At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of January, 2023

P R E S E N T:
HON. DEBRA SILBER,
Justice.

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LINTON RUSSELL,

Plaintiff,

- against -

RLI INSURANCE COMPANY,

Defendant.

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DECISION/ORDER

Index No. 521700/2020
Motion Seq. 1 & 2
Submitted: 1/19/23

The following papers were read herein:

	Papers Numbered NYSCEF
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	8-25; 27-49
Opposing Affidavits (Affirmations)	51-52
Reply Affidavits (Affirmations)	50; 53

Upon the foregoing papers, plaintiff moves, in motion sequence #1, for an order pursuant to CPLR §3212 granting him summary judgment, and for an order declaring that 1) the plaintiff's accident of August 17, 2015 and the pending lawsuit *Linton Russell v. MRZ Trucking Corp. and Michael Myrie*, Kings County Index Number 504476/2018, ("the underlying action") falls within the coverage afforded by the RLI policy with MRZ Trucking; 2) declaring that defendant has an obligation to defend and indemnify its insured in the underlying action; 3) declaring that defendant is required to pay any judgment plaintiff may

obtain against defendants in the underlying action; and 4) granting plaintiff costs incurred in connection with the filing of the instant declaratory judgment action. Defendant RLI Insurance Company (RLI) cross-moves, in motion seq. #2, for summary judgment pursuant to CPLR §3212, and for an order declaring that RLI does not owe a duty to defend or indemnify MRZ Trucking Corp. ("MRZ") in the underlying action.

BACKGROUND

The underlying action arises out of an accident which took place at JFK Airport, on August 17, 2015, while plaintiff was working for non-party Worldwide Flight Services, Inc., and operating a forklift to load trucks. At the time of the accident, plaintiff was in the process of loading a truck owned and operated by RLI's insured, MRZ Trucking. Plaintiff commenced a suit for his injuries, as cited above, on March 5, 2018. The action is on the trial calendar and is scheduled for jury selection on June 13, 2023.

Defendant RLI is an insurance company based in Illinois, and is authorized to do business in New York.[1] It insured MRZ with a motor vehicle policy, a copy of which is in the motion papers at Document 18. According to the papers in this action, RLI was not notified of the accident until shortly after the suit was commenced, which was more than two years after the accident. As a result, RLI disclaimed coverage, claiming late notice. Their disclaimer is included in the motion papers as Document 40.

This matter was commenced on November 4, 2020, and was initialized as a special proceeding, post-judgment, pursuant to Insurance Law Section 3420. However, it is not in fact a special proceeding. Despite that categorization by plaintiff, there is a summons and a

[1] This is specifically indicated on the New York State Department of Financial Services website, www.dfs.ny.gov.

complaint, which states that it is a declaratory judgment action. The language in the complaint is similar to the language in declaratory judgment actions regarding insurance coverage. There is one difference, however. That is that the plaintiff is not the insured, but the injured party.

An injured party cannot sue the insurer of the alleged tortfeasor due to the lack of privity of contract. It is common law that such an injured party has no standing. However, should an injured party obtain a judgment against the tortfeasor, New York Legislature has determined that, if all statutory requirements are met, which this court declines to determine herein, Insurance Law §3420(b) permits an injured party to sue the tortfeasor's insurer, which is based upon public policy and is in derogation of the common law (see *Carlson v American Intl Group, Inc.*, 30 NY3d 288 [2017]; *DeLuca v RLI Ins. Co.*, 187 AD3d 709 [2d Dept 2020]).

Specifically, "[i]n 1917, the Legislature remedied this inequity by creating a limited statutory cause of action on behalf of injured parties directly against insurers. This statutory right, presently codified at Insurance Law § 3420, grants, among other things, 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. The effect of the statute is "to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a . . . principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Once the statutory prerequisites are met, the injured party steps into the shoes of the tortfeasor and can assert any

right of the tortfeasor-insured against the insurance company" [internal citations omitted] (*DeLuca v RLI Ins. Co.*, 187 AD3d 709, 711 [2d Dept 2020]).

In accordance with the foregoing, defendant's motion (MS #2) for summary judgment is granted to the sole extent that the plaintiff's complaint is dismissed as premature, for failing to meet the statutory prerequisites for this action. Plaintiff's motion (MS #1) is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.