

American Commerce Ins. Co. v Martinez

2011 NY Slip Op 33050(U)

November 17, 2011

Sup Ct, Nassau County

Docket Number: 4213/11

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8
AMERICAN COMMERCE INSURANCE COMPANY,

Plaintiff,

INDEX NO. 4213/11

-against-

MOTION DATE: 10/06/11
SEQUENCE NO. 001, 003

Individual Claimant Defendants.

MARCELO MARTINEZ, LUIS GARCIA, VANESSA RIOS, BARBARA LICEA, MARISOL ALCAIDE, JOSE LOPEZ, JUAN ROSARIO, ANNIE TEJADA and CHRISTINE RAMOS,

Healthcare Provider Defendants.

DARLINGTON MEDICAL DIAGNOSTIC, P.C., GOOD NEW CHIROPRACTIC, P.C. DIAGNOSTIC PHYSICAL THERAPY, P.C. ATP PHYSICAL THERAPY, P.C. JSP ACUPUNCTURE P.C. WELLNESS PHYSICAL THERAPY P.C., PERSONAL TOUCH MEDICAL, P.C., I.D.F. MEDICAL DIAGNOSTIC, P.C., FEMA MEDICAL SUPPLY INC., IVY MED DISTRIBUTORS INC., SEARAY MEDICAL, P.C., VALLEY PSYCHOLOGICAL, P.C., COHEN & KRAMER, M.D., P.C., PRIORITY MEDICAL DIAGNOSTICS, P.C., STAND-UP MRI OF THE BRONX, P.C., BLUMENTHAL CHIROPRACTIC, P.C., SYNERGYFIRST MEDICAL, PLLC, ISURPLY, LLC, PREMIER SURGICAL SERVICES, P.C., ALL MEDICAL CARE OF BRONX, P.C. ACCURATE MEDICAL DIAGNOSTICS, P.C., and OPTIMUM MEDICAL, P.C.,

Defendants

-----X	
Amended Notice of Motion, Affs & Exs.....	<u>1</u>
Affirmation in Opposition & Exs	<u>2</u>
Notice of Cross-Motion, Affs & Exs.....	<u>3</u>
Affirmation in Opposition & Exs.....	<u>4</u>

Upon the foregoing papers, the plaintiff's motion for an order dismissing defendant Jose Lopez's counterclaim for defamation is granted, and defendant Jose Lopez's cross-motion to dismiss plaintiff's declaratory judgment action is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is a declaratory judgment action which seeks, *inter alia*, a declaration that the events giving rise to the defendants' claims were the product of an intentional incident, namely a staged accident/intentional loss which allegedly occurred on August 22, 2009, and are therefore not covered by the American Commerce Insurance Company policy at issue. The plaintiff contends that the applicable policy of insurance and accompanying endorsements that it issued to its insured do not afford coverage to any defendants named herein for any of the events leading up to and following the alleged incident of August 22, 2009.

The loss in question occurred on August 22, 2009 when a vehicle insured by the American Commerce Insurance Company (hereinafter "ACIC") allegedly rear-ended another vehicle.

Plaintiff moves to dismiss defendant Jose Lopez's counterclaim for defamation, arguing, *inter alia*, that defendant Lopez's counterclaim fails to state a cause of action, that plaintiff's actions are protected by Insurance Law §406, and that plaintiff's alleged actions are protected by a qualified privilege. Plaintiff contends that since defendant Lopez's counterclaim does not allege a specific false statement that was made by plaintiff, or particular words that were stated by the plaintiff, to the Bronx County District Attorney's Office and to Allstate Insurance Company, defendant Lopez fails to state a cause of action sounding in defamation. Plaintiff also argues that N.Y. Insurance Law §406 provides immunity to persons, including insurance companies, who provide information relating to suspected insurance fraud. Plaintiff further argues that its communications to law enforcement personnel regarding the nature of this accident are provided a qualified privilege. As such, plaintiff argues that defendant Lopez's counterclaim must be dismissed.

In support of his cross-motion to dismiss plaintiff's action and in opposition to plaintiff's

motion, defendant Jose Lopez contends that his counterclaim sufficiently states a cause of action for defamation against the plaintiff. Defendant Lopez further argues that plaintiff is not entitled to the immunity provided by N.Y. Insurance Law §406, as the plaintiff's defamatory conduct was motivated by malice, ill will and bad faith. While defendant Lopez argues generally that plaintiff maliciously defamed him in bad faith in order to deny a just insurance claim, defendant Lopez fails to specify or demonstrate the acts constituting the alleged bad faith on the part of the plaintiff. Defendant Lopez has not submitted any proof to support his contention that the plaintiff acted in bad faith. Defendant Lopez further argues that plaintiff's communications to the District Attorney are not subject to qualified immunity as the statements were not made during a pending legal proceeding.

