SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12
Justice

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MOUNTAIN VALLEY INDEMNITY COMPANY,

Plaintiff,

- v -

RAUL GONZALEZ and LUCAS SANTANA,

Defendants.

INDEX NO. 153146/17

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

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By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment against defendant Santana and pursuant to CPLR 3215 granting it a default judgment against defendant Gonzalez, and for an order declaring that it has no duty to defend Gonzalez or to provide medical payments to Santana in the underlying action commenced by Santana against Gonzalez. Santana opposes the motion; Gonzalez defaulted.

I. BACKGROUND

A. Underlying action

In 2016, Santana commenced an action against Gonzalez in Supreme Court, Suffolk County, under index number 613926/16, alleging that he was injured on January 22, 2016, while on premises owned by Gonzalez located at 38 Grant Avenue in Suffolk County in an incident involving an all-terrain vehicle (ATV) or quad with a snow plow attachment. (NYSCEF 19).

It is undisputed that plaintiff issued an insurance policy to Gonzalez, which excludes any injury arising from the ownership, maintenance, or use of a motor vehicle or motorized conveyance. The issue is whether the ATV at issue constitutes a motor vehicle and is thus excluded from coverage, as the policy excludes "the ownership, maintenance, use, loading or unloading of motor vehicle or all other motorized land conveyances," but not "a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration." (NYSCEF 18).

After plaintiff received notice of Santana's claim, it hired an investigator to determine whether the ATV was covered. By affidavit dated January 23, 2018, the investigator assigned to the claim states that he met with Gonzalez, recorded his statement, and took photographs of the ATV. Gonzalez told him that he had purchased the ATV with a snow plow attachment from a dealership, that the snow plow attachment was for his own personal use to remove snow from his driveway, that he had not used it until the date of Santana's accident, and that he used the ATV for recreation, mountain riding, dirt riding, and joy riding. (NYSCEF 11, 23).

Plaintiff's claims examiner states that she later spoke to Gonzalez by telephone and learned from him that he had registered the ATV with the Department of Motor Vehicles (DMV) but did not obtain automobile insurance coverage for it. (NYSCEF 10). The DMV requires the registration of an ATV if it is operated anywhere in New York State, including on the owner's property. (NYSCEF 17, 23).

Plaintiff thus contends that the DMV's registration requirement for ATVs and Gonzalez's actual registration demonstrate, *prima facie*, that the exclusion applies as the ATV was subject to registration. Santana argues, however, that the fact that an ATV must be registered with the DMV is not the same as being "subject to motor vehicle registration" as required by the

insurance policy, and as the Vehicle and Traffic Law (VTL) does not define an ATV as a "motor vehicle," an ATV is not subject to motor vehicle registration. He also observes that insurance is not required for an ATV if used on the owner's property. (NYSCEF 36).

Pursuant to VTL § 2281(b), an ATV does not include a vehicle used for agricultural purposes or for snowplowing but an ATV must be registered if it is used or intended to be used for any purpose other than agricultural or snowplowing and must be regulated according to provisions governing the operation of ATVs while in such use. There is no dispute here that Gonzalez used the ATV for other than agricultural and snowplowing. Moreover, the registration of ATVs is required by the DMV. (NYSCEF 10).

Plaintiff thus establishes, through the DMV rules, VTL requirements and definitions, and Gonzalez's registration of his ATV, that the ATV was subject to motor vehicle registration, and is therefore excluded from plaintiff's insurance coverage. While the VTL does not include an ATV within the definition of a "motor vehicle" (VTL § 125), plaintiff's insurance policy applies not only to motor vehicles but also to all other motorized conveyances.

None of the cases cited by Santana addresses the interpretation of insurance policies that exclude motor vehicles as well as motorized conveyances as they relate to the use of ATVs. (*E.g.*, *Showler v Am. Mfrs. Mut. Ins. Co.*, 261 AD2d 896 [4th Dept 1999] [vehicle in question was snowmobile which is not required to be registered by DMV if used on owner's private property]; *Hollenbeck v Aetna Cas. & Sur. Co.*, 195 AD2d 981 [4th Dept 1993] [vehicle was dirt bicycle, which cannot be registered with DMV]; *People v Miller*, 196 Misc 2d 591 [Justice Ct, Rensselaer County 2003] [dismissing VTL charges related to use of motor vehicle on ground that ATV is not motor vehicle]; *People v Church*, 148 Misc 2d 909 [Justice Ct, Dutchess County 1990] [dismissing Penal Law claims related to motor vehicle violations]).

In contrast, in *Mueller v Allstate Ins. Co.*, while the insured argued that an ATV is not a motor vehicle as defined by VTL § 125, and that the policy exclusion for "any motor vehicle designed principally for recreational use off public roads" did not apply, the Court held that it was a motor vehicle designed principally for recreational use off public roads, and that coverage was excluded. (21 AD3d 1010 [2d Dept 2005]; *see also D'Arrigo v Aetna Cas. & Sur. Co.*, 115 AD2d 345 [4th Dept 1985] [finding that insured's use of motorcycle was excluded from coverage, and that motorcycle did not fit within definition of "motor vehicle" in policy was irrelevant as it excluded "motorized land vehicles"]).

Moreover, as the policy never covered the ATV, whether plaintiff timely disclaimed is irrelevant. (*State Farm & Cas. Co. v Guzman*, 138 AD3d 503 [1st Dept 2016], *lv denied in part, dismissed in part* 28 NY3d 1101 [as insured did not reside at premises and thus premises not covered under policy, timeliness of insurer's disclaimer irrelevant]; *see also Konstantinou v Phoenix Ins. Co.*, 74 AD3d 1850 [4th Dept 2010], *lv denied* 15 NY3d 712 [untimeliness of disclaimer did not matter, as, if insurance policy did not contemplate coverage of vehicle at issue in first instance, failure to timely disclaim could not create coverage where none existed]; *Solomon v U.S. Fidelity & Guar. Co.*, 43 AD3d 333 [1st Dept 2007] [same]). Santana therefore fails to raise a triable issue in opposition to the motion.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting it summary judgment and for an order declaring that it has no duty to defend or indemnify defendant Gonzalez and to provide medical payments to others' coverage to defendant Santana in the underlying action is granted; it is further

ORDERED, that plaintiff's motion for a default judgment against Gonzalez is denied absent proof of his non-military status subsequent to the default; it is further

ADJUDGED and DECLARED, that plaintiff is not obliged to provide a defense to and provide coverage for, and to provide medical payments to defendants in the action *Santana v Gonzalez*, index no. 613926/16, pending in Supreme Court, Suffolk County; it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly.

9/27/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST			FIDUCIARY APPOINTMENT		REFERENCE