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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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LANCER INSURANCE COMPANY,

Plaintiff(s),

-against-

NEW 2000 AUTO ELECTRIC CORP., JUAN DIAZ, HIPOLITO REYES, ELSIE MANN AND STATE FARM INSURANCE COMPANY,

Defendant(s).

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Index No. 16541/08

Motion Submitted: 1/5/11
Motion Sequence: 001

The following papers read on this motion:

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

Motion by the attorneys for the plaintiff Lancer Insurance Company (Lancer) for an order pursuant to CPLR §3212 granting summary judgment in favor of the plaintiff is denied.

This is a declaratory judgment action commenced by plaintiff Lancer Insurance Company for a determination that it is not obligated to provide both a defense and an indemnification to defendant New 2000 Auto Electric Corp. (New 2000 Auto), the insured under the Lancer Insurance Policy, relative to a motor vehicle accident which occurred on March 2, 2006 on St. Nicolas Avenue at its intersection with West 155th Street, New York, New York. At the time of the subject motor vehicle accident, a 1977 Dodge Suburban owned and registered to defendant Juan F. Diaz and operated by defendant, Hipolito Reyes,

was involved in an accident with defendant Elsie Mann who was operating a 1994 Ford Suburban. As a result of the March 2, 2006 accident, defendant Elsie Mann commenced a lawsuit in Supreme Court, Kings County (hereinafter referred to as the "Kings County action") naming as defendants Juan Diaz and Hipolito Reyes seeking monetary damages for bodily injuries allegedly sustained in the accident. At the time of the March 2, 2006 accident, Juan Diaz was insured by State Farm Insurance Company. At the conclusion of discovery, the Kings County action was settled for $50,000 representing the limits of the policy of insurance issued by State Farm Insurance Company to Juan Diaz. Defendants Diaz (owner) and Reyes (operator) of the vehicle insured by State Farm both appeared for depositions. Defendant New 2000 Auto is an entity owned by defendant Diaz. In the Kings County action, Reyes testified that at the time of the accident he was a mechanic employed by defendant New 2000 Auto. Defendant Reyes also testified that he was operating the vehicle to pick up a part for Diaz in the course of his employment.

As a result of the deposition testimony in the Kings County action, counsel for Elsie Mann subsequently commenced an action in Supreme Court, Bronx County (hereinafter referred to as the "Bronx action") against defendant New 2000 Auto Electric Corp. The summons and complaint in the Bronx action is dated April 14, 2008. The Bronx action commenced against defendant New 2000 Auto was based on allegations that defendant Reyes was operating the motor vehicle owned by defendant Juan Diaz within the scope of his employment with defendant New 2000 Auto.

On or about June 23, 2008, defendant New 2000 Auto, by counsel, forwarded the Summons and Complaint in the Bronx action to plaintiff, Lancer. By correspondence dated July 12, 2008, the plaintiff, Lancer, issued a disclaimer of coverage letter to defendant New 2000 Auto concerning the March 2, 2006 accident and the resulting lawsuits. The disclaimer of coverage letter issued by Lancer is based on three separate grounds. Plaintiff was given late notice of the accident. The vehicle owned by Diaz and operated by Reyes was not being used in connection with New 2000 Auto's garage operations business. The vehicle owned by Diaz and operated by Reyes does not qualify as a "covered auto" under the Lancer Insurance Policy.

Although State Farm provided a defense in the Kings County action, it initially refused to provide a defense to New 2000 Auto in the Bronx action. Lancer, according to the testimony of James M. Harinski, its counsel, provided a gratuitous defense to New 2000 in the Bronx action. It appears that now State Farm may have taken over the defense for New 2000 in the Bronx action in early 2010. (Exhibit F, Harinski deposition, pg. 49 lines 6-11). In the within action, Lancer seeks judgment declaring that the policy of insurance issued by the plaintiff Lancer to defendant New 2000 Auto does not provide any coverage for the accident of March 6, 2006, and the resulting claims of Elsie Mann in the Kings

County action and the Bronx action; further that Lancer is not obligated to defend and indemnify Juan Diaz, Hipolito Reyes and New 2000 Auto in the Kings County and Bronx actions.

