Travelers Indem. Co. of Connecticut v Conroy
2011 NY Slip Op 32321(U)
August 26, 2011
Supreme Court, New York County
Docket Number: 112191/10
Judge: Doris Ling-Cohan
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SCANNED ON 8/30/2011
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Plaintiff,

INDEX NO. 112191/10

-against-

MOTION SEQ. NO. 001

SCOTT THOMAS CONROY and JONATHAN F. SANTOS,

Defendants.

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).

The following papers, numbered 1 - 6 were considered on this motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2, 3,
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	6

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is granted for the reasons set forth below.

BACKGROUND

This is an action for a declaratory judgment that plaintiff has no duty to defend or indemnify defendants in an underlying personal injury action, pending in the New York State Supreme Court, Bronx County, under Index No. 303173/09 (Underlying Action), commenced by defendant herein Jonathan F. Santos (Santos).

On or about June 19, 2007, defendant Scott Thomas Conroy (Conroy) stole a 1995 Dodge Intrepid (Vehicle) owned by Betty Arce (Arce). Arce's son, Adam Arce (Adam), attempted to stop Conroy from stealing the Vehicle. Conroy lost control of the Vehicle and struck Santos, a pedestrian.

Plaintiff Travelers Indemnity Company of Connecticut (Travelers) issued Automobile Policy number 9788873321011 (Travelers Policy) to Arce for the policy period June 7, 2007 through December 7, 2007.

In April 2009, Santos commenced the Underlying Action against Conroy, Adam, and Arce seeking damages. In the Underlying Action, Santos alleged that Conroy operated the Vehicle with the permission and consent of the owner, Arce. As such, Travelers provided insurance coverage and representation in the Underlying Action to Arce, Adam, and Conroy. During the course of Travelers' investigation, it discovered that Conroy pled guilty to Robbery in the Third Degree, pursuant to Penal Law § 160.05 and admitted in open court that he forcibly took the Vehicle and had no authority or permission to take or be in possession of the Vehicle. Based on this, Arce and Adams both moved for summary judgment in the Underlying Action. Their motion and cross-motion were granted in a decision issued by Hon. Patricia Anne Williams, dated June 16, 2010. Conroy is the only remaining defendant in the Underlying Action. Thereafter, Travelers commenced this action, seeking a declaratory judgment that Travelers has no duty to defend or indemnify Conroy or Santos in the Underlying Action. Travelers now moves for an order: (a) for summary judgment for a declaration against Conroy pursuant to CPLR 3212 and 3001; and (b) for a default judgment against Santos pursuant to CPLR 3215.

DISCUSSION

To date, Santos has failed to answer Travelers' complaint or appear in this action. Additionally, Santos has not submitted any opposition to Travelers' current motion. CPLR 3215 provides that "[w]hen a defendant has failed to appear, . . . the plaintiff may seek a default judgment against him. . . . The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305." Generally, New York courts favor resolution of actions on their merits rather than on default. *Picinic v Seatrain Lines, Inc.*, 117 AD2d

504, 508 (1st Dep't 1986). However, similar to the standard for vacating a default judgment, a party attempting to prevent a default judgment from being entered must demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Wehringer v Brannigan*, 232 AD2d 206, 206 (1st Dep't 1996). At this juncture, Santos has failed to put forth any reasonable excuse for the failure to appear or answer in this action, as Santos has not opposed the motion for a default judgment. Moreover, Conroy does not oppose Travelers' motion for a default judgment against Santos. As such, the portion of Travelers' motion seeking a default judgment against Santos is granted.

Travelers' motion also seeks summary judgment for a declaration against Conroy. Travelers argues that Conroy is not an insured under the Travelers Policy. The "Who is an Insured" section of the Travelers Policy states, in relevant part, that "you, any relative, and anyone else using your car if the use is or is reasonably believed to be with your permission, are insureds." Travelers Policy, PL-2506, NEW 2-76, p. 1. Travelers contends that Conroy is not a relative of Arce and did not have the permission of Arce or Adam to operate the Vehicle. As such, Travelers argues that Conroy is not an insured under the Travelers Policy.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence, by proof in admissible form, to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. "[M]ere conclusions, expressions

of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. *Id* at 562. In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

Travelers argues that no issues of fact exist to prevent a granting of summary judgment in its favor. In support of its motion, Travelers proffers a copy of the Travelers Policy, the transcript of the disposition of the Criminal Court action against Conroy, affidavits of Adam and Arce from the Underlying Action, as well as other documents. Travelers argues that the transcript of the Criminal Court action makes plain that Conroy did not have permission to take or operate the Vehicle. In fact, Conroy pleaded guilty and admitted, in open court, that he stole the Vehicle. The transcript, in relevant part, p. 4, ln 9 - p. 5, ln 5 reads:

THE COURT: It is charged on or about June 19, 2007, in the corner of University Avenue and West Fordham Road at approximately seven p.m., at that time and at that location, you did forcibly take property, that being a 1995 Dodge Intrepid from Adam Arce, is that correct?

THE DEFENDANT: Yes.

THE COURT: At that time and at that location, you did - - well, you were observed in the vehicle, apparently, and when Mr. Arce attempted to have you leave the vehicle, you struck him and thereby forcibly took the vehicle, is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: Again, you did not have permission or authority to take or be in possession of this vehicle, is that correct?

