Progressive Specialty Ins. Co. v Lombardi
2013 NY Slip Op 32476(U)
October 17, 2013
Supreme Court, Queens County
Docket Number: 22338/2012
Judge: Sidney F. Strauss
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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PROGRESSIVE SPECIALTY INSURANCE COMPANY,

Plaintiff,

-against-

CHARLES M. LOMBARDI, CAMERON LOMBARDI, AND NICOLE NAPOWSKI,

Defendants.

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CHARLES M. LOMBARDI, CAMERON LOMBARDI,

Third-Party Plaintiffs,

-against-

CHUBB INDEMNITY INSURANCE COMPANY,

Third-Party Defendant.

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Index No.: 22338/2012

Motion Date: September 9, 2013

Seq. No.: 1

The following papers numbered 1 to 12 were read on the motion of the plaintiff, Progressive Specialty Insurance Company ("Progressive"), seeking an order pursuant to CPLR 3212(b), granting summary judgment in its favor and a declaration that Progressive is not required to provide coverage under Charles Lombardi's automobile insurance policy. Also read was the cross-motion of the defendants/third-party plaintiffs, Charles M. Lombardi and Cameron Lombardi ("Lombardi"), seeking an order pursuant to CPLR 3212(b), granting summary judgment in their favor and a declaration tht Progressive is required to defend and indemnify Lombardi in the underlying personal injury action entitled *Nicole Napowski v Charles M.*

Lombardi and Cameron Lombardi, or alternatively, granting Lombardi summary judgment, pursuant to CPLR 3212(b), as against Chubb Indemnity Insurance Company ("Chubb") and requiring Chubb to defend and indemnify Lombardi in the underlying action. Also read was the cross-motion of defendant Chubb, seeking an order pursuant to CPLR 3212(b) and 3001, granting summary judgment in its favor and declaring that Chubb has no obligation to defend and indemnify Lombardi in the underlying action on the grounds that "motorized land vehicles" and "liability for the acts of others" exclusions of the Chubb insurance policy bar insurance coverage for said underlying action, or alternatively, declaring the rights and obligations of Chubb and Progressive under their respective policies.

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The instant motions stem from the underlying action wherein the defendant Nicole Napowski ("Napowski"), was injured as the result of a gunshot wound to her left eye and face, while a passenger in the vehicle owned by Charles M. Lombardi ("Charles") and operated by his son, Cameron Lombardi ("Cameron"). The incident occurred on May 9, 2011, when Cameron and an unknown driver of another vehicle engaged in road rage that began on the highway, and ended when Cameron exited the highway after the unknown driver, pulled up alongside said driver, and after further verbal altercation between the two, culminated in the unknown driver pulling out a shotgun, and shooting into the Lombardi vehicle, striking Napowski in the face.

Napowski brought two separate causes of action stemming from this incident, both since consolidated. She brought the first action claiming that due to the negligence of the Lombardis', Cameron engaged in an act of road rage, and that due to his actions, the unidentified driver of another vehicle took a gun and shot her in the face. In her second action, Napowski asserts a claim of negligent entrustment against Charles, for allowing his son to operate the vehicle in

question while knowing that his son had a propensity for violence and driving recklessly.

Progressive now submits, in the instant motion, that it disavowed coverage to Lombardi based upon the terms of the policy for automobile insurance. It contends that the incident did not arise out of the "use and operation" of the motor vehicle. Chubb, as insurer to the defendant Charles and his wife Patricia Lombardi, issued a Masterpiece Insurance Policy, and have since disclaimed coverage to Charles as to Napowski's first action, disclaimed coverage to the second action as well, but agreed to provide Cameron with a defense for the second action, subject to a full reservation of rights.

The proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (see, *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985].) CPLR Rule 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. (see, *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990].) Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979].)

It is well established that when an insurance company intends to exclude certain coverage from its obligations under a policy, the insurance company must use clear and unambiguous language. (See, *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100 [1st Dept. 2006].) In addition "[s]uch exclusions or exceptions from policy Coverage must be specific and clear in order to be enforceable, and they are . . . to be accorded a strict and narrow construction. Theus the insurance company bears the burden of establishing that the exclusions apply in a particular case." (*Lee v State Farm Fire & Casualty Co.*, 32 AD3d 902 [2d Dept. 2006].) The Court finds that, there are multiple issues of fact regarding the actions of the defendants Lombardi, and such issues preclude the finding as to what actions were intentional or that any intentional acts caused Napowski's injuries.

