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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE DORIS LING-COHAN Justice PART 3C

Index Number : 112975/2010
MATTHEWS, HARRY
vs
CONTINENTAL CASUALTY COMPANY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 4 5

Upon the foregoing papers, it is ordered that this motion is for summary judgment by defendant Continental Casualty Co is granted in accordance with the attached memorandum decision.

(Consolidated for disposition with motions Sequence #s 003 + 004)

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/15/13

_____, J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36

HARRY MATTHEWS,
Plaintiff,

-against-

CONTINENTAL CASUALTY COMPANY and WELSBACH ELECTRIC CORP.,
Defendants.

INDEX NUMBER 112975/2010
Motion Sequence 002, 003 & 004
JUDGMENT & ORDER

DORIS LING-COHAN, J.:

In this personal injury action, motions bearing sequence numbers 002, 003 and 004 are hereby consolidated for decision. Defendant Continental Casualty Company (Continental) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (Mot. Seq. 002). Plaintiff Harry Matthews moves, pursuant to CPLR 3212, for summary judgment in his favor on the complaint, seeking a declaratory judgment that defendants must proceed to arbitration (Mot. Seq. 003). Defendant Welsbach Electric Corp. (Welsbach) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (Mot. Seq. 004).

Factual Background

Plaintiff, a Welsbach employee, was injured shortly before midnight on June 8, 2007, while standing on the shoulder of a highway. Plaintiff was standing with a co-worker, who was reaching for equipment in a Welsbach truck, when he was hit by a passing vehicle. The driver of the adverse vehicle was intoxicated at the time, and his insurer, Allstate Insurance Company (Allstate), tendered the $25,000 policy limit to plaintiff, on or about April 12, 2010. On April 19, 2010, plaintiff advised Continental, insurer of Welsbach's vehicles, of Allstate's offer, stated

his intention to pursue supplemental underinsured motorist (SUM) benefits, and requested permission to accept the tender. Mot. Seq. 002, Ex. G. On May 13, 2010, Continental disclaimed coverage of plaintiff's injuries, because of untimely notice and plaintiff's presence outside the insured vehicle.

The instant action commenced on October 1, 2010, when plaintiff filed a summons and complaint against Continental. On April 25, 2011, the court so-ordered a stipulation executed by the parties, in response to Welsbach's motion, to allow Welsbach to intervene in the action. On March 2, 2012, plaintiff served an amended complaint asserting causes of action for a declaratory judgment that Continental's coverage extended to plaintiff's injuries and, failing that, that Welsbach shall be responsible for compensating plaintiff up to $350,000, the deductible limit of its policy with Continental. *Id.*, Ex. A; Eisenman Affirm., Mot. Seq. 003, Ex. R, Deductible Endorsement.

Legal Standard for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Discussion

Continental's Summary Judgment Motion – Mot. Seq. 002

At the time of the accident, Continental insured Welsbach's vehicles under policy number 2079600087 (the Policy). Mot. Seq. 002, Ex. D. The Policy includes a supplemental underinsured motorist (SUM) provision, stating that "[a]s soon as practicable, the insured or other person making claim shall give us written notice of claim under this SUM coverage." *Id.*, Conditions, ¶ 2. Further, SUM coverage is limited, under the circumstances at issue, to a "person while occupying a motor vehicle insured for SUM under this policy." *Id.*, Insuring Agreements, ¶ 1 (a) (2) (a) (internal punctuation modified). According to the Policy, the "term 'occupying' means in, upon, entering into, or exiting from a motor vehicle." *Id.*, Insuring Agreements, ¶ 3 (d).

Continental first contends that plaintiff's failure to give timely notice of the accident eliminated its duty to provide coverage for his injuries. "The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage." *White v City of New York*, 81 NY2d 955, 957 (1993). "Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time." *Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 (2005). Continental maintains that the 34-month unexcused delay in notifying it is a breach of the insurance contract as a matter of law, as in *Deso v London & Lancashire Indem. Co. of Am.* (3 NY2d 127 [1957]) (51 days); *Safer v Government Empls. Ins. Co.* (254 AD2d 344 [2nd Dept 1998]) (about six weeks); *Power Auth. of State of N.Y. v Westinghouse Elec. Corp.* (117 AD2d 336 [1st Dept 1986]) (53 days).