THE DEFENDANT: No, ma'am.

THE COURT: And, again, sir, you are pleading guilty voluntarily?

THE DEFENDANT: Yes, ma'am."

Moreover, affidavits from Arce and Adam both state that they did not know Conroy and did not give Conroy permission to take or operate the Vehicle.

Travelers has shown that Conroy is not listed as an insured under the Travelers Policy, is not a relative of Arce or Adam, and did not have permission from Arce or Adam to take or operate the Vehicle. As such, it has made a prima facie showing of entitlement to summary judgment as a matter of law, declaring that Travelers has no duty to defend or indemnify Conroy in the Underlying Action. As Travelers has met its burden, the burden shifts to Conroy to demonstrate by admissible evidence, that there are material issues of fact precluding summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). However, Conroy has failed to proffer any admissible evidence to raise an issue of fact.

In opposition, Conroy argues that there is an issue of fact as to whether Conroy had implied permission to take and operate the Vehicle. In support of his argument, Conroy proffers his affidavit and his attorney's affirmation. Conroy's attorney's affirmation is not based upon the requisite personal knowledge and is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Wehringer v Helmsley Spear, Inc.*, 91 AD2d 585, 585 (1st Dep't 1982). "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affidavit or affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1st Dept 1981), aff'd 54 NY2d 715 (1981). Thus, plaintiff's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Mktg.*, 66 NY2d at 968. The Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide

issues of fact necessary to defeat a motion for summary judgment. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

However, Conroy does provide his affidavit which states that he obtained permission to use the car from a man named Rufio. Conroy contends that his car was broken and was at the mechanic's shop. He states that he was staying with his girlfriend and needed a car to get to work. Conroy further states that his girlfriend called Rufio, who gave Conroy the keys to the Vehicle and lent it to Conroy. Conroy contends that he thought Rufio owned the Vehicle and so he had the right to use it. Conroy relies on the Vehicle and Traffic Law, Section 388, subdivision 1, which states:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle...by any person using or operating the same with the permission, express or IMPLIED, of such owner." (emphasis added)

Conroy argues that cases have found that when an owner of a vehicle places it under the unrestricted control of a second person, implied permission by the owner is extended to a third person, whom the second person permits to drive the vehicle. Conroy contends that because he believed he had permission from Rufio to operate the Vehicle, this creates a question of fact as to whether he had implied permission and consent to take and operate the Vehicle.

However, as stated above, the party opposing the motion for summary judgment must produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Here, even drawing all reasonable inferences in favor of Conroy, he has failed to raise a triable issue of fact sufficient to preclude summary judgment. In his affidavit, Conroy states that he believed he had Rufio's permission to operate the Vehicle. Conroy further states that due to the alleged permission from Rufio, there is an issue of fact as to whether he had implied permission to operate the Vehicle. However, as

stated above, the cases relied upon by Conroy found implied consent where an owner placed their vehicle under the unrestricted control of a second person who allows a third person to operate the vehicle. Here, Conroy fails to provide any proof in admissible form, or even allege, that Rufio had Arce or Adam's permission to operate the Vehicle. Moreover, Conroy fails to provide any evidence or explanation to contradict the evidence provided by Travelers that Conroy, by his own admission in criminal court, had no permission to take or operate the Vehicle. In Criminal Court, Conroy admitted to striking Arce and "thereby forcibly took the vehicle". Criminal Court action transcript, p. 4, ln 21-22. As Conroy has failed to raise any issue of triable fact, he has failed to defeat Travelers' motion for summary judgment. As such, the portion of Travelers' motion seeking a declaration that it has no duty to defend or indemnify Conroy is granted.

Finally, Conroy argues that Travelers' disclaimer of coverage was not timely as a matter of law. However, insurance coverage is determined by the terms of the policy. "[A] party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage." *Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1st Dep't 2004). As the Court has already determined that Conroy is not covered under the Travelers' Policy, it need to address this argument in detail. Conroy relies on cases in which an insured was not provided with a timely disclaimer of coverage. Here, Conroy is not an insured. There is no obligation to disclaim when an insurance carrier did not have a contract of insurance with the person who is seeking coverage. *See Aetna Casualty & Surety Co. v Hines*, 102 AD2d 725, 726 (1st Dep't 1984). Moreover, "[t]he court cannot create coverage where none exists". *White v Aron Kaufman & Co., Inc.*, 243 AD2d 255, 255 (1st Dep't 1997). Defendants have failed to cite to any cases in which a party, not insured by the insurance policy, was held to be covered based on an alleged untimely disclaimer.

Accordingly, it is

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ORDERED that plaintiff's motion for a default judgment against defendant Santos and for summary judgment against defendant Conroy is granted in its entirety; and it is further

ORDERED, ADJUDGED and DECLARED that the plaintiff Travelers Indemnity Company of Connecticut has no duty to defend or indemnify defendant Conroy in the Underlying Action; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon defendants.

Dated: 8/26/11

DORIS LING-COHAN, J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

Check if Appropriate: [ ] **DO NOT POST** [ ] **REFERENCE**

[ ] **SUBMIT ORDER/JUDG.** [ ] **SETTLE ORDER/JUDG.**

J:\Summary Judgment\Travelers v Conroy - def judg. and declaratory judg.wpd

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