Hartard v State Farm Auto. Ins. Co.
2015 NY Slip Op 32442(U)
December 22, 2015
Supreme Court, Suffolk County
Docket Number: 21960/12
Judge: Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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DONNA HARTARD,

Plaintiff,

-against-

STATE FARM AUTOMOBILE INSURANCE COMPANY, JEANNINE HASKINS and KEVIN HARKER,

Defendants.

----------X

INDEX NO.: 21960/12
CALENDAR NO.: 201401862MV
MOTION DATE: 3/5/15
MOTION NO.: 001 MD

PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 15 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 11-13 ; Replying Affidavits and supporting papers 14-15 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 001) of defendant State Farm Mutual Automobile Insurance Company for an order pursuant to CPLR R. 3212 granting summary judgment declaring that it is under no obligation to provide a defense or indemnification to either Jeannine Haskins or Kevin Harker with regard to the plaintiff's claim for personal injuries allegedly sustained in an April 17, 2007 incident involving a motor vehicle rented by Jeannine Haskins and operated by Kevin Harker, is granted to the extent indicated below, and is otherwise denied.

In this action, the plaintiff seeks a declaratory judgment, *inter alia*, that Jeannine Haskins and Kevin Harker are entitled to coverage under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company to Jeannine Haskins.

It is undisputed that Jeannine Haskins is the sole named insured under an automobile liability insurance policy issued by State Farm and in effect on the date of loss; that on or about April 15, 2007, Haskins rented a motor vehicle from ELRAC, Inc.; that the vehicle was rented for the use of her fiancé, Kevin Harker, whose vehicle was out of service; that on April 17, 2007, while operating the rented vehicle with the permission of Haskins, Harker caused serious physical injury to the plaintiff by hitting her with the vehicle just after she had exited it; that Harker subsequently entered pleas of guilty to charges of assault in the first degree, reckless endangerment in the first degree, and leaving the scene of an accident without reporting it, all with respect to his role in the incident; that on October 9, 2008, the plaintiff commenced a personal injury action against ELRAC, Inc., Jeannine Haskins, and Kevin Harker (*Hartard v ELRAC, Inc.*, Sup Ct, Suffolk County, Index No. 08-37585); that ELRAC, Inc. tendered the

statutorily required minimum coverage of $25,000.00 to the plaintiff; and that State Farm has refused to provide coverage for the incident, contending that the plaintiff's claim did not arise from an accident, that Harker does not qualify as an insured, and that the vehicle he was operating does not qualify as an insured vehicle.

The State Farm policy provides, in relevant part, as follows:

DEFINED WORDS WHICH ARE USED IN SEVERAL PARTS OF THE POLICY

* * *

Newly Acquired Car means a car newly owned by or newly leased to you or your spouse * * *.

Non-Owned Car – means a car not:

1. owned or leased by,

2. registered in the name of, or

3. furnished or available for the regular or frequent use of:

you, your spouse, or any relatives.

The use has to be within the scope of consent of the owner or person in lawful possession of it.

* * *

Relative – means a person related to you or your spouse by blood, marriage or adoption who resides primarily with you. It includes your unmarried and unemancipated child away at school.

Spouse – means your husband or wife who resides primarily with you.

Temporary Substitute Car – means a car not owned or leased by you or your spouse, if it replaces your car for a short time. Its use has to be with the consent of the owner. Your car has to be out of use due to its breakdown, repair, servicing, damage or loss. A temporary substitute car is not considered a non-owned car.

* * *

You or Your – means the named insured or named insureds shown on the declarations page.

Your Car means the vehicle described on the Declarations Page * * *.

* * *

SECTION I—LIABILITY—COVERAGE A

* * *

We will:

1. pay damages which an insured becomes legally liable to pay because of:

    a. bodily injury to others, and

    b. damage to or destruction of property including loss of its use,

    caused by accident resulting from the ownership, maintenance or use, including loading and unloading, of your car; and

2. defend any suit against an insured for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the accident which is the basis of the lawsuit.

* * *

Coverage for the Use of Other Cars

The liability coverage extends to the use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car.

Who Is an Insured

When we refer to your car, a newly acquired car or a temporary substitute car, insured means:

1. you;

2. your spouse;

3. the relatives of the first person named in the declarations;

4. any other person while using such a car if its use is within the scope of consent of you or your spouse; and

5. any other person or organization liable for the use of such a car by one of the above insureds.

When we refer to a non-owned car, insured means:

1. the first person named in the declarations;

2. his or her spouse;

3. their relatives; and

4. any person or organization which does not own or hire the car but is liable for its use by one of the above persons.

The plaintiff commenced this declaratory judgment action on July 20, 2012. Issue was joined by State Farm on or about August 30, 2012. The individual defendants have not answered the complaint or otherwise appeared in the action.

Now, discovery having been completed and a note of issue having been filed on November 5, 2014, State Farm timely moves for summary judgment.

On a motion for summary judgment, a liability insurer denying the duty to defend and indemnify has the burden "to establish that the injury complained of falls outside the coverage of the policy or is exempted by reason of an exclusionary clause * * *. If the insurer can establish, as a matter of law, that the claims against the assured are unambiguously excepted from coverage, summary judgment in favor of the insurer is proper" (*Smith Jean, Inc. v Royal Globe Ins. Cos.*, 139 AD2d 503, 504, 526 NYS2d 604, 605 [1988]).

