

**Duff v Aranivo**

2015 NY Slip Op 30905(U)

May 19, 2015

Supreme Court, Suffolk County

Docket Number: 6913/2013

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 6913/2013

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

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 CRYSTAL DUFF,

Plaintiff,

-against-

GREGORIO ARANIVO and MOTOR  
 VEHICLE ACCIDENT INDEMNIFICATION  
 CORPORATION,

Defendants.

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ORIG. RETURN DATE: JUNE 10, 2013  
 FINAL SUBMISSION DATE: AUGUST 1, 2013  
 MTN. SEQ. #: 001  
 MOTION: MG

ORIG. RETURN DATE: JUNE 13, 2013  
 FINAL SUBMISSION DATE: AUGUST 1, 2013  
 MTN. SEQ. #: 002  
 CROSS-MOTION: XMD

**PLTF'S/PET'S ATTORNEY:**  
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**ATTORNEY FOR DEFENDANT  
 MOTOR VEHICLE ACCIDENT  
 INDEMNIFICATION CORPORATION:**  
 CRUZ & GANGI AND ASSOCIATES  
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 NEW YORK, NEW YORK 10038  
 646-205-7880

**DEFENDANT:**  
 GREGORIO ARANIVO  
 14 STANDISH ROAD  
 BRENTWOOD, NEW YORK 11717

Upon the following papers numbered 1 to 8 read on this motion FOR DISMISSAL AND CROSS-MOTION FOR LEAVE TO COMMENCE AN ACTION  
 Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers  
4-6; Affirmation in Opposition and supporting papers 7, 8; it is,

**ORDERED** that this motion (seq. #001) by defendant MOTOR  
 VEHICLE ACCIDENT INDEMNIFICATION CORPORATION ("MVAIC") for an

Order dismissing plaintiff's complaint for plaintiff's failure to satisfy conditions precedent of Insurance Law § 5218 requiring plaintiff to obtain leave of this Court to sue MVAIC, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion (seq. #002) by plaintiff CRYSTAL DUFF for an Order, pursuant to Insurance Law § 5218, granting plaintiff leave to commence an action against MVAIC, is hereby **DENIED**.

This action, commenced on or about March 8, 2013, seeks to recover for personal injuries allegedly sustained by plaintiff. Plaintiff was a pedestrian when she was struck by a vehicle operated by defendant GREGORIO ARANIVO on Suffolk Avenue at or near its intersection with Fulton Street in Brentwood, New York. According to the police accident report, the offending vehicle was unregistered at the time of the accident, and there was no other information provided in the accident report as to the vehicle's titled owner. Defendant Aranivo has defaulted in appearing in this action.

Plaintiff asserts that MVAIC received timely notice of the intent to make a claim; however, MVAIC alleges that plaintiff is not a "qualified person" as that term is defined in the Insurance Law, and further alleges that plaintiff's address at the time she was struck was other than she had indicated in the notice to MVAIC.

Plaintiff, in her cross-motion, has provided an additional and more comprehensive household disclosure notice listing her four children as the only other individuals residing with her, all of whom are minors and none of whom are covered by any separate insurance coverage. MVAIC, rather than tailoring its opposition to the cross-motion's content, merely resubmits the arguments contained in the affirmation of counsel submitted with its original motion to dismiss.

MVAIC proffers neither case law nor other legal support for its arguments. The vehicle in question was identified in the police report; there was no active coverage for the vehicle in question in the police report; the owner of the vehicle was not identified; the operator of the vehicle has been named as a defendant; and there is no assertion that any coverage exists theoretically or otherwise for the offending vehicle.

Plaintiff is a resident of New York State and is neither an insured nor an uninsured owner of a vehicle. MVAIC's argument that she is not a "qualified person" is without legal or factual support and candidly borders on the frivolous. Although the operator of the vehicle was eventually identified when the vehicle was located by the police on Clark Street at a nearby location, there is no indication of any coverage whatsoever either for the vehicle or any other possible insured.

