

<b>Hough v USAA Cas. Ins. Co.</b>
2011 NY Slip Op 34340(U)
May 12, 2011
Supreme Court, New York County
Docket Number: 601490-2007
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice

PART 22

HOUGH, DENNIS

vs.

USAA CASUALTY INS. CO.

INDEX NO. 601490-2007

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

FOR THE

The following papers, numbered 1 to 3 were read on this motion to/for \_\_\_\_\_

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Notice of Cross-Motion — Affidavits — Exhibits	<u>2</u>
Answering Affirmation — Affidavits — Exhibits	<u>3</u>
Replying Affirmation — Exhibits	<u>3</u>

**FILED**

MAY 13 2011

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Cross-Motion:  Yes  No

Upon the foregoing papers, it is hereby

Plaintiff Dennis Hough ("plaintiff") moved pursuant to CPLR § 3212 and Insurance Law § 3420 (a) (2) and (b) to recover on an unsatisfied judgment entered against defendant USAA Casualty Insurance Company's ("defendant") insured, Josh Margulies ("Margulies"). In an order dated July 1, 2010 this court denied plaintiff's motion. Plaintiff now moves pursuant to CPLR § 2221 for leave to reargue the motion for summary judgment on the grounds that the court overlooked or misapprehended issues of law and fact pertaining to the timeliness of defendant's disclaimer. Since the court's prior order did not fully address the disclaimer issue, plaintiff's motion to reargue is granted.

Plaintiff was injured in an automobile accident on August 3, 2000. In denial letters dated May 15, 2002 and June 5, 2006 defendant disclaimed coverage. The May 15, 2002 denial letter, addressed to Margulies, disclaimed coverage on two grounds: (1) that defendant would not provide liability coverage for any person who intentionally acts or directs to cause with reasonable expectation of causing bodily injury or property damage; and (2) Margulies' alleged failure to cooperate. In March 2003 Margulies pleaded guilty to third degree assault (Penal Law § 120.00 [2]). On August 4, 2003, plaintiff commenced an action against Margulies to recover damages for his personal injuries. After Margulies defaulted, an inquest was held and a judgment in the amount of \$3,300,000, together with interest in the amount of \$1,567,183.56 and costs and disbursements in the amount of \$1,080.00, was entered against Margulies on November 16, 2005. Plaintiff served a copy of the default judgment with notice of entry upon Margulies on November 16, 2005 and upon defendant on May 8, 2006. The judgment remains unsatisfied.

Plaintiff established his *prima facie* entitlement to summary judgment by demonstrating

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

that he obtained a judgment against Margulies in an amount up to the policy limits, waited 30 days from service of the judgment with notice of entry upon the insured and the insurer, following which the judgment remained unsatisfied, and brought the present action against the insurer (*Rucaj v Progressive Ins. Co.*, 19 AD3d 270 [1<sup>st</sup> Dept]; *Lang v Hanover Ins. Co.*, 3 NY3d 350, 354; 820 NE2d 855; 787 NYS2d 211 [2004]; Insurance Law § 3420 [a] [2]). In opposition, to the motion for summary judgment defendant argued that Margulies' actions on August 3, 2000 were intentional and therefore not covered under either the automobile policy or the umbrella policy issued to him. Defendant also contents in opposition to the motion to reargue that its duty to disclaim coverage under the policies was not triggered because of the intentional nature of Margulies' actions.

