

Matter of Levin

2006 NY Slip Op 30393(U)

November 29, 2006

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT:

PART 55

Index Number : 400161/2001

LEVIN, NEIL D.

vs

AMERICAN AGENTS INSURANCE

Sequence Number : 049

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE 6/20/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-7
8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

to confirm a decision of the Referee is granted, and the cross-motion to vacate the order is denied, in accordance with the annexed memorandum decision and order.

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NOV 30 2006
NEW YORK
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Dated: 11/29/06

JSS

JANE S. SOLOMON ^{S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

In the Matter of the Application of

NEIL D. LEVIN, as Superintendent of
Insurance of the State of New York,
for an order to take possession of
the property and liquidate

DECISION AND ORDER

Index No. 400161/01

AMERICAN AGENTS INSURANCE COMPANY

-----X

JANE S. SOLOMON, J.:

The Superintendent of Insurance of the State of New York ("Superintendent") moves for an order confirming the decision of referee Curtis Farber ("Referee") issued in connection with a claim for benefits asserted against a policy issued by a liquidated insurance company, American Agents Insurance Company ("AAIC") by policyholders named Gregory Maugeri ("Maugeri") and Joanne Maugeri. Maugeri cross-moves for an order vacating the referee's decision, and requests that a new hearing be held pursuant to CPLR 4319. For the reasons below, the motion is granted and the cross-motion is denied.

Maugeri filed a claim for his vehicle insured under an AAIC policy, alleging that it had been stolen and subsequently recovered in a damaged condition. After investigation, AAIC disclaimed by a letter dated January 12, 2001, on the grounds that Maugeri failed to cooperate with the investigation, that the claim was fraudulent because he had made material misrepresentations and false statements in the presentation of

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his claim. Notice of Motion, Exhibit A (Letter from AAIC to Maugeri, dated January 12, 2001 [Disclaimer Letter]).

According to Maugeri, he leased a 2000 GMC Envoy through the General Motors Acceptance Corporation ("GMAC"). In March 2000, he awoke one morning to find that the truck was missing. A few days or weeks later (Maugeri gave conflicting testimony), it was recovered in a badly damaged condition. The truck was fixed, at significant expense, and stored by the repair shop pending payment by AAIC.

Maugeri put in a claim for repair bills, storage and renting an alternate vehicle, and also to recover for allegedly stolen electronic audio and video equipment. After AAIC disclaimed, GMAC paid the repair and storage bill. GMAC sued Maugeri in Supreme Court, Kings County to recover the money it paid, and he in turn sued AAIC as a third-party defendant. In the meantime, AAIC went into liquidation, so Maugeri's claim was presented to the Superintendent for payment.

Pursuant to an order dated February 5, 2001, I declared AAIC insolvent and enjoined all persons from prosecuting any actions against AAIC, and directed that claims against AAIC be presented to the Superintendent under Articles 74 and 76 of the Insurance Law. In a May 29, 2001 order, I appointed the Referee to hear and take evidence and report to the court with respect of claims presented to the Superintendent as AAIC's liquidator.

Pursuant to these orders, the Referee held a hearing on Maugeri's claim on November 10, 2005. Three witnesses testified: Maugeri, Joseph Yannone ("Yannone"), the investigator who handled the claim for AAIC, and Richard Pacheco ("Pacheco"), a locksmith and forensic examiner who testified as an expert on AAIC's behalf.

Maugeri testified regarding his claim, but gave conflicting answers regarding the circumstances of the alleged theft, when the vehicle was recovered, who paid to install the electronic equipment (or if it was paid for at all), and other matters. He testified that the vehicle was towed by the police to the Done Rite Auto Body Repair Shop ("Done Rite"), a repair shop a few blocks from where the vehicle was recovered, and that he did not request that it be towed there.

Yannone, the investigator, stated that Maugeri also made conflicting statements to him regarding the circumstances of the theft. He testified that Maugeri told him that he had requested that the police tow the vehicle to Done Rite. He had refused to have the car towed to a repair shop recommended by AAIC. Yannone also testified that when he first inspected the vehicle, the door and ignition locks were intact, and the windows were undamaged. A subsequent inspection revealed that the locks had been tampered with and the windows broken, and he opined that someone had done that to give the appearance of a

forced entry.

Pacheco further opined that the evidence showed that the ignition lock system had not been bypassed, so the only way the vehicle could have been moved was by starting the engine using a key. All the keys were accounted for, and the circumstances indicated that the truck had not been moved with a tow truck or a flat bed truck. He also noted that it appeared that the door and ignition locks had been tampered with between the time of the original investigation and his inspection.

The implication of the testimony given by Yannone and Pacheco is that the vehicle was not stolen; that the claim for stolen electronic equipment is not genuine; that the vehicle was intentionally damaged, requiring substantial repairs at great expense; that the condition of the vehicle was altered while stored at Done Rite to conform to Maugeri's prior statements regarding the circumstances of the theft; and that Maugeri and/or Done Rite made an effort to create the false appearance that the damage was the result of a theft so its repair would be paid by insurance.

The Referee agreed with the Liquidator that there is clear and convincing evidence of fraud, and that Maugeri did not establish that he suffered a loss by theft covered under the policy. Taken as a whole, the testimony before the Referee supports this conclusion. The court also is mindful that the

Referee had the opportunity to observe the testimony in person and was in a better position to determine witness credibility.

In support of his cross-motion, Maugeri's counsel argues that the only basis for AAIC's disclaimer was his failure to provide a receipt for the purchase of a \$100 computer game. This contention patently misconstrues the testimony received at the hearing. Maugeri also contends that fraud was not a basis for the disclaimer. This is simply incorrect, since fraud is specifically stated as a basis for the disclaimer. The Disclaimer Letter states that Maugeri concealed and misrepresented material facts and circumstances in connection with the claim, and made false statements in connection with the claim. Therefore, lack of disclaimer based on fraud can not be a basis for rejecting the Referee's report.

As part of his cross-motion, Maugeri contends that he is entitled to a new hearing under CPLR 4319 because the Referee was late in filing his decision. The Referee filed his decision two and a half months after the hearing. CPLR 4319 provides that:

The decision of a referee shall comply with the requirements for a decision of the court and shall stand as the decision of the court. Unless otherwise specified in the order of reference, the referee shall file his decision within 30 days after the cause or matter is finally submitted. If it is not filed within the required time, upon the motion of a party before it is filed, the court may grant a new trial and, in that

event, the referee shall not be entitled to any fees.

This branch of Maugeri's cross-motion must be denied because CPLR 4319 specifies that such relief can only be granted if made by the motion of a party before the decision is filed. But this cross-motion is dated May 30, 2006, more than four months after the Referee's decision was filed. CPLR 4319 does not provide a basis for a disappointed litigant to get a mulligan.

Finally, Muageri argues for the first time in reply to his cross-motion that the disclaimer is invalid because it was untimely made. The initial claim was made in March 2000, and the disclaimer was not made until January 2001. Maugeri's attorney made lengthy closing arguments, and concluded that "The main issue is that there was not a receipt produced and they failed to debunk any of the possible theories for why this car might of been stolen and how it was stolen." Transcript of Hearing, annexed as Exhibit D to the Notice of Motion, 140. In the cross-motion, Maugeri lists nine separate bases for why the Referee's report should not be confirmed. No mention is made of late disclaimer. Maugeri also fails to allege lateness as a bar to disclaimer in his third-party complaint against AAIC in Kings County Supreme Court.

While late disclaimer may have been a valid basis for challenging AAIC's actions had it been presented, Maugeri's

failure to plead it in the third-party complaint or to raise it at the hearing means that he cannot now rely on it to maintain that the Referee did not properly consider the evidence, fairly and free of bias, such that his decision must be vacated. See Aff. Of Ira Scott Meyerowitz, Esq., in opposition to the motion and in support of the cross-motion, at paragraphs 4-6.

Accordingly, it hereby is

ORDERED that the motion to confirm the Referee's report is granted, and the report hereby is confirmed; and the cross-motion to vacate the order or to direct a new hearing is denied.

Dated: November 29, 2006

ENTER:



J.S.C.

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