To further accentuate the gap in receiving plaintiff's notice, Continental notes that

plaintiff notified Allstate by August 13, 2007, as reflected in Allstate's response to him, dated August 13, 2007. Mot. Seq. 002, Ex. K. Also, plaintiff engaged counsel in this matter on December 5, 2007 (*id.*, Ex. I), who, in turn, wrote to Allstate on his behalf on December 17, 2007 (*id.*, Ex. J). Yet, Continental only learned of the events in 2010, after Allstate tendered its $25,000 offer, which plaintiff considered inadequate.

"In interpreting the phrase 'as soon as practicable' in the underinsurance context [courts have held] that the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured." *Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 495 (1999). Timeliness for a SUM claim is not measured by the interval between the occurrence and notification to the primary insurer, but from the time when the need for SUM coverage becomes apparent. *See id.* Then, an unexcused delay must also be shown to have prejudiced the SUM insurer. *Rekemeyer v State Farm Mut. Auto. Ins. Co.*, 4 NY3d 468, 476 (2005) ("carriers [must] show prejudice before untimely notice of a SUM claim is held to be a material breach in the contract warranting disclaimer"). In *Rekemeyer, supra.*, the Court of Appeals further stated that the "idea behind strict compliance with the notice provision in an insurance contract was to protect the carrier against fraud or collusion" (*id.* at 475), threats not ordinarily present when the injured party has pursued the adverse party, prior to seeking SUM benefits.

In the instant action, plaintiff notified Continental one week after it learned of Allstate's policy limit; such does not constitute a delay that requires any explanation or excuse.[1] Defendant's contention that plaintiff "knew or should have known within months of his accident that [the other driver] had only minimal coverage" is purely speculative, and cannot influence

[1]Notice to Allstate was effected 59 days after the accident, but it apparently never challenged the timeliness of plaintiff's claim.

this determination. Hertz Aff., ¶ 16. Thus, plaintiff's notice to Continental for SUM coverage was timely.

The second prong of Continental's challenge to the complaint is based on plaintiff's physical location when struck by the adverse vehicle. As the amended complaint states that, "while standing on the shoulder of the stated roadway, and while leaning into a WELSBACH truck to retrieve necessary equipment to effectuate a repair, plaintiff MATTHEWS was struck by a vehicle being operated on the westbound Grand Central Parkway." Amended Complaint, ¶ 13.

Plaintiff himself had no recollection of the accident when deposed on January 19, 2012. Mot. Seq. 002, Ex. L (Matthews Transcript). As a result of being knocked unconscious, he testified that he remembered nothing of the events of June 8, 2007. *Id.*, at 6-7. Anthony Hall (Hall), another Welsbach employee, partnered with plaintiff for three years, and was with him on the night of the accident. Hall testified in the criminal trial of the driver of the adverse vehicle in Supreme Court, Queens County, held in April and May 2009.[2] *Id.*, Ex. M. Hall described how he and plaintiff each drove a truck to the work site, parked on the highway shoulder, left their respective trucks, walked two or three car lengths to the street lighting equipment needing repair, determined that it needed a fuse, and returned to Hall's truck, which contained four storage compartments holding equipment and supplies. *Id.* at 136-40. Hall opened the hinged door of one of the storage compartments, and reached in for a fuse, with plaintiff standing right next to him. *Id.* at 141. Hall estimated that they stood by the side of his truck for about 20 to 30 seconds before he "heard a bang and then lights out." *Id.* at 142. The next thing Hall remembered was that he was lying on the road. *Id.*

Hall was also deposed, on June 23, 2010, in the civil action he brought against the driver

[2]Hall's testimony was provided in an undated excerpt of the trial transcript.

of the adverse vehicle, *Hall v Casco*, Supreme Court, Queens County, index no. 6212/2008. *Id.*, Ex. N. His description of what he and plaintiff were doing and where they stood at the time of the accident was effectively identical to his trial testimony.

Continental maintains that plaintiff was not occupying any Welsbach vehicle at the time of the accident, and, particularly, that plaintiff was outside of Hall's vehicle, not his own, when he was struck. Further, Continental states that "Plaintiff had never driven Hall's vehicle, and did not drive it or occupy it as a passenger the day of the accident." Hertz Aff., Mot. Seq. 002, ¶ 22. Continental relies upon *Matter of Rice v Allstate Ins. Co.* (32 NY2d 6, 11 [1973]), where the Court of Appeals held

> "that one is [not] considered to be occupying a car if he is merely approaching it with intent to enter; nor, in fact may such a status be created if the vehicle he is about to enter is part of a common expedition of two vehicles, for up to this point, insofar as the second vehicle is concerned, it cannot be said he was vehicle-oriented."

Following *Rice*, courts have often found workers outside, but proximate, to their vehicles, not to be "occupying" the vehicles. *Gallaher v Republic Franklin Ins. Co.*, 70 AD3d 1359, 1360 (4th Dept 2010) (court found plaintiff not to be "occupying" his fire company's truck, within the meaning of such term in the policy, where plaintiff had exited his fire company's truck and was directing traffic away from the scene of a motor vehicle accident; court determined that plaintiff's "conduct in directing traffic was unrelated to the [truck] and was not incidental to his exiting it") (internal quotation marks and citation omitted); *Faragon v American Home Assur. Co.*, 52 AD3d 917, 919 (3d Dept 2008) (court determined truck driver struck by a hit-and-run driver while standing on the street after unloading construction equipment,"was no longer vehicle-oriented"); *Matter of Martinez*, 295 AD2d 277, 278 (1st Dept 2002) ("while petitioner undoubtedly intended eventually to return to his [tow] truck, his absence from the truck was not

intended to be brief and his immediate purpose was to attend to the disabled vehicle as a necessary incident to his employment;" *Matter of State Farm Auto. Ins. Co. v Antunovich*, 160 AD2d 1009, 1010 (2d Dept 1990) (When plaintiff finished a repair job, he "cannot be deemed to have been entering the van at the time he was injured merely because he was walking toward the door on the driver's side with the intent to enter the vehicle").

In opposition, plaintiff interprets *Rice* to define "occupying", by examining whether plaintiff was: "(i) in the vicinity of the truck; (ii) stopped for a brief interruption in his journey; and (iii) intending to resume his place in the vehicle upon completion of the objective occasioned by the brief interruption." Eisenman Reply Affirm., Mot. Seq. 003, ¶ 22. Plaintiff argues that the time spent on repair was only a brief interruption of his journey, and there is no meaningful difference between Hall's truck and his own. Plaintiff relies on the following cases in support. *Rosado v Hartford Fire Ins. Co.* (71 AD3d 860, 860 [2d Dept 2010]) ("[a]t the time of the accident, the injured plaintiff was standing with his feet on the pavement, reaching with his hands into a side bay of the delivery truck to rearrange empty cases of beer"); *Matter of Continental Cas. Co. v Lecei* (65 AD3d 931, 932 [1st Dept 2009]) ("[the conclusion that] respondent was 'occupying' the truck within the meaning of the policy is substantiated by respondent's testimony that he was alighting from the truck when he was struck by a passing motorist"); *Estate of Cepeda v United States Fid. & Guar. Co.*, 37 AD2d 454, 455-456 (1st Dept 1971) ("[w]here the passenger alights following some temporary interruption at a place other than his destination, remains in the immediate vicinity of the vehicle and there is every reason to believe that, had it not been for the accident, he would shortly have resumed his place in the vehicle, his status as a passenger has not changed").

While none of the cases cited by the parties are directly on point, based upon the within

undisputed facts, plaintiff cannot be found to have been occupying his own or Hall's vehicle at the time of the accident. Plaintiff had not made a brief pause on his way to an ultimate destination, he was not on his way back to his vehicle, and his work on site would have continued once Hall had found a fuse. While *Rosado* offers some physical similarities to the instant circumstances, the plaintiff in *Rosado* was clearly "vehicle-oriented" in trying to organize his cargo. The *Gallaher* case is most instructive, because plaintiff herein's job brought him to the eventual accident site, plaintiff left his vehicle in order to perform his job duties and the length of his stay was indeterminate (not just a brief pause in a larger mission). Consequently, Continental is not obligated to provide SUM coverage to plaintiff, because he was not occupying an insured vehicle at the time of the accident. Continental's summary judgment motion is granted and the complaint as against it is dismissed (Mot. Seq. 002).

Plaintiff's Summary Judgment Motion – Mot. Seq. 003

Plaintiff requests a declaratory judgment that he was insured under the Policy, and that Continental must proceed to arbitration on that basis, under the terms of the Policy. If the court determines that the Policy's coverage does not extend to plaintiff, plaintiff requests, in the alternative, that Welsbach be directed to proceed to arbitration, as Welsbach allegedly self-insured the $350,000 deductible, under the Policy. In addition, plaintiff asks that Welsbach be obligated to pay the first $350,000 of any arbitration award to plaintiff.