In addition, defendant Lopez contends that plaintiff ACIC's complaint should be dismissed for failure to state a cause of action, pursuant to CPLR §3211(a)(7). Defendant Lopez contends that plaintiff has failed to plead facts sufficient to establish its entitlement to the declaratory judgment that it seeks as plaintiff has failed to establish that the accident was intentional/staged. Defendant argues that the plaintiff did not provide sufficient evidence that the collision was intentional and, that even accepting its allegations as true, plaintiff has not set forth a prima facie case that the accident was staged/intentional.

A complaint for defamation must set forth the particular words allegedly constituting defamation, and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made. (*Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dept. 2009); CPLR §3016(a); *See also, Brian v. Richardson*, 87 N.Y.2d 46 (1995)). The Court notes that nowhere within defendant Lopez's counterclaim does he specify the words allegedly stated by plaintiff to the Bronx District Attorney's Office or to Allstate Insurance Company regarding Jose Lopez or his alleged role in the "insurance fraud ring."

In addition, and more importantly, Insurance Law §406 states that "in the absence of fraud or bad faith, no person shall be subject to civil liability, and no civil cause of action of any nature shall arise against such person (i) for any information relating to suspected fraudulent insurance transaction furnished to law enforcement officials, their agents and employees; and (ii) for any information relating to suspected fraudulent insurance transactions furnished to other

persons subject to the provisions of this chapter; and (iii) for any such information furnished in reports to the insurance frauds bureau, its agents or employees or the workers' compensation fraud inspector general, its agents or employees." As plaintiff has sufficiently set forth the basis for its allegations that the instant accident was staged/intentional, and as there has been no admissible evidence presented by defendant Lopez which demonstrates that the plaintiff engaged in fraud or bad faith in relaying information relating to the suspected staged/intentional accident to the Bronx District Attorney's Office or Allstate Insurance Company, N.Y. Insurance Law §406 bars defendant Lopez's counterclaim for defamation against plaintiff. As there is no evidence of bad faith, plaintiff is provided immunity for reporting the suspected fraudulent insurance activity pursuant to N.Y. Insurance Law §406. As such, defendant Lopez's counterclaim is hereby dismissed.

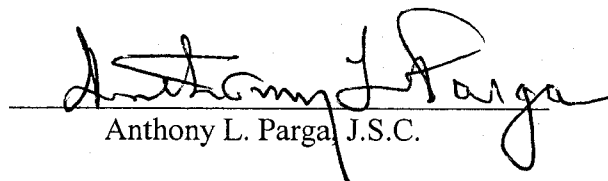
With respect to defendant Lopez's contentions that plaintiff's action should be dismissed for failure to state a cause of action, in considering a motion to dismiss for failure to state a cause of action, the court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*Brooks v. Key Trust Co. Nat'l. Ass'n*, 26 A.D.3d 628 (3d Dept. 2006), quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005)). In doing so, the Court determines only whether the facts as alleged fit within any cognizable legal theory. (*Id.*, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 683 N.E.2d 511 (1994); see also *Khoury v. Khoury*, 78 A.D.3d 903, 912 N.Y.S.2d 235 (2d Dept. 2010), citing *Gougenheim v. Ginzberg*, 43 N.Y.2d 268, 372 N.E.2d 17 (1977)). Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005); see also *Sokol v. Leder*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010)). Construing the plaintiff's allegations as true, plaintiff has plead sufficient facts to allege that the subject loss of August 22, 2009 was a staged/intentional accident. As such, defendant Lopez's cross-motion to dismiss, pursuant to CPLR §3211(a)(7), is denied.

Plaintiff is hereby ordered to serve a copy of this Order upon all defendants to this action or upon their counsel, if they are represented by counsel, within fifteen (15) days. All parties are reminded that there is a preliminary conference scheduled in this matter on **December 20, 2011**,

at 9:30 A.M. in the DCM Part, Nassau County Supreme Court.

This constitutes the decision and Order of this Court.

Dated: November 17, 2011



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