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

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiffs,

-against-

M.V.B. COLLISION INC. d/b/a MID ISLAND COLLISION,

Defendant.

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TRIAL/IAS PART 12

INDEX # 606797/17

Mot. Seq. 3
Mot. Date 3.15.18
Submit Date 6.8.18

The following papers were read on this motion: E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	67
Answering Affidavits (Affirmations)	91
Reply Affidavit	102

Defendant, M.V.B. Collision Inc. d/b/a Mid Island Collision (MVB) moves by notice of motion pursuant to CPLR 3211(a) (1), (2), and (3) for an order dismissing the complaint on the grounds that plaintiff lacks standing to bring suit and pursuant to CPLR 3211(a) (7) for failure to state a cause of action.

Plaintiff State Farm commenced this action by summons and complaint on July 12, 2017 seeking (i) replevin of a certain Nissan motor vehicle presently in the possession of defendant MVB, (ii) a declaration that it has no obligation to pay MVB for any additional amounts sought for work it performed on the Nissan, and (iii) a declaration that a lien asserted by MVB on the vehicle is without effect. The complaint alleges that State Farm informed MVB that the vehicle had been totaled, it was the owner of the Nissan, and that all repairs should cease and the vehicle released immediately. The complaint alleges that MVB has refused to release the vehicle.

On December 8, 2017, this court issued a decision and order on State Farm's motion for a summary order of seizure, for a preliminary injunction preventing MVB from disposing of the vehicle, and direction of a hearing on the validity of a lien asserted by MVB on the subject

vehicle. Finding that the action was timely commenced due to MVB's failure to serve a notice of sale upon State Farm as a party who had provided notice of an interest in property pursuant to Lien Law § 201, and that the parties presented conflicting affidavits regarding what repairs were authorized, the court directed a hearing on the issues of ownership of the vehicle and validity of the lien. On February 13, 2018, the court granted MVB's motion for reargument on the grounds that the court had not considered whether written notification of a property interest was required to invoke the notice of sale provisions of Lien Law § 201. Upon reargument, the court determined that actual notice, but not written notice, is required. Finding that actual notice was provided here, the court adhered to its initial determination. The court further denied renewal on standing grounds based upon the submission of State Farm's salvage certificate (MV-907A) dated after institution of the action.

Generally, a motion to dismiss made pursuant to CPLR 3211(a) (1) will be granted only if the cited documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*See Fontanetta v. Doe,* 73 AD3d 78 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22). The analysis is two-pronged: first, the evidence must be documentary and, second, it must resolve all the outstanding factual issues at bar.

"On a defendant's motion pursuant to CPLR 3211(a) (3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law (*see HSBC Mtge. Corp. [USA] v. MacPherson*, 89 A.D.3d 1061, 1062). To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing (*see U.S. Bank N.A. v. Faruque*, 120 A.D.3d 575, 578; *Deutsche Bank Natl. Trust Co. v. Haller*, 100 A.D.3d 680, 683)." (*U.S. Bank Nat. Ass'n v. Guy*, 125 AD3d 845 [2d Dept 2015]; *see also Berger v. Friedman*, 151 AD3 678 [2d Dept 2017]).

"[Finally, upon] a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), the court must determine whether from the four corners of the pleading 'factual allegations are discerned, which taken together, manifest any cause of action cognizable at law' " (*Salvatore v. Kumar*, 45 AD3d 560, 562-563 [2d Dept 2007], lv to app den. 10 NY3d 703 [2008], quoting *Morad v. Morad,* 27 AD3d 626, 627 [2006]). Further, "the pleading is to be afforded a liberal construction . . . the facts as alleged in the complaint accepted as true, [and the court must] accord plaintiffs the benefit of every possible favorable inference . . ." (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]).

> "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a)(7) (*see* CPLR 3211 [c]). If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v. Ginzburg* , 43 NY2d [268] at 275). Yet, affidavits submitted by a defendant 'will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [the plaintiff] has no

> cause of action' " (*Lawrence v. Graubard Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v. Orofino Realty Co.*, 40 NY2d [633]at 636 [emphasis and alterations of original quotation omitted]). Indeed, a motion to dismiss pursuant to CPLR 3211(a) (7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' " (*Guggenheimer,* 43 NY2d at 275).

(*Sokol v. Leader,* 74 AD3d 1180 [2d Dept 2010]).

MVB now moves to dismiss on the grounds that State Farm lacks standing to bring the instant action in the first instance. MVB contends that State Farm cannot demonstrate its ownership status as it has provided no copy of title in its name, no copies of any checks or wire transfers to its insured, and instead has provided a salvage certificate by which it claims that it acquired the vehicle, but only after this action was commenced. Further, MVB contends that State Farm has maneuvered to bring this action in its own name because if commenced as a subrogration action, State Farm would stand in the shoes of its insured and the action would be untimely under Lien Law § 210-a.