Likewise, there is no indication of title ownership to the vehicle, and plaintiff has not indicated what efforts, if any, have been made to ascertain the last title owner of the vehicle, or if any attempt has been made to obtain any ownership information from or through the NYS Department of Motor Vehicles. No plate number was listed on the accident report and there is no vehicle identification number listed either. There would seem to be no avenue to pursue to further identify the true owner of the vehicle.

The fact that there is an identified operator of the vehicle who was cited for both running a red light and driving while intoxicated under Vehicle and Traffic Law §§ 1111 (d) (1) and 1192 (3) provides no additional information. The summons and information may well contain a vehicle identification number for the vehicle, but that is merely speculation. The summons number AASG997082 and District Court docket number 045681-12 are listed in the accident report. The operator was obviously arrested and charged with those violations of law.

Neither plaintiff nor MVAIC has requested a framed issue hearing to determine what if any efforts or avenues of investigation may exist for the obtainment of additional information concerning the last known owner of the subject vehicle.

As stated in *Matter of Acosta-Collado v Motor Veh. Acc. Indem. Corp.*, 103 AD3d 714 (2d Dept 2013):

MVAIC was created in 1958 to compensate innocent victims of hit-and-run motor vehicle accidents (see *Canty v Motor Veh. Acc. Indem. Corp.*, 95 AD2d 509, 510, 467 NYS2d 50 [1983]). Article 52 of the New York Insurance Law is entitled the "Motor Vehicle Accident Indemnification Corporation Act" (Insurance Law § 5201 *et seq.*). The procedure for applying to a court for leave

to bring an action against MVAIC is set forth in Insurance Law § 5218. That section provides, *inter alia*, that a court may permit an action to be brought against MVAIC if certain criteria are met, including demonstrating to the court that “all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner’s consent, cannot be established” (Insurance Law § 5218 [b] [5]). Here, the petitioner failed to sustain his burden of demonstrating that the accident was one in which the identity of the owner and operator was unknown or not readily ascertainable through reasonable efforts (*see Matter of Troches v Motor Veh. Acc. Indem. Corp.*, 171 AD2d 873, 567 NYS2d 800 [1991]). Rather, “there is substantial evidence linking the suspect vehicle to the accident and, therefore, MVAIC is a speculative party” (*Byrd v Johnson*, 60 AD2d 900, 900-901, 401 NYS2d 549 [1978]). As such, the petitioner is required to exhaust his remedies against Sarmiento in the personal injury action before seeking relief from MVAIC (*see Hauswirth v American Home Assur. Co.*, 244 AD2d 528, 529, 664 NYS2d 466 [1997]). Only if the personal action ultimately fails due to lack of proof of the identity of the owner and/or operator may leave to sue MVAIC be considered (*see Matter of Frankl v Motor Veh. Acc. Indem. Corp.*, 53 AD2d 614, 384 NYS2d 20 [1976]; *Matter of Chocko v Motor Veh. Acc. Indem. Corp.*, 20 AD2d 728, 248 NYS2d 170 [1964]; *Matter of Ruiz v Motor Veh. Acc. Indem. Corp.*, 19 AD2d 832, 244 NYS2d 594 [1963]).

To proceed against the MVAIC, Section 5218 (b) (5) of the Insurance Law provides:

*all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and*

operator and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established

(Insurance Law § 5218 [b] [5] [emphasis added]).

While plaintiff has complied with all notice requirements required to maintain an action pursuant to Article 52 of the Insurance Law as against the MVAIC, the Court finds that questions remain as to whether the identity of the owner of the vehicle is reasonably ascertainable and what the factual circumstances are with respect to defendant Aranivo's operation of the vehicle on the date of the accident.

Accordingly, this motion by MVAIC to dismiss the complaint as asserted against it is **GRANTED**, and this cross-motion by plaintiff for leave to commence an action against MVAIC is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 19, 2015

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION