Prime Prop. & Cas. Ins. Inc. v Imperio Transp. Corp.
2022 NY Slip Op 32319(U)
January 18, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30939/2019E
Judge: Eddie J. McShan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 32

PRIME PROPERTY and CASUALTY INSURANCE INC.

Plaintiff,

-against-

IMPERIO TRANSPORT CORP., PEDRO PEREZ, VENUS FRANK, BOBBY PARKS, WANDA STEWART, WALLACE HUNTER, ARBITRATION FORUMS INC., PROGRESSIVE CORPORATION AND OSCAR RODRIGUEZ,

Defendants.

DECISION AND ORDER
Index No. 30939/2019E

Present:
Hon. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 25 – 91 (Motion Seq. # 2) were read on this motion and three cross-motions seeking summary judgment and other related relief.

Upon the foregoing cited papers, the Decision and Order on this Motion and the cross-motions is as follows:

Defendant Progressive Corporation ("Progressive") moves pursuant to CPLR 3212, for an order granting summary judgment requiring Plaintiff to provide coverage to its insured and dismissal of this action. Defendant Venus Frank ("Frank") cross-moves for an order of summary judgment declaring that Plaintiff must provide coverage to its insured and dismissal of the complaint. Frank moves for an order of dismissal based upon the Court's lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Defendants Wanda Stewart ("Stewart") and Hunter Wallace ("Wallace") cross-move for an order vacating an order of this Court dated June 30, 2021 which granted Plaintiff an extension of time to serve the summons. Stewart and Wallace also move for an order of summary judgment declaring that Plaintiff must provide coverage to its insured and dismissal of the complaint. Defendants Imperio Transport Corp. ("Imperio") and Oscar Rodriguez ("Rodriguez") (collectively referred to as "Imperio Defendants") also cross-moves for an order of summary judgment declaring that Plaintiff must provide them with coverage based upon the terms of the contract and Plaintiff's failure to disclaim coverage in

accordance with Insurance Law § 3420. Plaintiff opposes each of the defendants' respective motions. The Court decides the parties' respective applications as follows.

Background

This lawsuit arises from a two-vehicle accident which occurred on November 18, 2017 involving a commercial vehicle owned by Imperio and operated by Imperio's employee Defendant Pedro Perez ("Perez'), and a vehicle owned by non-party Crystal Massey Parks and operated by Defendant Bobby Parks ("Parks"). Imperio notified Plaintiff of the accident on December 21, 2017. On December 28, 2017, Plaintiff acknowledged receiving notice of the accident and issued a letter to Imperio reserving its right to disclaim coverage under the policy. Defendants Frank, Stewart and Wallace, as well as non-moving Defendant Bobby Parks ("Parks") subsequently filed personal injury actions relating to the accident. Progressive also filed a lawsuit to recover various payments on behalf of its insured as a result of the injuries sustained by the various parties involved in the accident. Plaintiff provided Imperio with defense counsel during all those actions.

Defendant Frank was granted summary judgment on August 3, 2018, and defendants Stewart and Hunter were also granted summary judgment on April 19, 2019. On May 13, 2019, Plaintiff sent a second reservation of rights letter to its insured and the attorneys for defendants Frank, Parks, Hunter and Stewart. On September 13, 2019, Plaintiff commenced the instant action seeking declaratory relief that the subject policy does not afford coverage to its insured and related relief. On September 17, 2019, the parties attend mediation attempting to settle the personal injury actions.

Lack of Personal Jurisdiction and Improper Service

Defendant Frank's application to dismiss the complaint pursuant to CPLR 3211(a)(8) based upon Plaintiff's failure to properly serve him is denied. CPLR 3211(a)(8) permits a court to dismiss an action on the basis that the court does not have jurisdiction over the person of the defendant (*see Bank Hapoalim, B.M. v Kotten Mach. Co. of Brooklyn, Inc.,* 151 AD2d 374 [1st Dept 1989]). However, CPLR 3211(e) provides in relevant part that "an objection that the

summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

The Court notes that Frank filed his Answer on October 21, 2020 (NYSCEF # 10) raising lack of personal jurisdiction as his first affirmative defense and improper service as his second affirmative defense. Frank did not serve his Notice of Cross-Motion seeking dismissal pursuant to CPLR 3211(a)(8) until June 11, 2021. Accordingly, Frank waived his objection of improper service based upon his failure to timely move for such relief. "The purpose of the 1996 amendment to CPLR 3211(e), which added the 60-day limit, was 'to require a party with a genuine objection to service to deal with the issue promptly and at the outset of the action . . . ferret out unjustified objections and . . . provide for the prompt resolution of those that have merit'" (*see GMAC Mortgage, LLC v Winsome Coombs,* 191 AD3d 37 [2d Dept 2020], quoting *Wade v Byung Yang Kim,* 250 AD2d 323 [2d Dept 1998]). Defendant Frank did not proffer any arguments of undue hardship to extend his time to seek dismissal.