"Not every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation'. The accident must be connected with the use of an automobile qua automobile' " (*Olin v Moore*, 178 AD2d 517, 518 [2d Dept. 1991]; quoting *United Servs. Auto. Assn. v Aetna Cas. & Sur. Co.*,75 AD2d 1022 [2d Dept. 1980].) Therefore, when an insured person engages in tortious or criminal conduct after exiting his vehicle and/or unrelated to the vehicle, such conduct cannot be said to have arisen out of the ownership, maintenance, or use of the vehicle-especially when the vehicle itself was neither the source of the injury nor being used in its intended fashion at the time of the events causing the injury. (*USAA v Olin*, supra.)

In this instance Napowski's complaint in the underlying action seeks to recover due to the negligence of the co-defendants, the Lombardis. To hold a defendant liable in negligence, a plaintiff must demonstrate that a duty was owed by the defendant to the plaintiff; a breach of that duty; and that the breach constituted a proximate cause of the injury. (See, *Ingrassia v Lividikos*, 54 AD3d 721 [2d Dept. 2008].) Generally, the existence of a defendant's duty is a question to be determined by the court in the first instance. In making such a determination courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was reasonably foreseeable. (See, *Lynfatt v Escobar*, 71 AD3d 743 [2d Dept. 2010].) After a defendant's duty to a plaintiff has been established, the defendant is required to establish that the alleged breach of duty was not a substantial cause of the events which produced the injury. (See, *Cruz v City of New York*, 6 AD3d 644 [2d Dept. 2004].) Ordinarily it is for the trier of fact to make the determination as to the issues of proximate cause. (Howard v Poseidon Pools, 72 NY2d 972 [1988].)

Viewing the evidence in a light most favorable to the movants, this Court finds that there are issues of fact with respect to whether the defendant Cameron's actions immediately leading up to the occurrence of the altercation off the highway and onto the service were a proximate cause of the plaintiff's injuries. There are questions of fact that remain unanswered at this juncture, in light of the fact that substantial discovery remains outstanding, as to whether the actions of the defendants were negligent or intentional.

"[T]he vehicle itself need not be the proximate cause of the injury," but "negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury" (*Zaccari v. Progressive Northwestern Ins. Co.*, 35 AD3d 597 [2d Dept. 2006]; see *Empire Ins. Co. v. Schliessman*, 306 AD2d 512 [2d Dept. 2003].) "To be a cause of the injury, the use of the motor vehicle must be closely related to the injury" (*Allstate Ins. Co. v Reyes*, supra, citing *Zaccari v. Progressive Northwestern Ins. Co.*, 35 A.D.3d at 599, 827 N.Y.S.2d 204) In fact, the Second Department determined "as a matter of law, [the plaintiff's] injuries did not result from the inherent nature of [the defendant's] vehicle, nor did the vehicle itself produce the injuries. The injuries were caused by [the defendant's] dog, and the vehicle merely contributed to the condition which produced the injury, namely, the location or situs for the injury. Allstate established that a causal relationship between the car and the incident was lacking, and [the plaintiff] failed to rebut that showing." (*Allstate Ins. Co. v Reyes*, 109 AD3d 468 [2d Dept. 2013].) It takes more than mere occupancy in a vehicle to "establish a causal link between a motor vehicle and a claimant's injuries." (See, *Cividanes v City of New York,* 95 AD3d 1 [1st Dept. 2012].) In this instance issues of fact remain as to whether the operation of the vehicle was the proximate cause of the altercation resulting in the injury.

In light of the foregoing determination, all three motions are denied. However, as to that branch of the Chubb cross-motion referencing whether Cameron is a "covered person" under the policy provisions, Cameron, in opposition to said cross-motion and in reply to the Lombardi cross-motion, submits an affidavit wherein he states that he resided at his parents' family

residence at the time of the accident, and continues to do so at this time, thereby submitting sufficient proof to establish that Cameron is a "covered person" under the Chubb policy.

Dated: October 7 , 2013

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SIDNEY F. STRAUSS, J.S.C.