

**New Jersey Mfrs. Ins. Co. v Progressive Ins. Co.**

2016 NY Slip Op 32861(U)

April 15, 2016

Supreme Court, Rockland County

Docket Number: 031745/2015

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory  
time period for appeals as of  
right (CPLR 5513 [a]), you  
are advised to serve a copy  
of this order, with notice of  
entry, upon all parties.

-----X  
NEW JERSEY MANUFACTURERS  
INSURANCE COMPANY,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 031745/2015

PROGRESSIVE INSURANCE COMPANY,

Defendant.

Motion Sequence #1

-----X

The following papers, numbered 1 to 6, were read in connection with Defendant's pre-answer motion seeking dismissal of this declaratory action pursuant to CPLR §3211:

Notice of Motion to Dismiss/Affirmation in Support(Reiter)/Exhibits(A-K)/	
Memorandum of Law in Support.....	1-3
Affirmation in Support(Downing)/Exhibits(A-E).....	4
Affirmation in Opposition to Motion(Reiter)/Exhibits(A-E).....	5
Reply Affirmation(Downing).....	6

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

By Corrected Decision and Order dated November 6, 2015, the Court granted New Jersey Manufacturer Insurance Company's (hereinafter "NJM") motion to renew the Court's previous granting of Progressive's unopposed motion to dismiss. In doing so, the Court held that it would consider various papers submitted in connection with that motion, Motion Sequence #2, in its determination of Defendant's motion to dismiss under Motion Sequence #1.

NJM commenced this declaratory judgment action to declare the parties' respective rights and obligations under insurance policies issued by them. The policies were brought into question based upon a motor vehicle accident that took place on May 8, 2014 involving John Desapio. On this date, Desapio had just delivered goods for KEB Delivery Services in Suffern, New York when his 1999 Freightliner tractor struck another vehicle in Airmont, New York.

The driver of the other vehicle involved commenced a personal injury action against Desapio in New York. On the date of the accident, Desapio had a non-trucking liability insurance policy with Progressive that he had obtained through its subsidiary or affiliate, Drive New Jersey. KEB had a commercial automobile policy with NJM in effect at this time. Progressive, following its investigation into the accident, denied liability coverage based upon a “Contingent Liability Endorsement” contained in Desapio’s policy that excluded coverage while his tractor was being operated in the business of any person or organization other than him. Given this, Progressive advised Desapio that KEB’s insurer, NJM, would be handling the claim. Thereafter, NJM requested that Progressive defend and indemnify Desapio and KEB in the underlying personal injury action based upon its assertion that the Progressive policy was the appropriate policy to handle the loss. Progressive reaffirmed its denial of coverage to Desapio, prompting NJM to seek declaratory and indemnification in this separate action.

Progressive asserts that this declaratory judgment should be dismissed for lack of personal jurisdiction under CPLR §3211(a)(1)(8), lack of subject matter jurisdiction under CPLR §3211(a)(1)(2) and *forum non conveniens* pursuant to CPLR §327(a).

Progressive alleges lack of personal jurisdiction because the parties lack the requisite “presence” in New York so as to allow it to assert general or “long arm” jurisdiction over the instant dispute. In support, it explains that the insurance policies in question were issued to a New Jersey individual and entity, underwritten by a New Jersey Corporation and this action seeks adjudication of the rights and liabilities under these insurance contract under New Jersey law. Progressive states that the only connection New York has with this case is that the underlying motor vehicle giving rise to a claim and question of coverage occurred in New York.

In opposition, NJM states that records from the New York State Department of Insurance establish that Progressive and Drive New Jersey are authorized to conduct business in New York. In addition, Progressive sent letters regarding this action from its offices at 1999 Marcus Avenue in New Hyde Park, New York. Therefore, based upon this in the application of Insurance Law §§1101, 1212, and 1213(a), Progressive transacted business in New York so as to confer personal jurisdiction over it in this action.

“Although a plaintiff is not required to plead and prove personal jurisdiction in the complaint, where jurisdiction is contested, the ultimate burden of proof rests upon

the plaintiff. ‘CPLR 302(a)(1) ...authorizes the court to exercise jurisdiction over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in this State . In order to determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction. The Court of Appeals has interpreted the second prong of the jurisdictional inquiry to require that, in light of all the circumstances, there must be an ‘articulable nexus’ or ‘substantial relationship’ between a defendant’s in-state activity and the claim asserted. Although ‘causation is not required,’ the Court of Appeals has stated that ‘at a minimum [there must be] a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former’. [W]here at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute”. *Pichardo v Zayas*, 122 AD3d 699, 700-01 [2d Dept 2014] *lv denied*, 26 NY3d 905 [2015].

The Court finds that Progressive transacted business in New York based upon the unrefuted fact that it is authorized to conduct business in New York and the cause of actions arose from this transaction, namely its insured seeking coverage for an accident that occurred in New York. As such, the Court has personal jurisdiction over Progressive.

These findings also refute Progressive’s assertion of lack of subject matter jurisdiction. The statutory basis for this portion of its application, Business Corporation Law §1314, entitled “Actions or special proceedings against foreign corporations” explicitly provides that an action or special proceeding may be maintained “[w]here the defendant is a foreign corporation doing business or authorized to do business in this state”. As such, dismissal on these grounds is denied.

The grounds asserted in support of Progressive’s *forum non conveniens* application largely echo those advanced as part of its motion to dismiss for lack of personal jurisdiction and will not be repeated at length herein. NJM opposes dismissal on these grounds for various reasons.

“Ordinarily, nonresidents are permitted to enter New York courts to litigate their disputes as a matter of comity. Obviously, however, our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State. The common-law doctrine of *forum non conveniens*, also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere. The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider

that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling. The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 [1984]; see *Stravalle v Land Cargo, Inc.*, 39 AD3d 735, 735 [2d Dept 2007].

The Court finds that Progressive has not met its burden of demonstrating relevant factors which militate against accepting the litigation in this forum. The burden on the Court is not tremendously onerous, as the underlying motor vehicle action is already pending before it and determinations made herein have significant ramifications upon that action. In addition, Progressive’s multiple New York addresses used in connection with this and the underlying motor vehicle action undercut any allegation of potential hardship. As such, the facts and circumstances of this action do not warrant dismissal based upon *forum non conveniens* grounds.

Based upon the foregoing, Progressive’s motion to dismiss is denied in its entirety. Progressive shall file an answer within thirty(30) days of the date hereof.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
April 15, 2016

E N T E R

  
HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel for Plaintiff  
Downing & Peck, P.C.

Counsel for Defendant  
Law Offices of Lorne M. Ritter, LLC