

Matsil v Utica First Ins. Co.

2016 NY Slip Op 32743(U)

January 7, 2016

Supreme Court, Nassau County

Docket Number: 604676/15

Judge: Jeffrey S. Brown

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 13**

STEVEN MATSIL and ELLEN MATSIL,

Plaintiff(s),

-against-

**INDEX # 604676/15
Mot. Seq. 1
Mot. Date 10.20.15
Submit Date 1.13.15**

**UTICA FIRST INSURANCE COMPANY and BRIAN DORIS
HOME IMPROVEMENTS, INC.,**

XXX

Defendant(s).

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3
Memorandum of Law.....	4

Motion by the defendant Utica First Insurance Company for an order pursuant to CPLR 3211 (a) (1), (7) dismissing the complaint against it and an order pursuant to CPLR 3211 (c) and CPLR 3001 granting it summary judgment, declaring that it has no duty to defend and/or indemnify any party, including the defendant Brian Doris Home Improvements, in connection with the June 29, 2014 accident in which the plaintiff Steven Matsil allegedly suffered serious injuries is determined as provided herein.

The plaintiffs in this action seek a declaratory judgment requiring the defendant Utica First Insurance Company (the insurance company) to defend and indemnify the defendant Brian Doris Home Improvements, Inc., in an action brought by them against Brian Doris Home Improvements in which they seek to recover, inter alia, for personal injuries the plaintiff Steven

Matsil allegedly sustained at work on June 29, 2014. The insurance company seeks dismissal of this action pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3211 (c) on two grounds: It maintains that the plaintiffs lack standing under Section 3420 of the Insurance Law because they have not procured a money judgment against its insured, Brian Doris Home Improvements. In addition, it maintains that since he was an employee of Brian Doris Home Improvements at the time of his accident, the plaintiff Steven Matsil's accident is not a covered event under the subject policy and that it timely and properly disclaimed coverage.

The facts pertinent to the determination of this motion are as follows: The plaintiff Steven Matsil was allegedly injured on the job on June 29, 2014. Brian Doris Home Improvements was also working at that job although the relationship between Steven Matsil and that company is unclear. On that date, the insurance company had a policy in effect with Brian Doris Home Improvements, however, it specifically excluded injuries for the insured's employees and contractors as well as employees of contractors hired by the insured. On July 8, 2014, the Robert C. Mangi Agency e-mailed the insurance company the First Notice of Loss. A letter from Matsil's attorneys Siler & Ingber addressed to Brian Doris Home Improvements dated July 2, 2014 was attached which indicated that they had been retained by Steven Matsil to represent him in connection with his accident of June 29, 2014 at 452 Westminster Road, Rockville Center, New York. Upon inquiry of Brian Doris Home Improvements, the insurance company allegedly learned that Steven Matsil was its employee on the day of his accident. Jason Englehart, the insurance company's claims examiner assigned to this claim, immediately notified Brian Doris Home Improvements that in light of his employee status, the employee exclusion in their policy excluded Steven Matsil's accident from coverage under their policy. A letter was allegedly issued to Brian Doris Home Improvements on July 10, 2014 so advising it and Siler & Ingber were copied on that letter.

The Matsils commenced their action against, inter alia, Brian Doris Home Improvements on or about September 3, 2013 and procured a default judgment against it on February 5, 2015. The order granting that default judgment did not award damages to Steven Matsil. Rather, it indicated that "a hearing may be required on the issue of damages." Although the Matsils' action against the remaining defendants was dismissed, an inquest has not yet been held and a judgment has not been entered.

The insurance company alleges that the first notice it received of the Matsils' action against Brian Doris Home Improvements was via this lawsuit. In their complaint, the plaintiffs allege that the insurance company's disclaimer was "[i]mproper, ineffective and a nullity with no legal effect upon the rights and obligations of the parties herein as it was . . . not properly served upon plaintiff, Steven Matsil."

"On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be afforded a liberal construction. The facts alleged must be presumed to be true and must be accorded every favorable inference. If they fit within any cognizable legal theory, the motion to dismiss must be denied" (*Stein v Chiera*, 130 AD3d 912, 914 [2d Dept 2015], citing *East*

Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 66 AD3d 122, 125 [2d Dept 2011], affd 16 NY3d 775 [2011]). “If . . . the allegations do not fit within any cognizable legal theory even after they are accorded every favorable inference, the motion to dismiss should be granted” (*Stein* at 914, citing *Fisher v. DiPietro*, 54 AD3d 892, 894 [2d Dept 2008]). “A court can consider evidence submitted in opposition to a motion to dismiss ‘to remedy defects in the complaint.’ This is because ‘[m]odern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one’ ” (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 85 [1st Dept 2013], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

“To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) based on a defense founded upon documentary evidence, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiffs' claim” (*DiGiacomo v Levine*, 76 AD3d 946, 949 [2d Dept 2010], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]; *Newcomb v Sims*, 63 AD3d 1022, 1023 [2d Dept 2009]). Bare legal conclusions and factual allegations that are “flatly contradicted by documentary evidence in the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (citations omitted)’ ” (*Deutsche Bank National Trust Co. v Sinclair*, 68 AD3d 914, 915 [2d Dept 2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]).

