

Mitchell-Bey v Coker
2023 NY Slip Op 30213(U)
January 20, 2023
Supreme Court, New York County
Docket Number: Index No. 161627/2021
Judge: Suzanne J. Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

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ZAFIR MITCHELL-BEY,

Plaintiff,

- v -

ANDREW OLUSOLA OLUSEGUN COKER, JOSE
CRISTOBAL ESCOBAR RUANO, ANA SORIANO, STATE
FARM INSURANCE COMPANY, THOMAS TOBIN

Defendant.

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INDEX NO. 161627/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 63, 64 were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motion of defendants State Farm Mutual Automobile Insurance Company (i/s/h/a State Farm Insurance Company) ("State Farm") and Thomas Tobin is granted and plaintiff's cross-motion is denied. This matter arises out of an alleged motor vehicle accident that occurred on or about November 12, 2018, in Nassau County, New York. Plaintiff alleges he was injured when the vehicle in which he was a passenger, operated by defendant Andrew Olusola Olusegun Coker, came into contact with a vehicle operated by defendant Jose Cristobal Escobar Ruano. The latter vehicle is insured under a policy issued by State Farm to defendant Ana Soriano. Defendant Tobin is the State Farm claim specialist who handled plaintiff's claim. The Fourth through Eighth Causes of Action of the Amended Verified Complaint assert claims against State Farm and/or Tobin sounding in fraud, respondeat superior, and prima facie tort. State Farm and Tobin now move pursuant to CPLR 3211(a)(7) to dismiss the Amended Verified Complaint as against them, and/or pursuant to CPLR § 603 to sever any causes

of action against them and direct plaintiff to commence a separate action. Plaintiff opposes the motion and cross-moves for attorneys' fees, costs, and sanctions for frivolous conduct, and to disqualify State Farm and Tobin's counsel from representing them. State Farm and Tobin oppose the cross-motion. Reply papers on a cross-motion are not permitted and thus not considered by the court.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Franklin v. Winard*, 199 A.D.2d 220 (1st Dep't 1993). In addition, pursuant to CPLR 3016(b), "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

As a threshold matter, dismissal of the Amended Verified Complaint as to the moving defendants is warranted because the statutory condition precedent to a plaintiff's bringing an action against a tortfeasor's insurer is the plaintiff's obtaining a judgment against the tortfeasor. *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 352 (2004). There is no evidence that plaintiff herein has obtained a judgment against defendant Soriano, State Farm's insured, or defendant Ruano, the insured vehicle's operator, which judgment has remained unsatisfied for 30 days. *See* New York Insurance Law § 3420(a)(2). As such, plaintiff cannot maintain its causes of action against State Farm and Tobin.

Further, even if plaintiff did have standing to sue State Farm and Tobin, his claims herein against these defendants independently warrant dismissal for failure to state a cause of action. For example, plaintiff fails to plead with particularity the elements of a fraud claim, namely “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages [citations omitted].” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Plaintiff’s allegations as to State Farm’s and Tobin’s statements and positions regarding the underlying motor vehicle incident are conclusory and unsupported.

With respect to plaintiff’s cross-motion, the record before the court, and indeed the law as discussed hereinabove, does not support any finding that State Farm’s and Tobin’s counsel engaged in sanctionable conduct, or engaged in conduct justifying their disqualification. Consequently, the cross-motion is denied in its entirety.

Accordingly, it is hereby

ORDERED that the motion of defendants State Farm and Tobin is granted and the Amended Verified Complaint is dismissed as to them; and it is further

ORDERED that plaintiff’s cross-motion is denied; and it is further

ORDERED that the action is severed as to State Farm and Tobin and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the moving defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that within 35 days of the date of this order, the remaining parties to this action shall submit to the Part Clerk of Part 39 an agreed upon Preliminary Conference Order for the judge's review and signature, as per the Part Rules.

This constitutes the decision and order of the court.



1/20/2023
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE