Braithewaite v Progressive Cas. Ins. Co.
2014 NY Slip Op 33594(U)
July 28, 2014
Supreme Court, Kings County
Docket Number: 5464/12
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:5464/12
Motion Date: 6-23-14
Motion Cal. No.:5

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KESTON BRAITHEWAITE,

Plaintiff,

-against-

DECISION/ORDER

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Defendant,

----------x

The following papers numbered 1 to 2 were read on this motion:

Papers:	**Numbered**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	2
Reply Affirmations/Affidavits/Exhibits.....	
Other.....	

Upon the foregoing papers the motion is decided as follows:

The plaintiff, Keston Braithwaite, moves pursuant to CPLR § 2221 to restore plaintiff's motion to reargue to this court's motion calendar, and upon restoration, for an order granting the motion.

Plaintiff's motion, to the extent it seeks an order restoring the motion to reargue to this court's motion calendar is granted. Plaintiff's motion to reargue, however, is denied in its entirety.

A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some

other reason, mistakenly arrived at its determination (*see Butler v. City of Rye Planning Com'n,* 114 AD3d 937, 980 N.Y.S.2d 831 [2d Dept 2014]; *Anthony J. Carter, DDS, P.C. v. Carter,* 81 AD3d 819, 916 N.Y.S.2d 821 [2d Dept.2011]; *Everhart v. County of Nassau,* 65 AD3d 1277, 885 N.Y.S.2d 765 [2d Dept 2009]; *McDonald v. Stroh,* 44 AD3d 720, 842 N.Y.S.2d 727 [2d Dept 2007]). In concluding that only $25,000 in uninsured motorist benefits is available to the plaintiff, the statutory minimum required under New York law (Insurance Law § 3420(f)(1)), plaintiff did not show that the court overlooked or misapprehended the facts or law or for some other reason, mistakenly arrived at this conclusion. As this Court stated in its August 16, 2013 decision and order, although defendant's policy provided $300,000.00 in coverage for uninsured benefits, plaintiff's claim did not fall within the policy's coverage for uninsured benefits since the vehicle he was occupying at the time of the accident was not an "uninsured motor vehicle" as the policy defined that term. As this court made clear in its August 16, 2013 decision and order, plaintiff's entitlement to uninsured benefits stems solely from the provisions of New York law.

Likewise, plaintiff did not show that the court overlooked or misapprehended the facts or law or for some other reason, mistakenly arrived at the conclusion that defendant was not obligated to issue a timely disclaimer inasmuch as the Progressive policy did not provide coverage for plaintiff's claim for uninsured motorist benefits. As this Court stated: "A disclaimer is unnecessary when a claim falls outside the scope of a policy's coverage portion, since "requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*Worcester Insurance Co. v. Bettenhauser*, 95 N.Y.2d 185, 712 N.Y.S.2d 433, 734 N.E.2d 745; *see Markevics v. Liberty Mutual Insurance Co.*, 97 N.Y.2d 646, 735 N.Y.S.2d 865, 761 N.E.2d 557; *American Ref–Fuel Co. of Hempstead v. Employers Insurance Co. of*

Wausau, 265 A.D.2d 49, 705 N.Y.S.2d 67)."

Plaintiff's contention that defendant's disclaimer is based on an exclusion to coverage is without merit.

Plaintiff's reliance on *Rowell v. Utica Mut. Ins. Co.*, 77 N.Y.2d 636, 638, 571 N.E.2d 707, 708, 569 N.Y.S.2d 399, 400 [1991] is misplaced. The policy at issue in that case was not issued in another state to an out-of-state resident as here. Thus, unlike here, the defendant insurer in *Rowell* was required to provide uninsured motorist protection in accordance with New York law.

Finally, there is no merit to plaintiff's contention that he established entitlement to summary judgment on the issue of liability. Plaintiff admits that the only proof submitted on his motion for summary judgment concerning the happening of the accident was the certified police report which was annexed to plaintiff's reply papers. The function of reply papers, however, is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments in support of the motion (*see, Lazar v. Nico Indus.*, 128 A.D.2d 408, 409–410, 512 N.Y.S.2d 693). A party moving for summary judgment is not permitted to use reply papers as a means to shift to the opposing party the burden to demonstrate a material issue of fact at a time when opposing party has neither the obligation nor opportunity to respond absent express leave of court (CPLR 2214[c]; *Lazar v. Nico Indus., supra*; *Ritt by Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562, 582 N.Y.S.2d 712, 713-714). In any event, the account of the accident as stated in the police report is hearsay and therefore insufficient to demonstrate plaintiff's entitlement to summary judgment.

The court has considered plaintiff's remaining arguments and find them to be without merit.

Accordingly, it is hereby

ORDERED that the motion to the extent it seeks an order restoring plaintiff's motion to reargue to this court's motion calendar is granted; and it is further

ORDERED that plaintiff's motion to reargue is **DENIED** on the merits.

Dated: July 28, 2014

PETER P. SWEENEY, A.J.S.C.

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HON. PETER P. SWEENEY, J.S.C.

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