SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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CHRISTINA SELVAGGIO,

Plaintiff,

- *against* -

THE CITY OF NEW YORK, DOE COURT HOMEOWNER'S ASSOCIATION, a.k.a., DOE COURT HOMEOWNER'S ASSOCIATION, LTD., UNITED STATES LIABILITY INSURANCE COMPANY, DAWNING REAL ESTATE INC., JOAN and ROBERT GALLO, YONA and YONI MATON, a.k.a., AVISHY SHAER and EILEEN MATON,

Defendants.

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HON. THOMAS P. ALIOTTA, J.S.C.

DECISION & ORDER

Index #100039/2018
Motion Sequence 010 and 011

Recitation as required by CPLR 2219 (a) of the following papers numbered "1" through "8" were submitted for decision on the 10th day of March 2021.

	Papers Numbered
Plaintiff's Order to Show Cause for, *inter alia*, an Order of Attachment and Preliminary Injunction, together with Plaintiff's Affidavit in Support and Supporting Papers (NYSCEF 165, 201-204 dated January 28, 2021)	1, 2
Affirmation of Defendants Doe Court Homeowner's Association, United States Liability Insurance Company, Dawning Real Estate, Incorporated, and Yona and Yoni Matmon in Opposition to Plaintiff's Order to Show Cause (NYSCEF 216 & 217 dated February 26, 2021)	3
Plaintiff's Letters/Correspondences to Judge (with the Permission of the Court) (NYSCEF 250 to 258 dated March 11, 2021)	4
Notice of Motion by Defendant United States Liability Insurance Company to Dismiss the Complaint pursuant to CPLR 3211(a)(7), together with Defendant's Affirmation in in Support and Supporting Papers (NYSCEF 205-215 dated February 5, 2021)	5, 6

Upon the foregoing papers, plaintiff's application (Seq. No. 010) by order to show cause dated January 28, 2021 for, *inter alia*, an order of attachment and preliminary injunction is denied; the motion (Seq. No. 011) of defendant United States Liability Insurance Company to dismiss the complaint as against it pursuant to CPLR 3211(a)(7) is granted.

In this action plaintiff seeks to recover damages for personal injuries sustained on May 15, 2018 when she allegedly stepped in a hole on the street where the roadway abuts the common driveway in front of 181 and 183 Freedom Avenue, Staten Island, New York. The premises are owned and managed by defendant Doe Court Homeowner's Association, a.k.a., Doe Court Homeowner's Association, LTD (hereinafter, "Doe Court"). Defendant United States Liability Insurance Company (hereinafter, "USLI") is Doe Court's insurance carrier.

Plaintiff's Motion Pursuant to CPLR §6313, §6301 and CPLR §6201

Presently before the Court is the application of the *pro se* plaintiff, Christina Selvaggio, for a temporary restraining order pending the determination by the Court of the within application for an order of attachment and preliminary injunction with respect to defendants, collectively. Plaintiff seeks a "preliminary injunction for a provisional remedy and emergency compliance order" barring defendants' attorney Ji Hyong Lee, of Counsel to Milber Makris Plousadis & Seiden, LLP from "continuing to engage in fraud and deceptive practices … and misrepresenting facts in violation of Judiciary Law section 487(1)."

It is well established "[p]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant" (*Shake Shack Fulton Street Brooklyn, LLC v. Allied Property Group, LLC*, 177 AD3d 924, 926 [2d Dept 2019] [internal quotation marks and citations omitted]). "The decision to grant a preliminary injunction is a matter ordinarily committed to the sound discretion of the court hearing the motion" (*19 Patchen, LLC v. Rodriguez*, 153 AD3d 1382, 1383 [2d Dept 2017] [citation omitted]; *see Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 149 AD3d 1121, 1123 [2d Dept 2017]).

The Court finds plaintiff's perceptions concerning certain alleged misconduct on the part of Mr. Lee and unfair treatment during the course of this litigation are legally insufficient to sustain her initial burden of establishing by "clear and convincing evidence" the elements for the issuance of a preliminary injunction, *i.e.*; (1) the likelihood of ultimate success on the merits; (2) irreparable harm in the absence of an injunction; and (3) a balance of the equities in favor of the injunction" (*see Shake Shack Fulton Street Brooklyn, LLC v. Allied Property Group, LLC*, 177 AD3d at 927; *Congregation Erech Shai Bais Yosef, Inc. v. Werzberger*, 189 AD3d 1165, 1166 [2d Dept 2020]; *19 Patchen, LLC v. Rodriguez*, 153 AD3d at 1383; CPLR §6312[a]). The purpose of a preliminary injunction is to preserve the status quo pending a trial (*see Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 149 AD3d at 1123), not to resolve a party's complaints and disputes concerning matters related to discovery, some of which were addressed by the Court in prior motions.

Plaintiff further seeks an order of attachment. Pursuant to CPLR §6201, an order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has

demanded and would be entitled ... to a money judgment against one or more defendants, when the following subsections apply:

> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or
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> 5. the cause of action is based on a judgment, decree or order of a court of the United States of America or any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53 [which applies to a foreign country's judgment] (*see generally*, *CIBC Mellon Trust Company v. Mora Hotel Corporation N.V.*, 100 NY2d 215 [2003]).

The Court finds plaintiff's request for provisional remedies, specifically, an order of attachment (CPLR §6201), and a temporary and preliminary injunction (CPLR §6313 and §6301, respectively) are either not applicable to this matter or are not warranted under the circumstances.

Motion of Defendant USLI to Dismiss the Complaint

Defendant, United States Liability Insurance Company, moves to dismiss the complaint on the grounds that plaintiff has failed to state a cause of action pursuant to CPLR §3211(a)(7) and lacks standing to commence this action against it. It is worthy to note, in a verified answer dated August 2, 2018, defendants raised affirmative defenses, including that plaintiff's allegations in the complaint fail to state a cause of action. Under CPLR §3211(e), a motion to dismiss for failure to state a cause of action may be raised at any time during the action (*see* CPLR 3211[e]).

On a motion to dismiss for failure to state a cause of action, the Court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiff the benefit of every possible favorable

inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *see* §3026). "At the same time, however, allegations consisting of bare legal conclusions … are not entitled to any such consideration" (*Simkin v. Blank*, 19 NY3d 46, 52 [2012]).

"Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d at 142; *see also* John R. Higgitt, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:22). The Court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint (*see Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

In the case at bar, plaintiff's complaint does not mention USLI in reference to any claims asserted in her causes of action. Specifically, the first cause of action for negligence is asserted against the City, Doe Court, Dawning Real Estate, Yoni and Yona Matmon, and Joan and Robert Gallo. It is predicated upon, *inter alia*, the so-called "Pothole Law", the Special Use Doctrine, the New York City Administrative Code §7-210, §19-152 and §16-123, and the Homeowner's Association's "Declaration of Covenants, Conditions Restrictions." The second cause of action is asserted against Doe Court and Dawning Real Estate, Inc. for, *inter alia*, defendants alleged failure to be incorporated and to file a proper offering plan for the Homeowner's Association, as required by the Office of the New York State Attorney General. The third cause of action as against the Board of Directors and Dawning Real Estate, Inc. is predicated upon the Not-for-Profit Corporation Law §621. Plaintiff seeks to enforce her alleged right to inspect the books and records of the Homeowner's Association and she requests that defendants cease and desist from

paying the attorney's fees for Yoni and Yona Matmon which is alleged to be a misappropriation of the Homeowner Development's funds. The fourth cause of action seeks a money judgment against the defendants, jointly and severally, in the amount of $1,000,000.00.

It is also relevant that USLI is the liability insurance carrier for the Doe Court defendants. As an injured party, plaintiff's right to maintain a cause of action against a tortfeasor's insurance carrier is subject to the provisions of Insurance Law §3420 (*see Lang v. Hanover*, 3 NY3d 350, 354 [2004]). Specifically, "any person who … has obtained a judgment against the insured … for damages for injury sustained or loss or damage occasioned during the life of the policy or contract" to maintain an action against the insurer [s]ubject to the limitations and conditions of subsection (a)(2) (*see* Insurance Law § 3420[b][1]). In that regard, subsection (a)(2) states, in pertinent part that, "in case judgment against the insured … shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment ... then an action may … 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 ..." Accordingly, Insurance Law § 3420, grants an injured plaintiff the right to sue the tortfeasor's insurance company *solely* for the purposes of satisfying a judgment against the tortfeasor. Notably, the Court of Appeals held in *Lang v. Hanover* (3 NY3d at 354) that "a judgment is a statutory condition precedent to a direct suit against the tortfeasor's insurer." Here, although Ms. Selvaggio flatly denies that Insurance Law §3420[a][2] applies, there is no question that the statutory pre-requisites for the commencement of a direct action against USLI are lacking and this action must be dismissed against USLI (*see Lang v.* Hanover, 3 NY3d at 354).

Based on the foregoing, the Court finds dismissal of the complaint as against USLI is warranted due to plaintiff's failure to state a cause of action. Although plaintiff maintains she has

a cause of action against USLI for negligence, breach of covenant of good faith and fair dealing, breach of contract, and breach of fiduciary duty, the complaint is devoid of any factual allegations in support of such claims. Moreover, the statutory pre-requisites for the commencement of a direct action against USLI have not been pled (*see Lang v. Hanover*, 3 NY3d at 354).

Viewing plaintiff's affidavit in opposition and according her the benefit of every favorable inference, the allegations and inferences when taken together do not allow for an enforceable right of recovery against USLI. Plaintiff's misguided legal conclusions do not remedy the defects in the complaint (*e.g.*, that Insurance Law §3420[a][2] does not apply to her because she is a party to the Association's insurance policies as a "customer" who is entitled to bring an action directly against USLI for negligence and bad faith; and *see Rovello v. Orofino Realty Co.*, 40 NY2d at 635). Therefore, the foregoing are insufficient to raise a cognizable theory of law to support a viable cause of action (*see Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d at 141-142; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v. Martinez*, 84 NY2d at 87-88; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

Accordingly, it is

ORDERED, plaintiff's application by order to show cause dated January 28, 2021 for, *inter alia*, an order of attachment and preliminary injunction is denied in its entirety; and it is further

ORDERED, a temporary restraining order was not issued when the application was made, therefore, such relief is moot; and it is further

ORDERED, the motion of defendant United States Liability Insurance Company to dismiss the complaint as against it pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED, the branch of the motion to dismiss the complaint on the grounds of lack of standing is denied as academic; and it is further

ORDERED, the complaint as against defendant United States Liability Insurance Company is hereby severed and dismissed; and it is further

ORDERED, that all parties shall appear virtually for a compliance conference on May 18, 2021 at a time to be determined in Part C-2; and it is further

ORDERED, the Clerk shall mark his records accordingly.

This constitutes the decision and order of the Court.

E N T E R,

Hon. Thomas P. Aliotta, J.S.C

Dated: April 20, 2021