

**Matter of Progressive Specialty Ins. Co. v New York
Cent. Mut. Ins. Co.**

2012 NY Slip Op 33730(U)

March 22, 2012

Supreme Court, Orange County

Docket Number: 1583/2010

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

In the Matter of the Petition of
PROGRESSIVE SPECIALTY INSURANCE COMPANY,
Petitioner,

For an Order Staying the Arbitration sought to be had by
STEPHEN ALEXIS and GWEN ALEXIS,
Respondents.

To commence the statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised
to serve a copy of this order, with
notice of entry, upon all parties.

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- and-

NEW YORK CENTRAL MUTUAL INSURANCE
COMPANY and SO MI KO,
Additional Respondents.

DECISION AFTER HEARING

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This action arises from a motor vehicle accident that occurred on September 1, 2009, between a vehicle owned and operated by respondent Stephen Alexis and a vehicle purportedly owned and being operated by additional respondent So Mi Ko. Stephen Alexis claims to have suffered serious physical injuries as a result of this accident, and seeks compensation pursuant to the SUM endorsement contained in his insurance policy, which was issued by petitioner Progressive Specialty Insurance Company.

An issue raised by this case is whether the vehicle being driven by additional respondent So Mi Ko (a 2005 Chrysler PT Cruiser) was insured by additional respondent New York Central Mutual Insurance Company (hereinafter New York Central) at the time of the accident. New York Central claims that it properly cancelled the policy effective August 7, 2009, based on two grounds. First,

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that So Mi Ko never registered the vehicle, which was a condition subsequent of coverage. And second, that she did own the vehicle at the time of the accident and, therefore, did not have an “insurable interest” in the vehicle. Thus, New York Central argues, it did not insure the 2005 Chrysler at the time of the accident.

Progressive argues that New York Central attempted to cancel the policy on one ground and one ground only— that So Mi Ko did not have an insurable interest in the vehicle. However, Progressive argues, she owned the vehicle and, therefore, had an insurable interest in the vehicle. Thus, Progressive asserts, New York Central must provide coverage for the accident.

By order dated September 3, 2010, this court, *inter alia*, ordered a framed issue hearing on coverage. At the hearing, the parties stipulated that New York Central issued a policy to So Mi Ko on the 2005 Chrysler prior to the accident and that the vehicle was not registered in her name at the time of the accident. (Hearing, pp. 3, 9). Further, the parties stipulated to the admission of certain documents into evidence, which included, *inter alia*, the following:

(A) A “Reassignment of Certificate of Ownership by Licensed New Jersey Dealer” for the 2005 Chrysler (Progressive’s exh. H). The certificate purports to be signed by So Mi Ko as the buyer;

(B) An error report from the DMV, dated June 29, 2009, which purports to show non-party Lisa Dropkin to be the registrant of the 2005 Chrysler (New York Central’s exh. L);

(C) A letter from New York Central to So Mi Ko, dated June 30, 2009, noting that information obtained from the DMV, concerning the 2005 Chrysler, did not match information on file, further requesting a copy of the registration for the vehicle (New York Central’s exh. N);

(D) A letter from New York Central to So Mi Ko, dated July 17, 2009, cancelling So Mi Ko’s

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policy effective August 7, 2009, for the following reason:

As per section 18:2:3 violations of conditions on which insurance was issued. No insurable interest in the 2005 Chrysler.

(New York Central, Exhibit H).

Discussion/Legal Analysis

New York Central has admitted that it issued a policy on So Mi Ko's 2005 Chrysler prior to the subject accident. Thus, it was New York Central's burden to establish, by competent evidence, that it properly canceled the policy prior to the date of the accident. *Worldwide Underwriters Ins. Co. v. Lumbermens Mut. Cas. Co.*, 181 A.D.2d 784, 581 N.Y.S.2d 93 (2nd Dept. 1992); *Federal Ins. Co. v. Kimbrough*, 116 A.D.2d 692, 497 N.Y.S.2d 756 (2nd Dept. 1986). New York Central failed to meet its burden of proof.

Initially, it is noted, So Mi Ko was insured by New York Central under the New York Automobile Insurance Plan (hereinafter "NYAIP"). The NYAIP is an entity formed pursuant to section 63 of the Insurance Law. *see generally, Aetna Casualty and Surety Company v. O'Connor*, 8 N.Y.2d 359, 170 N.E.2d 681 (1960). The law provides, *inter alia*, that the Superintendent of Insurance shall approve a plan by which applicants for insurance who are unable to obtain insurance in the voluntary market (*e.g.* poor risks) are assigned to insurers in accordance with the voluntary automobile insurance written by each such insurance company. All insurers licensed to write motor vehicle liability insurance in this State are statutorily mandated to participate. The NYAIP rules govern the rights and liabilities of parties entering into assigned risk contracts. Thus, the Plan is a comprehensive regulatory scheme which supplants the rights and liabilities of parties to an ordinary

insurance contract. Such insurance applications and policies cannot be viewed as private, contractual relationships, but are special relationships subject to immediate oversight and supervision by the Superintendent of Insurance. *Bowley Associates, Ltd. v State Ins. Dept.*, 98 A.D.2d 521, 471 N.Y.S.2d 585 (1st Dept. 1984) *aff'd* 63 NY2d 982 (1984); *Fogarty v. Boston Old Colony Ins. Co.*, 222 A.D.2d 484, 635 N.Y.S.2d 647 (2nd Dept. 1995) .

A notice of cancellation under the NYAID is subject to Insurance Law § 313 and, therefore, must set forth, *inter alia*, specific statements as to the grounds for cancellation so that the insured might cure the same. *DeUrbaez v Lumberman's Mut. Cas. Co.*, 68 N.Y.2d 930, 502 N.E.2d 993, 510 N.Y.S.2d 78 (*affirming on dissent of Murphy, J. at 116 A.D.2d 534, 497 N.Y.S.2d 919 (1 Dept., 1986)*); *Paramount Ins. Co. v Moctezuma*, 201 A.D.2d 652, 608 N.Y.S.2d 276 (2nd Dept. 1994); *Hartford Ins. Co. v Corrigan*, 59 A.D.2d 933, 399 N.Y.S.2d 448 (2nd Dept. 1977). The relevant inquiry is whether the notice given, without more, was adequate to advise an insured unversed in the terminology of the insurance trade of the specific reason for cancelling coverage. The fact that the insured is able to gather from a cryptic cancellation notice the reasons for its issuance does not relieve the insurer of its duty to specify. *DeUrbaez v Lumberman's Mut. Cas. Co.*, 68 N.Y.2d 930, 502 N.E.2d 993, 510 N.Y.S.2d 78 (*affirming on dissent of Murphy, J. at 116 A.D.2d 534, 497 N.Y.S.2d 919 (1 Dept., 1986)*).

Here, as noted *supra*, the stated reason for cancellation was: "As per section 18:2:3 violations of conditions on which insurance was issued. No insurable interest in the 2005 Chrysler." (New York Central, Exhibit H).

Section 18:2:3 of the rules, which concerns cancellation of a policy by an insurer, permits a cancellation when the insured "has violated any of the terms or conditions upon the basis of which the insurance was issued."

Here, New York Central argues, the citation to section 18:2:3 was a reference to section 11.F.1 of the rules, which concerns the issuance of temporary insurance identification cards. In relevant part, that section requires the name on the vehicle registration to match the name of the applicant/named insured, and that a vehicle be registered within 30 days of the issuance of the temporary insurance card. New York Central argues that, under the rule, an unregistered vehicle is not insurable, regardless of whether it is owned by the insured. (As noted *supra*, it is not disputed that the 2005 Chrysler was not registered in So Mi Ko's name at the time of the accident.) Thus, New York Central asserts, it properly disclaimed coverage on that basis. However, the notice of cancellation clearly failed to provide the required specific statement as to this purported ground for cancellation. Rather, New York Central's argument, which is attenuated on its face, cannot be meaningfully distinguished from the argument rejected in *DeUrbaez v Lumberman's Mut. Cas. Co.*, 68 N.Y.2d 930, 502 N.E.2d 993, 510 N.Y.S.2d 78 (affirming on dissent of Murphy, J. at 116 A.D.2d 534, 497 N.Y.S.2d 919 (1 Dept., 1986)). In sum, New York Central failed to demonstrate that it validly cancelled the policy based on the registration of the 2005 Chrysler.

Second, New York Central argues that, even if this court were to limit the ground for disclaimer to the lack of an insurable interest as defined by Insurance Law § 3401,¹ the policy was still validly canceled prior to the accident because there is no competent evidence that So Mi Ko owned the 2005 Chrysler at the time of the accident. However, this argument applies a too narrow a definition of insurable interest.

Pursuant to Insurance Law § 3401:

No contract or policy of insurance on property made or issued in this state, or made or issued

¹ New York Central does not argue that the NYAIP rules define "insurable interest."

upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. In this article, "insurable interest" shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

The problem addressed by the concept of an "insurable interest" is whether an insured, having no real economic interest in the subject matter, is actually making a wagering contract. *Scarola v Insurance Co. of North America*, 31 N.Y.2d 411, 292 N.E.2d 776 (1972). In general, a person has an insurable interest in the subject matter insured where he or she has such a relation or connection with, or concern in, such subject matter that he or she will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. *Scarola v Insurance Co. of North America*, 31 N.Y.2d 411, 292 N.E.2d 776 (1972); *Taylor v Allstate Ins. Co.*, 214 A.D.2d 610, 624 N.Y.S.2d 644 (2nd Dept. 1995). Thus, a legal or equitable interest in the property insured is not necessary to support an insurable interest. *Weissman v Galway Const. Corp.*, 239 A.D.2d 410, 659 N.Y.S.2d 42 (2 Dept. 1997); *Polley v Daniels*, 238 A.D. 181, 264 N.Y.S. 194 (3rd Dept. 1933)(bailee of another's property possessed insurable interest in property). Indeed, "[g]reat liberality is indulged in determining whether a person has anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest." *Scarola v Insurance Co. of North America*, 31 N.Y.2d 411, 292 N.E.2d 776 (1972). An "insurable interest" is *sui generis*, and peculiar in its texture and operation. *Scarola v Insurance Co. of North America*, 31 N.Y.2d 411, 292 N.E.2d 776 (1972).

Here, the record before the court is sufficient to demonstrate, at a minimum, (1) that So Mi Ko was the titled owner of the 2005 Chrysler on May 11, 2009; (2) that she obtained insurance for

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the vehicle; and (3) that she was a permissive user of the vehicle at the time of accident and continued to have a connection with the vehicle after the accident. Indeed, both she and Lisa Dropkin are listed at the same address on the DMV report. In light of the same, New York Central failed to demonstrate that it validly cancelled the policy on the ground that So Mi Ko lacked an insurable interest in the 2005 Chrysler at the time of the accident.

In sum, the court finds that New York Central failed to demonstrate that it validly cancelled the policy issued to So Mi Ko on the 2005 Chrysler prior to the accident at bar.

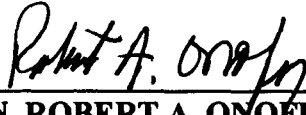
The foregoing constitutes the decision of the court.

Further Directives

The parties are therefore directed to appear, through respective counsel, for a Status Conference on Wednesday, May 23, 2012, at 9:15 A.M. at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

Dated: March 22, 2012
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, A.J.S.C.