

Serrano v Progressive Ins. Cos.
2013 NY Slip Op 34187(U)
April 15, 2013
Supreme Court, Kings County
Docket Number: 23479/ 11
Judge: Jack M. Battaglia
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 59

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 PATRICIA SERRANO AND JAYSON PLAZA,

Index No. 23479/11
 Motion Calendar No. 43
 March 11, 2013

Plaintiffs,

-against-

DECISION AND ORDER

Jack M. Battaglia
 Justice, Supreme Court

PROGRESSIVE INSURANCE COMPANIES, THE
 PROGRESSIVE CORPORATION, PROGRESSIVE
 CORPORATION, and PROGRESSIVE CASUALTY
 INSURANCE COMPANY,

Defendants.
 -----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on Defendants' motion for an order, pursuant to CPLR 3211, "dismissing this action":

- Notice of Motion to Dismiss
 Affirmation in Support
 Verification
 Exhibits A-G
- Affirmation in Opposition
 Exhibits 1-2
- Reply Affirmation

The Verified Complaint of plaintiffs Patricia Serrano and Jayson Plaza alleges that, on October 17, 2005, plaintiff Serrano was the driver of a vehicle she owned and plaintiff Plaza was a passenger, when the vehicle was struck in the rear by an unidentified vehicle on 34th Avenue, at or near its intersection with 73rd Street, in Queens. Further, that plaintiff Serrano's vehicle was insured by defendants Progressive Insurance Companies, The Progressive Corporation, Progressive Corporation, and Progressive Casualty Insurance Company (individually and collectively referred to hereinafter as "Progressive," as the context indicates) pursuant to a policy numbered 180855110 with uninsured motorist coverage; that Plaintiffs claimed from Progressive the full limits of the uninsured motorist coverage by reason of the injuries suffered in the October 17, 2005 collision, but Progressive has not paid.

Progressive now moves for an order, pursuant to CPLR 3211, “dismissing the action on the grounds that this Court does not have jurisdiction to address the claim; [and] that the contractual limitation of time to submit the matter to binding arbitration has expired” (Notice for Motion to Dismiss dated November 7, 2012.) Although not specified in the notice of motion, Progressive cites CPLR 3211 (a) (1), (a) (2), and (a) (5) (*see* Affirmation in Support ¶ 11), but the only case authority cited relates to a motion to dismiss pursuant to CPLR 3211 (a) (7).

However conceived or articulated, the basis for Progressive’s motion are the terms of the automobile insurance policy purportedly issued to plaintiff Serrano, and Progressive submits a copy of an automobile insurance policy, bearing the same policy number that appears in the Verified Complaint, issued to Patricia A. Serrano, and covering the period August 25, 2005 to February 25, 2006. In the Notice of Appearance and Verified Answer, Progressive admits having issued the policy to Plaintiff with an uninsured motorist endorsement.

Progressive submits no evidence in admissible form that the insurance policy upon which it relies is the policy issued to plaintiff Serrano. (*See* Prince, Richardson on Evidence § 9-101 [Farrell 11th Ed]; *NYCTL 1998-2 v Santiago*, 30 AD3d 572, 573 [2d Dept 2006] [“A private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established”].) Here, Plaintiffs do not challenge Progressive on the terms of the issued policy, and, perhaps more importantly, the terms of mandatory and optional uninsured motorist coverage are prescribed in great part by statute and Insurance Department regulations (*see* CPLR 3420 [f]; 11 NYCRR § 60-2.0 *et seq.*)

Progressive’s motion is based essentially on the contention - - again, no matter how conceived or articulated - - that “Plaintiffs’ only remedy” for the failure to provide uninsured motorist benefits under the policy “was to submit [their] SUM-Uninsured Motorist matter to binding arbitration” (*see* Affirmation in Support, last page, unnumbered.) Moreover, “since the Plaintiffs’ [*sic*] failed to submit the matter to binding arbitration within the six (6) year Statute of Limitation of CPLR 213, then the Plaintiffs’ claim . . . has expired and must be barred” (*id.*)

The parties’ disagreement relates to the meaning and interplay between two endorsements to the automobile policy issued to plaintiff Serrano: an Uninsured Motorist Endorsement and a Supplementary Uninsured/Underinsured Motorists Endorsement. Each of the Endorsements contains an arbitration provision, as follows:

Uninsured Motorist Endorsement

“10. **Arbitration.** *If we do not agree* with the insured or the insured’s representative making claim hereunder that the insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury to the insured, *or do not agree* as to the amount of payment which may be owing under this UM endorsement then, *upon written demand of either the*

claimant or us, the matter or matters upon which we do not agree with such person shall be settled by arbitration in accordance with the rules and procedures of the American Arbitration Association prescribed or approved by the Superintendent of Insurance for this purpose. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and we each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this UM endorsement.” (Emphasis added.)

Supplemental Uninsured/Underinsured Motorist Endorsement

“12. **Arbitration:** If any insured making claim under this SUM coverage and we *do not agree* that such insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, *or do not agree* as to the amount of payment that may be owing under this SUM coverage, then, *at the option and upon written demand of such insured, the matter or matters upon which such insured and we do not agree shall be settled by arbitration, administered by the American Arbitration Association, pursuant to procedures prescribed or approved by the Superintendent of Insurance for this purpose.*

If, however, the maximum amount of SUM coverage provided by this endorsement equals the amount of coverage required to be provided by section 3420 (f) (1) of the New York Insurance Law and Article 6 or 8 of the New York Vehicle and Traffic Law, *then such disagreement shall be settled by such arbitration procedures upon written demand of either the insured or us.*

Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, and any such insured and we each agree to be bound by any award made by the arbitrator as to this SUM coverage. For purposes of this Condition, the term ‘insured’ includes any person authorized to act on behalf of the insured.” (Emphasis added.)

Whichever provision applies, however, to the extent that a disagreement “shall be settled by arbitration,” the arbitration is commenced “upon written demand of either the claimant [“insured”] or us,” *i.e.*, the insurer. Assuming a disagreement between the insured and the insurer, Progressive points to no provision in either Endorsement or elsewhere in the policy that requires the insured to make the demand. Insurance Law § 3420 (f), which deals with mandatory and optional uninsured

motorist coverage, says nothing about arbitration. Neither Section 60-2.4 of the regulations, "Arbitration of SUM claims," nor the informal opinion dated May 10, 2000 of the Office of General Counsel of the Insurance Department, requires that arbitration be commenced by a demand of the insured.

Nor does Progressive point to anywhere in the statute, regulations, or the insurance policy, that specifies a time limit in which to seek arbitration of an uninsured motorist claim, nor does Progressive cite to any authority that a six-year statute of limitations, based upon CPLR 213, applies to arbitration of uninsured motorist claims under the policy.

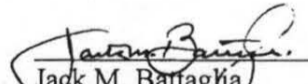
Indeed, Progressive provides no evidence of a "disagreement" about coverage that would trigger the arbitration provision in either Endorsement. In opposition to the motion, Plaintiffs submit a copy of their counsel's letter to Progressive dated November 16, 2005, with proof of mailing, in which claim is made for uninsured motorists benefits, and counsel's affirmation that Progressive never responded to the letter. Except for Progressive's counsel's letter to Plaintiffs' counsel dated May 21, 2012, demanding withdrawal of the Verified Complaint, there is no evidence of Progressive's response to Plaintiffs' 2005 claim.

In short, even assuming that one of the mandatory arbitration provisions would apply to Plaintiffs' claim for uninsured motorist benefits, Progressive has not shown that it did not agree with Plaintiffs' claim, so as to require that Plaintiffs demand that the disagreement be settled by arbitration. Indeed, Progressive does not show such a disagreement as would permit Progressive to demand arbitration.

Finally, there is no contention, and certainly no evidence, that Progressive did not receive Plaintiffs' claim for uninsured motorist benefits. Accepting the allegations of Plaintiffs' Verified Complaint to be true, as the court must, Progressive's failure to respond to the claim would constitute a breach of contract, and, since there is no general arbitration provision in the applicable policy, Plaintiffs may sue for an appropriate remedy. The six-year statute of limitations would apply (*see* CPLR 213 [2]), and from what appears in the record on this motion, this action would have been commenced within that time.

The motion is denied.

April 15, 2013


Jack M. Battaglia
Justice, Supreme Court



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