Calderon v American Tr. Ins. Co.
2011 NY Slip Op 33301(U)
July 12, 2011
Supreme Court, Queens County
Docket Number: 25776/2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

LIDA CALDERON,
Plaintiff,

AMERICAN TRANSIT INSURANCE COMPANY, et al.,
Defendants.

Index No. 25776 2010

Motion Date February 15, 2011

Motion Cal. No. 5

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendant American Transit Insurance Company (American Transit) pursuant to CPLR 3211 to dismiss plaintiff's complaint as against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-8
Reply Affidavits	9-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action by plaintiff seeking a declaratory judgment that defendant B.I. Tavarez-Veras a/k/a Blas Tavarez (Tavarez) was a covered driver under an automobile liability insurance policy issued by defendant American Transit under policy number BYLA501431; the policy was in effect on February 26, 2007; defendant Tavarez and John Doe a/k/a "Driver # 180" a/k/a "Blas" are the same individuals; defendant American Transit is obligated to assume the defense of defendant John Doe a/k/a "Driver # 180" a/k/a "Blas"

in connection with Index Number 16425/07; and defendant American Transit is obligated to satisfy the default judgment entered against its insured, John Doe a/k/a "Driver # 180" a/k/a "Blas" in connection with Index Number 16425/07. Plaintiff essentially seeks to amend the judgment in the underlying action under Index Number 16425/07 to substitute defendant Tavarez for defendant John Doe a/k/a "Driver # 180" a/k/a "Blas" and for defendant American Transit to pay that judgment.

Plaintiff sustained injuries in a motor vehicle accident on February 26, 2007. It was a single-car accident and plaintiff was a passenger in that car. Plaintiff commenced an action against Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc., Quisqueya II Car Service and Radio Dispatcher Corp., and John Doe a/k/a "Driver # 180" a/k/a "Blas" under Index Number 16425/07. In an order dated November 30, 2007, and entered in that action on December 27, 2007, plaintiff was granted a default judgment against all defendants.

It is undisputed that defendant American Transit was not advised of the accident, nor the underlying action until June of 2010, more than three years after the date of the accident, and more than two and one-half years after entry of the default judgment in the underlying action. At that time, defendant American Transit was advised that there was a judgment against various entities and defendant Tavarez and that American Transit was required to pay that judgment. Defendant American Transit did insure Tavarez for a vehicle which he owned and operated at the time of the accident, but a search of American Transit's records revealed that it did not receive notice of the accident or lawsuit. Defendant American Transit contacted defendant Tavarez, who denied being in an accident or knowing about the underlying lawsuit.

On June 29, 2010, defendant American Transit received a copy of the judgment in the underlying action, which did not name defendant Tavarez, but instead named John Doe a/k/a "Driver # 180" a/k/a "Blas" and several other entities, none of which were insured by defendant American Transit. The policy issued to defendant Tavarez is a commercial automobile policy written pursuant to Vehicle and Traffic Law (VTL) § 370, and it requires, among other things, that defendant American Transit be given immediate notice when there is an accident. It also requires, as a separate notice provision, that defendant American Transit be notified immediately when an action is commenced against an insured.

On July 2, 2010, defendant American Transit issued a denial/disclaimer, which denied coverage since American Transit did not insure the named entities (or vehicles owned by them), and absent coverage, American Transit had no duty to pay. Defendant American Transit also disclaimed due to the late notices since the notices of an accident and a lawsuit,

given in June of 2010, after the statute of limitations expired and a judgment rendered, were untimely, vitiating coverage.

On September 3, 2010, counsel for plaintiff sent correspondence to American Transit requesting reconsideration, claiming that he had served defendant Tavarez at his place of employment and that there was "sufficient notice afforded to [its] insured." Based on the sworn statement of defendant Tavarez and the fact that it did not insure any of the named entities in the underlying action, defendant American Transit issued an additional denial letter, reaffirming its position. Plaintiff thereafter commenced the instant action on October 12, 2010.

Defendant American Transit now moves to dismiss plaintiff's complaint as against it. Defendant American Transit contends that this action is barred by Insurance Law § 3420 since the judgment in the underlying action was not entered against its insured. Defendant American Transit also contends that since plaintiff did not serve the individual whom plaintiff claims was properly designated as "John Doe" with copies of the summons and complaint prior to the running of the statutory period, jurisdiction was never obtained over that individual, and CPLR 1024 and the relation back doctrine do not avail plaintiff (*see Goldberg v Boatmax://, Inc.*, 41 AD3d 255 [2007]). Defendant American Transit further contends that, even if a judgment had been entered against its insured, defendant American Transit properly disclaimed coverage based on failure to give timely notice of the subject accident and related lawsuit (*see Matter of GEICO Co. v Wingo*, 36 AD3d 908 [2007]).

Defendant American Transit's motion, in effect, is for dismissal pursuant to CPLR 3211(a) (1) and (7).

On a motion to dismiss the complaint pursuant to CPLR 3211(a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *see also Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2008]; *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408 [2005]). It is well established, however, "that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*Meyer v Guinta*, 262 AD2d 463, 464 [1999]; *see also Ahmed v Getty Petroleum Marketing, Inc.*, 12 AD3d 385 [2004]; *Doria v Masucci*, 230 AD2d 764 [1996]). Similarly, to succeed on a motion to dismiss pursuant to CPLR 3211(a) (1), the documentary evidence which forms the basis of the defense must be such

that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Goshen v Mutual Life Insurance Co. of New York*, 98 NY2d 314 [2002]; *see also Leon v Martinez*, *supra*; *Paramount Transportation Systems, Inc. v Lasertone Corp.*, 76 AD3d 519 [2010]).

CPLR 1024 provides that "[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

In order to utilize this procedural mechanism, the plaintiff must show that timely efforts were made to identify the correct party in interest prior to the expiration of the applicable statute of limitations (*see Hall v Rao*, 26 AD3d 694 [2006]; *see also Justin v Orshan*, 14 AD3d 492 [2005]; *Scoma v Doe*, 2 AD3d 432 [2003]). In addition, jurisdiction is not acquired over such "John" or "Jane Doe" unless the process is served in such a manner as to give that unidentified person notice that he or she is being summoned to court (*see Olmstead v Pizza Hut of America, Inc.* 28 AD3d 855 [2006]; *see also Justin v Orshan*, *supra*; *Reid v Niagara Mach. & Tool Co.*, 170 AD2d 662 [1991]).

In this case, a single letter to defendant Community Quisqueya Car Service Inc., seeking the identity of Driver # 180 a/k/a Blas and an assertion that an investigator[1] monitored the car service base at 86-29 102nd Street, Jamaica, New York on multiple occasions in order to identify Driver # 180 a/k/a Blas, without success, fail to demonstrate that plaintiff exercised due diligence prior to the running of the statute of limitations in the underlying action to identify defendant Tavarez by name (*see Scoma v Doe*, *supra*). In addition, the only description of the instant "John Doe" in the complaint is his identification as the operator of a motor vehicle owned by defendants Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc., and Quisqueya II Car Service and Radio Dispatcher Corp., which was involved in a collision with a fixed object, while plaintiff was his passenger, on February 26, 2007, in the course of his employment with those defendants. No physical description is given to John Doe a/k/a "Driver # 180" a/k/a "Blas," other than the implicit allegation of his sex. Same does not adequately describe the "Doe" in the underlying action (*see e.g. Thas v Dayrich Trading, Inc.*, 78 AD3d 1163 [2010]).

Moreover, delivery on July 6, 2007, to a Benny Ramirez, radio dispatcher, at 86-29 102 Street, Richmond Hill, New York, 11418, of process addressed to, among other people,

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1. Plaintiff does not provide the court with an affidavit from this investigator.

John Doe a/k/a "Driver #180" a/k/a "Blas" followed by receipt at that address of an envelope marked John Doe a/k/a "Driver #180" a/k/a "Blas" may not reasonably be expected to come to the actual attention of the concerned individual (*see Harak v Lydig Superette, Inc.*, 161 Misc2d 445 [1994]).[2] Defendant Tavarez, in fact, avers in a sworn statement that, while he owned the subject vehicle, he was not in an accident on the subject date and first received notice of the accident when his insurance company (defendant American Transit) telephoned him on June 18, 2010. In an affidavit submitted with plaintiff's opposition papers, Miguel Polanco, the Vice President of defendant Community Quisqueya Car Service Inc., avers, among other things, that he also never received by mail or in person the Summons and Complaint in the underlying action, which the affidavit of service on said defendant indicates were delivered on the same date to that same radio dispatcher, and were mailed to that same premises.

Since personal jurisdiction was not obtained and the applicable three-year statute of limitations has expired (*see* CPLR 214 [5]), plaintiff may not add defendant Tavarez as a new party in the underlying action, and also is not entitled to the benefit of the relation back doctrine (*see* CPLR 203 [f]), which requires, among other things, that the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well (*see Buran v Coupal*, 87 NY2d 173 [1995]; *see also Miner v City of New York*, 78 AD3d 669 [2010]; *Comice v Justin's Restaurant*, 78 AD3d 641 [2010]). Here, plaintiff's failure to identify Tavarez prior to commencing the underlying action was not the result of any mistake, but rather, was the product of her failure to make a timely and genuine attempt to ascertain Tavarez's identity. (*See Hall v Rao*, *supra*). Therefore, plaintiff may not utilize this doctrine to amend the complaint to add Tavarez as a party united in interest with defendants Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc. and Quisqueya II Car Service and Radio Dispatcher Corp.

Furthermore, plaintiff failed to demonstrate that defendant Tavarez was in any way united in interest with these originally named defendants (*see* CPLR 203 [c]; *see also Opiela v May Industries Corp.*, 10 AD3d 340 [2004]; *Scoma v Doe*, *supra*). Codefendants are united in interest only when one defendant is responsible for the acts or omissions of the other. While unity of interest will generally be found where one of the parties is vicariously liable for the conduct of the other (*see Mondello v New York Blood Ctr. - - Greater New York Blood Program*, 80 NY2d 219 [1992]), none of the named defendants in the underlying action, that is, defendants Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc. and Quisqueya II Car Service and Radio Dispatcher Corp., are vicariously liable

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2. The Court conducted a search of County Clerk records and reviewed the affidavits of service filed in the underlying action.

for the alleged negligence of the operator of the subject vehicle. Defendants Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc. and Quisqueya II Car Service and Radio Dispatcher Corp., cannot be held vicariously liable because they are not owners of the subject vehicle, as defined by VTL § 128 and used in VTL § 388. In addition, an independent contractor and the party who retains him or her are not united in interest because the latter is not vicariously liable for torts of the former (*see generally Rosenberg v Equitable Life Assurance Society of the United States*, 79 NY2d 663 [1992]), and it is incontrovertible that defendant Tavarez was an independent contractor retained by the car service defendants to perform specified services (*see Kuchinski v Charge & Ride, Inc.*, 21 AD3d 1062 [2005]; *see also Abouzeid v Grgas*, 295 AD2d 376 [2002]; *Irrutia v Terrero*, 227 AD2d 380 [1996]).

Since no judgment has been entered against defendant American Transit's insured, defendant Tavarez, the instant action against defendant American Transit is barred by Insurance Law § 3420. Moreover, American Transit properly disclaimed coverage on the ground that plaintiff, the named defendants, Community Quisqueya Car Service Inc., La Nueva Quisqueya Car Service Inc. and Quisqueya II Car Service and Radio Dispatcher Corp., and its insured, defendant Tavarez, failed to provide defendant American Transit with timely notice of the accident, the underlying litigation and the legal papers filed in connection therewith (*see American Tr. Ins. Co. v Sartor*, 3 NY3d 71 [2004]; *see also Liriano v Eveready Ins. Co.*, 65 AD3d 524 [2009]; *Matter of GEICO Co. v Wingo*, *supra*).

Accordingly, in light of the foregoing, defendant American Transit's motion to dismiss plaintiff's complaint as against it is granted.

Dated: July 12, 2011

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J.S.C.