

Brown v Petit
2019 NY Slip Op 34317(U)
December 12, 2019
Supreme Court, Westchester County
Docket Number: Index No. 71139/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
MARLENE BROWN,

Plaintiff,

-against-

**DECISION & ORDER
Index No. 71139/2018**

**JACQUES PETIT, and PROGRESSIVE ADVANCED
INSURANCE COMPANY,**

Seq. No. 2

Defendants.
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WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Document Numbers 34-47, were read in connection with defendants Jacques P. Petit, and Progressive Advanced Insurance Company’s motion to dismiss the complaint against Progressive.

This action arose from a motor vehicle accident on May 6, 2017, wherein plaintiff seeks to recover damages for personal injuries allegedly sustained when she was run over by defendant Petit’s motor vehicle while she was crossing the street at the crosswalk located at Cliff Street in Yonkers.

NOW, based upon the foregoing the motion is decided as follows:

It is well settled that pursuant to CPLR 3211(a)(7) “upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The

court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 A.D.3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). This does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a)(7), a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]), or where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

In support of their motion to dismiss, defendants claim that plaintiff cannot sue Progressive directly because there was no privity of contract between plaintiff and Progressive; plaintiff has no common law right to seek relief directly from a tortfeasor's insurer, and that the statutory right created in Insurance Law 3420 arises only after plaintiff has obtained a judgment in the underlying personal injury action.

As a preliminary matter, plaintiff argues that defendants did not plead lack of privity in their answer. CPLR 3018(b) states:

“Affirmative defenses. A party shall plead all matters which, if not pleaded, would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading....”

However, privity is not a defense specifically enumerated under CPLR 3211(e) as subject to waiver if not timely pled. In any event, it can come as no surprise to plaintiff that it did not directly contract with the Progressive. Thus, contrary to the plaintiffs' contention, defendant did not waive its defense regarding the applicable coverage limit by failing to plead it as an affirmative defense, since this defense did not take the plaintiffs by surprise, and did not raise issues of fact not appearing on the face of the complaint (see CPLR 3018[b]); (Giraldo v Washington Int'l Ins. Co., 103 AD3d 775, 776 [2d Dept 2013]). The evidence before the court establishes a lack of privity between plaintiff and Progressive.

Further, under the common law, “an injured person possessed no cause of action against the insurer of the tortfeasor” (Lang v Hanover Ins. Co., 3 NY3d 350, 353 [2004]). To remedy this inequity, Insurance Law §3420 grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the

tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company (Lang v Hanover Ins. Co., 3 NY3d 350, [2004]). Having failed to fulfill the condition precedent to suit, namely, gaining a judgment against Progressive, plaintiff cannot pursue a direct action against Progressive.

Even as the court accepts the facts as alleged in the complaint as true, as the court must, and accords plaintiff the benefit of every possible favorable inference, the court finds that plaintiff has not sufficiently pleaded a cause of action against Progressive.

Accordingly, based upon the stated reasons, it is hereby


ORDERED, that defendants' motion to dismiss the complaint as against Progressive is **Granted**; and it is further

ORDERED, that the remaining parties are directed to appear in the Compliance Part on *December 13*, 2019, at *9:30 AM.* in Room 800 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records.

All other matters not herein decided are denied. This constitutes the Decision and Order of the Court.

**Date: December 12, 2019
White Plains, New York**



**HON. CHARLES D. WOOD
Justice of the Supreme Court**

TO: All Parties by NYSCEF