In addition, Frank's "conclusory and unsubstantiated denial of [proper] service lacked the factual specificity and detail required to rebut the prima face proof of proper service set forth in the process server's affidavit of service" (*see for example Board of Managers of Foundry at Washington Park Condominium v Foundry Development Co., Inc.,* 111 AD3d 776 [2d Dept 2013]). Defendant's attorney affirmation merely states, "plaintiff never properly served the defendants with process herein." Accordingly, Defendant Frank's application to dismiss the complaint pursuant to CPLR 3211(a)(8) based upon his allegation of improper service of process is denied.

Vacatur of Order Extending Time to Serve

Defendants Stewart and Hunter cross-move pursuant to CPLR 5015 to vacate Order dated June 30, 2020 of the Honorable Fernando Tapia extending Plaintiff's time to serve (NYSCEF # 55). Stewart and Hunter argue that Plaintiff failed to establish good cause for its failure to serve

them within 120 days and obtained an *ex parte* extension of the time to serve by failing to serve the notice of motion on the defendants despite knowing the parties and their attorneys. They note that Plaintiff appeared for mediation four days after commencing the instant action, failed to notify them of it or serve them, and yet sought an extension pursuant to CPLR 306-b. Defendants Stewart and Hunter suggest that Plaintiff served them 157 days after moving for an extension.

Plaintiff argues that Stewart's and Hunter's motion to vacate Judge Tapia's June 30, 2020 Order must be denied because it was e-filed almost a year ago, and because there are no new or different facts to justify reconsideration of that order. Plaintiff notes that Judge Tapia found that "the delay in seeking the extension was not significant, the statute of limitations had not expired, and there would be no prejudice to the defendants as their ability to defend on the merits had not been impaired." Plaintiff asserts that Stewart's and Hunter's challenge to service is "too late" and notes that they pled improper service in their answer filed on October 7, 2020 (NYSCEF # 74).

The Court finds Stewart's and Hunter's motion challenging proper service of the Summons untimely as noted above. Stewart's and Hunter's application to vacate Judge Tapia's order extending Plaintiff's time to serve is ultimately a challenge to proper service and this Court's personal jurisdiction over them. If this Court was to vacate Judge Tapia's Order and determine that the extension of time to serve should not have been granted, service of the summons on Stewart and Hunter would be untimely and the matter would have to be dismissed for a lack of jurisdiction against the moving parties pursuant to CPLR 3211(a)(8) (*see for example Rodriguez v Consolidated Edison Company of New York, Inc.*, 163 AD3d 734 [2d Dept 2018]).

The Court notes that Stewart and Hunter served their answer on or about October 7, 2020 and included as their first affirmative defense that Plaintiff failed to timely serve the summons as required by CPLR 306(b). Stewart and Hunter made the instant application challenging the service of the Summons on or about June 21, 2021. Clearly more than 60-days have elapsed since their pleading. Accordingly, Stewart's and Hunter's application to vacate the prior order

extending Plaintiff's time to serve the Summons and Complaint is denied as untimely pursuant to CPLR 3211(e).

Summary Judgment

Defendant Progressive argues that Plaintiff failed to issue a proper disclaimer and also failed to issue it within the strict time constraints imposed by Insurance Law 3420(d)(2). Progressive notes that Plaintiff's first reservation of rights letter dated December 28, 2017 expressly identifies a coverage concern, namely that Imperio's employee Perez was not included as an authorized driver on the policy (NYSCEF # 27). Progressive further notes that Plaintiff further stated that it was going to "reserve its rights to deny coverage" and that it will "specifically reserve the right to decline coverage for any other reason that may come to our attention in the future" (NYSCEF # 27). Progressive emphasizes that Plaintiff did not send its next correspondence until a year and a half later on May 13, 2019 suggesting that coverage was still in question, and that its evaluation was incomplete (NYSCEF # 28). Progressive asserts that neither the first reservation of rights letter dated December 28, 2017 nor the second reservation of rights letter dated May 13, 2019 contain any disclaimer language clearly identifying the basis for the disclaimer. Progressive insists that the Court of Appeals has made it clear that a reservation of rights letter is not a substitute for a formal disclaimer.

Defendant Progressive argues that even if the instant action constitutes a formal disclaimer letter to the insured, it does not meet the stringent requirements of Insurance Law 3420(d)(2). Progressive contends that courts have interpreted the "as soon as reasonably possible" provision of Insurance Law 3420(d)(2) to require that written notice of a disclaimer be mailed within approximately one month. Progressive insists that the only document through which Plaintiff first sought to actively disclaim coverage was in the filing of the instant action nearly two years later. Progressive asserts that this Court must declare that the subject coverage is warranted by virtue of Plaintiff's failure to disclaim coverage within a month of the first reservation of rights letter dated December 28, 2017.

Defendant Progressive argues that Plaintiff's failure to provide it with notice of the second reservation of rights letter despite of being aware of its claim through fax correspondence sent to Plaintiff on April 25, 2019 is fatal to Plaintiff's belated attempt to disclaim coverage. Progressive also argues that Plaintiff must be equitably estopped from disclaiming coverage noting that Frank, Parks, Hunter and Stewart personal injury actions have been thoroughly litigated before their respective attorneys were notified of the coverage issue through the commencement of the instant action. Progressive notes that Frank obtained summary judgment liability against defendants Imperio and Perez in August 2018 under Index No. 20038/2018 and filed a note of issue in June 2019; that Progressive went through a loss transfer intercompany arbitration process and awards were published on July 25, 2019; and that Hunter and Stewart had their most recent compliance conference in October 2020 under Index No. 30274/2018. Progressive emphasizes that Plaintiff unilaterally hired attorneys on behalf of its insured for the aforementioned proceedings. Progressive insists that Plaintiff's "extensive delay irreparably prejudiced its insured, the various defendants and the court system itself for no defensible reason warranting a dismissal of the plaintiff's claims herein on equitable estoppel grounds . . . ."

Imperio Defendants adopts Progressive's arguments and insist that Plaintiff failed to timely disclaim coverage. They assert that it is undisputable that they are insureds under the subject policy and that Plaintiff must defend them in the underlying actions. They insist that Plaintiff failed to provide notice of its disclaimer as soon as it was reasonably possible and failed to explain its delay in doing so. Imperio Defendants argue that Plaintiff's attempt to disclaim coverage nearly four years after the accident is impermissible under New York law. Relying on *U.S. Underwriters Ins. Co. v City Club Hotel, LLC,* Imperio Defendant assert that Plaintiff must reimburse their fees and costs incurred in defending the instant action suggesting that Plaintiff is improperly seeking to free itself from its policy obligations. Defendants Frank, Hunter and Stewart join in on their co-defendants' arguments.

Plaintiff argues that "the claim was not covered to begin with" and therefore, whether "an insurer informed its policyholder of its coverage position within a reasonable time is of no

moment." Plaintiff insists New York Insurance Law § 3420 does not apply because Perez was not a "scheduled driver" under the Policy. Plaintiff suggest that Insurance Law § 3420 only applies to disclaimers based on defenses to coverage but not in situations where there was no coverage.

Plaintiff also argues that they are not estopped from disclaiming coverage. Plaintiff asserts that the Imperio Defendants have failed to show that they have been prejudiced by its delay. Plaintiff states that "Prime might have disclaimed coverage when it received notice of this subject accident. Instead, Prime properly provided counsel in the underlying actions while they investigated the issues related to coverage." Plaintiff states that it, in good faith, informed the Imperio Defendants that it would investigate the claim subject to the reservation of rights to deny coverage. Plaintiff contends that it did not unreasonably delay the filing of this declaratory judgment action because it "'did the right thing' by its policyholder – when it was informed of the claim, it appointed counsel to defend Imperio, subject to a reservation of rights; requested information from Imperio, its policyholder, that would inform it whether there were grounds to deny coverage . . . ." Plaintiff suggests that when the Imperio Defendants failed to provide the information it requested in its letter dated May 13, 2019, it filed the instant action on September 13, 2019. Plaintiff emphasizes that the instant action constitutes sufficient notice of disclaimer.

