At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of March 2019.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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LORIANN RUSNAK,

Plaintiff,

Index No.: 505809/2018

-against-

Decision and Order

UTICA MUTUAL INSURANCE CO. and
AMERICAN HOME ASSURANCE CO.,

Defendants.

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The following *papers* numbered 6 to 40 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	6-23,25, 27-36
Opposing Affidavits (Affirmations)	37-38
Reply Affidavits (Affirmations)	39-40
Memorandum of Law	24

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant, UTICA MUTUAL INSURANCE COMPANY, (hereinafter UTICA) moves to dismiss this action pursuant to CPLR 3211(a)(1) and (7), and further for the court to treat the motion to dismiss as a motion for summary judgment pursuant to CPLR

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3211(c) since there is no issue of fact and declare, pursuant to CPLR 3001 that UTICA has no obligation to pay the judgment demanded by plaintiff. In the alternative, UTICA, requests that this court grant partial summary judgment and limit the amount of damages that the plaintiff can seek to recover to $25,000 based on New York Insurance Law 3420.

Plaintiff opposes the same contending there is no basis for dismissal and judgment as a matter of law is warranted in favor of the plaintiff on the amount of coverage for each defendant carrier with interest from September 4, 2008 to date. Plaintiff alleges all parties were served with notice of entry on May 20. 2008.[1]

Defendant, AMERICAN HOMES ASSURANCE CO., (hereinafter AMERICAN HOMES), submits an affirmation in partial support of defendant UTICA's motion to dismiss. AMERICAN HOMES contend the Inquest Order should be declared void and unenforceable due to plaintiff's failure to have served that Order with Notice of Entry as required by both the Order itself and the mandates of CPLR 2220.

Facts

This action arises out of an accident that occurred on June 14, 2005, wherein a judgment was taken by the plaintiff in 2008 against a party not named in the present action. The plaintiff alleges that she commenced an action against Beltran, that she obtained a Judgment in that action on September 4, 2008, that she served the Judgment with Notice of Entry on Beltran and Utica on November 1, 2016, that more than 30 days have elapsed since that time, that the Judgment is not satisfied and, pursuant to NY Ins,. Law 3420(a)(2), Rusnak has a statutory claim against Utica to recover the Judgment and interest thereon.

[1] The Court notes that no defendant named in this action is listed on the affidavit of service served with Notice of Entry of the May 20, 2008 Order as alleged by the plaintiff.

Judgment was entered following an Order dated May 20, 2008 which granted a default judgment for Rusnak against Beltran and directed that Rusnak file and serve the May 20, 2008 Order with notice of entry within 30 days.

Arguments

Defendant, UTICA, contends that it has no obligation to pay the judgment demanded by the plaintiff arising out of a suit titled Rusnak v. Beltran Auto Repair, et. al., index number 545/2007 filed in Supreme Court, Kings County.[2] Utica contends plaintiff fails to state a valid cause of action because the plaintiff failed to comply with the court's orders in the previous suit. UTICA further contends that laches applies, and they have a valid late notice defense. Additionally, UTICA argues that even if the suit is permitted to proceed, any recovery must be limited to the UTICA policy limits of $25,000.00.

Defendant, AMERICAN HOME ASSURANCE CO., submits an affirmation in partial support of defendant, UTICA's, motion to dismiss contending that the September 4, 2008 judgment secured by the plaintiff is void. Defendant, AMERICAN HOMES, in support of that portion of UTICA's motion which seeks dismissal on the basis that the September 4, 2008 Judgment secured is void, contend they are in the same position as UTICA regarding the judgment and if the court finds the judgment against UTICA void then the court must also find the JUDGMENT void as to AMERICAN HOMES. AMERICAN HOMES contend the Inquest Order should be declared void and unenforceable due to plaintiff's failure to have served that Order with Notice of Entry as required by both the Order itself and the mandates of CPLR 2220. Therefore, as a result

[2] The court notes UTICA was not a party to the action in which judgment was obtained titled Rusnak v. Beltran Auto Repair, et. al., index number 545/2007 filed in Supreme Court, Kings County.

of plaintiff failing to serve the order with notice of entry on defendant UTICA and AMERICAN HOMES it is void and unenforceable.

In opposition, plaintiffs contend there is no basis for dismissal and judgment as a matter of law is warranted in favor of the plaintiff on the amount of coverage for each defendant carrier with interest from September 4, 2008 to date. Plaintiff alleges all parties were served with notice of entry on May 20. 2008, (please refer to footnote 1 above).

Analysis

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 NY2d at 635, 389 NYS2d 314, 357 NE2d 970) **and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one**" (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss

for failure to state a cause of action (*see McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65).

Insurance Law § 3420(d) requires an insurance carrier to give its insured and the injured party written notice of a disclaimer of coverage as soon as is reasonably possible. "An 'insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even [where] the policy holder's own notice of the incident to its insurer is untimely' (First Fin. Ins. Co. v. Jetco Contr. Corp., 1 NY3d 64, 67 [769 NYS2d 459, 801 NE2d 835] [2003])" (Matter of New York Cent. Mut. Fire Ins. Co. v. Aguirre, 7 NY3d 772, 774, 820 NYS2d 848, 854 NE2d 146). Where there is a delay in providing the written notice of disclaimer, the burden rests on the insurance company to explain the delay (see *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 NY3d 64, 769 NYS2d 459, 801 NE2d 835; *Matter of Allstate Ins. Co. v. Cruz*, 30 AD3d 511, 817 NYS2d 129; *Pennsylvania Lumbermans Mut. Ins. Co. v. D & Sons Constr. Corp.*, 18 AD3d 843, 796 NYS2d 122; *citing Quincy Mut. Fire Ins. Co. v. Uribe*, 45 AD3d 661, 661–62, 845 NYS2d 434, 435 (2007)). Moreover, "an insured which fails to timely notify its insurer of a claim or suit breaches a condition precedent contained within every insurance policy, vitiating coverage and allowing the insurer to deny both defense and indemnification, without regard to prejudice. Plaintiffs' late notice was unreasonable as a matter of law, that the Appellate Division correctly applied Matter of Brandon" (Nationwide Mut. Ins. Co.) (97 NY2d 491 [2002]) and that the insurer need not show prejudice. Argo Corp. v. Greater New York Mut. Ins. Co., 4 N.Y.3d 332, 336–37, 827 N.E.2d 762 (2005). For years the rule in New York has been that where a contract of primary insurance requires notice "as soon as practicable" after an occurrence, the absence of timely notice of an occurrence is a

failure to comply with a condition precedent which, as a matter of law, vitiates the contract (see *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440-443 [1972]) [failure to notify in a timely manner allowed insurer to disclaim coverage]). No showing of prejudice is required (*id.*). Strict compliance with the contract protects the carrier against fraud or collusion (*id.*); gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement (*Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 582 [1992]); *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 N.Y.3d 332, 339, 827 N.E.2d 762 (2005).

Pursuant to Insurance Law § 3420 (a) (2), an injured person who has obtained an unsatisfied judgment against a tortfeasor may commence an action against the tortfeasor's insurer to recover the amount of the unsatisfied judgment, up to the policy limit (see Insurance Law § 3420 [a] [2]; Lang v Hanover Ins. Co., 3 NY3d 350, 352 [2004]; Marsala v Travelers Indem. Co., 50 AD3d 864, 865 [2008]).

Further, Insurance Law § 3420 (a) (3) gives the injured party an independent right to give notice of the accident to the insurer and to satisfy the notice requirement of the policy. "[W]hile an insured's failure to provide notice may justify a disclaimer vis-à-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer" (Becker v Colonial Coop. Ins. Co., 24 AD3d 702, 704 [2005]). As such, the injured person " 'is not to be charged vicariously with the insured's delay' " (id. at 704, quoting Lauritano v American Fid. Fire Ins. Co., 3 AD2d 564, 568 [1957], affd 4 NY2d 1028 [1958]). "However, where an injured party fails to exercise the

independent right to notify an insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well" (Maldonado v C.L.-M.I. Props., Inc., 39 AD3d 822, 823 [2007]; see Viggiano v Encompass Ins. Company/Fireman's Ins. Co. of Newark, N.J., 6 AD3d 695 [2004]; see also Tower Ins. Co. of N.Y. v Alvarado, 84 AD3d 1354, 1355 [2011]; Sputnik Rest. Corp. v United Natl. Ins. Co., 62 AD3d 689, 690 [2009]); quoting *Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643, 645–46, 940 N.Y.S.2d 116 (2012)

In the present case, it is undisputed that UTICA gave notice of disclaimer of the policy to the plaintiff in this action, on numerous occasions, as every notice of disclaimer was forwarded to the plaintiff i.e. on 6/16/2008; 10/1/2010; 12/1/2016. In the present case it is undisputed that UTICA disclaimed coverage as soon as they reasonably could upon receiving notice. It is undisputed that the defendants were not parties to the case in which the judgment was granted and entered. It is undisputed that the defendants were never given notice of the judgment. In opposition the plaintiff does contend that the defendants were served with notice of entry of the judgment. However, the supporting documentary evidence, a copy of the Notice of Entry of the Judgment with the affidavit of service, does just the opposite and evidences that the named defendants in this action were not served with notice of entry of the judgment.

Accordingly, Defendant Utica's motion to dismiss the complaint as against them is hereby granted for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: March 1, 2019

RICHARD VELASQUEZ, J.S.C.