In opposition, State Farm contends that it has conclusively established its standing to commence this action as owner and bailee of the subject vehicle. In particular, State Farm submits the certificate of title signed by the vehicle's former owner and State Farm's insured, Courtney Pope, on June 12, 2017 and contends that this document demonstrates that ownership to the vehicle was transferred as of that date and the salvage certificate merely memorializes the transfer. State Farm contends that by operation of law, title to a vehicle is deemed to pass when the parties to the exchange intend for it to pass.

State Farm also submits the July 20, 2017 affidavit of Cheyenne Cook, a Team Manager in plaintiff's Columbia, Missouri operations center. This affidavit was submitted on the plaintiff's initial motion and was reviewed in the court's December 2017 decision and order. By her affidavit, Ms. Cook states that she manages some of State Farm's property damage claim units for New York State. She explains that State Farm maintains comprehensive claim files, with notes that are created contemporaneously by State Farm employees conducting communications relevant to a claim. In addition, all letters, estimates and reports are scanned into the claim file.

Ms. Cook states that State Farm issued a policy of insurance to Courtney Pope covering her 2015 Nissan, which vehicle had a finance lien from TD Auto Finance. On March 27, 2017, the Nissan was damaged in a collision and was taken to MVB for a repair. According to Ms. Cook, the policy and New York State regulations provide that State Farm will pay for any authorized and necessary repairs to the vehicle, and if the cost of repairing the vehicle exceeds a total loss threshold which is 75% of actual cash value of the vehicle, no further repairs will be covered. Instead, State Farm would pay the insured the actual cash value for the vehicle. In this case, starting on March 31, 2017 and continuing to May 25, 2017, State Farm's estimators conducted site inspections at MVB's request and approved repairs in the amount of

approximately $28,000.00. One June 5, 2017, the claim was reassigned to State Farm's Total Loss Unit, which determined that the Nissan had reached the 75% threshold, after which no additional repairs would be covered. MVB was so advised by message on the same day.

Ms. Cook states that on June 7, 2017, State Farm paid Ms. Pope and TD the actual cash value of the Nissan and Pope signed title for the vehicle over to State Farm. On June 7, 2017, State Farm spoke with MVB and advised, again, that the Nissan was a total loss. MVB advised that the repairs were complete. Also on June 7, 2017, State Farm sent an estimator to review the Nissan and was provided, for the first time, with invoices for work by MVB but was told that the managers at MVB were unavailable to review the estimates. On June 9, 2017, State Farm attempted to arrange pick up of the Nissan but MVB advised that the vehicle was not ready and that final charges would be ready on June 12, 2017. On June 13, 2017, State Farm contacted MVB to arrange pickup and verify charges to release the Nissan. MVB informed State Farm that the charges would be ready in two days. On June 15, 2017, MVB informed State Farm that it required an additional $32,503.96 in charges to release the Nissan, which after credits for payments authorized before the vehicle was declared a total loss was reduced to $21,042.68. Over the next week, State Farm called MVB several times to determine if the Nissan would be released. On June 27, 2017, Brian from MVB told State Farm that after crediting the recent payments, it was due $21,042.68. State Farm responded that no further payments were due and that State Farm had taken title to the vehicle. On July 6, 2017, State Farm receive via facsimile a notice of lien and sale of the Nissan, seeking an additional $50,728.44 for repair and storage charges. According to Ms. Cook, MVB's own estimate reflected a market value of only $36,000.00 for the vehicle.

The court notes that the date on which the insured signed the certificate of title as seller largely corroborates the timeline set out in Ms. Cook's affidavit. MVB submits no affidavit of its own to contest this timeline.

In reply, MVB argues that the requirements for an insurer to take title to a salvage vehicle are more restrictive than an ordinary vehicle transfer, and by operation of VTL § 429 and the rules promulgated thereunder, State Farm cannot establish that it had title to the vehicle when this action was commenced. Rather, MVB posits that "transfer requires an application process" with the commissioner of the Department of Motor Vehicles.

