

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JUDI KENNEDY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N09C-06-271 MMJ
)	
ENCOMPASS INDEMNITY CO.,)	
)	
Defendant/Third-Party)	
Plaintiff,)	
)	
v.)	
)	
GOVERNMENT EMPLOYEES)	
INSURANCE CO.,)	
)	
Third-Party Defendant.)	

Submitted: August 1, 2012
Decided: September 28, 2012

On Defendant Encompass Indemnity Company's
Second Motion for Summary Judgment

DENIED

On Third-Party Defendant GEICO's
Motion to Dismiss

GRANTED

OPINION

Kevin G. Healy, Esquire, Morris James LLP, Newark, Delaware, Attorney for Plaintiff

Arthur D. Kuhl, Esquire, Reger Rizzo & Darnall LLP, Wilmington, Delaware, Attorney
for Defendant/Third-Party Plaintiff

Dawn L. Becker, Esquire, Law Office of Dawn L. Becker, Wilmington, Delaware
Attorney for Third-Party Defendant

JOHNSTON, J.

This personal injury action involves a dispute over Delaware uninsured motorist (“UM”) benefits. Defendant, Encompass Indemnity Company (“Encompass”), has moved for summary judgment on the ground that its insured, Plaintiff Judi Kennedy (“Kennedy”), cannot seek UM coverage from Encompass for injuries sustained in a motor vehicle accident until she exhausts her remedies against the tortfeasor, Nicholas Hios (“Hios”).

GEICO, the Third Party Defendant, has moved to dismiss Encompass’s Complaint, arguing that its insured, Hios, is the proper party to Encompass’s subrogation claim.

The Court held oral argument on the motions on August 1, 2012. For the following reasons, Encompass’s Second Motion for Summary Judgment is denied and GEICO’s Motion to Dismiss is granted.

FACTUAL BACKGROUND

The facts of this case are relatively straightforward and undisputed. On September 7, 2007, Plaintiff Judi Kennedy (“Kennedy”), a Delaware resident, was operating a vehicle on the Garden State Parkway in New Jersey. Kennedy was stopped as a result of traffic conditions. Nicholas Hios (“Hios”), a New Jersey resident, was operating his vehicle, which was positioned directly behind Kennedy. Hios failed to stop his vehicle and

collided with the rear of Kennedy's vehicle. As a result of the collision, Kennedy suffered bodily harm and injuries.

Kennedy was insured under a policy issued in Delaware by Encompass Indemnity Company ("Encompass"). The Encompass policy includes UM coverage. Hios' insurance carrier is Government Employees Insurance Company ("GEICO").

PROCEDURAL CONTEXT

On September 7, 2007, Kennedy filed a notice of claim with GEICO, alleging personal injuries as a result of the collision. On May 20, 2009, GEICO denied Kennedy's claim, asserting that Kennedy's injuries did not meet the statutory requirements under the New Jersey Verbal Tort Threshold Statute.¹

On June 25, 2009, Kennedy filed the instant action against her insurer, Encompass, seeking UM benefits (hereinafter referred to as the "Delaware action"). Encompass, subsequently filed a Third Party Complaint against GEICO for indemnification. Shortly thereafter, on August 26, 2009,

¹ See N.J. Stat. Ann. § 39-6A-8(a). Under New Jersey's Verbal Threshold Statute, noneconomic damages for personal injury are only available in cases of "death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement."

Kennedy filed a negligence action in New Jersey against Hios (hereinafter referred to as the “New Jersey Action”).

On May 21, 2010, this Court stayed the instant action pending resolution of the New Jersey Action. The New Jersey Action proceeded to arbitration on February 10, 2011. The arbitrator determined that New Jersey’s verbal threshold had not been met. On June 27, 2011, the New Jersey Action was dismissed without prejudice.

This Court lifted the stay of the Delaware action on June 2, 2011. By Order dated December 9, 2011, this Court denied Defendant Encompass’s Motion for Summary Judgment, finding that to the extent Kennedy can prove fault and damages, she is entitled to UM benefits. Also by Order dated December 9, 2011, the Court denied Third-Party Defendant GEICO’s Motion to Dismiss, holding that although the right to indemnification does not ripen until and unless the third-party plaintiff has been found to be liable, there is no prohibition against joining the third-party defendant as part of the underlying action.

On June 20, 2012, GEICO filed a Second Motion to Dismiss Encompass’ Third Party Complaint. Thereafter, Encompass filed a Second Motion for Summary Judgment.

ANALYSIS

I. Encompass' Motion for Summary Judgment

A. Standard of Review

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.² All facts are viewed in a light most favorable to the non-moving party.³ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.⁴ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁵ If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.⁶

² Super. Ct. Civ. R. 56(c).

³ *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

⁴ Super. Ct. Civ. R. 56(c).

⁵ *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Parties' Contentions

Encompass has moved for summary judgment on the ground that Kennedy cannot seek UM benefits because she failed to exhaust her remedies against the tortfeasor before turning to Encompass, her own insurance company, for UM coverage. According to Encompass, Kennedy's voluntary dismissal of the New Jersey action precludes her from pursuing a claim for UM benefits. In order to be entitled to UM benefits, Encompass contends that Kennedy must unsuccessfully litigate the New Jersey action to a final judgment.

In response, Kennedy argues that GEICO's denial of coverage, based on the New Jersey Verbal Threshold Statute, triggers Delaware's Uninsured Motorist Statute. Specifically, Kennedy argues that GEICO's denial of coverage satisfied one of the definitions of an "uninsured vehicle" under 18 *Del. C.* § 3902(a)(3)(b).

C. Discussion

Delaware's Uninsured Motorist Statute

Pursuant to 18 *Del. C.* § 3902, an insurance carrier is required to provide UM benefits to protect insured drivers from owners or operators of uninsured or hit-and-run vehicles. Subsection (a) provides:

No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle shall be delivered or

issued for delivery in this State with respect to any such vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or hit-and-run vehicles for bodily injury, sickness, disease, including death, or personal property damage resulting from the ownership, maintenance or use of such uninsured or hit-and-run motor vehicle.⁷

The Legislature's intent in enacting Delaware's uninsured motorist statute was to protect "innocent persons from the negligence of unknown or impecunious tortfeasors."⁸ "Delaware courts have consistently interpreted Section 3902 as a form of supplemental coverage designed to protect Delaware motorists from an irresponsible driver causing injury or death."⁹

Traditionally, an "uninsured vehicle" is one in which there is "no auto liability bond, insurance or other security at the time of the accident..."¹⁰ Delaware, however, liberally construes the definition of "uninsured vehicle" to include instances where a tortfeasor's liability carrier "denies coverage."¹¹

⁷ 18 Del. C. § 3902(a).

⁸ *Cropper v. State Farm Mut. Auto. Ins. Co.*, 671 A.2d 423, 425 (Del. Super. 1995) (citing *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449, 451 (Del. 1994)).

⁹ *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 42 (Del. 1991) (citations omitted).

¹⁰ See 18 Del. C. § 3902(a)(3)(a).

¹¹ 18 Del. C. § 3902(a)(3)(b). See *Taber v. Goodwin*, 2012 WL 2106374, at *2 (Del. Super.).

Coverage Denied

In determining whether summary judgment is appropriate in this case, the Court's inquiry must focus on whether, as a matter of law, Kennedy is entitled to UM coverage as provided by Section 3902(a)(3)(b). The Court's inquiry must focus on two issues: (1) whether a New Jersey arbitrator or other authorized adjudicator determined whether Kennedy's injuries satisfied New Jersey's "verbal threshold" standard; and (2) whether GEICO denied coverage for Kennedy's injuries such that Delaware's Uninsured Motorist Statute was triggered.

The undisputed record establishes that GEICO, the tortfeasor's insurer, denied Kennedy's claim for personal injury. According to GEICO, the "objective evidence relative to [] Kennedy's alleged damages [did] not meet the statutory requirements for recovery" under New Jersey's Verbal Tort Threshold Statute. Specifically, GEICO concluded that the soft tissue injuries sustained by Kennedy did not satisfy the standard of a "permanent injury" as set forth in the Statute.

Following GEICO's denial, Kennedy filed suit in New Jersey, and the matter proceeded to arbitration on February 10, 2011. The arbitrator determined that although Kennedy was still receiving treatment at the time of arbitration, she did not sustain permanent injury from the accident as

required by N.J. Stat. Ann. § 39-6A-8(a). Therefore, the arbitrator found that Kennedy's injuries did not pierce New Jersey's Verbal Threshold Statute. Shortly thereafter, the New Jersey action was dismissed without prejudice.

The Court finds that Kennedy is entitled to UM coverage under 18 *Del. C.* § 3902. Under New Jersey law, only an arbitrator or other neutral decision maker is authorized to make a determination as to whether the injured party satisfies New Jersey's verbal threshold.¹² “[W]hether the verbal threshold is met is a question to be decided by the arbitrator and not by the judge.”¹³ Allowing only arbitrators to resolve coverage issues effectuates the purpose of the New Jersey legislature in “reduc[ing] significantly the burden of the automobile personal injury litigation upon the courts.”¹⁴

In the case *sub judice*, a New Jersey arbitrator determined that Kennedy's injuries did not satisfy New Jersey's Verbal Threshold Standard. Contrary to Encompass's argument, this determination sufficiently resolves the issue of coverage. Under New Jersey law, for purposes of the verbal

¹² *Whitaker v. USAA*, 2007 WL 2812998, at *3 (Del. Super.) (citing *Dicks v. N.J. Auto. Full Underwriting Ass'n*, 604 A.2d 239, 242 (N.J. Super. Ct. 1992)).

¹³ *Dicks*, 604 A.2d at 242.

¹⁴ *Id.*

threshold, the arbitrator's ruling is the final decision at the trial court level. Therefore, Kennedy has exhausted her remedies against the tortfeasors and may seek recovery from her own UM carrier.

GEICO denied Kennedy's personal injury claim on the basis that Kennedy's injuries were not permanent in nature,¹⁵ and thus, did not pierce New Jersey's "verbal threshold." The Court finds that GEICO's denial of coverage triggered Delaware's Uninsured Motorist Statute, rendering Hios an "uninsured motorist."¹⁶ Kennedy, therefore, may pursue a claim for UM benefits from her own insurer, Encompass. Whether Kennedy is legally entitled to recover such benefits will depend upon her ability to prove fault and damages.¹⁷

II. GEICO's Motion to Dismiss

A. Standard of Review

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any

¹⁵ It is settled New Jersey law that neither an insurance company nor its claims adjusters are empowered to determine whether a plaintiff satisfies the verbal threshold. *Whitaker*, 2007 WL 2812998, at *3 (citing *Dicks*, 604 A.2d at 242). However, in order to trigger Delaware's Uninsured Motorist Statute, the insurance company must deny coverage to the injured party.

¹⁶ See *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454 (Del. 2010).

¹⁷ *Kent v. Nationwide Prop. & Cas. Ins. Co.*, 844 A.2d 1092, 1098 (Del. Super.).

reasonably conceivable set of circumstances susceptible of proof.”¹⁸ The Court must accept as true all non-conclusory, well-pleaded allegations.¹⁹ Every reasonable factual inference will be drawn in favor of the non-moving party.²⁰ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.²¹

B. Parties’ Contentions

GEICO argues that it is not a proper party in this Third Party Complaint. According to GEICO, Delaware law is well-settled that the proper party to a subrogation action is the “person legally responsible for the bodily injury.”²² In other words, any right to subrogation that Encompass may have lies against Hios, the alleged tortfeasor.

Encompass contends that GEICO is the proper party to a subrogation claim. Relying on common law subrogation, Encompass argues that GEICO is the party from whom recovery is sought; therefore, Encompass can seek subrogation directly from GEICO, the liability carrier.

¹⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

¹⁹ *Id.*

²⁰ *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

²¹ *Spence*, 396 A.2d at 968.

²² *See* 18 Del. C. § 3902(a)(4).

C. Discussion

Delaware's uninsured motorist statute sets forth the right of subrogation by an uninsured motorist carrier. Section 3902(a)(4) provides:

In the event of payment to any person under uninsured vehicle coverage and, subject to the terms of such coverage, to the extent of such payment, the insurer shall be entitled to the proceeds of any settlement recovery from any *person legally responsible for the bodily injury* or property damage as to which such payment was made and to amount recoverable from the assets of the insolvent insurer of the other vehicle; provided, that this right of subrogation is limited to the amount of coverage required by the financial responsibility law.²³

The plain language of Section 3902(a)(4) contemplates that the tortfeasor, rather than the tortfeasor's insurance carrier, is the proper party to a subrogation claim, as the tortfeasor is the party *legally responsible* for the bodily injury.²⁴ The Court, therefore, finds that Encompass's statutory right to subrogation is against Hios in the first instance, and not GEICO.²⁵

There has been no final judgment against Encompass. Thus, Encompass's subrogation claim is not yet ripe for determination. GEICO could have voluntarily entered its appearance in this action pursuant to

²³ 18 Del. C. § 3902(a)(4) (emphasis added).

²⁴ See *Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986).

²⁵ To allow Encompass to seek subrogation directly against the tortfeasor's liability carrier, as Encompass urges, runs contrary to the principles underlying *uninsured* motorist benefits.

permissive joinder.²⁶ However, GEICO is not a necessary party at this stage of the proceedings.²⁷ Therefore, the Court finds that GEICO's Motion to Dismiss may be granted.

As the Court stated during oral argument, GEICO is on notice that a future subrogation action may be initiated and GEICO's interests could be affected. Under these circumstances, principles of *res judicata* and judicial economy likely will prevent GEICO from re-litigating any issues previously resolved. By moving to be dismissed as a party, GEICO is waiving its rights to protect its interests in the instant action.

CONCLUSION

The Court finds that Plaintiff Kennedy may pursue a UM claim against Encompass, her insurer. A New Jersey arbitrator determined that Kennedy's injuries did not satisfy New Jersey's "verbal threshold." Plaintiff has exhausted her other remedies, and the tortfeasor's insurance carrier has denied coverage.

THEREFORE, Encompass's Motion for Summary Judgment is hereby **DENIED**.

²⁶ Super. Ct. Civ. R. 20.

²⁷ See Super. Ct. Civ. R. 19(a).

The Court further finds that any right Encompass may have to subrogation, in which GEICO may be named as a party, is not yet ripe for determination.

THEREFORE, GEICO's Motion to Dismiss is hereby GRANTED.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston