

Amica Mut. Ins. Co. v Prunitis
2017 NY Slip Op 33479(U)
January 9, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 607023-2015
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**P R E S E N T:**Hon. PETER H. MAYER
Justice of the Supreme CourtMOTION DATE 1-14-16ADJ. DATE 3-8-16Mot. Seq. # 001 - MotD-----X
AMICA MUTUAL INSURANCE COMPANY, :

Plaintiff(s), :

- against - :

ANDREW P. PRUNITIS, GREGORY W.
PRUNITIS, KRISTINA H. PRUNITIS and
ROBERT A. SCARETTA,Defendant(s). :
-----X**Monteiro & Fishman LLP**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated November 30, 2015; and supporting papers, including Memorandum of Law; (2) Affirmation in Opposition by the defendant Andrew P. Prunitis, dated February 22, 2015, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the branch of plaintiff's motion (001), which seeks an order granting plaintiff summary judgment against defendant Andrew P. Prunitis pursuant to CPLR 3212, is hereby granted as against said defendant; and it is further

ORDERED that the branch of the plaintiff's motion (001), which seeks a default judgment against defendants Gregory W. Prunitis, Kristina H. Prunitis and Robert A. Scaretta pursuant to CPLR 3215, is hereby denied, without prejudice and with leave to resubmit, for the reasons set forth herein; and it is further

ORDERED that plaintiff's counsel shall promptly provide a copy of this Order via First Class Mail upon all parties in this action and in the underlying Suffolk County personal injury action (*Scaretta v*

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Prunitis, Index No 11220-2013), or their attorneys if represented by counsel, and shall promptly thereafter file the affidavits of such service with the Suffolk County Clerk.

This declaratory judgment action arises from an incident in which Andrew P. Prunitis ("Prunitis") assaulted Robert A. Scaretta ("Scaretta") outside Scaretta's home on September 27, 2012. The record indicates that on that date, Prunitis had an argument on the phone with his estranged wife, Krystal. Thereafter, Prunitis drove to Scaretta's home to confront Krystal and Scaretta who were dating at the time. Once there, Prunitis physically assaulted Scaretta, knocking him to the ground, then punching and kicking him repeatedly in the face and body. While Prunitis continued to hit Scaretta, Prunitis was screaming, "do you like f--king my wife" and "I'm going to kill you." Prunitis was arrested hours after the incident and charged with Assault in the Third Degree and Harassment in the Second Degree. He ultimately pled guilty to Assault in the Third Degree.

At the time of the incident, Prunitis allegedly lived with his parents, Gregory W. Prunitis and Kristina H. Prunitis, who were named insureds under a homeowners policy of insurance with Amica ("Amica Policy"). As a result of his alleged injuries, Scaretta commenced a personal injury action against Prunitis, captioned *Robert A. Scaretta v Andrew Prunitis*, under Suffolk County Index No 11220-2013 ("underlying action"). Prunitis seeks indemnification under his parents' Amica Policy for the injuries allegedly inflicted by Prunitis upon Scaretta during the Assault. Amica seeks a declaration that Prunitis is precluded from coverage under the policy on the grounds that the incident is not a covered "occurrence" under the Policy, and because Prunitis failed to provide timely notice of the incident to Amica, which first learned of the incident when Prunitis served Amica with the underlying lawsuit papers in or about May 2013, approximately eight (8) months after it occurred.

In relevant part, CPLR 3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Summary judgment for the insurer is appropriate in a declaratory judgment action when an insured who possesses contemporaneous knowledge of the incident for which coverage is sought but, without a valid excuse, fails to notify the carrier of the incident until several months later by forwarding a copy of the summons and complaint in the underlying personal injury action (see *Lukralle v. Durso Supermarkets*, 238 AD2d 318, 656 NYS2d 292 [2d Dept 1997]). Notice of an incident, which must be provided within a reasonable time under all the circumstances, is a condition to the carrier's liability and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy (*id.*). It is well settled that insurance policy terms constitute a material condition precedent to the insurer's liability and that if there is no excusable noncompliance by the insured, the policy is vitiated (see *Security Mutual Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 340 NYS2d 902 [1972]; *American Home Assur. Co. v Transamerica Ins. Co.*, 90 NY2d 433, 661 NYS2d 584 [1997]).

A disclaimer pursuant to Insurance Law § 3420(d) is required when the denial of coverage is based upon a policy exclusion without which the claim would be covered; however, a disclaimer pursuant to Insurance Law § 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion (see *Ciasullo v Nationwide Ins. Co.*, 32 AD3d 889, 823 NYS2d 85 [2d Dept 2006], citing *Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185 [2000]; *Handelsman v Sea Ins. Co.*, 85 NY2d 96 [1994]; *Zappone v Home Ins. Co.*, 55 NY2d 131, [1982]).

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In opposition to Amica's motion, plaintiffs submit an affirmation from counsel, but no affidavit from a party plaintiff. An affirmation of a party's attorney submitted in support of or opposition to a motion, and which is without actual knowledge of the facts, is without evidentiary value and is, therefore, unavailing on the issues presented to the Court (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Browne v Castillo*, 288 AD2d 415, 733 NYS2d 494 [2d Dept 2001]; *Dicupe v City of New York*, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]; *Farina v Pan American World Airlines, Inc.*, 116 AD2d 618, 497 NYS2d 706 [2d Dept 1986]).

In any event, Amica's motion papers establish that Prunitis's September 27, 2012 assault of Scaretta, for which Prunitis seeks indemnification, is not a covered "occurrence" under the Amica Policy. Even if the incident could have constituted a covered occurrence, Prunitis failed to provide timely notice of the incident to Amica. Therefore, Amica has made a prima facie showing of entitlement to summary judgment as a matter of law. Prunitis's opposition fails to rebut that showing. Counsel's contention that summary judgment should be denied because discovery is not complete is unavailing on this record. To speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone a decision on the summary judgment motion (see *Gateway State Bank v Shangri-La Private Club For Women, Inc.*, 113 AD2d 791, 493 NYS2d 226 [2d Dept 1985], *aff'd*, 67 NY2d 627, 499 NYS2d 679 [1986]). Furthermore, the mere hope that further discovery would reveal the existence of triable issues of fact is insufficient to delay determination of a motion for summary judgment (*Shectman v Wilson*, 68 AD3d 848, 890 NYS2d 117 [2d Dept 2009]; *Giraldo v Morrissey*, 63 AD3d 784, 880 NYS2d 512 [2d Dept 2009]).

Based upon the foregoing, the branch of Amica's motion for an order granting summary judgment as against Andrew P. Prunitis is granted. The branch of the motion, however, which seeks a default judgment against defendants Gregory W. Prunitis, Kristina H. Prunitis and Robert A. Scaretta pursuant to CPLR 3215, is hereby denied without prejudice and with leave to resubmit for failure to comply with 50 USCS Appx §521(b). Title 50 USCS Appx §521, which applies in state courts, was enacted for the "protection of service members against default judgments." Pursuant to 50 USCS Appx §521(a), this section "applies to any civil action or proceeding in which the defendant does not make an appearance" (emphasis supplied).

Under 50 USCS Appx §521(b)(1), "the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit: (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service" (emphasis added). Under §521(b)(4), "[t]he requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury."

Here, there is no showing in plaintiff's affidavits of service as to the military status of defendants Gregory W. Prunitis, Kristina H. Prunitis and Robert A. Scaretta, nor does plaintiff submit any other proof of said defendants' military status. Therefore, pursuant to 50 USCS Appx §521(b), a judgment of default may not be entered against those defendants.

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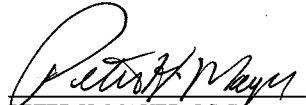
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This constitutes the Order and Judgment of the Court.

Dated: January 9, 2017
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