In support of Lancer's motion for summary judgment, it relies on a summary of the deposition transcripts of Diaz in the Kings County action provided to Lancer by State Farm. Diaz testified that the subject vehicle was loaned to Reyes to run personal errands, not business errands. Lancer argues that Juan Diaz was the president of defendant New 2000 Auto which repairs and services automobiles. Diaz was also a mechanic and responsible for administering New 2000 Auto. Diaz testified that if New 2000 Auto needed parts for vehicles it was repairing, the supplier would be called, who would then deliver the parts to New 2000 Auto. One of the suppliers was Big City Auto Parts. New 2000 Auto also procured parts from Fordham Toyota. Only Juan Diaz and his daughter, Ana, would order parts. New 2000 Auto would call Fordham Toyota and Fordham Toyota would send the part the next day. Diaz testified that no one from New 2000 Auto would ever pick up parts from Fordham Toyota. Diaz also testified that Reyes worked repairing cars at New 2000 Auto in 2006. Reyes worked 8 hours per day, Monday through Friday, with a one hour break during the day. Diaz acknowledged that he allowed Reyes to borrow his 1997 Dodge Caravan to "do an errand." Diaz was aware the accident occurred while Reyes borrowed the vehicle. However, Diaz asserts he did not ask Reyes to pick up any parts from Fordham Toyota, or any other place, while Reyes was driving the vehicle on the date of the accident. When Reyes returned to New 2000 Auto, he told Diaz that he had an accident. Reyes contends he was in the area of 155th Street and St. Nicholas, where the accident occurred, because he was going to the Bronx. Diaz did not know why Reyes was going to the Bronx and did not know whether Reyes ever completed his errand. Following the incident, Diaz reported the accident to State Farm. Diaz told State Farm that Reyes was driving the vehicle when it was involved in the accident. He identified Reyes as a friend. Diaz did not advise any of New 2000 Auto's insurers about the accident because he believed that New 2000 Auto had nothing to do with the accident.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (***Sillman v. Twentieth Century-Fox Films Corp.***, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York University Medical Center***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Fox v. Wyeth Laboratories, Inc.***, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept., 1987); ***Royal v. Brooklyn Union Gas Co.***, 122 A.D.2d 132, 504 N.Y.S.2d 5 [2d Dept., 1986]). Lancer has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (***Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.***, 46 N.Y.2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Conclusory statements are insufficient. (***Sofsky v. Rosenberg***, 163 A.D.2d 240, 559 N.Y.S.2d 873 (1st Dept., 1990); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); *see* ***Indig v. Finkelstein***, 23 N.Y.2d 728, 244 N.E.2d 61, 296 N.Y.S.2d 370 (1968); ***Werner v. Nelkin***, 206 A.D.2d 422, 614 N.Y.S.2d 66 (2d Dept., 1994); ***Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides***, 80 A.D.2d 781, 437 N.Y.S.2d 1(1st Dept., 1981); ***Jim-Mar Corp. v. Aquatic Construction, Ltd.***, 195 A.D.2d 868, 600 N.Y.S.2d 790 [3d Dept., 1993]).

In opposition to the motion for summary judgment, the defendants want to use as documentary evidence in the within motion a copy of the transcript of the deposition of Reyes from the Kings County action in which Reyes testified that he was driving to pick up a car part for New 2000 Auto.

Lancer argues that permitting the use of the Reyes transcript is prejudicial to the plaintiff because its attorneys did not have the opportunity to depose Reyes in the Kings County action. An unsigned certified deposition, like an affidavit can be introduced as evidence on a motion for summary judgment. There is no claim that the transcript is not accurate or that there was not sufficient compliance with CPLR 3116(a). (*See* ***Chisholm v. Mahoney***, 302 A.D.2d 792, 756 N.Y.S.2d 314 (3d Dept., 2003); ***Morchik v. Trinity School***, 257 A.D.2d 534, 684 N.Y.S.2d 534 (1st Dept., 1999); ***R. N. Newell Co. v. Rice***, 236 A.D.2d 843, 653 N.Y.S.2d 1004 [4th Dept., 1997]).