In reply, Progressive and the Imperio Defendants argue that Perez was covered by the Policy. They note that Section II "Covered Autos Liability Coverage 1. Who Is An Insured" (p. 3 of 13 of the policy - NYSCEF # 68) includes "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow . . ." The Imperio Defendants assert that it is undisputed that the Imperio's truck was covered by the policy, and that Perez was its employee at the time of the accident. Progressive and the Imperio Defendants insist that the coverage applies since Perez operated the insured vehicle on consent of the insured employer. Progressive asserts that "[w]hile the plaintiff relies on an exclusionary endorsement to the policy, that endorsement merely identifies who is a listed a [sic] driver. It does not define who or what is insured." Progressive insists that even if the Court considers the endorsement as creating a

possible coverage exclusion, the language at issue should be deemed ambiguous and interpreted in favor of the insured (*Selective Ins. Co. of America v County of Rensselaer,* 26 NY3d 649 [2016]). Imperio Defendants contend that Plaintiff has no basis to disclaim coverage by virtue of the MCS-90 endorsement which is intended to "eliminate the possibility of a denial of coverage by requiring the insurer to pay any final judgment recovered against the insured for negligence in the operation, maintenance, or use of a motor vehicles subject to federal financial responsibility requirements, even though the accident vehicle is not listed in the policy" (1 Auto. Liability Ins. 4th Section 2:12 [2008]).

Progressive further asserts that "Plaintiff's position that it was doing the 'right thing' by its insured is not consistent with a two-year investigation into coverage when the basis it believed it was disclaiming coverage was known to it within a week of it being notified of the accident as documented in its initial reservation of rights letter . . . . Still it left its insured with several lawsuits, including one on the trial calendar with the possibility of having the attorneys plaintiff has provided for years suddenly gone with its coverage. This was not prompt as required by statute or any sensible use of the word, it was not generous and it has caused substantial prejudice."

It is well settled that a party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985] *citing Zuckerman v City of New York*, 49 NY2d 557 [1980]). The moving party's evidence, most important, must be in admissible form (*Friends of Animals, Inc. v Associate Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067 [1979]). The moving parties' failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d 851; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once the moving party establishes a *prima facie* showing, the burden shifts to the nonmoving party to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Alvarez*, 68 NY2d 320). The nonmoving party cannot provide

conclusory allegations of fact or law to defeat a summary judgment application *(Zuckerman*, 49 NY2d 557). In considering whether to grant a summary judgment motion, a "drastic remedy" in this State, this court looks to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395).

In the instant matter, the Court finds that the moving defendants have established a prima facie showing of entitlement to judgment as a matter of law based upon Plaintiff's failure to timely disclaim coverage in accordance with Insurance Law 3420(d)(2). "The legislature enacted section 3420(d)(2) to 'aid injured parties' by encouraging the expeditious resolution of liability claims" (*see KeySpan Gas East Corp. v Munich Reinsurance America, Inc.*, 23 NY3d 583 [2014], quoting *Allstate Ins. Co. v Gross,* 27 NY2d 263 [1970]). The Court of Appeals noted that "[t]o effect this goal, the statute 'establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party'" (*KeySpan Gas East Corp.*, 23 NY3d 583). Section 3420(d)(2) "creates a heightened standard for disclaimer that 'depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel'" (*KeySpan Gas East Corp.*, 23 NY3d 583). "[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*see Matter of Arbitration between Allcity Ins. Co.*, 78 NY2d 1054 [1991]).

It is undisputed based upon the record presented that neither Plaintiff's December 28, 2017 nor the May 13, 2019 reservation of rights letter expressly disclaims coverage to the insured, Imperio Defendants, after receipt of the notice of claim. Plaintiff acknowledges as much based on its assertion that the instant action constitutes sufficient notice of disclaimer. The Court agrees that Plaintiff's commencement of this action constitutes a notice of disclaimer (*Generali-U.S. Branch v Rothschild,* 295 AD2d 236 [1st Dept 2002]). The moving defendants emphasize that Plaintiff did not commence its action for declaratory relief until September 13, 2019, nearly two years after the accident despite being aware of its alleged grounds for

