Cardinal Frgt .Carriers, Inc. v Kingsway Gen. Ins. Co.
2008 NY Slip Op 30546(U)
February 19, 2008
Supreme Court, Nassau County
Docket Number: 4007-06/
Judge: Michele M. Woodard

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CARDINAL FREIGHT CARRIERS, INC., now known as CARDINAL LOGISTICS MANAGEMENT CORPORATION,
Plaintiff,

-against-

KINGSWAY GENERAL INSURANCE COMPANY, PINDER TRANSPORT LIMITED, SHANE T. ZANDBERGEN and LAURIE GUERRA,
Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 14007/06
Motion Seq. Nos: 01,02 & 03

DECISION AND ORDER

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In Motion Sequence Number One, Defendants Kingsway General Insurance Co. ("Kingsway"), Pinder Transport Limited ("Pinder") and Shane T. Zandbergen ("Zandbergen") move to dismiss Plaintiff Cardinal Freight Carriers, Inc. now known as Cardinal Logistics Management Corp.'s ("Cardinal") first and second causes of action pursuant to CPLR §3211(a)(8) and CPLR §3211(a)(7) respectively.

Cardinal's first cause of action for arbitration as to the $50,000 payment has been withdrawn by Cardinal (see Exhibit A annexed to Ms. Guerra's reply affidavit dated December 8, 2006).

In Motion Sequence Number Two Defendant Laurie Guerra ("Ms. Guerra") cross moves to dismiss Cardinal's cause of action as to her on the grounds that Ms. Guerra's defense is based on documentary evidence, Cardinal lacks the legal capacity to sue Ms. Guerra and Cardinal does not have a cause of action as to Ms. Guerra.

In Motion Sequence Number Three, Cardinal cross-moves pursuant to CPLR §3212, for summary judgment as to Cardinal's third cause of action against Ms. Guerra.

The herein matter involves insurance benefits paid by Cardinal to Ms. Guerra. Ms. Guerra was involved in a vehicle collision involving two tractor trailers which occurred on September 4, 2003 at Route 290 and its intersection with Delaware Avenue in Tonowanda, N.Y. The offending vehicle was operated by Zandbergen (Zandbergen's employer was Midnight Hustler Express, Inc., a non-party herein), owned by Pinder and insured by Kingsway. At the time of the collision, Ms. Guerra was employed by Cardinal as a truck driver of one of Cardinal's vehicles. Cardinal had a self-insured retention of at least $50,000. Thus, Cardinal paid Ms. Guerra $50,000 for medical expenses and lost wages under New York's No-Fault system. Subsequently, Ms. Guerra brought an action against Pinder and Zandbergen and others and won a $1 million judgment (see Exhibits A-E annexed to Defendants' motion). The money was paid out to Ms. Guerra by Kingsway. Cardinal sought the recovery of the $50,000. Pursuant to Ms. Guerra's settlement agreement and release, she agreed to hold Pinder and Zandbergen harmless as to any liens (see Exhibit A annexed to Kingsway's, Pinder's and Zandbergen's motions). The issue herein is whether Pinder and Zandbergen, the owner and operator, respectively, of the offending tractor/trailer insured by Kingsway are "covered" persons in accordance with Insurance Law § 5102(j).

In its second cause of action against all the Defendants, Cardinal seeks the $50,000 it paid

to Ms. Guerra. Defendants argue Pinder and Zandbergen were not "covered" persons and Cardinal is already entitled to recover by law with no need for the herein action against Defendants Kingsway, Pinder and Guerra. Ms. Guerra contends the parties involved in the collision of September 4, 2003 were all "covered" persons and Cardinal has no claim for $50,000 as to Ms. Guerra.

It is not disputed that Kingsway is a Canadian corporation. Pinder was a Canadian corporation and Zandbergen was a Canadian resident at the time of the collision.

