

**Goglia v Atlantic Mut. Ins. Co.**

2008 NY Slip Op 31986(U)

July 8, 2008

Supreme Court, New York County

Docket Number: 0120527/2003

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Index Number : 120527/2003

GOGLIA, RICHARD

vs

ATLANTIC MUTUAL INSURANCE

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 120527/03  
 MOTION DATE 5/22/08  
 MOTION SEQ. NO. 005  
 MOTION CAL. NO. 3

The following papers, numbered 1 to 1, were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits A-D  
 Answering Affidavits – Exhibits A-E  
 Replying Affidavits – Exhibits A-C

| PAPERS NUMBERED |
|-----------------|
| <u>1-2</u>      |
| <u>3</u>        |
| <u>4</u>        |


Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision, order, and judgment.

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**MICHAEL D. STALLMAN**  
 J.S.C.

Dated: 7/8/08

  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X  
RICHARD GOGLIA,

Plaintiff,

Index. No. 120527/03

ORDER and JUDGMENT

v.

ATLANTIC MUTUAL INSURANCE CO.,

-----  
MICHAEL D. STALLMAN, J.S.C.

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Motion sequence numbers 005 and 006 are consolidated for disposition.

Plaintiff Richard Goglia moves pursuant to CPLR 3212 for summary judgment on the issue of his entitlement to Supplementary Uninsured/Underinsured Motorist (SUM/UM) coverage under an insurance policy issued by defendant, Atlantic Mutual Insurance Co. (Atlantic Mutual). By separate motion, Atlantic Mutual moves pursuant to CPLR 3212 or 3211 (a) (7) to dismiss the complaint on the ground that it is barred by the arbitration and/or notice provisions in the subject insurance policy. In the alternative, Atlantic Mutual seeks an order compelling arbitration of this dispute.

BACKGROUND

On January 20, 2003, while in the course of his employment, Goglia was involved in a motor vehicle accident. At the time of the accident, Goglia was making a delivery in New Jersey in his employer's truck when another vehicle on the road cut him, causing Goglia to lose control of the vehicle and strike a pole which fell across the cab of the truck. As a result of the accident Goglia sustained serious injuries including the amputation of his right leg.

It is undisputed that the insurance policy covering this accident was issued by defendant to plaintiff's employer and that plaintiff is covered under the policy by virtue of his status as an employee. The policy included SUM coverage in the amount of one million dollars (\$1,000,000) per accident. Goglia's former attorney sent a March 3, 2003 letter to Atlantic Mutual, return receipt requested, advising the insurer of Mr. Goglia's SUM claim. Atlantic Mutual acknowledged receipt of the letter. (Harper 3/26/08 Aff in Opp, Ex. A)

### PROCEDURAL HISTORY

#### A. The Related Actions

On December 18, 2003, Goglia commenced this action seeking coverage under the SUM/UM endorsement of the subject policy.

Thereafter, on September 29, 2004, Atlantic Mutual commenced a declaratory judgment action against Goglia, captioned *Atlantic Mutual Insurance Co. v. Richard Goglia*, Index No. 113868/04, for a declaration that there was no coverage under the SUM endorsement of the subject policy (the declaratory judgment action).

In March, 2005, Atlantic Mutual moved for summary judgment in the declaratory judgment action seeking a declaration that Goglia was not entitled to SUM coverage. Goglia cross moved for attorney's fees. The motion court (Heitler, J.) granted Atlantic Mutual's motion and Goglia appealed the motion court's order. On October 27, 2007, the First Department reversed the motion court's decision, holding that Goglia "is entitled to a judgment declaring plaintiff liable for uninsured motorist coverage up to the full measure of the policy endorsement." Goglia promptly served a notice of entry of that decision and Atlantic Mutual did not timely seek further appellate review.

## CONTENTIONS

Goglia contends that the Appellate Division decision collaterally estops Atlantic Mutual from denying him SUM/UM coverage and mandates that this Court grant Goglia's summary judgment motion on the issue of SUM/UM coverage.

In opposition to Goglia's motion and in support of its motion for summary judgment dismissing the complaint, Atlantic Mutual argues that the arbitration provision in the subject policy bars plaintiff from maintaining this lawsuit and, alternatively, that the complaint must be dismissed because Goglia failed to timely notify Atlantic Mutual of his SUM claim.

## DISCUSSION

The doctrine of collateral estoppel precludes a party from relitigating an issue that has been decided against him/her in a prior or contemporaneous proceeding in which he/she had a full and fair opportunity to litigate the issue. (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]) Collateral estoppel is based on general notions of fairness and is intended to reduce litigation and conserve the resources of the courts and the litigants. (*Juan C. v Cortines*, 89 NY2d 659, 667 [1997]) A party must satisfy two requirements to invoke the doctrine of collateral estoppel: (1) the identical issues must necessarily have been decided in the prior action; and (2) the precluded party must have had a full and fair opportunity to contest the prior determination. (*Matter of Hee K. Choi v State of New York*, 74 NY2d 933, 936 [1989]). In this case, Goglia has satisfied both requirements.

In the declaratory judgment action, Atlantic Mutual sought a declaration that it did not owe Goglia UM/SUM coverage under the subject policy. The issue in this case is identical to the issue in the declaratory judgment action, that is whether Goglia is entitled to UM/SUM coverage under the subject policy. In both the motion court and the Appellate Division, Atlantic Mutual had a full

and fair opportunity to present its arguments and to oppose Goglia's contentions. Thus, Atlantic Mutual fully availed itself of the opportunity to present its arguments to the courts. (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 350 [1999][collateral estoppel applied where the issues in prior litigation were virtually identical and plaintiff not only had an opportunity to fully litigate the issues, but also availed himself of the opportunity])

Despite the collateral estoppel effect of the First Department's decision in the related matter, Atlantic Mutual maintains that the complaint should be dismissed because Goglia failed to file a notice of claim under the SUM endorsement and that the action is barred by the arbitration provision in the subject insurance policy. Both of these arguments are without merit.

A. Notice

The "notice" argument fails because: (1) Atlantic Mutual failed to include the untimely notice of claim defense among the affirmative defenses in its answer; (2) approximately six weeks after the accident, and while Goglia was still in the hospital, his prior attorney sent a certified letter, return receipt requested, to Atlantic Mutual, notifying the insurer that Goglia was making a claim under the UM/SUM endorsement. The return receipt card demonstrates that Atlantic Mutual received the letter on March 3, 2003 (Harper, 3/26/08 Aff in Opp., Ex. A) and (3) Atlantic Mutual never notified Goglia in writing or otherwise, as it was required to do under the Insurance Law, that it was disclaiming coverage for late notice of claim. (See, Ins. L. Section 3420[d]<sup>1</sup>; *79<sup>th</sup> Realty Co. v*

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<sup>1</sup> Insurance Law § 3420(d) provides in pertinent part:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident . . . it shall give written notice as soon as is reasonably possible of such disclaimer of liability or

*Wausau Ins. Cos.*, 7 AD3d 507, 508 [2<sup>nd</sup> Dept 2004][under Section 3420(d) of the Insurance Law, an insurer may not disclaim coverage if it fails to give the insured notice of the disclaimer as soon as reasonably possible.]) Atlantic Mutual's failure to provide Goglia with timely written notice of disclaimer precludes its denial of coverage on the basis of late notice. (*Bovis Lend Lease, LMB Inc. v Garito Contr., Inc.*, 38 AD3d 260 [1<sup>st</sup> Dept 2007])

#### B. Arbitration

The arbitration provision, at issue here provides:

If any insured making claim under this SUM coverage and we do not agree that such insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, or do not agree as to the amount of payment that may be owing under this SUM coverage, then, **at the option and upon the written demand of such insured**, that matter or matters upon which such insured and we do not agree shall be settled by arbitration, administered by the American Arbitration Association, pursuant to procedures prescribed by the Superintendent of Insurance for this purpose.

If, however, the maximum amount of SUM coverage provided by this endorsement equals the amount of coverage required to be provided by section 3420(f)(1) of the New York Insurance Law and Article 6 or 8 of the New York Vehicle and Traffic Law, then such disagreement shall be settled by such arbitration procedures upon written demand of either the insured or us. (emphasis added)

(2/28/08 Hattar Aff., Ex. D, para. 12)

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denial of coverage to the insured and the injured person or any other claimant.

The plain language of this arbitration provision does not require Goglia to file a demand for arbitration. The first paragraph clearly states that the question of SUM coverage can only be submitted to arbitration **at the option of the insured**. Here, plaintiff has chosen to have his dispute decided by the Court, not by arbitration.

Moreover, the exception to the first paragraph's arbitration provision, that is articulated in the second paragraph, does not apply in this case because the SUM endorsement at issue provides one million dollars (\$1,000,000) in coverage. Section 3420(f)(1) of the New York Insurance Law and Articles 6 and 8 of the New York Vehicle and Traffic Law only require fifty thousand dollars (\$50,000) of SUM coverage in the event of injury. Because the SUM coverage in this case exceeds the amount of coverage required by the cited statutes, defendant cannot opt to arbitrate this matter.

In *McCarthy v Commercial Union Insurance Co.* (194 Misc 2d 295, 297 [Sup Ct, Richmond County 2002]), the court found that a similar, if not identical, arbitration provision could only be invoked at the option of the insured. There, the court stated, "it is clear from the language of defendant's policy that in the event of a dispute regarding SUM coverage 'at the option and upon the written demand of such *insured*, the matter or matters upon which [the parties] . . . do not agree shall be settled by arbitration.'" The McCarthy court noted that there was no evidence of such demand and thus the insurer's argument that arbitration was required was unavailing.

It also appears that even if arbitration was not solely the insured's option, that Atlantic Mutual waived its right, if any, to demand arbitration by actively participating in the litigation for several years. (See *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985][party seeking arbitration waived his right by aggressive participation in the litigation over an extended period involving the

same claims sought to be arbitrated]; *Grenadeir Parking Corp. v Landmark Assocs.*, 294 AD2d 313 [1<sup>st</sup> Dept 2002])

The questions of comparative /contributory negligence and damages are not before the Court on these motions. However, by failing to request arbitration, Goglia has opted to have those matters addressed by the trial court when, and if, they do arise.

Goglia's request for sanctions against Atlantic Mutual is denied as Goglia has failed to demonstrate that Atlantic Mutual's arguments are frivolous as that term is defined in Section 130-1.1 of the Rules of the Chief Administrator, in that it cannot be said that Atlantic Mutual's arguments are completely without merit or were taken primarily to delay the resolution of this action.

Accordingly, it is ORDERED that plaintiff Richard Goglia's motion for summary judgment on his entitlement to coverage under the SUM/UM endorsement of the subject policy is granted; and it is further

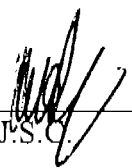
ADJUDGED and DECLARED that defendant Atlantic Mutual Insurance Co. is liable to plaintiff for SUM/UM coverage under Policy Number 763-00-72-06-0000, issued to Seabrite Foods, Inc.; and it is further

ORDERED that defendant Atlantic Mutual's motion for summary judgment dismissing the complaint or, alternatively for an order directing arbitration, is denied;

This decision constitutes the order and judgment of the Court.

Date: July 8, 2008  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the Court clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**GERALD D. STALLMAN**  
J.S.C.