

Konstantinou v Phoenix Ins. Co.

2009 NY Slip Op 30764(U)

April 6, 2009

Supreme Court, Wayne County

Docket Number: 61775/2007

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

GEORGE KONSTANTINOU, as Administrator
of the estate of STAVROS KONSTANTINOU,
Deceased, and GEORGE KONSTANTINOU,
as Administrator d.b.n. of the Estate of
LORIN KONSTANTINOU, Deceased,

DECISION

Plaintiff,

-vs-

PHOENIX INSURANCE COMPANY,

Index No. 61775

Defendant

2007

Anthony J. Villani, Esq.
Attorney for Plaintiff

Hiscock & Barclay, LLP
Joseph A. Wilson, Esq., of counsel
Attorney for Defendant

The Defendant Phoenix Insurance Company ("Phoenix") has moved pursuant to CPLR §3212 for an order granting summary judgment against the Plaintiff ("Konstantinou") and dismissing the Complaint. The Plaintiff has opposed the Defendant's motion and further requests that summary judgment be awarded to the Plaintiff pursuant to CPLR §3212(b).

The Plaintiff commenced this action as a judgment creditor against a

liability insurance company, as authorized by Insurance Law §3210. The underlying action arose from a motor vehicle accident involving a 1985 Chevrolet Celebrity owned by Tynette Thurston and driven by her brother David Thurston. The vehicle was insured by State Farm Mutual Automobile Insurance. The accident resulted in the death of Lorin Konstantinou and serious injury to Stavros Konstantinou (who later died due to unrelated causes). Plaintiff's decedents recovered two net judgments against both David Thurston and Tynette Thurston, each in the amount of \$250,000.00. (Portions of the total judgments were paid by other carriers.)

The action was originally commenced against The Travelers Insurance Co. And St. Pauls Travelers Insurance Co., who were then believed to be insurers of a motor vehicle owned by Brenda L. Henderson, the mother of Tynette and David Thurston. It was later learned that Ms. Henderson's automobile policy was issued by Phoenix Insurance Company, and the action against the other insurers was discontinued.

Based on the fact that portions of both judgments remain unsatisfied, the Plaintiff commenced this action under §3210 seeking insurance coverage for the Thurstons under the policy issued by Phoenix to

Henderson. Phoenix originally disclaimed coverage, maintaining that neither Tynette nor David were resident relatives of the Henderson household at the time of the accident, as that term is defined in the policy, and therefore, they are excluded from coverage. Later, coverage was also denied due to the fact that the vehicle owned by Tynette allegedly did not meet the definition of a “non-owned car” as that term is used in the policy.

The pertinent provisions of the Phoenix insurance policy provide as follows:

WHO IS AN INSURED

For *your car* - you, any *relative*, and anyone else using *your car* if the use is (or reasonably believed to be) with *your* permission, are *insureds*. Any other persons or organizations are also *insureds* but only for their liability for the acts or omissions of an *insured* described in the preceding sentence.

For a *non-owned car* - you and any *relative* are *insureds* while using that car if the use is (or is reasonably believed to be) with the owner's permission. Any other persons or organizations not owning or hiring the car are also *insureds*, but only for their liability for the acts or omissions of an *insured* described in the preceding sentence.

DEFINITIONS

1. You and your mean the person named in Item 1 of the declarations page. They also mean that person's spouse if residing in the same household.

2. Relative means *your* relative, residing in *your* household.

3. Insured, for each coverage, means any person or organization shown as having coverage under the "Who Is An Insured" paragraph for that coverage.

....

5. Your car means any vehicle described on the declarations page of this policy... .

...

6. Substitute car means a vehicle which *you* do not own but are using temporarily with the owner's permission. However, this vehicle must be used as a replacement for *your* car while *your* car is out of service because of breakdown, repair, servicing, damage or destruction.

....

8. Non-owned car means a land motor vehicle with at least four wheels designed to be used mainly on public roads, or a *trailer*. However, it must not be owned by or furnished or available for the regular use of *you* or a *relative*. It does not include a *substitute car*.

At the time that Plaintiff filed the motions, it was conceded that Tynette Thurston could be considered a "resident relative" under the policy, in that, while she was a college student residing in Buffalo, New York, she nonetheless maintained a residence with her mother in Lyons, New York. David Thurston, however, was legally in the custody of his father, Lee Thurston and the Defendant initially argued that David was therefore not a resident of his mother's household . However, at the time of oral argument on the return date of this motion, counsel for the Plaintiff conceded that, based on the facts, David Thurston could also be considered a resident of his mother's household (See Transcript of January 8, 2009, argument at page 10.) Therefore, it is the Court's conclusion that the residence requirement under the definitional section of that portion of the policy entitled "Who is An Insured" is no longer an issue.

Therefore, the remaining question is whether the vehicle involved in the accident falls within the definitions set forth in the policy. The definitions at issue are "your car" and a "non-owned car". (The Court here notes that, at oral argument, counsel for the Plaintiff claimed that the original disclaimer of coverage by the company was based solely on the issue of residence. Therefore, the Plaintiff argued that any argument

pertaining to the vehicle itself is precluded. However, counsel for Phoenix correctly maintains that, even were the disclaimer silent as to the vehicle, such an omission would not be fatal, because “(w)here, ... the insurance policy does not contemplate coverage in the first instance, ... requiring payment of a claim upon failure to timely disclaim would [impermissibly] create coverage where it never existed.” (State Farm Fire and Casualty Company v. Whiting, 53 AD3d 1033 (4th Dept, 2008), citing Matter of Worcester Ins. Co. v. Bettenhouser, 95 NY2d 185 (2000)).

Therefore, turning to the definitions themselves, clearly the Celebrity does not fall within the definition of “your car”, since that term applies only to a vehicle owned by Brenda Henderson, the insured. Therefore, that term applies only to a 1990 Chevrolet Lumina, which appears on the declaration page of the policy as Ms. Henderson’s vehicle.

Thus, the remaining issue appears to turn on whether the Celebrity should be considered a non-owned vehicle under the terms of the policy. Had Tynette been the driver of the vehicle, clearly coverage would be excluded since she is the owner of the vehicle, and therefore the Celebrity would not be a “non-owned car” as to her. However, her liability is vicarious only, and therefore her status is dependent on David’s status.

Therefore, the Court is ultimately faced with the question of whether Tynette's vehicle is a "non-owned car" as to David Thurston. As stated above, a "non-owned car" ... "must not be owned by or furnished or available for the regular use of you or a relative." In the case, both Tynette and David Thurston have been found to be residents of Brenda Henderson's household. Therefore, both are "relatives" under the language of the policy. Tynette Thurston is the owner of the vehicle in question. She is also a "resident relative" in the same household as her brother David, and therefore, the vehicle cannot be considered a "non-owned car" as to David Thurston as well. The Court must conclude that both Tynette Thurston and David Thurston do not fall within the definition of "insureds" under the Phoenix policy.

Therefore, the Defendant's motion for summary judgment is granted, and the Complaint is dismissed.

Counsel for the Defendant is hereby directed to submit an order in accordance with this Decision for the Court's signature.

Dated: April 6, 2009
Lyons, New York

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SUPREME AND COUNTY COURT
WAYNE COUNTY



Honorable Dennis M. Kehoe
Acting Supreme Court Justice