

<b>Pope v Utica Natl. Assur. Co.</b>
2020 NY Slip Op 35127(U)
May 21, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 612011/2019
Judge: Denise F. Molia
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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT: HON. DENISE F. MOLIA, A.J.S.C.

**ORIGINAL**

\_\_\_\_\_  
BLANCHE POPE,

Plaintiff,

DECISION & ORDER

Index No. 612011/2019

v.

*Seq. DOZ MG  
Case Disposed: YES*

UTICA NATIONAL ASSURANCE COMPANY,  
UTICA NATIONAL INSURANCE COMPANY,  
ALFONSO TROTTA, ROSE ANN TROTTA,  
AL'S REPAIR CENTER, INC., and  
212 BANGOR STREET CORP.,

Defendants.

\_\_\_\_\_  
Upon the following papers filed and considered relative to this matter:

Notice of Motion dated August 15, 2019; Affirmation in Support of Motion for Summary Judgment and for a Protective Order dated August 15, 2019; Exhibits A-V; Affirmation in Opposition dated October 8, 2019 on behalf of plaintiff; Affirmation in Opposition dated October 11, 2019 on behalf of defendants Alfonso and Rose Trotta; Reply Affirmation in Further Support of Motion for Summary Judgment and for a Protective Order dated October 22, 2019; and upon due deliberation; it is

**ORDERED**, that defendant Utica's motion for summary judgment and for a protective order is granted.

**DISCUSSION**

Plaintiff commenced the foregoing action for a declaratory judgment. Plaintiff, who was involved in a motor vehicle accident, seeks a declaration that Utica National Assurance Company and Utica National Insurance Company (collectively "Utica") owes insurance coverage for the accident. The accident occurred while defendant Alfonso Trotta was commuting home from work

in his personal vehicle. Defendant Alfonso Trotta is the president of Al's Repair Center Inc. ("Al's Repair"), an auto repair shop located at 212 Bangor Street, Lindenhurst, New York. Defendant Alfonso Trotta's wife, Rose Trotta, is the sole shareholder of Al's Repair and 212 Bangor Street Corp. ("212 Bangor"), the corporation that owns the building where Al's Repair is located. Utica provided a Business Auto Policy, covering "hired" and "non-owned" autos, and an Umbrella Policy to Al's Repair and 212 Bangor, which were in effect at the time of the accident.

Utica subsequently filed the foregoing summary judgment motion seeking summary judgment pursuant to CPLR 3212 and to declare under CPLR 3001 that Utica has no duty to defend or indemnify co-defendants Alfonso Trotta, Rose Ann Trotta, Al's Repair and 212 Bangor in the underlying auto accident/personal injury action brought by plaintiff. Furthermore, Utica requests that this court grant its motion for a protective order under CPLR 3103, striking plaintiff's notice of deposition for Utica's claim representative, since there are no relevant facts which could be discovered in such a deposition.

#### **Contract Construction**

Plaintiff argues that the policy issued by Utica is ambiguous and uncertainty arises in determining what exactly "or your personal affairs" means.

Insurance policies should be enforced according to their terms unless they are prohibited by public policy, statute or rule. *Liberty Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 168 AD2d 121, 131 (2d Dept 1991); *Universal American Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.'" *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 (2008), quoting *White v. Continental Cas. Co.*, 9 NY3d 264, 267 (2007). Ambiguity arises when, read as a whole, the contract fails to disclose its purpose and the parties' intent. *Universal*, 25 NY3d at 680, quoting *Ellington v. EMI Music, Inc.*, 24 NY3d 239, 244 (2014). "If the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract...if the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer." *Antoine v. City of New York*, 56 AD3d 583, 584 (2d Dept 2008). A court cannot disregard clear provisions in the policies which the insures inserted and the insured accepted. *Baughman v. Merchants Mut. Ins. Co.*, 87 NY2d 589, 592 (1996); *Richmond Farms Dairy, LLC v.*

*National Grange Mut. Ins. Co.*, 60 AD3d 1411, 1414 (4th Dept 2009).

Utica issued a primary commercial package policy (CPP3767786) to 212 Bangor and Al's Repair from November 1, 2014 to November 1, 2015. The package policy contained both a commercial auto coverage part and a commercial general liability coverage part. Utica also provided a commercial umbrella liability policy to 212 Bangor and Al's Repair from November 1, 2014 to November 1, 2015. Utica disclaimed coverage for defendant Trotta's accident under the Utica business auto commercial general liability and umbrella policies issued to Al's Repair and 212 Bangor. Utica's business auto policy covered Hired "Autos" only (symbol 8) and Nonowned "Autos" only (symbol 9). Hired "Autos" only include "Only those 'autos' you lease, hire, rent or borrow. This does not include any 'auto' you lease, hire, rent, or borrow from any of your 'employees', partners (if you are a partnership), members (if you are a limited liability company) or members of their households." Nonowned "Autos" only include "only those 'autos' you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes 'autos' owned by your 'employees', partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs." The term "your" is defined in the policy as the named corporate insureds, being 212 Bangor and Al's Repair.

The dispute in this matter involves symbol 9, nonowned autos, and the phrase "your personal affairs". This court finds that the policy language is clear and explicit under the facts of this case. Defendant Alfonso Trotta could have only been covered if he was engaged in the business or personal affairs of Al's Repair or 212 Bangor at the time of the accident.

#### **Al's Repair and 212 Bangor's Personal Affairs**

Plaintiff further argues that the commute of the company president would reasonably be within the ambit of the personal affairs of a closely held corporate entity.

The liability of an employer for the negligent acts of an employee is determined by the doctrine of *respondeat superior*. *Kelly v. Starr*, 181 AD3d 799, 801 (2d Dept 2020). "An employer, however, cannot be held vicariously liable for its employee's alleged tortious conduct if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business at the time of the incident." *Gui Ying Shi v. McDonald's Corp.*, 110 AD 3d 678, 679 (2d Dept 2013). It is well settled that an employee driving to and from work is not acting within the scope of his

employment because the element of control is lacking. *Beres v. Terranera*, 153 AD3d 483, 486 (2d Dept 2017), quoting *Tucker v. Melendez*, 278 AD2d 488, 488 (2000); *Cicatello v. Sobierajski*, 295 AD2d 974, 974 (4th Dept 2002); *Shumway v. Geneva General Hosp.*, 233 AD2d 868, 868 (4th Dept 1996); *D'Amico v. Christie*, 71 NY2d 76, 88 (1987); *Figura v. Frasier*, 144 AD3d 1586, 1587 (4th Dept 2016); *Correa v. Baptiste*, 303 AD2d 355, 355 (2d Dept 2003); *Lundberg v. State*, 25 NY2d 467, 471 (1969).

On January 29, 2015, defendant Alfonso Trotta was operating his personal vehicle when he was involved in a motor vehicle accident with a pedestrian. At that time of the accident, defendant Trotta was commuting home from work. The facts in this case demonstrate that defendant Trotta was not acting in furtherance of Al's Repair or 212 Bangor at the time of the accident. Defendant Alfonso Trotta's deposition testimony supports the fact that not only was the language of the policy clear, as he did not make an application to Utica for coverage in this matter and instead was confused why his insurance policy for the business was involved as his vehicle was insured by GEICO, but that he was not using the vehicle in connection with Al's Repair or 212 Bangor's business. To include defendant Trotta's commute home in his personal vehicle under the business auto policy would provide an added source of indemnification which had not been contracted for and for which no premium had ever been paid. To hold Utica liable for defendant Trotta's accident in his personal vehicle on either of the policies written by Utica would be to rewrite the policy and expose Utica to a risk never contemplated by the parties for which Utica had never been compensated.

The facts in this case clearly demonstrate that defendant Trotta was not acting in furtherance of Al's Repair or 212 Bangor at the time of the accident and was using the vehicle for his own purpose. Contrary to plaintiff's contentions, the vehicle driven by defendant Trotta at the time of the accident was not a covered nonowned auto within the meaning of Utica's insurance policy. Plaintiff's and defendants Alfonso and Rose Trotta's opposition consisting of solely an attorney's affirmation is insufficient to preclude summary judgment. *Mobil Oil Corp. v. Penna*, 139 AD2d 501, 501-502 (2d Dept 1988). Accordingly, Utica's motion for summary judgment is granted. Based on the court's conclusion that defendant Trotta is not covered under Utica's policy, he likewise is not covered under the umbrella policy. As such, Utica was under no obligation to provide prompt notice of disclaimer. *State Farm Fire & Cas. Co v. Raabe*, 100 AD3d 738, 739 (2d Dept 2012); *York Restoration Corp. v. Solty's Constr., Inc.*, 79 AD3d 861, 863 (2d Dept 2010). Consequently, Utica's request for a

protective order striking plaintiff's notice of deposition for Utica's claim representative is also granted.

Accordingly, it is the Decision and Order of the Court that defendant Utica's motion for summary judgment is granted.

Dated: 5-21-20

**HON. DENISE F. MOLIA** 

HON. DENISE F. MOLIA

Acting Supreme Court Justice