Smith v Geico Ins. Co.
2012 NY Slip Op 30918(U)
April 5, 2012
Supreme Court, Suffolk County
Docket Number: 08799/2010
Judge: Paul J. Baisley
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SHORT FORM ORDER

INDEX NO. 08799/2010

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

ORIG. RETURN DATE: January 17, 2012
FINAL RETURN DATE: February 14, 2012
MOT. SEQ. #: 001 - MD
CROSS MOT. SEQ.#. 002 - MG

ANTHONY SMITH,

Plaintiff,

-against-

GEICO INSURANCE COMPANY,

Defendant.

GEICO INSURANCE COMPANY,

Third Party Plaintiff
Index No. 0007/13

-against-

LIBERTY MUTUAL INSURANCE COMPANY,

Third Party Defendant.

PLTF'S ATTORNEY:
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DEFT'S ATTORNEY for GEICO:
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DEFT'S ATTORNEY for Liberty Mutual Ins. Co.:
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Upon the following papers numbered 1 to 23 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7, 11 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 8 - 10; Replying Affidavits and supporting papers 19 - 23; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendant/third-party plaintiff for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the third-party defendant for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint is granted; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8 (f) on April 20, 2012 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action to recover no-fault insurance benefits, including outstanding medical bills and loss of earnings, from the defendant/third-party plaintiff Geico Insurance Company (Geico). It appears that, on or about September 2, 2008, the plaintiff was injured when he was involved in an accident with a motor vehicle operated by nonparty Edward J. Conrad (Conrad). Geico insured the plaintiff's vehicle, and the third-party defendant Liberty Mutual Insurance Company (Liberty) insured the Conrad vehicle. The facts and circumstances surrounding the happening of the accident are not clear.

Geico moves for summary judgement dismissing the complaint on the grounds, *inter alia*, that the plaintiff failed to submit the prescribed no-fault insurance billing forms, that the plaintiff's intentional actions are excluded from no-fault coverage, and that the plaintiff was a pedestrian who may only seek no-fault benefits from Liberty. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, Geico submits the pleadings, the affirmation of its attorney, affidavits from two employees of Geico, and a copy of the police accident report, Form MV-105, regarding this incident. The police accident report record relied on by Geico is plainly inadmissible and has not been considered by the Court in making this determination (*see Mooney v Osowiecky*, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; *Szymanski v Robinson*, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; *Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; *Cadieux v D.B. Interiors*, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]). Geico fails to include an affidavit by someone with personal knowledge as to how this accident happened, and how the plaintiff was injured.

Initially, Geico argues that the plaintiff cannot satisfy his prima facie burden in an action to recover no-fault benefits that the prescribed statutory billing forms have been mailed by him and received by the insurer, and that payment of no-fault benefits is overdue (Insurance Law § 5106; 11

NYCRR 65.15). In support of this contention, Geico submits the affidavit of Roxanne McCarville (McCarville), an employee in Geico's claims division. In her affidavit McCarville swears that she made "several repeated and unsuccessful attempts to obtain the relevant bills." She further swears to the detailed procedure followed by Geico in mailing denial of claims forms to its insureds, and that the copies of the "relevant Denial of Claim forms ... if applicable and as referred to below, are attached hereto." Despite the fact that a denial of claim form was issued by Geico regarding this incident on October 3, 2008, Geico fails to include a copy in its submission. However, the plaintiff has supplied the Court with a copy of said denial of claim. It has been held that once an insurer repudiates liability by issuing a denial of coverage, an insured is excused from any of his obligations under the policy (*see Lee v American Tr. Ins. Co.*, 304 AD2d 713, 757 NYS2d 796 [2d Dept 2003]; *State Farm Ins. Co. v Domotor*, 266 AD2d 219, 697 NYS2d 348 [2d Dept 1999]; *King v State Farm Mut. Auto. Ins. Co.*, 218 AD2d 863, 630 NYS2d 397 [3d Dept 1995]; *see generally Auerbach v. Otsego Mut. Fire Ins. Co.*, 36 AD3d 840, 829 NYS2d 195 [2d Dept 2007]; *but see Paul K. Rooney, P.C. v Chicago Ins. Co.*, 2001 WL 262703 [US Dist Ct, SD NY 2001]). Therefore, Geico's contention herein is without merit.

In addition, Geico has failed to establish its entitlement to summary judgment regarding its contention that the plaintiff's intentional acts exclude him from no-fault coverage. It is undisputed that Geico issued a Family Automobile Insurance Policy (Policy) to the plaintiff on August 8, 2008, effective June 3, 2008 to December 3, 2008. The Policy, Section VI - Amendments and Endorsements, Form A30NY, provides, in pertinent part:

> Exclusions
>
> This coverage does not apply to personal injury sustained by:
>
> * * *
>
> (e) any person who intentionally causes his or her own personal injury;

Without submitting admissible proof of the facts, Geico nonetheless contends that the plaintiff was involved in a "road rage" incident with Conrad, that he stopped his vehicle, got out of the vehicle, jumped on the hood of the Conrad vehicle, and was injured. It is well established that when an insurance company intends to exclude certain coverage from its obligation under a policy, the insurance company must use clear and unambiguous language (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 815 NYS2d 507 [1st Dept 2006]). In addition, "[s]uch exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are ... to be accorded a strict and narrow construction. Thus the insurance company bears the burden of establishing that the exclusions apply in a particular case" (*Lee v State Farm Fire & Casualty Co.*, 32 AD3d 902, 903, 822 NYS2d 559, 560 [2d Dept 2006]).

The Court finds that, even if it were to consider the police accident report submitted herein, there are multiple issues of fact regarding the actions of Conrad and the plaintiff including, but not limited to, whether the plaintiff exited his vehicle, and whether he jumped on the hood of Conrad's vehicle. The issues of fact present herein preclude a finding as to what actions of the plaintiff were intentional, or that any intentional actions caused his alleged injuries.

The issues of fact herein also preclude a finding that Geico is entitled to summary judgment finding Liberty liable to the plaintiff for no-fault benefits "based on the doctrine of striking vehicle." It has been held that a person who has left his or her car is considered a pedestrian covered under no-fault insurance law with regard to the insurance covering the striking vehicle (*Matter of General Acc., Fire & Life Ins. Co. v Viruet*, 169 AD2d 608, 564 NYS2d 754 [1st Dept 1991]; *Colon v Aetna Cas. & Sur. Co.*, 64 AD2d 498, 410 NYS2d 634 [2d Dept 1978] *affd* 48 NY2d 570, 423 NYS2d 908 [1980]). This is true even where the person left his or her vehicle with the intention to return shortly (*Thomas v Travelers Ins. Co.*, 54 AD2d 608, 387 NYS2d 498 [4th Dept 1976]; *Aetna Ins. Co. v Espinosa*, 92 Misc 2d 200, 399 NYS2d 975 [Sup Ct, Kings County 1977]). Here, Geico has failed to establish the facts surrounding this accident, and whether the plaintiff was a pedestrian at the time of his alleged injuries. Geico's remaining contentions are either not established sufficiently to warrant summary judgment, without merit, or raised prematurely.

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp., supra*; *Winegrad v New York Univ. Med. Ctr., supra*). Accordingly, Geico's motion for summary judgment is denied.

Liberty moves for summary judgement dismissing the third-party complaint on the grounds, inter alia, that the plaintiff's intentional actions are excluded from no-fault coverage, that Geico is liable to the plaintiff for no-fault insurance benefits because the plaintiff's alleged injuries were the result of his "use or operation'" of his vehicle, and that the Court is an improper forum to resolve the dispute between the insurers regarding no-fault coverage. Liberty has also failed to submit any admissible evidence, or affidavits from an individual with personal knowledge, indicating how this accident occurred. The issues of fact regarding the plaintiff's actions and the cause of his alleged injuries remain. Thus, Liberty has failed to establish its entitlement to summary judgment regarding the first two grounds of its motion.

However, Liberty also contends that the dispute between Geico and Liberty over who might be responsible to pay no-fault (first-party) benefits must be determined in an arbitration proceeding. Insurance Law § 5105 (b) requires that mandatory arbitration be used to resolve all disputes between insurers as to their responsibility for the payment of first-party benefits. 11 NYCRR 65- 4.11 (a) (6) provides that mandatory arbitration "shall not apply to any claim for recovery rights to which an insurer in good faith asserts a defense of lack of coverage of an alleged covered person on any grounds, ... [h]owever, any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (i.e., priority or payment or sources of payment as provided in section 65-3.12 of this Part) is not considered a coverage question and must be submitted to mandatory arbitration under this section."

11 NYCRR 65-3.12 (b) provides that "[i]f a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim is given . . . *by or on behalf of an eligible injured person*, shall be responsible for payment to such person. Any such dispute shall be resolved in accordance with the arbitration Smith vs

procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part" (emphasis added).

Geico contends that the plaintiff is not an "eligible injured person" by virtue of his allegedly intentional acts. However, the facts surrounding the plaintiff's actions, and the cause of his injuries, have not been determined, and Geico's contention is essentially that there is a question of coverage, which does not require mandatory arbitration. It has been held that when an insurer denies the plaintiff's claim on the ground that no-fault benefits are payable by another insurer, that insurer has raised an issue as to which insurer was obligated to pay first-party benefits, subject to mandatory arbitration (*M.N. Dental Diagnostics, P.C. v Government Empls. Ins. Co.*, 81 AD3d 541, 916 NYS2d 598 [1st Dept 2011]; *Progressive Cas. Ins. Co. v. New York State Ins. Fund*, 47 A.D.3d 633, 850 N.Y.S.2d 478 [2d Dept 2008]; *Paramount Ins. Co. v Miccio*, 169 AD2d 761, 565 NYS2d 128 [2d Dept 1991]; *Hartford Acc. & Indem. Co. v Country-Wide Ins. Co.*, 63 AD2d 981, 405 NYS2d 775 [2d Dept 1978]). Accordingly, Liberty's motion for summary judgment is granted, and the third-party complaint is dismissed.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: April 5, 2012

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.