

**American Transit Ins. Co. v State Farm Fire & Cas.**

2013 NY Slip Op 32747(U)

October 17, 2013

Sup Ct, New York County

Docket Number: 116082/2009

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: LUCY BILLINGS  
Justice

PART 46

Index Number : 116082/2009  
AMERICAN TRANSIT INSURANCE  
VS.  
STATE FARM FIRE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 2  
Replying Affidavits \_\_\_\_\_ No(s). 3

Upon the foregoing papers, it is ordered ~~that this motion is~~ and *adjudged that:*

*The court denies plaintiff's motion for summary judgment and dismisses its complaint against defendant Bass pursuant to the accompanying decision. C.P.L.R. §§ 3001, 3212(b) and (f), 3215(c).*

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

**FILED**  
OCT 31 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

RECEIVED  
OCT 30 2013  
THE MOTION SUPREME COURT  
THE COUNTY CLERK'S OFFICE

### 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: 10/17/13

Lucy Billings, J.S.C.

LUCY BILLINGS

- 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: IAS PART 46

-----X

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff

Index No. 116082/2009

- against -

DECISION AND ORDER

STATE FARM FIRE AND CASUALTY a/s/o  
SUN Y. LIU, APPLE POOL CONTRACTING,  
and LISA BASS,

**FILED**

Defendants

OCT 31 2013

RECEIVED  
OCT 30 2013  
IAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

-----X  
NEW YORK  
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.:

I. BACKGROUND

Plaintiff insured a commercial motor vehicle owned by defendant Apple Pool Contracting. In May 2002, defendant Bass, while operating the vehicle, was involved in a collision with another motor vehicle owned by defendant State Farm Fire and Casualty's insured. State Farm commenced an action and obtained a judgment against defendants Apple Pool Contracting and Bass in December 2003 for damage to the vehicle owned by State Farm's insured.

In this declaratory judgment action, plaintiff seeks summary judgment declaring that plaintiff owes no obligation to defend or indemnify plaintiff's insureds, Apple Pool Contracting and Bass. C.P.L.R. §§ 3001, 3212(b). Plaintiff claims that it timely and adequately denied coverage due to these defendants' failure to notify plaintiff of the collision, the property damages, or State Farm's action against them, in violation of Apple Pool

Contracting's insurance policy requiring immediate notice of these events as conditions precedent to coverage.

Plaintiff never served defendant Apple Pool Contracting, a corporation, in this action. Although plaintiff claims this defendant was dissolved in June 2004, the document on which plaintiff relies indicates only that the New York State Secretary of State maintained no record of Apple Pool Contracting as of November 27, 2009, when plaintiff attempted service on this defendant. Aff. of Marjorie Bornes Ex. G.

## II. SUMMARY JUDGMENT STANDARDS

Plaintiff, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if plaintiff satisfies this standard, does the burden shift to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If plaintiff fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co.

Ltd. Partnership, 91 A.D.3d 507, 508 (1st Dep't 2012); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352 (1st Dep't 2006). See Roman v. Hudson Tel. Assoc., 15 A.D.3d 227, 228 (1st Dep't 2005). In evaluating the evidence for purposes of plaintiff's motion, the court construes the evidence in the light most favorable to defendants. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

### III. PLAINTIFF'S EVIDENCE

#### A. Lack of Notice of the Collision, Damages, or Lawsuit

An affidavit supporting summary judgment must indicate the witness' personal knowledge of the facts attested to. C.P.L.R. § 3212(b); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d at 508; Spector v. Cushman & Wakefield, Inc., 87 A.D.3d 422, 423 (1st Dep't 2011); De La Cruz v. Lettera Sign & Elec. Co., 77 A.D.3d 566 (1st Dep't 2010). In support of plaintiff's motion, its claims director attests that plaintiff never received any notice of the collision, the property damages, or the action against plaintiff's insureds and only received notice on October 30, 2009, of State Farm's December 2003 judgment against its insureds. Aff. of Richard Carroll ¶¶ 2-4. The claims director attests that, in response, and after reviewing the insureds' case file, plaintiff mailed notices to all defendants, State Farm, Apple Pool Contracting, and Bass, on November 4, 2009,

disclaiming coverage to both the insureds and to claimant State Farm based on the insureds' breach of a material provision of the policy. Id. ¶ 4. Although plaintiff presents evidence that plaintiff mailed the disclaimer to defendants, plaintiff admits that its disclaimer to defendant Apple Pool Contracting was returned as undeliverable. Bornes Aff. Ex. G.

State Farm maintains that the claims director's affidavit fails to establish as a matter of law that plaintiff did not receive any notice from plaintiff's insureds regarding the collision, the claimed damages, or the action against them. State Farm points out that, because plaintiff failed to serve Apple Pool Contracting in this action, plaintiff has deprived Apple Pool Contracting of an opportunity to defend against plaintiff's claim of lack of notice by showing that the insured did notify plaintiff.

B. Lack of Notice of Plaintiff's Disclaimer

Even if plaintiff has met its burden regarding its lack of notice, shifting the burden to defendants to show otherwise, plaintiff fails to establish that it disclaimed coverage of its insured Apple Pool Contracting. As plaintiff admits, it failed to transmit a disclaimer to its policyholder and insured, Apple Pool Contracting. Bornes Aff. Ex. G. Nor has plaintiff shown that it was unable to transmit the disclaimer. As set forth above, plaintiff's evidence does not show not when, if ever, Apple Pool Contracting was dissolved. Id. Ex. D. Even if it was dissolved at least by the time plaintiff attempted to serve the

summons and complaint in this action, however, and even if service of the summons and complaint in this action constituted notice of plaintiff's disclaimer, such a disclaimer is ineffective as to Apple Pool Contracting because plaintiff never met the requirement for service on this defendant.