Usually, an automobile insurer which has paid first party benefits to it's insured after the insured's vehicle is involved in any injury-causing accident with another vehicle acquires a lien by operation of law against the insured's tort settlement with the offending vehicle's owners the instant the settlement is made (*General Accident Insurance v Roberts*, 266 AD2d 791[3d Dept 1999]; *see Dymond v Dunn*, 148 AD2d 56[3d Dept 1989]).

Insurance Law § 5104(b) provides that in any action by a covered person (here, Ms. Guerra) against a non-covered person or persons for personal injuries arising out of the use or operation of a motor vehicle, an insurer which paid first party benefits on account of such injuries has a lien against any recovery to the extent of the benefits paid to the covered person (*Marshall v Nationwide Mutual Insurance Co.*, 166 AD2d 852[3d Dept 1990]).

Thus, even where a policy issued by a Canadian insurance company did not afford no-fault benefits, as long as the policy did provide liability coverage in excess of the required by VTL § 311(4)(a) and that Canadian insurance company was authorized to do business in New York State and was, thus, an authorized insurer at the time of the collision, the Canadian vehicle owner and the operator of the insured vehicle are deemed "covered" (*Fireman's Insurance Co. of Newark,*

N.J. v Le Compte, 194 AD2d 918[3d Dept 1993]).

Insurance Law § 5104(b) provides, in pertinent part, that:

> "In any action by or on behalf of a covered person against a non-covered person where damages for personal injuries arising out of the use or operation of a motor vehicle . . . may be recovered, an insurer which paid or is liable for first party benefits on account of such injuries has a lien against any recovery to the extent of benefits paid or payable by it to the covered person."

Cardinal paid Ms. Guerra $50,000 for her injuries, lost wages, etc., due to the September 4, 2003 collision, but she later recovered a judgment for over $1,000,000 from Kingsway due to the Pinder/Zandbergen collision. If Pinder/Zandbergen are deemed "uncovered," Cardinal may recover the $50,000 on its lien pursuant to Insurance Law § 5104(b).

Whether the owner and operator of the Canadian vehicle are "covered" persons so that the lien provision is inapplicable, depends, in part, upon whether the Canadian vehicle had, in effect, the financial security required by VTL § 5102; proof of financial security is defined as proof of ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance (*Marshall v Nationwide Mutual Insurance Co., supra*).

Thus, if the insurance policy covering the Canadian vehicle had a liability policy with limits in excess of the minimum prescribed by VTL § 311(4)(a), the vehicle has the required financial security in effect, making the owner and operator "covered persons" irrespective of whether the Canadian liability policy provided no fault benefits; however, an additional requirement is that the policy must be issued by an authorized insurer or by an unauthorized insurer which has filed a form consenting to service of process and declaring that its policy shall be deemed to be varied to

comply with the requirements of VTL, Article 6 (*see Marshall v Nationwide Mutual Insurance Co., supra*).

Here, the record reflects the Canadian tractor-trailer owned by Pinder and driven by Zandbergen had insurance policy coverage in excess of the minimum set forth by VTL § 311(a)(4).

An owner and operator of a motor vehicle registered in a Canadian province and insured for liability by a Canadian insurer was not a "covered" person within the meaning of the Comprehensive Motor Vehicle Insurance Reparations Act wherein the liability policy covering the Canadian vehicle was issued by an unauthorized insurer which had not filed a required form consenting to service of process and declaring that its policy be deemed to vary to comply with the requirements of the Act (*Marshall v Nationwide, supra*).

However, nowhere in the record herein does the court find a declaration by the insurance company that it had filed a form consenting to service of process and declaring that the policy in issue was deemed to comply with the requirements of VTL, Article 6.

The Court notes that Alf Pinder, the owner of Pinder Transportation, signed documents (see Exhibit C annexed to Ms. Guerra's responding affidavit) indicating that he, Pinder, declared that the requirements for his vehicle as to insurance requirements in the various jurisdictions in which travel by his, Pinder's vehicles, were intended were met. However, from the context of the information, the insurance needed would be the minimum amount for a gross vehicle weight of 80,000 pounds to be operated on New York State highways. "Covered" or "uncovered" was not considered in documents in that exhibit. Mr. Pinder is not the insurance company, Kingsway, is its authorized representative.