The first prong of plaintiff's motion is denied in light of the decision above on Continental's summary judgment motion, dismissing the complaint as against it. That leaves plaintiff's motion to direct Welsbach to arbitration to establish the damage award for his injuries, up to $350,000. Plaintiff contends that the Policy's $350,000 deductible limit made Welsbach self-insured for $350,000, which should be available to him regardless of the posture of the

Policy. Specifically, plaintiff argues that "Welsbach actually self-insured the first $350,000 of the SUM coverage under the Continental policy and accordingly, must be viewed as a separate and distinct insurer." Plaintiff's Memorandum of Law, Mot. Seq. 002, at 8. Plaintiff offers no legal support for this argument.

The amended complaint asserts that Welsbach "is obligated to pay the first $350,000.00 of any successful claim set forth under the 'policy' with defendant CONTINENTAL." Amended Complaint, ¶ 27. However, recognizing that there might not be a successful claim against Continental, the amended complaint asserts that "defendant WELSBACH, who received notice of the subject accident on June 9, 2007, would be obligated to pay plaintiff MATTHEWS up to $350,000.00, should he succeed in an arbitration in an amount equal to or less than $350,000.00." *Id.*, ¶ 34. Nowhere does plaintiff explain why arbitration is the proper path for resolving this dispute, nor does he suggest any guidelines for the conduct of such arbitration or any related procedural matters, in the absence of a writing. Accepting plaintiff's position for the sake of argument still leaves open the issue of what terms and conditions, if any, apply to the coverage Welsbach should offer under the present circumstances.

Before denying its purported role as an insurer, Welsbach opposes plaintiff's motion on the grounds of notice and "occupying," as if it were an insurer. However, even if Welsbach accepted the role of insurer here, plaintiff's remedy might be forestalled by the absence of a insurance contract or any suggestion of how to proceed beyond the general invocation of "arbitration." However, such is not relevant since Welsbach, which specializes in outdoor electrical construction and maintenance, is not an insurer, and plaintiff has no claim on the illusory $350,000. New York allows for vehicle self-insurance for an entity registering more than 25 motor vehicles in the state, upon application and payment of prescribed fees. Vehicle

and Traffic Law § 316. Welsbach, which has a requisitely large fleet of motor vehicles, has not applied to be self-insured.

The Policy's $350,000 deductible is not a form of self-insurance. "A SIR [self-insurance reserve] differs from a deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply. . . . In contrast, a deductible is an amount that an insurer subtracts from a policy amount, reducing the amount of insurance." *In re September 11th Liability Ins. Coverage Cases*, 333 F Supp 2d 111, 124 n 7 (SD NY 2004); *Spector v Cushman & Wakefield, Inc.*, 2012 NY Slip Op 31553(U), **9 (Sup Ct, NY County 2012) ("A *self-insured retention* represents a dollar amount of loss that is 'retained' by the insured and not covered by insurance. Where a self-insured retention exists, the insured must exhaust the amount retained, before the insurer will respond to the loss . . .") (citation omitted). Plaintiff misapprehends the Policy, and mislabels its $350,000 deductible as self-insurance, without any legal support. Thus, plaintiff's motion to direct Welsbach into arbitration and to pay the first $350,000 of any arbitration award is denied (Mot. Seq. 003).

Welsbach's Summary Judgment Motion – Mot. Seq. 004

Welsbach moves to dismiss the complaint because plaintiff was not occupying an insured vehicle at the time of the accident, or, alternatively, because of untimely notice. Since it has been determined that plaintiff was not occupying an insured vehicle at the time of the accident within the meaning of New York law, Welsbach's motion for summary judgment is granted, and the complaint is dismissed as against it.

As both defendants have been granted summary judgment, the complaint is dismissed in its entirety.

Accordingly, it is

ORDERED that defendant Continental Casualty Company's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant (Mot. Seq. 002); and it is further

ORDERED that defendant Welsbach Electric Corp.'s motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant (Mot. Seq. 004); and it is further

ORDERED that plaintiff Harry Matthews's motion for summary judgment, pursuant to CPLR 3212, in his favor on the complaint is denied (Mot. Seq. 003); and it is further

ADJUDGED and DECLARED that plaintiff Harry Matthews was not an insured under defendant Continental Casualty Company's policy number 2079600087 issued to Welsbach Electric Corp.; and it is further

ADJUDGED and DECLARED that Welsbach Electric Corp. was not self-insured for any damages that might be claimed by said plaintiff; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy of this order upon plaintiff, with notice of entry.

DATED: **April** 15 **, 2013**

Doris Ling-Cohan, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).