A dissolved corporation retains the power to wind up the corporation's affairs for a reasonable time. N.Y. Bus. Corp. Law § 1006(a); Lance Intern., Inc. v. First Nat. City Bank, 86 A.D.3d 479, 480 (1st Dep't 2011). Consistent with this extended life of a dissolved corporation, process may be served on a dissolved corporation sued in its corporate name by service on the New York State Secretary of State. N.Y. Bus. Corp. Law § 1006(b); Bruce Supply Corp. v. New Wave Mech., 4 A.D.3d 444, 445 (2d Dep't 2004). Plaintiff fails to show it attempted any form of service on Apple Pool Contracting, via the Secretary of State or otherwise, that also would substitute as notice of plaintiff's disclaimer of coverage.

Where the claim is not for death or bodily injury under New York Insurance Law § 3420(d), delay in giving notice of a disclaimer of coverage does not bar a disclaimer unless the insured suffered prejudice. See, e.g., Fairmont Funding v. Utica Mut. Ins. Co., 264 A.D.2d 581, 582 (1st Dep't 1999); Topliffe v. US Art Co., Inc., 40 A.D.3d 967, 969 (2d Dep't 2007); Legum v. Allstate Ins. Co., 33 A.D.3d 670 (2d Dep't 2006). Here, however, plaintiff's disclaimer was completely ineffective, and plaintiff transmitted no disclaimer at all to its insured Apple Pool

Contracting, even after plaintiff received notice on October 30, 2009, of State Farm's judgment against Apple Pool Contracting. See, e.g., Estee Lauder, Inc. v. OneBeacon Ins. Group, L.L.C., 62 A.D.3d 33, 35 (1st Dep't 2009); Columbia Cas. Co. v. National Emergency Servs., 282 A.D.2d 346, 347 (1st Dep't 2001).

Apple Pool Contracting's prejudice is self-evident. When State Farm sued Apple Pool Contracting after the vehicle collision, the insured had not been notified of any disclaimer and well may have assumed that the insurer would cover any judgment. Nor has Apple Pool Contracting ever been notified of any disclaimer since then, deprived now of an opportunity to negate the grounds for any disclaimer, were it effective.

While defendants that were served in this action, State Farm and Bass, might locate and present a former corporate officer or employee of Apple Pool Contracting to attest to its notification of plaintiff, those other defendants, too, are prejudiced by receiving notice of the need to gather such evidence only upon receiving notice of this action. Apple Pool Contracting obviously was conducting business, through corporate officers or employees with knowledge of the corporation's acts, when the collision involving its commercial vehicle occurred and for an undetermined period afterward. During that period, locating corporate actors surely would have easier. If, as plaintiff claims, the corporation was in fact dissolved by the time plaintiff commenced this action, locating those representatives at that point undoubtedly had become more difficult.



C. State Farm's Lack of Opportunity to Dispute Plaintiff's Evidence

Even if plaintiff were considered to have timely and adequately disclaimed coverage of plaintiff's policyholder and insured or were relieved of that requirement, only in reply to State Farm's opposition does plaintiff's claims director supply the detail missing from his supporting affidavit to establish the absence of notice from plaintiff's insureds. The court may not consider evidence presented for the first time in reply, especially when plaintiff's initial failure to support its claim deprived State Farm of an opportunity to respond. Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012). Therefore, insofar as plaintiff's witness now attests to its reporting system for receipt of notices of a collision, claim, or lawsuit and to his search of files, State Farm is entitled to conduct disclosure regarding plaintiff's process for recording incoming notices, the extent of the search, the records searched, and the basis for expecting to find notices in those records. C.P.L.R. § 3212(f); Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001); Cooke v. City of New York, 95 A.D.3d 537, 538 (1st Dep't 2012); Arbor Leasing, LLC v. BTMU Capital Corp., 68 A.D.3d 580 (1st Dep't 2009); Slemish Corp., S.A. v. Morgenthau, 63 A.D.3d 418, 419 (1st Dep't 2009).

IV. CONCLUSION

Because plaintiff has failed to meet its burden to establish that it disclaimed coverage of its insured, defendant Apple Pool Contracting, and because defendant State Farm Fire and Casualty needs disclosure to rebut plaintiff's showing regarding its lack of notice, the court denies plaintiff's motion for summary judgment against State Farm Fire and Casualty. C.P.L.R. §§ 3001, 3212(b) and (f); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d at 508; Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352. See Spector v. Cushman & Wakefield, Inc., 87 A.D.3d at 423; De La Cruz v. Lettera Sign & Elec. Co., 77 A.D.3d 566. Because plaintiff concedes that defendant Bass has never answered, and plaintiff has failed to seek a default judgment against her for more than three years after her default in answering or to explain why a default judgment was not sought during that time, the court denies plaintiff's motion for summary judgment against Bass and dismisses the action against her. C.P.L.R. §§ 3212(b), 3215(c); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Counsel Abstract, Inc., Defined Benefit Pension Plan v. Jerome Auto Ctr., Inc., 23 A.D.3d 274, 275-76 (1st Dep't 2005).

DATED: October 17, 2013

**FILED**

OCT 31 2013

*Lucy Billings*

LUCY BILLINGS, J.S.C.

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NEW YORK COUNTY CLERK'S OFFICE

LUCY BILLINGS J.S.C.