

<b>Desai v Cure Auto Ins.</b>
2019 NY Slip Op 31021(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 152967/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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SHIVAN DESAI,
Plaintiff,

- v -

CURE AUTO INSURANCE,
Defendant.

INDEX NO. 152967/2017
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20

were read on this motion to/for DISMISSAL

This is an action by plaintiff Shivan Desai ("Plaintiff") to challenge the denial of no-fault benefits by defendant Cure Auto Insurance ("Defendant") which arose from an auto accident that occurred on or about March 31, 2011 at or about East 34th Street, New York, New York. The accident involved a 2010 Audi bearing New Jersey License Plate No. ZLL34 (the "Vehicle") owned and operated by non-party KI H. Chang and insured by an auto policy issued by Cure Auto Insurance, which insurer is licensed to conduct business in the State of New Jersey.

BACKGROUND

The car accident in which Plaintiff was involved occurred on March 31, 2011. Plaintiff was a pedestrian traveling across East 34th Street in Manhattan who was hit by the Vehicle which was owned and operated by KI H. Chang. At the time, Plaintiff did not own a car and was residing in New York. After seeking to recover under his parent's New Jersey auto policy, on April 13, 2011, Plaintiff put Defendant on notice of his claim for no-fault benefits. By letter dated April 22, 2011, Defendant acknowledged receipt of the claim but denied Plaintiff's request for no-fault benefits.

On May 25, 2016, Plaintiff settled his injury claim against KI H. Chang. On May 30, 2017, Plaintiff commenced this action to obtain no-fault benefits denied to Plaintiff in order to reimburse the ERISA health plan that had paid Plaintiff's medical expenses since the accident on March 31, 2011.

Now, Defendant moves to dismiss the Complaint as barred by three-year statute of limitations contained in CPLR 214(2).

#### DISCUSSION

On a motion to dismiss under CPLR 3211(a), the complaint is to be liberally construed (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d,144, 151-152 [2002]). The court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Moreover, the plaintiffs are to be accorded the benefit of "every possible favorable inference" (*The 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 2012 N.Y. Slip Op. 31302[U] [Sup Ct New York Cnty 2012], *affd as mod sub nom.*, *Pine St. Homeowners Ass'n v 20 Pine St. LLC*, 2013 N.Y. Slip Op. 05962 [1st Dept 2013], quoting *511 W. 232nd Owners Corp.*, 98 NY2d at 152), although "bare legal conclusions" are not entitled to any such presumption or inference (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005] [citations omitted]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). Dismissal pursuant to CPLR

3211(a)(1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and “conclusively establishes a defense to the asserted claims as a matter of law” (*Weil, Gotshal & Manges, LLP, v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]).

Upon a CPLR 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*see Tristaino v Teitler*, 24 Misc3d 1244[A] [2009]).

Defendant moves to dismiss the complaint as barred by CPLR 214’s three years statute of limitation and further argues that New Jersey law, not New York law, is applicable to Plaintiff’s claims. Plaintiff counters that Plaintiff is a resident of New York, the accident occurred in New York, and thus New York law applies. Plaintiff further argues that, under the precedent *Matter of Travelers Indem. Co. of Conn. v. Glenwood Med., P.C.*, 48 A.D.3d 319 [1<sup>st</sup> Dept 2008] and *Benson v. Boston Old Colony Ins. Co.*, 134 AD3d 214 (1<sup>st</sup> Dept 1987), the six-year statute of limitations applies to no-fault claims against insurance companies liable for no-fault benefits due to the issuance of an insurance policy. However, Plaintiff’s application of the precedent in *Matter of Travelers Indem. Co. of Conn.* is an over simplification of the precedent, which stands only for the narrow principle that, where a claim is covered by both the three-year statute of limitations contained in CPLR 213 and the six-year statute of limitations for breach of contract claims under CPLR 214, the longer of the two periods can be applied to the subject claims. A breach of contract claim against an insurer will not lie where, as here, the person seeking no-fault

benefits is not an insured or assignee of the subject insurance policy (see *Mandarino v Travelers Prop. Cas. Ins. Co.*, 37 AD3d 775, 776 [2d Dept 2007]).

Here, Plaintiff is not a party to the insurance policy issued by Cure Auto Insurance. Rather, Plaintiff seeks no-fault benefits as a covered person under the insurance policy. Thus, the narrow rule set forth in *Matter of Travelers Indem. Co. of Conn.* would not entitle Plaintiff to avail themselves of the six-year statute of limitations for breach of contract claims under CPLR 213. Accordingly, whether the New Jersey statute of limitations applies, the New York statute of limitations under CPLR 214(2), or the New York statute of limitations for "non-covered persons" under Insurance Law 5104(b),<sup>1</sup> Plaintiff's claims are still time barred.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to dismiss the Complaint is granted, the complaint is dismissed in its entirety, without costs and disbursements, and the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

4/8/2019  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>1</sup> See Reply Affirmation, NYSCEF Doc. No. 19, pp.4-5.