

Daimler Trust v Progressive Cas. Ins. Co.

2020 NY Slip Op 34348(U)

November 5, 2020

Supreme Court, Albany County

Docket Number: 901931-19

Judge: Justin Corcoran

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DAIMLER TRUST and DAIMLER TITLE CO.,

Plaintiffs,

DECISION, ORDER
and JUDGMENT
Index No. 901931-19

-against-

PROGRESSIVE CASUALTY INSURANCE CO.,

Defendant.

(Albany County Supreme Court, Motion Term)

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CORCORAN, JUSTIN J.S.C.

This is an insurance coverage dispute wherein both parties seek summary judgment. On or about January 31, 2015, Michael Hamrah ("Hamrah") leased a 2015 Mercedes-Benz C300-9 ("the vehicle" or "the subject vehicle"). The vehicle was at all relevant times owned by Daimler Trust ("Daimler"). Under the terms of the lease, Hamrah was required to obtain "comprehensive fire and theft coverage for the actual value of the vehicle" and name Daimler as an "additional insured and loss payee." The lease also required Hamrah to provide Daimler with a copy of the policy. Hamrah applied for coverage with Progressive Casualty Insurance Company ("Progressive") on March 2, 2017 for the policy period of March 1, 2017 through September 1, 2017. The policy was issued in the State of Georgia to Hamrah, a Georgia resident. No additional

insured was listed on the policy. Progressive issued the policy after reviewing Hamrah's application for insurance but did not review the title or registration to the vehicle and had no information indicating that Daimler was the owner of the vehicle. Progressive does not have a standardized policy to confirm an insurable interest.

The policy stated that "[a] person seeking coverage must:

1. cooperate with us in any manner concerning of loss we may a claim or lawsuit;
2. provide any written proof of loss as we may reasonably require
3. allow us to take signed and recorded statements . . . which we may conduct outside the presence of you or any other person seeking coverage, and answer all reasonable questions we may ask as often as we may reasonably require."

On April 23, 2017, Hamrah informed Progressive that the vehicle was stolen. Progressive opened a claim for the theft and sent several letters to Hamrah requesting that he provide various records, authorizations and a recorded statement. Each letter explained that Hamrah's cooperation was required pursuant to the above cited section of his policy, but Hamrah failed to provide any response. By letter dated September 6, 2017, Progressive informed Hamrah that his claim was denied because he failed to cooperate with the investigation.

The complaint alleges three causes of action sounding in 1) breach of contract, 2) "express third-party beneficiary status", and 3) an equitable lien. Progressive's answer denies the substantive allegations and asserts affirmative defenses including Daimler's lack of standing and privity of contract.

Progressive argues that the breach of contract cause of action must be dismissed because there is no contract between Progressive and Daimler. Even if Daimler could be considered a beneficiary of the policy, Progressive contends there was no breach, as Georgia law supports its decision to deny coverage based on the insured's lack of cooperation. Progressive argues that Daimler is not a third party beneficiary because Daimler is not mentioned in the policy and the contract language does not evince an intent to permit enforcement by a third party. Finally, Progressive argues that Daimler cannot proceed in equity because it can recoup its losses by suing the insured.

In its cross motion, Daimler argues that Progressive's failure to review any document other than Hamrah's application for insurance amounts to "willful blindness", resulting in defendant wrongly identifying Hamrah as the holder of the ownership interest. Daimler notes that insurance carriers can only issue policies to persons who have an insurable interest in the thing that is sought to be insured and must take reasonable care to refrain from knowingly issuing an unenforceable policy to persons who have no insurable interest. Daimler contends that Progressive never attempted to determine the nature of Hamrah's insurable interest and still has not identified the insurable interest it intended to cover when it issued the policy. Daimler argues that this "lack of clarity" must be construed against Progressive and in favor of coverage.

Alternatively, Daimler contends that Progressive is "presumed" to have intended coverage for its ownership interest because this presumption saves Progressive from engaging in

fraud. Additionally, Daimler relies on the non-cooperation clause which applies to a "person seeking coverage." While the policy does not define a "person seeking coverage," the general definitions section defines "You" and "Yours" as a named insured on the declarations page. Daimler maintains that if Progressive intended to limit coverage to the named insured, the non-cooperation clause would be addressed to "You" rather than to a "person seeking coverage."

Daimler contends that because Progressive knew that it had not determined that Hamrah held an ownership interest and therefore knew it had not limited coverage to only Hamrah, estoppel should prevent Progressive from benefitting from its "malfeasance." Alternatively, that the Court should impose a constructive trust because Progressive made no effort to discover Daimler's ownership interest.

In opposition to the cross motion, Progressive asserts that the requirement that an insurance contract be issued for the benefit of persons having an insurable interest in the thing to be insured is satisfied here because a lessee has an insurable interest in leased property. Further, that Daimler has cited no authority that requires insurers to ascertain whether individuals who lease property have listed the owner of the property on their insurance applications.

Additionally, Progressive contends that Daimler stands in the shoes of the insured and therefore takes the contract subject to the same defenses, including noncooperation with an insurance agreement. Progressive contends that there is no dispute that the insured utterly failed to cooperate with the investigation, and plaintiff does not contend that Progressive's denial of the claim was unjustified. Since the insured could not make a legitimate claim to the subject vehicle, Progressive argues that Daimler is in no better position.

Progressive contends that estoppel is inapposite here, and distinguishes the cases cited by Daimler, all of which concern carriers issuing policies with actual knowledge that the property was titled in the names of persons other than the insured. Progressive argues that Daimler has not even alleged that it had actual knowledge that Daimler held title to the vehicle.

Discussion

The parties agree that Georgia law governs the merits of this controversy, which is consistent with the rule as set forth in the Restatement [Second] of Conflict of Laws:

"(1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6.

"(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law." Restatement [Second] of Conflict of Laws 244.

The New York Court of Appeals has adopted the "most significant relationship" approach to conflict of law cases, beginning with *Babcock v Jackson*, 12 NY2d 473, 479 [1963] [there

referred to as the "most significant contacts" test], and continuing in *Matter of Midland Ins. Co.*, 16 NY3d 536, 544 [2011]. In both cases [*Babcock*, 12 NY2d at 479 [citing the then draft Restatement [Second]; *Midland Ins. Co.*, 16 NY3d at 544], and several cases in between [see *Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238, 245 [2002]; *Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994], the Court of Appeals has expressly referred to and apparently adopted the Restatement [Second] position with respect to substantive law. See *Indosuez Intl. Fin.*, 98 NY2d at 245 ["New York choice of law principles require a court to apply the law of the state with the most significant relationship with the particular issue in conflict."]. However, under New York common-law principles, procedural rules are governed by the law of the forum, or in this case, CPLR 3212. See *Tanges v Heidelberg N. Am.*, 93 NY2d 48, 53 [1999]; *Martin v Dierck Equip. Co.*, 43 NY2d 583, 588 [1978].

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. See *Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. A defendant seeking summary judgment must establish that the "cause of action ... has no merit." CPLR 3212[b]. The movant's failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Med. Center, supra*. In the context of a summary judgment motion, "[t]he totality of the evidence should be viewed in a light most favorable to the nonmoving party and [the Court] should accord it the benefit of every reasonable inference." *Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 1219 [3d Dept. 2007]; see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37 [2004]; *Czarnecki v Welch*, 13 AD3d 952 [3d Dept 2004].

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so. See *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*. A party in opposition to a motion for summary judgment "must assemble and lay bare affirmative proof to establish that the matters alleged are real and capable of being established upon a trial." *Izzo v Lynn*, 271 AD2d 801, 802 [3d Dept. 2000]. "The court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it." *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992].

An insurance policy is a contract subject to principles of contract interpretation. See *Maxum Indem. Co. v Jimenez*, 318 Ga. App. 669, 669 [2012]. "The elements for a breach of contract claim in Georgia are the breach and the resultant damages to the party who has the right to complain about the contract being broken." *Roberts v JP Morgan Chase Bank, Nat'l Ass'n*, 342 Ga App 73, 76 [2017] citing *Houghton v. Sacor Financial*, 337 Ga App 254, 256 [2016]. "The party asserting the existence of a contract has the burden of proving its existence and its terms." *AgSouth FarmCredit, ACA v West*, 352 Ga App 751, 760 [2019], quoting *Jackson v Easters*, 190 Ga App 713, 714 [1989]. Contract disputes are "well suited for adjudication by summary judgment

because construction of a contract is ordinarily a matter of law for the court." *Maxum Indem. Co. v Jimenez, supra*.

"[T]he construction of contract involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury." *City of Baldwin v Woodard & Curran, Inc.*, 293 Ga. 19, 30 [2013] [citations omitted].

The policy here is clear and unambiguous. The parties to the contract are Progressive and Hamrah; Daimler is not explicitly named as an additional insured, nor is Daimler mentioned or referred to in any fashion. Nor can the policy be construed to confer any rights to Daimler as a third party beneficiary. "The beneficiary of a contract made between other parties for [the third party's] benefit may maintain an action against the promisor on the contract." OCGA 9-2-20 [b]. "A third party has standing to enforce a contract under OCGA 9-2-20 if it clearly appears from the contract that it was intended for his benefit; the mere fact that he would benefit from performance of the contract is insufficient." *City of Atlanta v Atlantic Realty Co.*, 205 Ga. App. 1, 6 [1992]. "A contract is intended to benefit a third party when the promisor engages to the promisee to render some performance to a third person." *Scott v Mamari Corp.*, 242 Ga. App. 455, 457 [2000]. "Unless such an intention is shown on the face of the contract, defendant is under no duty [to the third party] and consequently plaintiff acquires no right as the third party beneficiary." *Gay v Ga. Dep't of Corr.*, 270 Ga App 17, 22 [2004] citing *Scott v Mamari Corp., supra*. While Daimler would benefit from enforcement, this is insufficient to confer such rights, and Daimler's proffered construction of the policy language does not establish that the contract was clearly intended for its benefit.

Even if Daimler were conferred third party beneficiary status, its right to sue on the policy would be "no greater than those granted by the contract as intended by the parties thereto. To recover, the beneficiary must bring himself within its terms and construction of the contract is involved. Since recovery on a third person beneficiary contract is a recovery on the contract itself, the right of the beneficiary is no greater than if the contract were enforced between the nominal parties, the beneficiary being in no better position than the promisee." *Bailey v Georgia Mut. Ins. Co.*, 168 Ga App 706, 708-09 [1983] quoting *Deal v Chemical Constr. Co.*, 99 Ga App 413, 417 [1959]. Daimler does not dispute that Progressive was justified in denying coverage to Hamrah based on his lack of cooperation, and the Court finds that Progressive's proof supports such a determination.¹ Even assuming that Daimler was the intended beneficiary of the contract, then

¹ Daimler has not contested Progressive's decision to deny coverage based on Hamrah's lack of cooperation. In any event, the Court finds that Progressive's proof establishes all of the necessary elements in order to deny coverage. See *Travelers Home & Marine Ins. Co. v Castellanos*, 297 Ga. 174, 177 [Ga. Sup. Ct. 2015] citing *Vaughan v. ACCC Ins. Co.*, 314 Ga. App. 741, 742-743 [2012], *Cotton States Mut. Ins. Co. v Proudfoot*, 123 Ga. App. 397 [1971] and *H.Y. Akers & Sons, Inc. v St. Louis Fire & Marine Ins. Co.*, 120 Ga App 800 [1969] ["To justify the denial of coverage for an insured's non-cooperation under Georgia law, the insurer must establish: (a) that it reasonably requested

Daimler takes the policy subject to all its defenses, one of which is the failure to cooperate. See *Richards v State Farm Mut. Auto. Ins. Co.*, 252 Ga. App. 45, 46 [2001] ["a potential third-party beneficiary has no greater rights than the insured"].

Further, Daimler's contention that Progressive could only have intended to insure its ownership interest in order to avoid fraud is without merit. "An 'insurable interest' is '[a] legal interest in . . . the protection of property from injury, loss, destruction, or pecuniary damage.' Black's Law Dictionary [7th ed.] at 816. To identify an insurable interest, we consider whether the party claiming the interest 'has such a right, title, or interest therein, or relation thereto, that he will be benefitted by its preservation and continued existence, or suffer a direct pecuniary loss from its destruction or injury.' *Brown v Ohio Cas. Ins. Co.*, 239 Ga. App. 251, 253 [1999]; see also OCGA 33-24-4 [a]. Thus, 'while title may not always be the determinative fact, the insured must have some lawful interest in property before he can have an insurable interest in the property, although that interest may be 'slight or contingent, legal or equitable.' *Splish Splash Waterslides, Inc. v Cherokee Ins. Co.*, 167 Ga. App. 589, 591 [1983]. Under Georgia law, a lessee has such an insurable interest in leased property." *Conex Freight Sys. v Ga. Ins. Insolvency Pool*, 254 Ga. App. 92, 96-97 [2002]. Daimler does not dispute that Hamrah had an insurable interest in the leased vehicle, nor has Daimler cited any authority or policy language that imposes an affirmative duty on Progressive to identify or insure the owner of leased property.

