SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 14

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TREVOR J. HOFFMAN,

Plaintiff,

- against -

GOVERNMENT EMPLOYEES INSURANCE COMPANY, ODECIA O. NANTON and KENZEL SHEIL,

Defendants.

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DECISION AND ORDER

Index No. 33101/2019E

Present: John R. Higgitt, J.S.C.

Upon the November 11, 2019 notice of motion of defendant Government Employees Insurance Company (GEICO) and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's January 8, 2020 notice of motion and the affirmation, affidavits and exhibits submitted in support thereof; defendant GEICO's January 21, 2020 affirmation in reply and the exhibit submitted therewith; plaintiff's March 18, 2020 affirmation in reply; the May 26, 2020 affirmation in opposition of defendants Nanton and Sheil ("the Nanton defendants") and the exhibit submitted therewith; plaintiff's June 2, 2020 affirmation in reply; and due deliberation; defendant GEICO's motion for an order pursuant to 3211(a)(1), (3), and (7) dismissing the complaint against it is granted, and plaintiff's cross motion for an order disqualifying defendant GEICO's counsel, granting partial summary judgment on the issue of the liability of the Nanton defendants, and directing an immediate trial pursuant to CPLR 3212(c), is granted in part.

DISMISSAL

As against defendant GEICO, which issued a policy of insurance to defendant Nanton, the complaint alleges that defendant GEICO's actions in paying out two-thirds of the available insurance limits by settling with two other non-party claimants allegedly injured in the subject motor vehicle accident, leaving insufficient funds to recompense plaintiff, were in contravention

of the Insurance Law, accepted industry practices, duties to plaintiff, duties to its insureds, and representations that it had made to plaintiff and/or his counsel, upon which plaintiff relied.

Plaintiff was a passenger in a vehicle driven by non-party Guy Havercome. Defendant GEICO asserts that it simultaneously offered the full policy limits of $25,000.00 per person and $50,000.00 per accident to each of the three claimants (plaintiff, Havercome, and the driver of a third vehicle), and that while the other two claimants accepted one-third of the available $50,000.00 and signed releases, plaintiff refused a one-third share of the proceeds and demanded $25,000.00.

Defendant GEICO asserts that the claim against it is barred by Insurance Law § 3420(a)(2), one of the provisions without which a policy of insurance cannot be issued in New York State:

> [I]n case judgment against the insured or the insured's personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

Defendant GEICO asserts that Insurance Law § 3420(a)(2) is the exclusive method of and a condition precedent to asserting a direct claim against it, and the conditions have not been met.

"Insurance Law § 3420 … grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances -- the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004]; *see Vineyard Sky, LLC*

v Ian Banks, Inc., 123 AD3d 461 [1st Dept 2014]; *National Union Fire Ins. Claim No. Co. of Pittsburgh, PA. v State of N.Y.*, 72 AD3d 620 [1st Dept 2010], *lv den* 16 NY3d 703 [2011]; *Linden v Moskowitz*, 294 AD2d 114 [1st Dept 2002], *rearg den* 2002 NY App Div LEXIS 8499 [1st Dept 2002]; *Mount Vernon Fire Ins. Co. v NIBA Constr.*, 195 AD2d 425 [1st Dept 1993]; *Rodriguez v JLF Props.*, 191 AD2d 211 [1st Dept 1993]; *see also Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6 [1st Dept 1992], *lv dism* 80 NY2d 918 [1992]). There is no dispute that judgment has not yet been entered against any tortfeasor.

In opposition, plaintiff asserts that the cause of action is supported by Insurance Law § 2601(a), which prohibits unfair claim settlement practices; however, that statute does not give rise to a private right of action (*see Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 614 [1994]). Accordingly, the motion is granted.

DISQUALIFICATION

Approximately one week after the commencement of this action, and prior to answering the complaint, defendant GEICO, represented by Picciano & Scahill, P.C. (Picciano), made this motion. The notice of motion was signed on behalf of "defendants," while the affirmation identified Picciano as counsel for defendant GEICO. In the November 14, 2019 Request for Judicial Intervention ("RJI") submitted with the motion, Picciano identified itself as counsel for all defendants. Within three weeks thereafter, Montfort, Healy, McGuire & Salley LLP ("Monfort") submitted an answer on behalf of the Nanton defendants, and Picciano filed a letter stating that it had erroneously consented to representation of the Nanton defendants and requesting that the Bronx County Clerk correct the error. Plaintiff asserts that it is a conflict of interest to represent both GEICO and the Nanton defendants. Picciano asserts that the RJI, the sole indication of joint representation, was the product of inadvertent clerical error. The Nanton

defendants' counsel asserts that Monfort is the only law firm retained to represent them.

"A movant seeking disqualification of an opponent's counsel faces a heavy burden ... A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized" (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]). Whether to disqualify an attorney is a decision that rests in the court's discretion (*see Mayers v Stone Castle Partners, LLC*, 126 AD3d 1 [1st Dept 2015]).

"[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship. Moreover, doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" (*Matter of Strasser*, 129 AD3d 457, 458 [1st Dept 2015] [citations and quotation marks omitted]). Disqualification, however, may not be premised on speculation (*see Starwood Hotels & Resorts Worldwide, Inc. v Aoki Corp.*, 2 AD3d 135 [1st Dept 2003]; *George v City of Buffalo*, 789 F Supp2d 417, *affd* 789 F Supp2d 417 [WD NY 2011]), and here there is no indication that Picciano ever acted on behalf of the Nanton defendants, acquired confidential information from them, or engaged in any act giving rise to the appearance of a conflict in interest (*see Safiler v Government Emps. Ins. Co.*, 95 AD2d 54 [1st Dept 1983]).

SUMMARY JUDGMENT

In support of the cross motion for partial summary judgment on the issue of the liability of the Nanton defendants, plaintiff submits his affidavit in which he avers that the vehicle in which he was a passenger had entered an intersection after the traffic signal controlling its direction of travel turned green, when it was struck in the side by the Nanton defendants' vehicle, which had disobeyed the red traffic signal governing its entry into the intersection. Plaintiff also

submits a certified copy of the police accident report; however, the report does not contain any statements constituting admissions or other exceptions to the rule against hearsay.

The entry of the Nanton defendants' vehicle into the intersection against a red traffic signal violated Vehicle and Traffic Law § 1110(a) ("Every person shall obey the instructions of any official traffic-control device applicable to him") and § 1111(d)(1) ("Traffic ... facing a steady circular red signal ... shall ... stop before entering the crosswalk on the near side of the intersection ... and shall remain standing until an indication to proceed is shown "). The unexcused violation of a statutory standard of care constitutes negligence (*see Gonzalez v Medina*, 69 AD2d 14 [1st Dept 1979]).

Plaintiff's affidavit was admissible (*see Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429 [1st Dept 2010]), and sufficient to meet plaintiff's prima facie burden (*see Garcia v McCrea*, 170 AD3d 513 [1st Dept 2019]). The Nanton defendants assert that the affidavit is deficient because plaintiff does not explicitly state that he viewed the events unfold and that, therefore, the motion is not supported by an affidavit by "a person having knowledge of the facts" (*see* CPLR 3212[b]). "It is the burden of the proponent of an affidavit to demonstrate the basis of the affiant's knowledge" (*Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 254 [1st Dept 2011]), and plaintiff, an occupant of one of the vehicles involved in the accident who avers that he is "fully familiar with the facts and circumstances underlying this matter," states a sufficient basis for his factual assertions.

In opposition, the Nanton defendants do not submit admissible evidence sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). "While evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment, such evidence cannot form the sole basis for the court's determination" (*Clemmer v*

Drah Cab Corp., 74 AD3d 660, 661 [1st Dept 2010]). In any event, that the police accident report may indicate that the Nanton defendants' vehicle was travelling eastbound rather than westbound is insufficient to raise an issue of fact as to whether their vehicle entered the intersection against the governing traffic control device and struck the vehicle in which plaintiff was a passenger.

The application for an immediate trial is denied. "[CPLR 3212(c)] is not designed to provide an immediate trial for any and all kinds of issues, no matter how invitingly simple they may appear. On the contrary, it allows for an 'immediate trial' only where the sole dispute is over the amount or extent of damages" (*Tache-Haddad Enters. v Melohn*, 224 AD2d 213, 214 [1st Dept 1996]). The failure to establish a "serious injury" under Insurance Law § 5102(d) is a complete bar to plaintiff's recovery (*see Perl v Meher*, 18 NY3d 208 [2011]), and the issue of a plaintiff's right to damages is a question separate and distinct from the amount of damages (*see e.g. Glick v Nozell*, 94 AD2d 956 [4th Dept 1983]). "Damages," as is understood here, "compensate plaintiffs in money for their losses" (*Grobman v Chernoff*, 15 NY3d 525, 529 [2010]). Accordingly, the remaining issues do not relate solely to "the amount or extent of damages" (*see Licari v Elliott*, 57 NY2d 230 [1982]; *see also Reid v Brown*, 308 AD2d 331 [1st Dept 2003] ["Since the issue of serious injury was not established, we remand for further proceedings on that issue and, if established, on damages"]; *cf. Amodio v Noto*, 229 AD2d 366 [2d Dept 1996]).[1]

The court notes that plaintiff did not seek dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct, which therefore remain extant.

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[1] It is thus apparent that, although the determination of "serious injury" generally occurs during the "damages phase" of a bifurcated trial (*see Van Nostrand v Froehlich*, 44 AD3d 54 [2d Dept 2007], *lv dism* 10 NY3d 837 [2007]; *Abbas v Cole*, 44 AD3d 31 [2d Dept 2007]; *Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002[), the question is not solely one of the magnitude of damages.

Accordingly, it is

ORDERED, that defendant GEICO's motion for an order pursuant to 3211(a)(1), (3), and (7) dismissing the complaint against it is granted; and it is further

ORDERED, that the aspect of plaintiff's cross motion for an order granting partial summary judgment on the issue of the liability of the Nanton defendants is granted; and it is further

ORDERED, that the cross motion is otherwise denied; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant GEICO dismissing the complaint as against it and all cross claims against it; and it is further

ORDERED, that the Clerk of the Court shall issue a case scheduling order on **August 14, 2020**.

This constitutes the decision and order of the court.

Dated: June 10, 2020

Hon. John R. Higgitt, J.S.C.