Prop. & Cas. Co. v Chulack*, 265 AD2d 550, 697 NYS2d 153 [1999]).

Robert Silverstein testified at his examination before trial that he and his wife, Robin, live at 22 Ashland Street, Mount Sinai, New York. He testified that his son, Steven, did not reside in his household at the time of the subject accident. He testified that while his son does visit their home, the longest Steven has stayed at their house since moving out in December 1996 or January 1997 was approximately three days. Robert Silverstein testified that Steven uses 22 Ashland Street as his mailing address for his driver's license, because he moves around a lot. He testified that he maintains an automotive insurance policy with GEICO, which states that he and his wife are the insured under the policy, and that his son was removed from such policy after he moved out of the home in 1996 or 1997. Robert Silverstein testified that after he received a letter from GEICO informing him that his insurance premiums were going to increase, because Steven had previously been involved in an accident, his attorney sent a letter, dated September 11, 1998, to GEICO directing that Steven be removed from the automobile insurance policy, as he no longer resided with his parents. Robert Silverstein testified that following the correspondence from his attorney, GEICO reinstated his insurance policy at the previous premium level and informed him that the September 11th letter would be kept on file. Robert Silverstein testified that on May 15, 2000, his wife sent GEICO a fax, along with two of their son's pay stubs, as proof that Steven did not reside in their home, after GEICO again attempted to raise their premiums on the basis that Steven resided in their home. Robert Silverstein further testified GEICO never once informed him or his wife that it was rejecting any of the letters sent to it regarding Steven's residency.

Steven testified at his examination before trial that his address is 22 Hayrick Lane, Commack, New York, and that he had lived at that address since 2002. Steven testified that he does not reside in his parents' home and has not done so since he was 18 years old. Steven testified that after he was convicted of burglary in either 1996 or 1997, his father asked him to leave the home. Steven testified that he does visit his parents' home, but he does not have a regular visitation schedule. He testified that

he continues to use his parents' address for employment and tax purposes, because he moved around a lot after leaving his parents' residence. He testified that in order to prevent having to change his address on his driver's license every time he moved, he never informed the Department of Motor Vehicles of a change of address and continued to use his parents' address for his license. Steven testified that his father informed him that he was being removed from his fathers' auto insurance policy, and that he was not allowed to drive any of his father's vehicles. He further testified that he provided his father with either a pay stub or phone bill as proof of residence for the insurance company in order to remove him from his father's insurance policy.

Plaintiff O'Donnell testified that she and Steven had been friends for about five years, and that during those five years she had picked Steven up and dropped him off in front of his parents' house on numerous occasions. Plaintiff testified that Steven always was waiting outside the house, in front of the stop sign, when she would pick him up and that she was unaware that Steven had an address other than his parents' home. In fact, plaintiff testified that Steven informed her that he lived with his parents. Plaintiff further testified that Steven told her that he had been "kicked out" of his parents house, because of the subject accident, and that she had never phoned his parents' house.

Based upon all of the adduced evidence and the foregoing authority, the Court finds that Robert Silverstein has met his burden on the motion by demonstrating prima facie that Steven Silverstein was not a resident of his household on the date of the subject accident (*see, Government. Empls. Ins. Co. v Paolicelli, supra; Matter of Metro. Prop. & Liab. Co. v Feduchka*, 135 AD2d 715, 522 NYS2d 616 [1987]). Plaintiff, in opposition, failed to present any evidence that would raise a triable issue of fact regarding Steven's residence (*see generally, Zuckerman v City of New York, supra; Appell v State Farm Ins. Co.*, 292 AD2d 407, 739 NYS2d 182 [2002]). While plaintiff may have testified that during the five years that she has known Steven she has picked him up and dropped him off on numerous occasions at his parents' house, she also testified that Steven always was waiting for her outside of the house and that she had only been inside of his house once or twice. Thus, plaintiff's testimony failed to refute the testimony of Steven and Robert Silverstein that Steven has not been a member of his parents' household since at least January 1997. Moreover, the fact that Steven's driver's license contained his parent's address or that he used his parents' address for tax or employment purposes is insufficient as a matter of law to demonstrate that Steven resided with his parents at the time of the subject accident (*Matter of State Farm Mut. Auto. Ins. Co. v Nicoletti, supra; Matter of American. Natl. Prop. & Cas. Co. v Chulack, supra*). Furthermore, in reviewing the record, the evidence failed to demonstrate that Steven, although he continued to visit with his parents, maintained a residence or had any intent to remain in his parents' household at the time of the accident (*Government. Empls. Ins. Co. v Paolicelli, supra; Hollander v Nationwide Mut. Ins. Co.*, 60 AD2d 380, 401 NYS2d 336 [1978]; *cf., Nationwide Ins. Co. v Allstate Ins. Co.*, 181 AD2d 1022, 581 NYS2d 955 [1992]). Accordingly, defendant Robert Silverstein's motion for summary judgment is granted.


GEICO's cross motion for summary judgment in its favor on the declaratory judgment claim also is granted. Defendants have demonstrated that Steven had established a different residence and was no longer a member of Robert Silverstein's household in August 2003 (*see, Dutkanych v United States Fid. & Guar. Co.*, 252 AD2d 537, 675 NYS2d 623 [1998]). Steven, therefore, was not an insured motorists under the automobile liability insurance policy issued by GEICO to Robert Silverstein (*see, Government. Empls. Ins. Co. v Paolicelli, supra; Dutkanych v United States Fid. & Guar. Co.*,

O'Donnell v Silverstein
Index No. 04-10721
Page No. 5

supra). Thus, the Court declares that GEICO is not obligated to defend and indemnify in the underlying personal injury action filed by the plaintiff (*Matter of Aetna Cas. & Sur. Co. v Gutstein, supra; Government. Empls. Ins. Co. v Paolicelli, supra; Matter of American. Natl. Prop. & Cas. Co. v Chulack, supra*). Finally, in view of the lack of coverage, we need not address whether the notice of claim was timely (*Matter of Allstate Ins. Co. v DiBello*, 40 AD3d 401, 835 NYS2d 576 [2007]).

This action is severed and continued as against defendant Steven Silverstein only.

Dated: JAN 11 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION