

<b>Anthony's Deli &amp; Catering, Inc. v Utica First Ins. Co.</b>
2019 NY Slip Op 34628(U)
November 25, 2019
Supreme Court, Putnam County
Docket Number: Index No.501338/2019
Judge: Victor G. Grossman
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To commence the 30 day 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 PUTNAM**

-----X  
ANTHONY'S DELI & CATERING, INC.,

**DECISION & ORDER**

Plaintiff,

Index No. 501338/2019

-against -

Sequence Nos. 1-2

UTICA FIRST INSURANCE COMPANY,

Motion Date: 9/25/19

Defendant.

-----X  
**GROSSMAN, J.S.C.**

The following papers, numbered 1 to 23, were considered in connection with Plaintiff's Order to Show Cause, dated August 12, 2019, seeking an Order, pursuant to CPLR §6301, directing Defendant to defend Plaintiff in underlying action, and Defendant's Notice of Cross Motion, dated September 13, 2019, seeking an Order, dismissing the action.

<b>PAPERS</b>	<b>NUMBERED</b>
Plaintiff's Order to Show Cause/Vitale Affidavit in Support/ Exhs. A-G/Memorandum of Law	1-10
Notice of Cross Motion/Affirmation in Support/Exhs. A-F/ Wheaton Affidavit in Support/Exhs. 1-2	11-21
Plaintiff's Reply Memorandum of Law in Support of Order to Show Cause and in Opposition to Cross Motion	22
Defendant's Affirmation in Reply and In Further Support of Cross Motion	23

Plaintiff Anthony's Deli & Catering, Inc. commenced this action against Defendant Utica First Insurance Company seeking, an Order, directing Defendant to defend Plaintiff in the action entitled *Matthew J. Multari v Joseph A. Vitale, Anthony N. Vitale, and Anthony's Deli & Catering, Inc.*,

in the Supreme Court of the State of New York, Dutchess County, Index No. 2018-51955, and otherwise take appropriate actions as insurer under the insurance policy no. BOP 1382063 issued by Defendant to Plaintiff.

By way of background, on May 17, 2017, Defendant issued a Business Owner's Special Policy, Policy No. BOP 1382063 (the "Policy") to Plaintiff, in which Defendant agreed to insure Plaintiff from direct loss or expense arising or resulting from claims for bodily injury wherein the Insured becomes legally obligated to pay as damages resulting from an Occurrence (OTSC, Exh. A; Wheaton Affidavit, Exh. 1 at 17).

On July 2, 2018, Matthew J. Multari commenced the Dutchess County action against Joseph A. Vitale, Anthony N. Vitale, and Plaintiff, seeking damages he sustained from a June 16, 2017 accident in which Joseph was driving an automobile owned by Anthony, which struck the vehicle that Multari was operating. It was alleged that Joseph was operating the automobile in the course of his employment by Plaintiff, and that Plaintiff was vicariously liable to Multari for Joseph's negligence, carelessness, and recklessness (Vitale Affidavit at ¶5).

Plaintiff stated that Joseph was not its employee (Vitale Affidavit at ¶6).

Having been notified of Multari's claim, on or about August 17, 2018, Defendant issued a letter to Plaintiff denying coverage (Vitale Affidavit at ¶¶7-8; Exh. B). In that letter, Defendant acknowledged notice of the subject claim, but stated that coverage under the Policy did not apply (OTSC; Exh. B):

Please refer to your Policy BOP1382063, Policy Form BP-200, 1/87 ed., under the section listing EXCLUSIONS THAT APPLY TO ALL COVERAGES, which reads as follows:

6. We do not pay for bodily injury or property damage that arises out of ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading of:
- a. an aircraft;
  - b. an auto, except as provided under the Incidental Coverage – Mobil Equipment. This exclusion does not apply to the parking of an auto on premises owned by, rented to or controlled by you or on the ways immediately adjoining if the auto is not owned by or rented to or loaned to an insured;
  - c. a watercraft. This exclusion does not apply if the watercraft;
    - 1. is on shore on premises owned by, rented to or controlled by you; or
    - 2. is not owned by you and is:
      - a. less than 26 ft in length and
      - b. not being used to carry persons or property for a charge:
  - d. mobile equipment, except as provided under Incidental Coverage – Mobile Equipment.

On May 20, 2019, Plaintiff, through his counsel, emailed Defendant, advising it that the Policy covered claims with respect to Plaintiff's employees and the imputation of vicarious liability imposed because of that relationship (OTSC; Exh. C). Plaintiff stated that it had no automobiles and that the fact that an automobile was allegedly involved was fortuitous (Vitale Affidavit at ¶¶11-13). Defendant issued another letter to Plaintiff, maintaining its position to decline coverage (Vitale Affidavit at ¶14; Exh. D).

On August 9, 2019, Plaintiff commenced this action. Plaintiff argues that "Defendant wrongfully and without just cause \* \* \* and in violation of the terms and conditions of the Policy, wrongfully

refused and continues to refuse to defend said action or otherwise protect the interests of the Plaintiff herein in connection with said litigation, all of which was in violation of said Policy” (Vitale Affidavit at ¶16). Plaintiff asserts that by reason of Defendant’s action, it was obliged and did retain counsel at its own expense. Accordingly, Plaintiff seeks, *inter alia*, a declaration that Defendant is required to defend it in the underlying action and pay all defense costs that have occurred and will occur (Vitale Affidavit at 4).

Plaintiff argues that Defendant has a duty to defend its insured and that based on the allegations in the underlying complaint, Defendant is contractually bound to defend Plaintiff even though it may not ultimately be bound to pay. Plaintiff states that it had no automobiles and therefore, there was no reason to cover that risk. Plaintiff continues that the “only connection that the plaintiff herein has with the plaintiff in the Multari Lawsuit is that \* \* \* Multari has claimed that Joseph was employed by the Deli and was allegedly acting in the course of his employment with the Deli” (Memorandum of Law at 3-4). Plaintiff states that the “gravamen of the Complaint is the allegation that Joseph Vitale was employed by Deli. The imputation of liability from Joseph to Deli is not based upon the instrumentality by which Multari was allegedly injured – an automobile. The role of the automobile is completely fortuitous with respect to its role in the alleged accident” (Memorandum of Law at 4).

Defendant opposes the motion and cross moves for dismissal, seeking an Order:

1. pursuant to CPLR §3211(a)(1) & (7) dismissing the action against Utica First Insurance Company in its entirety; and
2. since there is no question of material fact presented, this Court treat the motion as one for summary judgment pursuant to CPLR §3211(c) and declare, pursuant to CPLR §3001, that Utica First has no duty to defend or indemnify any party, including the plaintiff, Anthony’s Deli & Catering, Inc., herein in

connection with the June 16, 2017 automobile accident involving non-party Matthew Multari in the Dutchess County action.

Defendant argues that the Policy contains an exclusion to coverage for any liability arising out of the use of an automobile. Defendant states it is well-settled that: (1) no matter what alternative theories of liability are set forth by the insured, if those claims would not exist but-for the automobile accident, the automobile exclusion applies; (2) the automobile exclusion is clear and unambiguous; and (3) the policy phrase “arising out of” is broadly interpreted (Affirmation in Support of Cross Motion at ¶5).

Addressing Defendant’s cross motion first, “[a] motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Parkoff v Stavsky*, 109 AD3d 646, 647 [2d Dept 2013], *lv to appeal denied*, 22 NY3d 864 [2014]; *see also Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159-1160 [2d Dept 2019]). “In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as ‘documentary evidence,’ it must be ‘unambiguous, authentic, and undeniable’” (*25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015] [quotations and citations omitted]). “It is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’ in the proper case” (*id.* [quotations and citations omitted]). “Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence”(*id.*)

Here, Defendant submitted the subject Policy, which plainly excludes coverage for a loss

caused by the use or operation of an automobile (Cross Motion; Exh. F at 19). Joseph Vitale was driving an automobile when he struck Multari's automobile, causing his alleged injuries. The fact that it was alleged in the underlying lawsuit that he worked for Plaintiff is irrelevant. Accordingly, there is no obligation to defend Plaintiff "because of the language of the policy exclusion \* \* \* establish[es], as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify him under any provision contained in the policy (*Villa Charlotte Bronte, Inc. v Commercial Union Ins. Co.*, 64 NY2d 846, 848 [1985]; see also *Ruge v Utica First Ins. Co.*, 32 AD3d 424, 426 [2d Dept], *lv to appeal denied* 7 NY3d 716 [2006] [Utica First's automobile exclusion in its general liability policy is unambiguous and must be accorded its plain and ordinary meaning).

Accordingly, it is hereby

ORDERED that Defendant's cross motion (seq. #2) is granted to the extent stated herein; and it is further

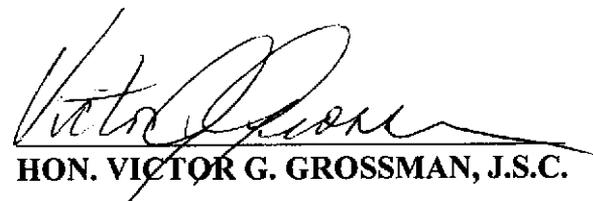
ORDERED that Plaintiff's motion (seq. #1) is denied as moot; and it is further

ORDERED that any issue not directly addressed herein is denied; and it is further

ORDERED that the Complaint is dismissed.

The foregoing constitutes the Decision, Order, and Judgment of the Court.

Dated: Carmel, New York  
November 25, 2019



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