

Garcia v Government Empls. Ins. Co.
2015 NY Slip Op 32772(U)
June 15, 2015
Supreme Court, Nassau County
Docket Number: 4844-13
Judge: Jerome C. Murphy
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

ANTONIO GARCIA,

Plaintiff,

- against -

**GOVERNMENT EMPLOYEES INSURANCE
COMPANY,**

Defendant.

TRIAL/IAS PART 22
Index No.: 4844-13
Motion Date: 3/27/15
Sequence No.: 003

DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation, Affidavit and Exhibits.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation of Richard Fogel in Support.....	3

PRELIMINARY STATEMENT

Defendant brings this application for an order pursuant to CPLR § 3212 on the ground that there is no dispute of material fact that there is no evidence to support plaintiff's allegation that on May 19, 2006, there was a \$1 million umbrella liability insurance contract in effect entered into by defendant and the insured Jeanne Rakowski or that defendant wrongfully terminated any umbrella liability insurance contract with Rakowski, together with such other relief as the Court may deem just and proper. Plaintiff submitted opposition to this application.

BACKGROUND

Beginning as of October 10, 2003, Jeanne Rakowski was covered by a \$1,000,000.00 Personal Umbrella Insurance Policy with GEICO. The policy, # P5118238 covered a 2003 Land Rover automobile, and a primary residence at 151 Beach 127th Street, Belle Harbor, New York. The annual premium was \$199.00. The policy was renewed for the period October 10, 2004 — October 10, 2005, with the same \$1,000,000.00 coverage for the automobile and primary

residence. The annual premium was \$211.00. During the policy period, an additional vehicle, a 2001 Mercedes Benz, was added and the premium increased to \$332.00. After the application of a premium discount, the premium was reduced to \$306.00. Similarly, for the period October 10, 2005 — October 10, 2006, the \$1,000,000.00 coverage for the two vehicles and the primary residence cost \$306.00, which was paid by Ms. Rakowski.

In response to the August 29, 2005 suggestion by GEICO that she consider increasing her coverage, she telephoned them on August 30, 2005, seeking an increase in coverage to \$2,000,000.00 and adding a rental property at 2132 E. 14th St., Brooklyn, New York as a covered risk. GEICO approved these changes on August 30, 2005 (Def. Exh. "Q"). On August 31, 2005, GEICO sent a notice regarding Policy # 5118238, indicating that the premium was \$505, and that the minimum payment was \$306.00. This was a change from the August 26, 2005 notification to Ms. Rakowski, which did not include the additional coverage or covered premises. On October 18, 2005 GEICO sent a notification to Ms. Rakowski that the amount now due was \$199.00, indicating that the \$306.00 had already been paid.

When Ms. Rakowski failed to pay the additional premium of \$199.00 by October 27, 2005, GEICO issued a Notice of Cancellation, for non-payment of premium, dated November 4, 2005, which indicated that the premium of \$199.00 was past due, and that the policy would be cancelled at 12:01 a.m. Standard Time on August 8, 2006, unless payment was made prior to that date. Ms. Rakowski testified that she had no recollection of receiving the Notice of Cancellation, and that she first learned of the lack of coverage during the course of the trial on behalf of Garcia for his personal injuries.

Ms. Rakowski did not pay the additional \$199.00. On August 8, 2006, after 12:01 a.m., she loaned her vehicle to a friend, who was involved in a collision, injuring plaintiff in this action. Mr. Garcia prevailed in his action against Ms. Rakowski, as owner, and the driver, in the amount of \$819,152.90. Rakowski's primary automobile insurance paid \$310,000.00, and Garcia seeks to recover the balance of the award from the umbrella policy in the amount of \$1,000,000.00, which he contends was in effect as of the date of the accident.

The issue presented is whether, having paid \$306.00 for \$1,000,000.00 in umbrella coverage, but having failed to pay \$199.00 representing the increased premium for \$2,000,000.00 coverage and an additional property, there existed a valid and subsisting \$1,000,000.00 policy of insurance; or whether the failure to pay the added premium resulted in a valid cancellation of the

policy in its entirety.

DISCUSSION

The answer to this question brings to the fore the issue of whether or not the policy is divisible or severable. In *Nationwide Mut. Ins. Co. v. Mason*, 37 A.D.2d 15 (2d Dept. 1971), the Court was called upon to resolve an analogous question, which they stated as follows: “(w)here a holder of a fully paid automobile liability policy subsequently requests an endorsement adding another automobile to the coverage of the policy, may the carrier cancel the Entire policy when the insured fails to pay the additional premium for the added automobile?”

Lumbermens Mutual Casualty Company (“Lumbermans”) issued a policy of insurance to Hattie B. Dozier (“Dozier”) covering a 1957 Ford Automobile. The term of the policy was December 5, 1967 — December 5, 1968. The policy was renewed for another year from December 5, 1968 — December 5, 1969. On December 13, 1968, the Ford was eliminated from the policy and replaced by a 1961 Buick. The renewal premium of \$89 was fully paid. On March 24, 1969, a 1961 Chevrolet was added to the policy, and from that day forward, the Buick and Chevrolet were both covered under the policy. On or about April 30, 1969 Lumbermens sent Dozier a notice that there was an additional premium of \$68 due for “car #2 added.”

Mason was a passenger in the Dozier Buick on October 3, 1969, during the term of the December 5, 1968 — December 5, 1969 policy. Lumbermens rejected Mason’s claim for damages for personal injuries, claiming that the policy had been canceled for non-payment of the \$68 additional premium. Mason made a Demand for Arbitration against Nationwide, with whom he had a policy providing an uninsured coverage endorsement. The trial court determined that the cancellation notice issued by Lumbermens was ineffective, as they failed to file a copy with the Commissioner of Motor Vehicles within 30 days.

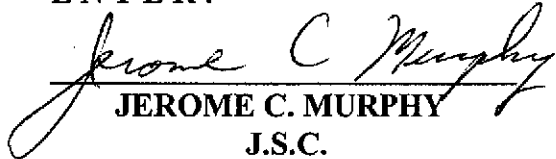
The Appellate Division found it unnecessary to address the issue upon which the trial court determined the matter. Rather, the Court concluded that Lumbermens did not have the right to cancel coverage on the Buick, for which the premium had been paid; its sole right was to cancel coverage of the Chevrolet, for which the additional premium had not been paid. The Court relied upon the language of *Donley v. Glens Falls Ins. Co.*, 184 N.Y. 107, 111 (1906) in determining that, under the rule of severability, that “the coverage afforded by the endorsement had a separate premium and was on a different automobile from the vehicle covered by the policy as thertofore in effect.”

The same principle which dictated the result in *Nationwide* is applicable to the case at bar. Ms. Rakowski paid \$306.00 for a \$1,000,000.00 umbrella policy, covering two vehicles and her primary residence for the period October 10, 2005 — October 10, 2006. This policy was in full force and effect on August 8, 2006, when Garcia was injured in an accident involving one of the covered cars. During the course of the deposition of Rich Pitts, on behalf of GEICO, he indicates that the additional unpaid premium of \$199.00 was for the sole purpose of increasing the amount of coverage from \$1,000,000.00 to \$2,000,000.00. The addition of another property did not produce an additional premium, only the increase in coverage (Exh. "O" to Motion, pp. 113 — 118).

Accordingly, defendant's summary judgment motion is denied due to one or more factual questions that exist against the defendant.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
June 15, 2015

ENTER:

JEROME C. MURPHY
J.S.C.

ENTERED
JUN 17 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE