

**Total Fitness & Karate Center, Inc. v Zurich North
America**

2012 NY Slip Op 31155(U)

April 24, 2012

Sup Ct, Queens County

Docket Number: 16130/09

Judge: Robert J. McDonald

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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TOTAL FITNESS & KARATE CENTER, INC.,
SUSAN COLLINS, CRISTAIN ZAHAROIU &
TARA SHANAHAN,

Index No.: 16130/09

Motion Date: 1/19/12

Plaintiffs,

Motion No.: 29

- against -

Motion Seqs.: 4 & 5

ZURICH NORTH AMERICA, FITNESS AND
WELLNESS INS. AGENCY, PHILADELPHIA
INSURANCE COMPANIES,

Defendants.

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The following papers numbered 1 to 23 read on this motion by defendant Philadelphia Indemnity Insurance Company, sued herein as Philadelphia Insurance Companies (Philadelphia Indemnity), to dismiss the complaint; by separate notice of motion by defendant Zurich American Insurance Company, sued herein as Zurich North America (Zurich), to dismiss the claims of plaintiffs Total Fitness & Karate Center, Inc. (Total Fitness), Susan Collins (Collins), and Cristain Zaharoiu (Zaharoiu); and on the cross motion by defendant Fitness and Wellness Insurance Agency, sued herein as Fitness and Wellness Ins. Agency (Fitness and Wellness), to dismiss the claims of Total Fitness, Collins, and Zaharoiu.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits	9-11
Answering Affidavits - Exhibits	12-18
Reply Affidavits	19-23

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

The instant declaratory judgment action was commenced as a result of an underlying action (Index No. 26044/08) for personal injuries that plaintiff Tara Shanahan (Shanahan) allegedly sustained on October 1, 2007, at premises located at 46-12 Queens Boulevard, in the County of Queens. Total Fitness owned the subject premises at the time of the incident. In that underlying action, Shanahan alleged that she was injured due to the negligence of Total Fitness and its employees, Collins and Zaharoiu. Fitness and Wellness allegedly procured an insurance policy for Total Fitness from Zurich. Zurich issued a commercial general liability insurance policy for the subject premises for the period from December 6, 2006, to December 6, 2007, which was in effect at the time of the incident. However, Zurich disclaimed coverage of Total Fitness' claim as a result of the incident, for untimely notice. Philadelphia Indemnity issued an insurance policy for the subject premises for the period from December 6, 2007, to December 6, 2008. Plaintiffs Total Fitness, Collins, Zaharoiu, and Shanahan have alleged that Fitness and Wellness is a division of Philadelphia Indemnity and that Philadelphia Indemnity was contractually obligated to notify Zurich of Shanahan's claim in the underlying action.

Philadelphia Indemnity has moved to dismiss the complaint and has argued that Total Fitness' claims must be dismissed since it is not represented by counsel, as required by CPLR 321. CPLR 321 (a) provides, in pertinent part, "a corporation or voluntary association shall appear by attorney." Generally, a corporation may not maintain an action without representation by counsel (CPLR 321 [a]; see *Hilton Apothecary v State of New York*, 89 NY2d 1024 [1997]; *Matter of Sharon B.*, 72 NY2d 394, 397-398 [1988]; *Matter of Oh v Westchester County Dept. of Consumer Protection*, 287 AD2d 721 [2001]).

Although Total Fitness was initially represented by counsel, in an order dated June 22, 2011, this court granted the motion of counsel for Total Fitness to withdraw as its attorney of record and stayed the proceedings for 30 days from the date of the order with notice of entry, in order to allow Total Fitness time to obtain new counsel. Total Fitness has not obtained new counsel and it has not submitted any opposition to the instant motions and cross motion. Under these circumstances, Philadelphia Indemnity is entitled to the dismissal of Total Fitness' claims in the instant action.

Inasmuch as Zurich and Fitness and Wellness have adopted Philadelphia Indemnity's arguments and evidence as to Total Fitness in support of their respective motion and cross motion, Zurich and Fitness and Wellness are also entitled to the

dismissal of Total Fitness' claims against them in light of the above.

Turning to Philadelphia Indemnity's motion to dismiss Shanahan's claims pursuant to CPLR 3211 (a)(3) and (a)(7), and it has argued that Shanahan lacks the standing to prosecute the instant action for declaratory judgment against it because she has not obtained a judgment against Total Fitness, an alleged tortfeasor in the underlying action. In opposition, Shanahan has argued that she is a statutory plaintiff to the instant action and that she has standing to maintain the action pursuant to Insurance Law § 3420.

CPLR 3211 (a)(3) provides for dismissal of an action if the party commencing the action does not have the legal capacity to sue. CPLR (a)(7) provides that an action may be dismissed if the pleading fails to state a cause of action. "Under Insurance Law § 3420(a)(2), a declaratory judgment action seeking a judgment declaring that the at-fault party's insurance company was obligated to defend and indemnify its insured can only be commenced after the third party seeking the declaration obtains a judgment against the at-fault insured, and it has gone unpaid for 30 days" (*Symonds v Progressive Ins. Co.*, 80 AD3d 1046, 1047 [2011]). Taking into consideration the circumstances of the instant matter, including the undisputed fact that Shanahan has not obtained a judgment against Total Fitness, Collins or Zaharoiu in the underlying action, she does not have the requisite standing to maintain the instant action for declaratory judgment (*see id.*; *Azad v Capparelli*, 51 AD3d 956 [2008]). Therefore, Philadelphia Indemnity is entitled to the relief sought on this branch of its motion.

Philadelphia Indemnity has also moved to dismiss Collins' and Zaharoiu's claims pursuant to CPLR 3211 (a)(3) and (a)(7). Collins and Zaharoiu were employees of Total Fitness at the time of Shanahan's fall, and were named as defendants in the underlying action. Even in the absence of any opposition to Philadelphia Indemnity's motion by Collins and Zaharoiu, Philadelphia Indemnity, nevertheless, must meet its prima facie burden to obtain the relief sought (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Attard v FRP Sheet Metal Contr. Corp.*, 9 AD3d 341 [2004]). Often, as is the case in the instant matter, motions under CPLR 3211 (a)(3) and (a)(7) overlap when a plaintiff's alleged lack of capacity to sue would cause his or her complaint to fail to state a cause of action (*see Siegel, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C3211:13).

Philadelphia Indemnity has argued that Collins and Zaharoiu lack any privity with it in order to maintain the instant action. Factual allegations in a complaint are accepted as true and given every favorable inference on a pre-answer motion to dismiss for a plaintiff's alleged lack of capacity to sue (see *Matter of Graziano v County of Albany*, 3 NY3d 475, 481 [2004]; *Lazar v Merchants' Natl. Props*, 45 Misc 2d 235, 236 [1964], *affd* 23 AD2d 630 [1965]). Based upon a reading of the papers, Philadelphia Indemnity has failed to submit sufficient evidence for the court to make a decision as a matter of law, and its affirmation by counsel and memorandum of law lack evidentiary value (CPLR 3211 [c]; see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; see generally *Allen v Allstate Ins. Co.*, 78 AD3d 872 [2010]; *Siegel, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C3211:43). In light of the above, Philadelphia Indemnity has failed to affirmatively establish that it did not have any type of a relationship with Collins or Zaharoiu which would place them in privity with it and confer upon them the legal capacity to commence the instant action. Although Philadelphia Indemnity has submitted a copy of the insurance policy it issued to Total Fitness in support of its motion, it has conceded that the claims against it in the instant action do not arise out of the issuance of that policy. Therefore, Philadelphia Indemnity is not entitled to the relief sought as against Collins and Zaharoiu.

Zurich and Fitness and Wellness have adopted Philadelphia Indemnity's arguments and evidence with respect to the branches of their motion and cross motion against Collins and Zaharoiu. However, a review of the papers submitted has revealed that neither Zurich, nor Fitness and Wellness, has submitted sufficient evidence in support of their motion and cross motion to meet their prima facie burdens (CPLR 3211 [c]; see *Zuckerman v City of New York*, 49 NY2d at 563; see generally *Anderson v Learning Annex Found., Inc.*, 19 AD3d 339, 340 [2005]). Neither Zurich, nor Fitness and Wellness, has affirmatively established through admissible evidence that Collins and Zaharoiu did not have privity with them under the terms of the liability insurance policy Zurich issued to Total Fitness, or any other relationship or agreement that Zurich or Fitness and Wellness may have had with Collins and Zaharoiu. Therefore, Zurich and Fitness and Wellness are not entitled to the relief sought on these branches of their motion and cross motion.

Accordingly, the branches of the motion by Philadelphia Indemnity to dismiss the claims of Total Fitness and Shanahan are granted and its motion is denied in all other respects. The branch of the motion by Zurich to dismiss the claims of Total

Fitness is granted and the branch of its motion to dismiss the claims of Collins and Zaharoiu is denied. The branch of the cross motion by Fitness and Wellness to dismiss the claims of Total Fitness is granted and the branch of its cross motion to dismiss the claims of Collins and Zaharoiu is denied. Therefore, this court finds and declares that Total Fitness' and Shanahan's claims in the instant action are dismissed.

Dated: Long Island City, NY
April 24, 2012

ROBERT J. McDONALD
J.S.C.