Estoppel is not appropriate under the circumstances of this case. Georgia law is clear that where a policy of insurance is issued and the agent has full and actual disclosure of the ownership of the property, the insurer waives its rights under the policy and is estopped to claim an avoidance of responsibility under the contract as written because of non-compliance with the conditions as to ownership which preclude coverage under the terms of the contract. See *Christian v Allstate Ins. Co.*, 239 Ga. 850, 852-53; *Brown v Globe & Fire Ins. Co.*, 161 Ga. 849, 852; *Blackstock v Jefferson Ins. Agency*, 23 Ga. App. 642, 643; *Mechanics & Ins. Co. v. Mut. Real Estate &c. Assn.*, 98 Ga. 262, 266; *Great American Ins. Co. v Walton*, 101 Ga. App. 475, 476; *Allstate Ins. Co. v Anderson*, 121 Ga. App. 582, 585-86; *Wilson Marine Sales &c., Inc. v Fireman's Fund Ins. Co.*, 133 Ga. App. 220, 223. While Daimler accuses Progressive of willful blindness and lax business practices, plaintiff does not allege, nor provide any proof, that Progressive had actual knowledge of Daimler's ownership interest in the vehicle. Nor has Daimler demonstrated that Daimler had any affirmative obligation to ascertain the ownership interest in the vehicle. Moreover, as noted by the Court in *Brown v Globe & Rutgers Fire Ins. Co.*, *supra* at 853, "estoppel is the shield of justice interposed for the protection of those who have not been wise enough or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud." Daimler, a sophisticated entity, could have protected itself here by enforcing that portion of the lease which required Hamrah to provide Daimler with a copy of the insurance policy.

Daimler is not in contract, nor in privity of contract, with Progressive, nor can Daimler be considered a third party beneficiary of the policy. Accordingly, Daimler lacks standing and its first

the insured's cooperation in defending against the plaintiff's claim, (b) that its insured willfully and intentionally failed to cooperate, and (c) that the insured's failure to cooperate prejudiced the insurer's defense of the claim."].

and second causes of action are dismissed. *See Richards v State Farm Mut. Auto. Ins. Co.*, 252 Ga App 45, 45 [2001] ["Generally, a party not in privity of contract may not bring a direct action suit against the liability insurer of the party alleged to have caused damage absent an unsatisfied judgment against the insured, legislative mandate, or as permitted by a provision in the insurance policy at issue."]; *Dominic v Eurocar Classics*, 310 Ga App 825, 828 [2011] ["one not in of contract with another lacks standing to assert any claims arising from violations of the contract."] *see* OCGA 9-2-20 [a].

Daimler's third and final cause of action for an equitable lien is also unsustainable. As a rule, "there is no equity jurisdiction where there exists an adequate remedy at law." *Total Supply v Pridgen*, 267 Ga App 125, 128 [2004]; *see also McArthur Elec., Inc. v Cobb County School Dist.*, 281 Ga 773, 774 [2007], *quoting Sherrer v Hale*, 248 Ga 793, 797-98 [1982]; *Middlebrooks v Lonas*, 246 Ga 720, 721 [1980]. Daimler does not dispute that it can commence suit against the insured to recoup the remaining balance on the vehicle. For similar reasons, the Court declines to impose a constructive trust. *See* OCGA 53-12-93 [a] ["a constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity."]; *Atlanta Classic Cars v Chih Hung United States Auto Corp.*, 209 Ga. App. 908, 910 [1993] [constructive trust "is a remedial device created by a court of equity to prevent unjust enrichment."].

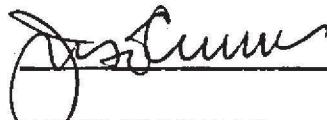
Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is


ORDERED and ADJUDGED that defendant's cross-motion for summary judgment is granted, this case is dismissed, and the clerk is directed to enter judgment accordingly.

The Court has uploaded the original Decision, Order and Judgment to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Albany County Clerk. Defendant is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

DATED: November 5, 2020
Albany, New York



JUSTIN CORCORAN
Justice of the Supreme Court



Papers Considered: Electronic Case Record Document Numbers 1-36.

11/05/2020