Insurance Law § 3420 [d], applicable only to claims for "death or bodily injury," reads "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." Disclaimer pursuant to section 3420 [d] is unnecessary when a claim falls outside the scope of the policy's coverage portion (*Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 734 NE2d 745, 712 NYS2d 433 [2000]). Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed (*id.*). "Stated differently, insurers are not precluded by an untimely disclaimer from asserting a lack of coverage where the injuries did not arise from a covered accident" (*Matter of Government Employees Ins. Co. v Spence* 23 AD3d 466 [2d Dept 2005]). By contrast, disclaimer pursuant to section 3420 [d] is necessary when the denial of coverage is based on a policy exclusion without which the claim would be covered (*id.*). The insuring agreement provision of the automobile policy provides that defendant will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an "auto accident." Similarly, defendant's obligation under the umbrella policy must arise from "an occurrence not excluded" by the policy. The umbrella policy defines an occurrence as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in bodily injury or property damage." Therefore, because defendant's denial of coverage is based, in part, on the assertion that the underlying event was outside the policies' scope of coverage, defendant was not required to issue a timely disclaimer (*see Matter of Travelers Indem. Co. v Cruz*, 40 AD3d 362 [1<sup>st</sup> Dept 2007] [disclaimer not required where motor vehicle collision was intentional because insurer's denial of coverage was based on a lack of coverage and not a policy exclusion]; *State Farm Mut. Auto. Ins. Co. v Langan*, 18 AD3d 860 [2d Dept 2005] [injuries or death resulting from an intentional assault or intentional homicide are not the result of an accident and the incident is not covered under the applicable policy]; *State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490 [2d Dept 2003] [disclaimer not required because a deliberate collision in furtherance of an insurance fraud scheme is not a covered accident).

Plaintiff's verified complaint in the underlying action against Margulies alleges claims sounding in negligence and criminal negligence, causes of action which are sufficient to establish as a matter of law that defendant had a duty to defend Margulies, despite the evidence that Margulies intentionally struck plaintiff with his motor vehicle (*see Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769 [3<sup>rd</sup> Dept 1997]). However, because defendant's breach of this duty cannot create coverage, defendant is not precluded from demonstrating that the actual basis of Margulies' liability to plaintiff is such that the loss falls entirely outside the policies' scope of

coverage. Thus, defendant's defenses to the instant action are limited to those it would have against its insured, Margulies, and defendant may not go behind the default judgment to raise defenses extending to the merits of plaintiff's underlying claim (*Rucaj*, 19 AD3d at 272 [internal citations omitted]; *Robbins*, 236 AD2d at 771). Defendant's assertion that plaintiff's injuries were intentionally caused by Margulies is clearly not a defense to plaintiff's personal injury claim against Margulies and is therefore properly raised by defendant (*id.*). Moreover, since the issue of whether plaintiff's injuries were intentionally caused or resulted from negligence was not actually litigated in the underlying action, the default judgment has no collateral estoppel effect on this question (*id.*). In addition, since the fact that Margulies received a favorable plea to a crime with a criminal intent element of recklessness does not necessarily foreclose finding that his underlying conduct was in fact intentional (*see Carmean v Royal Indem. Co.*, 302 AD2d 670 [3<sup>rd</sup> Dept 2003]) defendant should have the opportunity at trial to meet its burden of establishing that it has no duty to indemnify Margulies because the basis for his liability to plaintiff involves harm that, from Margulies' point of view, was not unexpected, unusual or unforeseen (*Robbins*, 236 AD2d at 771; *Agoado Realty Corp. v United Int'l Ins. Co.*, 95 NY2d 141, 733 NE2d 213, 711 NYS2d 141 [2000]).

To the extent defendant's disclaimer is based upon Margulies' alleged failure to cooperate, the disclaimer is untimely as it was not made as soon as reasonably practicable (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 2010 NY Slip Op 5861 [1st Dept]).

Accordingly, it is hereby

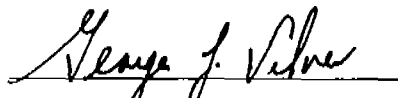
ORDERED that plaintiff's motion for leave to reargue its motion for summary judgment is granted; and it is further

ORDERED that, upon reargument, the court vacates its prior order dated July 1, 2010; and it is further

ORDERED that plaintiff's motion is granted to the extent that defendant's affirmative defenses pertaining to the insured's alleged failure to cooperate are dismissed. Plaintiff's motion is otherwise denied; and it is further

ORDERED that the parties are to appear for a discovery conference on June 17, 2011 in Room 103 of the courthouse located at 80 Centre Street, New York, New York 10013 at 9:30 am; and it is further

ORDERED that plaintiff is to serve a copy of this order with notice of entry upon defendant within thirty days of entry.

  
George J. Silver, J.S.C.

GEORGE J. SILVER  
J.S.C.

Dated: *May 12, 2011*  
New York County

**FILED**

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