Insurance Law § 3420 (b)(1) authorizes “any person who . . . has obtained a judgment against the insured . . . for damages for injury sustained or loss or damage occasioned during the life of the policy or contract” to maintain an action against the insurer “[s]ubject to the limitations and conditions of paragraph two of subsection (a) hereof.” That subsection states “in case judgment against the insured . . . shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may . . . be maintained against the insurer.” “Insurance Law § 3420 therefore grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company” (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004], citing *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]; see also, *Santa v Capitol Specialty Ins., Ltd.*, 96 AD3d 638, 639 [1st Dept 2012]). “Once the statutory prerequisites are met, the injured party steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company” (*Lang* at 355; see also, *Santa*, 96 AD3d 638).

Having failed to procure a judgment against the insured which remained unsatisfied for 30 days after service with notice of entry, the plaintiffs have failed to comply with Insurance Law § 3420 and lack standing to maintain this action. In opposition, while they outline their

continuing efforts to procure a money judgment against the insured, the plaintiffs have not established that they have in fact procured a judgment against Brian Doris Home Improvements which remained unsatisfied for 30 days. This action must accordingly be dismissed.

The insurance company also seeks dismissal of this action on the merits, assuming, *arguendo*, that the statutory predicate had been satisfied. More precisely, it seeks a declaration that Matsil's accident is excluded under the subject policy and that it properly and timely disclaimed coverage.

Insurance Law §3420 provides that “[i]f under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.” Jason Englehart, the Insurance company's claims examiner of the subject claim, has attested in support of the insurance company's motion that upon the the insurance company's first notification of the Matsils' claim, he contacted Brian Doris and was informed that at the time of his accident, Steven Matsil was employed by his company. He attests that not only did he inform Brian Doris of the policy's exclusion for employees, he prepared a letter addressed to Brian Doris at his business address which was copied to Steven Matsil's attorneys Siler & Ingber at the address listed on their letter of July 2, 2014 to Brian Doris. That letter informed both Brian Doris and the plaintiffs' attorneys that the subject policy's Employee Exclusion precluded coverage of Matsil's injuries. Englehart further attests that per the insurance company's custom and practice, that draft letter was sent via e-mail to Chris Williams, of the office's clerical staff, who was to print the letters and envelopes and compile them for mailing in accordance with company custom and practice. Per the insurance company's custom and practice, Williams would place the letters in a central claims mail bin. Englehart attests that mail room staff picks up mail twice a day, places postage on the letters and takes the envelopes to the post office. In addition, he opines that those letters are customarily sent by both regular mail and return receipt requested. Richard Shlotzhauer, a Vice President of the insurance company, has similarly attested to the insurance company's custom and practices and he attests that he has no reason to believe that the company's customs and practices were not followed with respect to the subject disclaimer letter.

The plaintiffs' attorney denies receipt of the disclaimer letter until after this action was commenced and notes the lack of proof of mailing.

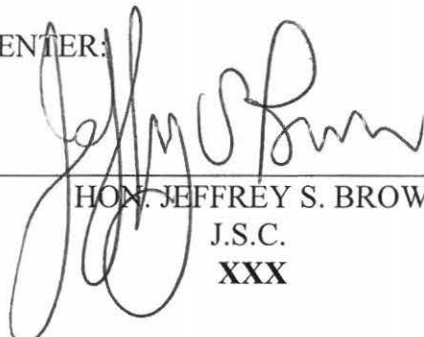
Discovery has not yet taken place in this case, in particular with respect to this issue. The insurance company has not cited any cases requiring dismissal of the complaint *at this juncture* based on the notice of disclaimer evidence provided. Assuming, *arguendo*, that the action was not being dismissed pursuant to Section 3420 of the Insurance Law based upon the lack of an unsatisfied money judgment, the motion to dismiss pursuant to CPLR 3211 (c) and declaratory

relief in the insurance company's favor would be denied. See, *Hermitage Ins. Co. v Zaidman*, 107 AD3d 579, 580 [1st Dept 2013] "issue of fact . . . exists as to whether [defendant] gave the insureds written notice disclaiming coverage, as required by Insurance Law § 3420 [d] [2]").

In conclusion, the defendant insurance company's motion is **granted to the extent** that the complaint is dismissed pursuant to Insurance Law § 3420 based upon the lack of an unsatisfied judgment against the insurance company's insured. The insurance company's motion is otherwise denied.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 7, 2016

ENTER:


HON. JEFFREY S. BROWN
J.S.C.
XXX

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ENTERED

JAN 12 2016

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COUNTY CLERK'S OFFICE