The affidavit of Ms. Bridget Nelson, a representative of Kingsway, is set forth as Exhibit F

to Defendants' motion. Ms. Nelson states that Kingsway is not a signatory to the New York Comprehensive Automobile Insurance Reparations Act (basically, No-Fault Provision in New York State). Quite frankly, the terms of Ms. Nelson's affidavit indicate that Kingsway has nothing to do with New York State. There is no indication from Ms. Nelson's affidavit that Kingsway had filed the form consenting to service or process.

Thus, a potentially unauthorized insurer, Kingsway, would have to have filed a form consenting to service of process (in New York State) and also filed a form declaring that its policy (here issued to Pinder) shall be deemed to be varied so as to comply with the requirements of VTL Article 6 (*Marshall v Nationwide Insurance Co., supra*). Without the filing of this form by Kingsway, the insurer, the owner, Pinder and the operator, Zandbergen, are not "covered" persons. They are "uncovered" persons. Thus, Cardinal has a lien against Ms. Guerra for the $50,000 paid to her for lost wages, medical expenses, etc., before she received her $1 million settlement from Kingsway.

Generally, on a motion to dismiss pursuant to CPLR §3211(a)(7), the material allegations contained in the complaint are deemed true as are all reasonable inferences implied from such allegations (*Rovello v Orogino Realty Co.*, 40 NY2d 633[1976]). If the factual allegations taken together give notice of what is intended to be proved and manifest a cause of action cognizable at law, the motion must be denied (*512 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144[2002]; *Guggenheimer v Ginzburg*, 43 NY2d 268[1977]).

While it is true that on a motion pursuant to CPLR §3211(a)(1), (7), allegations are to be liberally construed and documentary evidence must conclusively dispose of a Plaintiff's claim (*Manfro v McGivney*, 11 AD3d 662[2d Dept 2004]; *Jorjill Holding Ltd. v Grieco Associates, Inc.*,

6 AD3d 500[2d Dept 2004]), it is also true that "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Mass v Cornell University*, 94 NY2d 87, 91 [1999]; *Morris v Morris*, 306 AD2d 449[2d Dept 2003]; *Giustino v County of Nassau*, 306 AD2d 376[2 Dept 2003]; *Tal v Malekan*, 305 AD2d 281[1st Dept 2003]; *Sesti v North Bellmore Union Free School Dist.*, 304 AD2d 551[2 Dept 2003]; *Olszewski v Waters of Orchard Park*, 303 AD2d 995[4th Dept 2003]; *Doria v Masucci*, 230 AD2d 764[2d Dept 1996]; *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233[1st Dept 1994]). Defendants Kingsway, Pinder and Zandbergen have met their respective burden, Ms. Guerra has not.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320[1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News,* 211 AD2d 626[2d Dept 1995]). Thus, the burden of the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio,* 81 NY2d 1062[1993]).

Cardinal has met its burden.

Based on the above standards, the motion of Kingsway, Pinder and Zandbergen, to dismiss Cardinal's second cause of action (the first cause of action is deemed **moot** by Cardinal's previously noted withdrawal of Cardinal's request to arbitrate) is **granted**. The cross motion of

Ms. Guerra to dismiss Cardinal's third cause of action pursuant to CPLR 3211(a)(1), (3) and (7) is **denied**, and Cardinal's cross motion for summary judgment as to Ms. Guerra is **granted**.

A hearing shall be held to determine the exact amount of monies owed Cardinal by Ms. Guerra. It is hereby **ORDERED**, that all remaining parties are directed to appear.

This matter is referred to the Calendar Control Part (CCP) for a hearing on the issue of reimbursement of medical expenses to be held on March 20, 2008 at 9:30 a.m.. Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

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

DATED: February 19, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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