Thus, the question here is whether by Ms. Pope's signing of the certificate of title and State Farm's notification to MVB that the vehicle was deemed a total loss, notification that MVB does not dispute, State Farm obtained standing to challenge the lien imposed by MVB and to bring the instant action. As MVB notes, VTL § 429(1)(a), pertaining to the acquisition of junk and salvage vehicles by an insurance company requires that "[s]uch company shall deliver the certificate of title or any other ownership documents relating to such motor vehicle properly executed to transfer title from the insured to the company . . . to the commissioner with [a] required statement of acquisition." However, MVB overreads the requirements of the VTL and the plain language of the statute belies MVB's arguments on this motion. As explained below, delay between the time when the car is deemed a "total loss" by an insurer and payment made to

its insured, and the time that a statement or salvage certificate is filed with the Department of Motor Vehicles is to be expected and is expressly contemplated by the statutory scheme. This delay does not deprive the insurer of its property interest.

Nothing in the language of the VTL or the rules promulgated thereunder requires the salvage certificate to be filed before the insurer acquiring a salvaged vehicle becomes a party with an interest in the property pursuant to the Lien Law. Indeed, Section 81.1 of the commissioner's regulations includes in the definition of "a junk and salvage vehicle," "any 1973 or later model year vehicle ***which has been transferred*** to an insurance company in settlement of a claim for damage thereto . . . ." (15 NYCRR § 81.[6]). The use of the past tense here suggests an acknowledgment that the vehicle has already "been transferred" to the insurer. The same section defines "proof of ownership" as consisting of ***one*** of the following: (i) the most recent certificate of title which has been issued for such vehicle; [or] (ii) the most recent MV-907A (transfer copy) for which a corresponding MV-907A (DMV copy) has been filed with the department . . . ." (15 NYCRR § 81.1[8]). Thus, filing of the salvage certificate is not the only means by which an insurer can substantiate its property interest. In turn, Section 81.8, which sets forth the procedures for acquisition or transfer states that "whenever a person acquires a junk and salvage vehicle, other than by receiving a properly endorsed MV-907A (transfer copy), such person shall properly complete an MV-907A . . . and submit the DMV copy . . . within 15 business days of the date such vehicle was acquired . . . ." Possession of the vehicle prior to filing of a salvage certificate is, therefore, clearly contemplated by the statutory scheme. (15 NYCRR § 81.8[a] [1]).

Accordingly, contrary to MVB's arguments, an application for a certificate of title to the vehicle pursuant to § 81.13 is not required for an insurer to become a party with interest in the property. Indeed, there is no indication in the record that State Farm has made such application despite having filed the MV-907A. Nevertheless, Lien Law § 201-a applies not only to the titled owner of an encumbered property but to "the owner ***or*** any person entitled to notice pursuant to [§ 201]." While the lack of certificate of title may forestall State Farm from conveying the vehicle to a third party, it does not wipe out State Farm's property interest.

To hold otherwise could have untenable results. The vehicle's original owner, having been paid the value of the car by her insurance company and further having surrendered the certificate of title, has no reason to bring a § 201-a challenge. In fact, in this case, Pope acted exactly as a reasonable person would be expected to act – she simply forwarded the notice of sale to her insurance carrier who had taken ownership. Precluding State Farm's challenge to the lien where, as here, notice had been given to the lienor, would undermine the purpose of the Lien Law's notice of sale requirement.

MVB's arguments concerning State Farm's supposed manuevering in failing to bring this proceeding as a subrogation action serve only to obfuscate the issues. While a subrogation action may be permissible (*see Motors Ins. Corp. a/s/o Rex Pontiac v. American Garages Inc.*, 94 Misc.2d 338 [Civ. Ct. N.Y. County 1978]), it is not mandatory in this situation. Standing to

mount a challenge to a notice of lien sale inures to "any person entitled to notice pursuant to [§ 201]."

Finally, to state a cause of action for replevin, the plaintiff must allege that "he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (*Khoury v. Khoury*, 78 AD3d 903 [2d Dept 2010]). In this case, plaintiff has alleged facts, which if accepted as true, establish at least a lawful entitlement to possession of the Nissan.

In sum, State Farm has adduced evidence by both the affidavit of Cheyenne Cook and the certificate of title signed by Courtney Pope on June 12, 2017 sufficient to raise an issue of fact as to its standing and defeat defendant's motion pursuant to CPLR 3211(a) (1) and (3). Further, defendant has not established that plaintiff fails to state a cause of action under 3211(a) (7). Accordingly, MVB's motion to dismiss is **denied** in its entirety.

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

Dated: Mineola, New York
July 11, 2018

ENTER:

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

Attorneys for Plaintiff
Rubin Fiorella & Friedman, LLP
630 Third Avenue, 3rd Floor
New York, NY 10017
212-953-2381
2129532462@fax.nycourts.gov
hschreiber@rubinfiorella.com

Attorneys for Defendant
Barket Marion Epstein & Kearon, LLP
666 Old Country Road, Ste. 700
Garden City, NY 11530
516-745-1500
aklein@barketmarion.com