Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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LANCER INSURANCE COMPANY,

Plaintiff(s),

-against-

MARINE MOTOR SALES, INC., JOHN PARKS, DONALD TIERNEY, LUIS SANCHEZ, GEICO INDEMNITY COMPANY, THE TRAVELERS INSURANCE GROUP, STATEN ISLAND UNIVERSITY HOSPITAL, RAGHAVE RAJU, M.D., GOETHALS RADIOLOGY, P.C. EMERGENCY MEDICINE SERVICES OF STATEN ISLAND, P.C. AND HEALTHCARE ASSOCIATES IN MEDICINE, P.C.,

Defendant(s).

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Index No. 1501/08

Motion Submitted: 12/7/09
Motion Sequence: 002, 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Travelers Insurance Group ("Travelers") moves this Court for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint, declaring that Plaintiff is obligated to defend and indemnify Marine Motor Sales, Inc. ("Marine") and John Parks ("Parks"), and further declaring that the subject motor vehicle is not an uninsured motor vehicle under the insurance policy issued by Travelers.

Plaintiff cross moves for an order pursuant to CPLR § 3212 granting summary judgment in its favor declaring that its policy of insurance does not provide coverage to defendants Marine Motor and John Parks for claims arising out of an alleged incident of October 17, 2007, that it is not obligated to defend and indemnify defendants Marine Motor and John Parks, that it is not obligated to provide coverage for any claims made by defendant GEICO with respect to the payment of No-Fault benefits for medical treatment of its insured for injuries allegedly sustained as a result of the subject accident. Plaintiff further seeks a judgment declaring it is not obligated to provide No-Fault benefits to defendant Tierney and is not obligated to pay for treatment allegedly rendered to defendant Tierney by defendants Staten Island University Hospital, Raju, Goethals Radiology, Emergency Medicine Services of Staten Island and Healthcare Associates in Medicine.

Defendants Marine and Parks seek an order pursuant to CPLR § 3212 granting summary judgment in their favor declaring that Plaintiff is obligated to defendant and indemnify Marine and Parks in the Richmond County, New York actions against them entitled Luis Sanchez v. Marine Motor Sales, Inc. and John P. Parks, Index No. 45967/2007, Supreme Court, Richmond County and Donald Tierney v. Marine Motor Sales, Inc. and Luis Sanchez, Index No. 102609/2008, Supreme Court, Richmond County. Marine and Parks further seek costs and attorneys fees.

Lancer commenced this action seeking declaratory judgment against defendants as to Lancer's rights, duties and obligations under an automobile policy of insurance issued by Lancer to Marine. At the time of the incident, Parks was operating a vehicle owned by Marine. Donald Tierney was a passenger in the Marine vehicle when the collision occurred. It is alleged that on October 17, 2007 at approximately 12:20 a.m. at or near the intersection of Richmond Road and Four Corners Road in Staten Island, N.Y., the Marine vehicle collided with a vehicle occupied by defendant Luis Sanchez. Travelers had issued an auto insurance policy to Tierney that had Supplemental Uninsured Motorist ("SUM") benefits in the event Tierney was involved in a collision with an uninsured vehicle.

Both Tierney and Sanchez brought separate underlying actions claiming that they were injured in the collision. Travelers, Marine and Parks contend the policy issued to Marine by Lancer was a "garage policy," in effect at the time of the collision thereby providing coverage for the claim. It is alleged Parks was a part-time salesperson for Marine, a used car establishment. Parks alleges that he, Parks, took Tierney out for a test drive in the subject vehicle, one of Marine's cars, and had discussed Tierney's purchase of the subject vehicle when the collision occurred. An insurance claim was submitted by Marine but it was rejected by Lancer as not falling within the scope of the Marine coverage. Lancer alleged the incident occurred later (12:20 a.m.) after Parks and Tierney, a personal friend of Parks, had spent the night dining and drinking. Travelers, Parks and Marine contend the subject vehicle

was owned by Marine and Parks and Tierney's claim of a test drive put the subject vehicle squarely under the Lancer garage policy.

Lancer contends that Parks fabricated the test drive-potential sale scenario so as to avail himself of coverage under the Marine garage policy in effect at the time the incident occurred. Lancer denied coverage alleging the use of the subject vehicle by Parks at the time of the incident was not "garage operations" related. Lancer points to the statement of Tierney dated December 4, 2007 in which Tierney states Parks took the subject vehicle and Tierney to a bar and grill wherein Tierney stated he, Tierney, became intoxicated. Tierney stated he did not recall leaving the bar nor the collision. Tierney was admitted to the hospital for injuries sustained in the collision. There was no mention of "test driving" the subject vehicle by Tierney in Tierney's post-collision statement. Lancer contends the subject vehicle was being used for the personal use of Parks while dining and drinking with his friend, Tierney, when the collision occurred at 12:20 a.m. After the collision, Parks was arrested for DWI. The charges were ultimately dismissed.

Initially, Lancer contends that Marine and Parks' cross-motion is untimely. A party's cross-motion for summary judgment should be considered by a court where a timely motion for summary judgment by another party was made and both the motion and cross motion are nearly identical in content (see ***Grande v. Peteroy***, 39 A.D.3d 590, 833 N.Y.S.2d 615 (2d Dept., 2007); see also ***Bickelman v. Herrill Bowling Corp.***, 49 A.D.3d 578, 853 N.Y.S.2d 383 [2d Dept., 2008]). Here Marine and Park's cross motion made after Travelers' timely motion will be permitted and considered since it discussed the identical grounds of Travelers' timely summary judgment motion.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594, [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein Plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The personal use of a vehicle with dealer's plates which vehicle is held for sale or demonstration does not violate VTL § 415 (***People v. Giordano***, 116 Misc.2d 393, 457 N.Y.S.2d 665 [App. Term 2d Dept., 1982]). Parks' use of the Marine subject vehicle with dealer's plates was not in contravention of the law. Moreover, there is no necessity for a vehicle to be "owned" by Marine in order for it to be a "covered auto" and "any auto" is a "covered auto" if it is maintained or used in the insured's defined operations, which include all operations "necessary or incidental" thereto (***Hartford Insurance Group v. Rubinshteyn***,

66 N.Y.2d 732, 488 N.E.2d 98, 497 N.Y.S.2d 352 [1985]). The question of coverage turns on whether or not the insured vehicle was being used in an operation necessary or incidental to Marine's used car dealership or business at the time of the incident.

Test driving a vehicle recently repaired at a service station is incidental to a garage business (***Belmer v. Nationwide Mutual Insurance Co.***, 157 Misc.2d 845, 599 N.Y.S.2d 427 [Supreme Court, Kings County 1993]). The use of a vehicle by the insured's employee for purposes unrelated to the garage business at the time of the accident is not part of the insured's "garage operations" and is, therefore, not covered by the garage liability insurance policy (***Empire Group Allcity Insurance Co. v. Cicciaro***, 240 A.D.2d 362, 658 N.Y.S.2d 112 [2d Dept., 1997]).

While the subject vehicle would have been a covered auto within the meaning of the policy if it was being used in connection with Marine's business, operating the subject vehicle at 12:20 a.m., long after Marine's normal hours of 8 a.m. to 5 p.m., to and from an eating and drinking establishment is not operating in furtherance of the garage business. (See ***Lancer Insurance Company v. Whitfield***, 61 A.D.3d 724, 878 N.Y.S.2d 82 [2d Dept., 2009]).

Since Lancer demonstrated its *prima facie* entitlement to summary judgment, the burden shifted to Travelers, Marine and Parks as opponents of the motion, to provide evidence in proper admissible form, sufficient to raise a triable issue of fact. Here, the opponents have failed to meet their burden.

Tierney's deposition submitted by Traveler's in opposition to Lancer's motion raised only feigned issues of fact intended solely to avoid the consequences of his prior admission that he, Tierney, was intoxicated, was not driving the subject vehicle when the collision occurred, and never mentioned test driving the vehicle (see generally ***Marchese v. Skenderi***, 51 A.D.3d 642, 856 N.Y.S.2d 680 [2d Dept., 2008]). Moreover, even if the initial purpose of operating the vehicle was to demonstrate its operation, any such characterization would be unreasonable as a matter of law at the time of the subject accident.

Furthermore, Lancer, citing the affidavit of Steven Shapiro, a vice president of DC White Agency d/b/a Lancer Insurance Co., notes that Marine's policy did not cover the mere use of a Marine automobile by Parks. The policy did not provide for personal and incidental use of a Marine owned vehicle such as is alleged by Lancer's analysis of Park's use of the subject vehicle herein. A contract should be read as a whole and interpreted so as to give effect to the intention in the unequivocal language employed (***Canavan v. Chase Manhattan Bank***, 278 A.D.2d 352, 718 N.Y.S.2d 617 [2d Dept., 2000]).

Lancer's motion is granted.

Lancer's policy of insurance does not provide coverage to defendants Marine Motor and John Parks for claims arising out of an alleged incident of October 17, 2007. It is not obligated to defend and indemnify defendants Marine Motor and John Parks. It is not obligated to provide coverage for any claims made by defendant GEICO with respect to the payment of No-Fault benefits for medical treatment of its insured for injuries allegedly sustained as a result of the subject accident. Plaintiff is not obligated to provide No-Fault benefits to defendant Tierney and is not obligated to pay for treatment allegedly rendered to defendant Tierney by defendants Staten Island University Hospital, Raju, Goethals Radiology, Emergency Medicine Services of Staten Island and Healthcare Associates in Medicine.

In light of, this Court's decision above, Travelers', Marine's and Parks' motions are denied.

Submit judgment on notice.

Dated: February 24, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

Hon. Karen V. Murphy