

Serpa v Liberty Mut. Mid-Atlantic Ins. Co.
2018 NY Slip Op 33438(U)
November 23, 2018
Supreme Court, Queens County
Docket Number: 711913/2016
Judge: Denis J. Butler
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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JACKY SERPA, Index
Number: 711913/2016
Plaintiff(s),
-against- Motion Date:
September 25, 2018
LIBERTY MUTUAL MID-ATLANTIC INSURANCE
COMPANY, Motion Seq. No.: 003
Defendant(s).
-----x
LIBERTY MUTUAL MID-ATLANTIC INSURANCE
COMPANY,
Third-Party Plaintiff,
-against-
ZAHIRA Y. MERCCEDES and DAMIAN VELOZ,
Third-Party Defendants.
-----x

The following papers were read on this motion by defendant/third-party plaintiff Liberty Mutual Mid-Atlantic Insurance Company ("Liberty Mutual") for an order, pursuant CPLR 3211 (a) (7), dismissing plaintiff's verified complaint against Liberty Mutual, and granting Liberty Mutual costs and disbursements.

	Papers <u>Numbered</u>
Notice of Motion, Affirmation, Exhibits,	
Memorandum of Law.....	E34-38
Affirmation In Opposition, Exhibits.....	E39-42
Reply Memorandum of Law.....	E43
Sur-Reply.....	E44

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action for supplementary underinsured and uninsured motorist (SUM) coverage. The accident occurred on October 5, 2010, in the State of New York, and involved a motor vehicle owned and operated by Victor Serpa and plaintiff, respectively, and a motor vehicle owned and operated by third-party defendants Damian Veloz and Zahira Mercedes, respectively. Liberty Mutual issued an insurance policy in New Jersey to plaintiff and Victor Serpa for that vehicle, which was registered in New Jersey.

Plaintiff's verified complaint alleges two causes of action: The first cause of action is based upon Liberty Mutual's non-payment of plaintiff's claim for SUM coverage. The second cause of action is based upon a violation of General Business Law § 349.

Plaintiff alleges that she commenced an action against third-party defendants in the Supreme Court of the State of New York, County of Queens, under Index Number 17479/2013, but it was dismissed for failure to serve process. Plaintiff further alleges that she demanded that Liberty Mutual pay SUM coverage benefits under the policy it issued to her and Victor Serpa, less any potential recovery from the policy issued by Geico to third-party defendant Veloz. Liberty Mutual has refused to provide such payment.

The court determines that New York law as opposed to New Jersey law should be applied, because there is no discernible difference in the laws of the two states. "In a conflicts of law analysis, the first consideration is whether there is any actual conflict between the laws of the competing jurisdictions. If no conflict exists, then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd sub nom. Excess Ins. Co. v Factory Mut. Ins.*, 3 NY3d 577 [2004]; see *Matter of Allstate Ins. Co. [Kathleen Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]; *Taylor v American Bankers Ins. Group*, 267 AD2d 178 [1st Dept 1999]). Here, plaintiff's sole claimed difference in the laws of the two states is that New Jersey does not require the primary insurance to be exhausted before a SUM claim may be pursued. This court disagrees, and concludes that no such conflict exists.

New Jersey law, just as New York law, requires exhaustion prior to the satisfaction of a SUM claim. New Jersey Statutes Annotated § 17:28-1.1 (e) (1) provides as follows:

"[U]nderinsured motorist coverage" means insurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance, operation or use of an underinsured motor vehicle. . . . A motor vehicle is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery. *A motor vehicle shall not be considered an underinsured motor vehicle under this section unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments.* The limits of underinsured motorist coverage available to an injured person shall be reduced by the amount he has recovered under all bodily injury liability insurance or bonds" (emphasis added).

A "motorist with [underinsured motor vehicle] coverage cannot collect unless his policy limit and, of course, the value of his claim, exceed the limits of 'bodily injury liability insurance or bonds applicable at the time of the accident' and those limits have been exhausted" (*Stabile v New Jersey Mfrs. Ins. Co.*, 263 NJ Super 434, 440 [App Div 1993]).

Similarly, New York's Insurance Law § 3420 (f) (2) (A), provides that, "[a]s a condition precedent to the obligation of the insurer to pay under the supplementary uninsured/underinsured motorists insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements." This exhaustion requirement is adhered to strictly by the New York courts (see *In re Kemper Nat. Ins. Co.*, 75 AD3d 724 [3d Dept 2010]). Any "setoff" to circumvent the statute, as proposed by plaintiff, is not allowed (see *Fed. Ins. Co. v Watnick*, 80 NY2d 539 [1992]; *Sutorius v Hanover Ins. Co.*, 233 AD2d 332 [2d Dept 1996]). As a result, plaintiff's first cause of action fails.

It necessarily follows that, because Liberty Mutual properly denied plaintiff's claim for SUM coverage due a lack of exhaustion, the second cause of action predicated upon fraud also fails.

Accordingly, the motion by Liberty Mutual is **GRANTED** to the extent that plaintiff's verified complaint is hereby dismissed.

This constitutes the decision and order of the court.

Dated: November *23*, 2018



Denis J. Butler, J.S.C.