Here, upon review of the relevant policy terms, the court is constrained to find, as a matter of law, that Kevin Harker is not entitled to coverage because he is not an insured within the meaning of the policy. As a starting point for analysis, the court observes that the policy provides coverage only to an "insured," and that the policy's general definition of "insured" is "the person, persons or organization defined as insureds in the specific coverage." Turning, then, to the relevant coverage provisions, the question of who is an insured is answered in two ways, with one definition if the vehicle is "your car," a "newly acquired car" or a "temporary substitute car," and another if the vehicle is a "non-owned car." Harker fits within neither definition. Plainly, the vehicle involved–a rental–does not qualify as "your car" or a "newly acquired car." Nor does it qualify as a "temporary substitute car," as it is undisputed that it was not acquired to replace the vehicle described on the policy's declarations page but rather to replace Harker's disabled vehicle. Even assuming, then, that it qualifies as a "non-owned car," Harker is not entitled to coverage since he does not fit within any of the four specified categories which would qualify him as an "insured" of a "non-owned car." It is clear on the record provided that he is not the "first person

named in the declarations" nor "his or her spouse"; furthermore, although State Farm offers no evidentiary support for its argument that Harker does not qualify as a "relative" within the meaning of the policy, the plaintiff does not contest the point, arguing only that the fourth category–"any person or organization which does not own or hire the car but is liable for its use by one of the above persons"–is ambiguous. The court disagrees. As State Farm correctly contends, that clause unambiguously refers to a person or organization who is vicariously liable for the acts of a person in one of the first three categories (*see also State Farm Mut. Auto. Ins. Co. v Boyd*, 377 F Supp 2d 511 [D SC 2005]; *Gilmer v State Farm Mut. Auto. Ins. Co.*, 110 Cal App 4th 416, 1 Cal Rptr 3d 756 [2003]; *Crawley v State Farm Mut. Auto. Ins. Co.*, 90 Haw 478, 979 P2d 74, *cert denied* 91 Haw 124, 980 P2d 998 [1999]). And while the plaintiff again does not press the issue, it does not appear how Harker could be found vicariously liable for the acts of Jeannine Haskins, nor that any such acts caused the plaintiff's injuries.

As to Jeannine Haskins, however, the court finds that State Farm failed to establish its entitlement to summary judgment. While State Farm concedes that Haskins is an "insured," it argues that Kevin Harker intended to cause physical harm to the plaintiff and that the plaintiff's claim, therefore, falls outside the policy's coverage because her injuries were not "caused by accident." That argument is rejected. "[I]n deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen" (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145, 711 NYS2d 141, 143 [2000] [emphasis in original]; *accord RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 777 NYS2d 4 [2004]). Here, even if the assault was intentional on Harker's part, there is nothing in the record to indicate that it was anything but "unexpected, unusual and unforeseen" from the point of view of Haskins.[1] Additionally, to the extent State Farm contends, without more, that Haskins was not "using" the vehicle within the policy coverage because she was neither its owner nor its operator, it suffices to note, for purposes of this determination, that "use" of a vehicle is not synonymous with its "operation" (*Gering v Merchants Mut. Ins. Co.*, 75 AD2d 321, 429 NYS2d 252 [1980]; *Nassau County Ch. of Assn. for Help of Retarded Children v Insurance Co. of N. Am.*, 59 AD2d 525, 397 NYS2d 107 [1977]); that she was not driving the vehicle at the time of the incident, therefore, is not conclusive as to whether she was using it at that time. The record, in fact, is devoid of proof as to her whereabouts or her role, if any, in the incident.

Accordingly, State Farm is entitled to summary judgment declaring only that it is under no obligation to provide a defense or indemnification to Kevin Harker with respect to the subject incident, and its motion is granted solely to that extent.

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[1] State Farm's objection that *State Farm Mut. Auto. Ins. Co. v Langan* (16 NY3d 349, 922 NYS2d 233 [2011]), cited by the plaintiff, "has no applicability" to this matter because it was decided in the context of a claim for uninsured motorist benefits, is worthy of brief mention. In *Langan*, the Court of Appeals held that, for purposes of an uninsured motorist endorsement, an occurrence should be viewed from the perspective of the insured, not the tortfeasor, to determine whether it qualifies as an accident. Looking at the larger picture, it appears that prior to *Langan*, the rule in New York requiring a court "to look at the casualty from the point of view of the insured" (*Miller v Continental Ins. Co.*, 40 NY2d 675, 677, 389 NYS2d 565, 566 [1976]; *accord Nallan v Union Labor Life Ins. Co.*, 42 NY2d 884, 397 NYS2d 786 [1977]) was applicable in contexts other than a claim made under an uninsured motorist endorsement (*State Farm Mut. Auto. Ins. Co. v Langan*, 55 AD3d 281, 865 NYS2d 102 [2008], *appeal dismissed* 12 NY3d 883, 883 NYS2d 177 [2009], *mod* 16 NY3d 349, 922 NYS2d 233 [2011]). What the Court of Appeals did in *Langan* was simply to extend the rule to claims made under such an endorsement.

The court directs that all claims as to which summary judgment was granted are hereby severed and that all remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: December 22, 2015

PAUL J. BAISLEY, JR.

J.S.C.