Simultaneously with the execution of the Certification Order, all counsel signed a stipulation stating that defendant Reyes had to be produced for an examination before trial by June 7, 2010, or be precluded from testifying in the within action. Reyes never appeared for the deposition in the within action. Plaintiff's counsel argues that the preclusion order that prohibits Reyes from testifying in this action should also preclude the Reyes' deposition transcript in the Kings County action from being admissible in the determination of the within motion. The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 against a party who has refused an order of disclosure is a matter within the discretion of the court. (*See* ***Jaffe v. Hubbard***, 299 A.D.2d 395, 751 N.Y.S.2d 491 [2d Dept., 2002]). It was not the purpose of the preclusion order to impose sanctions for nonappearance at the examination before trial on any party other than the non-appearing party, *to wit*, defendant Reyes. The co-defendants bore no responsibility for the failure of defendant Reyes to testify. At this stage of the proceedings and solely for the determination of the within motion, it would be unfair to punish the co-defendants by refusing to admit the deposition transcript of Reyes from the Kings County action because Reyes violated a court order by failing to

appear for an examination before trial. Having determined that the deposition transcript of Reyes from the Kings County action is admissible in the within action as an affidavit, there is a question of fact as to whether Reyes was operating the vehicle owned by defendant Diaz while in the scope of his employment and in connection with the business/garage operations of defendant New 2000 Auto thereby precluding the granting of the motion for summary judgment.

Moreover, credibility issues have been raised as a result of Reyes' deposition testimony, which generally require the denial of summary judgment and are to be resolved by the trier of fact. ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept. 2005); ***Frame v. Markowitz***, 125 A.D.2d 442, 509 N.Y.S.2d 372 (2d Dept. 1986).

Lancer also asserts that the defendants have failed to offer a reasonable excuse for their failure to notify Lancer of the subject accident and the subsequent lawsuits. The subject accident occurred on March 2, 2006. Lancer was notified of the subject accident on or about June 23, 2008, three months after the first allegation that the subject accident arose out of Reyes using the vehicle in connection with the garage operation of New 2000 Auto, and two months after the commencement of the Bronx action.

Relying on the deposition testimony of Juan F. Diaz that Reyes was operating the vehicle on a personal errand at the time of the accident, defendants have raised a question of fact as to whether they had a good faith, reasonable belief in non-liability so as to excuse the insured's delay in giving the plaintiff notice of the subject accident until June 2008 (***See Nails 21st Century Corp. v. Colonial Co-op Ins. Co.***, 21 A.D.3d 1069, 803 N.Y.S.2d 626 [2d Dept., 2005]). Whether the two to three month delay in notifying Lancer of the accident following Reyes' deposition testimony constitutes notice being given within a reasonable time under all the circumstances is a question of fact to be resolved by the trier of fact (***Argentina v. Otsego Mutual Fire Insurance Company***, 207 A.D.2d 816, 616 N.Y.S.2d 747 (2d Dept. 1994); ***Hartford Fire Insurance Company v. Masternak***, 55 A.D.2d 472, 390 N.Y.S.2d 949 [4th Dept. 1977]).

Parties are admonished that the use of the Reyes deposition in lieu of an affidavit, although admitted for the determination of the within motion should not be construed as having met the criteria set forth in CPLR §3217 to introduce the Reyes deposition at the trial of this action. Moreover, on a motion for summary judgment the court refrains from making a determination of credibility, ***S.J. Capelin Associates, Inc. v. Globe Mfg. Corp; Surdo v. Albany Collision Supply, Inc.***, 8 A.D.3d 655, 779 N.Y.S.2d 544 [2d Dept., 2004] and the papers are scrutinized in the light most favorable to the party opposing the motion. (***Glover v. City of New York***, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept., 2002); ***Perez v. Excl Logistics***, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept., 2000); ***Dodge v. City of Hornell***

Indus. Development Agency, 286 A.D.2d 902, 730 N.Y.S.2d 902 [4th Dept., 2001]).

The motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: March 10, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.