Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

Nationwide Insurance Company of America as subrogee of Winston Narine,

Plaintiff,

- against -

City of New York and RSS Construction Corp.,

Defendants.

Index Number: 702717/13

Motion Date: 12/3/13

Motion Cal. Number: 114

Motion Seq. No.: 1

The following papers numbered 1 to 14 read on this motion by defendant, RSS Construction Corp., and cross-motion by defendant, The City of New York, to dismiss or for removal.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation	5-7
Affirmation in Opposition to Motion-Exhibits	8-10
Affirmation in Opposition to Cross-Motion	11
Reply(RSS)	12
Reply(City)	13-14

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by RSS and the City to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied.

Plaintiff's subrogee, Narine, allegedly sustained injuries when the motor vehicle he was operating came into contact with a sunken asphalt patch on 26th Avenue and Utopia Parkway in Queens County on April 23, 2012. Narine applied for no-fault benefits and plaintiff alleges that it has thus far paid Narine $21,332.40 pursuant to his Personal Injury Protection (PIP) coverage on his insurance policy. Plaintiff claims that it is, therefore, subrogated to Narine's cause of action and is entitled to recovery

of the sums it paid under Narine's PIP coverage.

Defendants move for dismissal of the action upon the ground that a loss transfer is only permitted if a motor vehicle involved in the accident weighs at least 6,500 lbs or is primarily used for hire, pursuant to §5105(a) of the Insurance Law. RSS argues, and the City adopts RSS' argument, that since no evidence has been proffered that Narine's vehicle weighs more than 6,500 lbs or that it is a vehicle for hire, plaintiff has no right of recovery under §5105(a) of the Insurance Law. That section provides, in relevant portion, "Any insurer liable for payment of first party benefits to or on behalf of a covered person...has the right to recover the amount paid from any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. In any case, the right to recover exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire."

This section of the Insurance Law, however, is clearly inapplicable to the present case, since it concerns claims between covered persons, and neither RSS nor the City was a "covered person" as defined by the Insurance Law (see §5102[j]). A covered person is either an owner, operator or occupant of a motor vehicle or a pedestrian injured by a motor vehicle (see id.). Therefore, although plaintiff was a covered person, defendants were non-covered persons.

As plaintiff correctly states, its cause of action is based upon §5104(b) of the Insurance Law, which provides, in relevant portion, "In any action by or on behalf of a covered person, against a non-covered person, where damages for personal injuries arising out of the use or operation of a motor vehicle or a motorcycle may be recovered, an insurer which paid or is liable for first-party benefits on account of such injuries has a lien against any recovery to the extent of benefits paid or payable by it to the covered person". Here, the City and RSS, although not natural persons, are non-covered "persons" within the meaning of §5104(b) (see e.g. Aetna Life and Casualty Co. v Nelson, 67 NY 2d 169 [1986]).

Plaintiff's attorney's argument in reply, adopted by the City in its reply, in which counsel apparently abandons the sole basis for his motion to dismiss, that plaintiff did not qualify for recovery of first party benefits because it did not meet the criteria set forth in §5105(a) of the Insurance Law, and, instead,

raises as a new basis for dismissal that the complaint fails to state a cause of action because it lacks detail in that it does not disclose that its cause of action is based upon §5104(b), is disingenuous and borders upon the frivolous. If defendants wanted more "detail", specifically, the section of the Insurance Law under which plaintiff sought recovery, they should have served a demand for a bill of particulars.

That branch of the motion for an order transferring the case down to the Civil Court, pursuant to CPLR 325-d, in that the amount being sought is within the jurisdictional limit of the Civil Court, is denied without prejudice. The determination whether to transfer a case down to the Civil Court, pursuant to CPLR 325-d, is made by the presiding justice of the Trial Scheduling Part. Both respective counsel are experienced in practicing in this Court and should be well aware of the procedure regarding 325-d transfers.

Dated: December 6, 2013

KEVIN J. KERRIGAN, J.S.C.