disclaimer of liability immediately after being notified of the accident. Caselaw has determined that Plaintiff's disclaimer of coverage first asserted in its complaint nearly two years after its issuance of the first letter of reservation of rights cannot be considered reasonable as a matter of law. The Court of Appeals in *First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64 (2003), "note[d] that the Appellate Division several times has found fixed periods less than 48 days unreasonable as a matter of law" (*see also City of New York v Greenwich Ins. Co.*, 95 AD3d 732 [1st Dept 2012] finding a five-and-a-half month delay unreasonable as a matter of law). However, the Court of Appeals was careful in imposing a fixed time period and noted that "[a]n insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay" (*see First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64 [1st Dept 2003]). Accordingly, the burden shifts to the Plaintiff to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Alvarez*, 68 NY2d 320).

The Court finds that Plaintiff failed to establish the existence of a factual issue requiring a trial to determine the dispute (*Alvarez*, 68 NY2d 320). Although Perez's coverage under the subject Policy is in dispute, Plaintiff was required to serve a timely disclaimer because Imperio's claim falls squarely within policy's coverage provision as set forth in Section II of the Policy (*see for example Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185 [2000]). Plaintiff's denial of coverage is predicated on a specific endorsement within the policy and but for that endorsement Perez would have been insured under the Policy if it is determined that he was in fact one of Imperio's employees. Accordingly, Plaintiff was required to serve a timely disclaimer as required by Insurance Law Section 3420(2).

The Court also finds that Plaintiff failed to allege a sufficient reasons for its delay in promptly disclaiming coverage to the defendants. It is well-settled that "where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law", or "[w]here the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law" (*see Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, 75 AD3d 404 [1st

Dept 2010]). Moreover, "[i]f a delay allegedly results from a need to investigate the facts underlying the proposed disclaimer, the insurer must demonstrate the necessity of conducting a thorough and diligent investigation" (*Hunter Roberts Const. Group, LLC,* 75 AD3d 404, relying on *Quincy Mutual Fire Ins. Co. v Uribe,* 45 AD3d 661 [2d Dept 2007]).

By Plaintiff's own admission, it commenced the instant action when the Imperio Defendants failed to provide the information it requested placing into question "the necessity of conducting a thorough and diligent investigation" (*Hunter Roberts Const. Group, LLC,* 75 AD3d 404, relying on *Quincy Mutual Fire Ins. Co. v Uribe,* 45 AD3d 661 [2d Dept 2007]). In fact, Plaintiff presents nothing in this record to establish its "'very heavy burden' of demonstrating that it acted diligently in seeking to bring about the insured's cooperation, that its efforts were reasonably calculated to obtain the insured's cooperation and that the attitude to the insured, after his cooperation was sought, was one of willful and avowed obstruction" (*Hunter Roberts Const. Group, LLC,* 75 AD3d 404, quoting *State Farm Indem. Co. v Moore,* 58 AD3d 429 [1st Dept 2009]). Plaintiff sought the information from Imperio to confirm Perez's employment by letter dated May 13, 2019 and still waited until September 1, 2019 to commence this action and disclaim coverage despite its suggestion that Imperio failed to provide the required information. Accordingly, the Court finds that Plaintiff failed to timely disclaim coverage and therefore cannot rely on Scheduled Drivers Endorsement ACA-99-03 to disclaim coverage.

Based upon the Court's findings hereinabove, the moving defendants' applications for summary judgment dismissing this action is granted in their entirety. Plaintiff is therefore required to provide Imperio with coverage in accordance with the subject Policy.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant Venus Frank's application to dismiss the complaint pursuant to CPLR 3211(a)(8) based upon his allegation of improper service of process is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that defendants Wanda Stewart's and Wallace Hunter's application to vacate Judge Tapia's Order dated June 30, 2020 (NYSCEF # 8) is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the moving defendants, Progressive Corporation, Venus Frank, Wanda Stewart, Hunter Wallace, Imperio Transport Corp. and Oscar Rodriguez applications for summary judgment are granted in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the Wanda Stewart' and Hunter Wallace's application for attorney fees for having to defend this action is denied as they are not insured by the Plaintiff; and it is further

ORDERED AND ADJUDGED that the Clerk shall dismiss this action in its entirety in accordance with the Court's findings hereinabove.

This shall constitute the decision and order of the Court.

Dated: January 18, 2022

J.S.C.