

American Tr. Ins. Co. v Vaccaro

2015 NY Slip Op 32984(U)

October 9, 2015

Supreme Court, Kings County

Docket Number: Index No. 500587/2014

Judge: Kathy J. King

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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of October, 2015.

P R E S E N T:
HON. KATHY J. KING,

Justice.

-----X
AMERICAN TRANSIT INSURANCE
COMPANY,

Petitioner

- against -

Index No. 500587/2014

GINA VACCARO AND ANNE MARIE THOMPSON,

Respondents,

-and-

SALVATORE PILLITTERI and NEW YORK
CENTRAL MUTUAL FIRE INSURANCE
COMPANY,

Proposed Additional Respondents

-----X

The following papers numbered 1 to 3 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross-Motion and Affidavits
(Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavit (Affirmations) _____
Memoranda of Law _____

Papers Numbered

1
2, 3
4
5

Upon the foregoing papers, petitioner, American Transit Insurance Company (ATIC) moves for an order, pursuant to CPLR 7503(b): (1) permanently staying the uninsured motorist arbitration between petitioner and respondents; or (2) temporarily staying the uninsured motorist arbitration between petitioner and respondents; (3) joining the proposed additional respondents as named herein; and (4) ordering the respondents to comply with the uninsured motorist claim

preliminary requirements of a framed issue hearing regarding the validity of the disclaimer issued by New York Central Mutual Fire Insurance Company (NY Central), or alternative, if the court determined arbitration is necessary. Respondents, Gina Vaccaro and Anne Marie Thompson (Respondents) oppose the petition in its entirety. Further, proposed additional respondents, Salvatore Pillitteri (Pillitteri) and NY Central oppose the instant petition on the grounds that they should not be joined as respondents in this action because Pillitteri's vehicle was not at fault for the accident.

On January 10, 2008 respondents were involved in a two car collision wherein they alleged to have sustained personal injuries. At the time of the collision, respondents were passengers in an ATIC-insured vehicle registered to Seagull 2000, Inc. (Seagull). The vehicle that came into contact with Seagull's vehicle was registered to Pillitteri. The police report created as a result of the collision listed insurance code 240 which corresponds to NY Central.

On January 6, 2011, respondents commenced a lawsuit against Seagull. Neither respondents' counsel nor Seagull forwarded a copy of the summons and complaint to ATIC. Said action culminated in entry of default judgment against Seagull awarding Vaccaro the sum of \$88,068.75 and Thompson the sum of \$52,841.25.

On April 21, 2014, ATIC was first informed by respondents of the default judgment entered against Seagull. On April 28, 2014, ATIC sent a letter to respondents' counsel disclaiming coverage to both Seagull and respondents based on their failure to comply with the notice provisions of its policy which is a condition precedent to coverage.

It is undisputed that both vehicles involved in the January 10, 2008 collision were insured. The movant indicates that NY Central's denial of coverage is based on an assessment that Pillitteri's vehicle was hit in the rear and was not at fault for the accident. Respondents

contend that based on NY Central's denial of coverage, Pillitteri's vehicle is rendered uninsured.

Insurance Law 3240(f)(1) defines what constitutes an uninsured motorist or vehicle. The statute states that an uninsured motorist or vehicle exists when a motorist is without liability insurance at the time of an accident, a stolen vehicle is involved in an accident, motor vehicles operated without permission of the owner are in an accident, unknown vehicles are involved in a hit and run accident, or where an insurer disclaim or deny coverage by reason of its insolvency. Insurance Law 3420(f)(1). An accident involving any of these scenarios can trigger the uninsured motorist provision.

In the case at bar, Pillitteri's vehicle does not fall under any of the uninsured motorist classifications established in Insurance Law 3420(f)(1). It is undisputed that the Pillitteri vehicle was insured by NY Central, and registered in the state of New York at the time of the accident. It was not a stolen vehicle, or an unidentified vehicle that fled the scene of the accident. NY Central readily admitted in a correspondence, dated March 5, 2014, that Pillitteri vehicle was insured by NY Central at the time of the accident and Pillitteri was a permissive user. It was operated with the permission of the owner and NY Central did not disclaim coverage by reason of its insolvency. The fact that NY Central is contesting liability for the accident is not a valid ground recognized under Insurance Law 3420(f) to render the Pillitteri vehicle as uninsured to trigger the uninsured motorist coverage. Thus, Respondents have failed to furnish sufficient evidence to support their allegations that the adverse vehicle was uninsured.

Additionally, coverage for the underlying accident was properly disclaimed by petitioner. Under New York Law, insured parties must comply with insurance policy notice provisions as a pre-condition to coverage (*Kahn v Allstate Ins. Co.*, 17 AD3d 408 [2d Dept. 2005]). "Where an insurance policy requires that notice of an occurrence be given 'as soon as practicable,' notice

must be given within a reasonable time in view of all the circumstances” (*Columbia Univ. Press, Inc. v Travelers Indem. Co. of Am.*, 89 AD3d 667 [2d Dept. 2011]; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d 596, 597 [2d Dept. 2010]). “[T]he absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract” (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]).

A review of the ATIC insurance policy issued to Seagull establishes that the insured is obligated to provide a detailed written notice to ATIC “as soon as practicable” after the happening of any of four different events, including 1) an occurrence; 2) an offense that may result in a claim; 3) a claim is made; or 4) a suit is brought against the insured (*see* Petitioner’s EXHIBIT F – Business Auto Coverage Form – Section IV – Business Auto Conditions (A)(2), Page 12). The policy defines “suit” as meaning “civil proceeding in which damages because bodily injury, property damages, or ‘personal and advertising injury’ to which the insurance applies are alleged. (*Id.* Page 16). There is no doubt that, by definition, the underlying action commenced by respondents for personal injuries resulting from the subject accident, constituted a suit. Accordingly, respondents had a duty to notify ATIC of the underlying suit as soon as practicable. Thus, respondents’ failure to provide notice of the underlying claim vitiates ATIC’s obligation under the insurance policy, and ATIC may disclaim coverage whether it was prejudiced by the delay or not (*Briggs Avenue LLC v Ins. Corp. of Hannover*, 550 F3d 246 [2d Circ. 2008]).


Additionally, Respondents are not entitled to insurance coverage under petitioner’s policy pursuant to Insurance Law 3420 since they also failed to provide notice as reasonably practicable (*see American Transit Ins. Co. v Sartor*, 781 NYS2d 630 [2004]; *Engelson v Commerce Casualty Co.*, 149 Misc. 886 [Sup. Ct. Kings Co., 1993]; *Everready Insurance Company v*

Chavis, 150 AD2d 332 [1989]). Respondents' counsel does not deny that he waited nearly three years to notify ATIC of the underlying lawsuit. In fact, respondents' counsel readily admitted in his papers that he sent ATIC a letter putting ATIC on notice of his intention to make an uninsured motorist claim in 2008. Although respondents' counsel knew the identity of the carrier, he chose not to give notice of the underlying lawsuit until April 21, 2014, only after he had entered the default judgment. Since Seagull and the respondents failed to provide ATIC with timely notice of the commencement of the underlying suit as required by its policy, ATIC was unable to defend or indemnify Seagull and properly disclaimed coverage.

Based on the foregoing, petitioner's motion is granted to the extent that arbitration is permanently stayed.

The foregoing constitutes the decision and order of the court.

ENTER



 HON. KATHY J. KING
 J.S.C.

**HON. KATHY J. KING
 JSC**

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