

Gonzalez v Progressive Advanced Ins. Co.
2021 NY Slip Op 30564(U)
February 23, 2021
Supreme Court, Kings County
Docket Number: 519928/2020
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of February 2021

HONORABLE FRANCOIS A. RIVERA

-----X

LINDA GONZALEZ

Petitioner,

DECISION & ORDER

Index No. 519928/2020

- against-

PROGRESSIVE ADVANCED INSURANCE COMPANY

Respondent

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the order to show cause, petition and annexed papers filed on October 15, 2020, under motion sequence number one, by Linda Gonzalez (hereinafter Gonzalez) for a judgment declaring that a release which Gonzalez signed indemnifying the Progressive Advanced Insurance Company (hereinafter Progressive) of a certain bodily injury claim is null and void.

- Order to Show Cause
- Petition
- Petitioner's Affidavit in Support
- Exhibit A-D
- Respondent's Notice of Appearance
- Affirmation in Opposition
- Affidavit in Opposition
- Reply Affirmation

BACKGROUND

On October 15, 2020, Gonzalez commenced the instant proceeding for a declaratory judgment by filing an order to show cause, petition, and accompanying exhibits (hereinafter the commencement papers) with the Kings County Clerk's office. The respondent filed a notice of appearance.

The petition alleges, inter alia, the following salient facts. On August 13, 2020, Gonzalez was involved in a three-car accident while traveling west bound on the Belt Parkway near Cross Island Parkway (hereinafter the subject accident). As Gonzalez was slowing down in traffic her motor vehicle was hit in the rear by a motor vehicle that was owned and operated by Michael Haynes. That collision then propelled Gonzalez's vehicle into another vehicle, which was traveling directly in front of her vehicle.

As a result of the subject accident Gonzalez sustained serious physical injuries for which she sought and received treatment. She initially obtained medical assistance at the Kings County Hospital Emergency Department. On August 17, 2020, Gonzalez retained the Bogoraz Law Group, P.C. to represent her in the personal injury action regarding the subject accident.

On August 18, 2020, in lieu of contacting her attorneys for issues pertaining to her bodily injury claim, Gonzalez was directly contacted by a representative of Progressive. The representative told Gonzalez that he would be emailing her some paperwork which she would have to sign in order to receive a check in the amount of \$750.00. The representative did not explain to Gonzalez the nature of that paperwork.

Several days prior, Gonzalez had a conversation with one of the Progressive representatives regarding transfer of her vehicle's title. Gonzalez was under the impression that this transaction was related to the transfer of her vehicle's title. On August 24, 2020, Gonzalez electronically signed all the forms as she was instructed by the representative and emailed them back to Progressive. She did receive the check from Progressive in consideration for signing the paperwork.

Only weeks later, when her attorneys received the signed copies of her paperwork from Progressive, she learned that one of the documents she had signed was a contract (hereinafter the subject release) releasing Michael Haynes of all the injury claims which she brought against him pertaining to the subject accident. It was at that time that she discovered that her insurer, Progressive, was also the insurer of Michael Haynes's motor vehicle.

Gonzalez did not understand the contents of the paperwork which was emailed to her by Progressive prior to signing it. She did not show this paperwork to her attorneys prior to signing it, nor did she notify her attorneys that she received the paperwork from her insurance company prior to signing it. Gonzalez was under the impression that this transaction involved only transfer of her vehicle's title. She just simply did not expect and could not comprehend that her insurance company, with which she insured her vehicle for years, and which she trusted was protecting her interests in this matter, undermined its fiduciary obligations and intentionally under compensated her bodily injury claim. Gonzalez seeks, inter alia, a judgment declaring that the subject release is

null and void.

Progressive has appeared and has submitted opposition to the petition but has not interposed an answer in accordance with either CPLR 403 (b) or CPLR 3011.

LAW AND APPLICATION

Although Gonzalez commenced this matter as a special proceeding, the relief that she seeks is cognizable only in an action (*see* CPLR 103 [b]; *Matter of Chase v Wells Fargo Bank, N.A.*, 135 AD3d 751, 752 [2nd Dept 2016]). Accordingly, the Court exercises its authority pursuant to CPLR 103 (c) to convert the proceeding into an action for declaratory relief and deems the notice of petition to be the summons and the petition to be the complaint (*see Matter of Chase*, 135 AD3d at 753).

CPLR 403 (b) provides as follows:

(b) Time for service of notice of petition and answer. A notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least two days before such time. A reply, together with supporting affidavits, if any, shall be served at or before such time. An answer shall be served at least seven days before such time if a notice of petition served at least twelve days before such time so demands; whereupon any reply shall be served at least one day before such time. (NY CPLR 403 [McKinney])

CPLR 3011 pertains to kinds of pleadings and provides as follows:

There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff and a cross-claim against a defendant. A defendant's pleading against another claimant is an interpleader complaint, or against any other person not already a party is a third-party complaint.

There shall be a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided. There shall be no other pleading unless the court orders otherwise. (N.Y. C.P.L.R. 3011 [McKinney]).

CPLR 3212 (a) provides, in pertinent part, that any party may move for summary judgment in any action after issue has been joined. The moment of joinder of issue continues to be the earliest time for the making of a motion for summary judgment on the claim involved. If the motion is made against the plaintiff's cause of action, the service of the defendant's answer marks the joinder of issue; if its subject is a counterclaim, the service of the plaintiff's reply is the moment of joinder (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:12).

The requirement that issue be joined before a motion for summary judgment is granted is intended to show the court precisely what the plaintiff's claims and the defendant's position as to them, and his defenses, are (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:11, p 431) and has been strictly adhered to (*Miller v Nationwide Mutual Fire Ins. Co.*, 92 AD2d 723,724 [4th Dept 1983]).

It has been held that the motion does not lie before joinder of issue although the papers present no triable issue (*Milk v Gottschalk*, 29 AD2d 698 [3rd Dept 1968]). It has also been held that the Supreme Court is powerless to grant summary judgment prior to joinder of issue (*see* CPLR 3212 [a]; *Union Turnpike Associates, LLC v Getty Realty Corp.*, 27 AD3d 725, 728 [2nd Dept 2006]).

CPLR 3001 provides that the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed (*see Peters v Smolian*, 154 AD3d 980, 983 [2nd Dept 2017], citing CPLR 3001). To constitute a justiciable controversy, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect (*see Cong. Machon Chana v Machon Chana Women's Inst., Inc.*, 162 AD3d 635 [2nd Dept 2018], quoting *Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2nd Dept 2010]).

The Court finds that Gonzalez commenced the instant action as a proceeding seeking an accelerated judgment declaring that the subject release was null and void. Progressive filed a notice of appearance and submitted opposition to the petition. Progressive, however, did not interpose an answer in accordance with either CPLR 403 (b) or CPLR 3011. Consequently, Gonzalez application is denied without prejudice as premature. Progressive should deem the notice of petition to be a summons and the petition to be a complaint. Progressive must either interpose an answer or make a motion extending its time to answer on or before April 12, 2021.

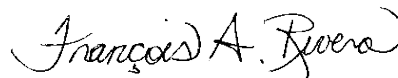
CONCLUSION

The order to show cause, petition and annexed papers by Linda Gonzalez for a judgment declaring that the subject release is null and void is denied without prejudice as premature.

The instant special proceeding is converted to an action and Progressive Advanced Insurance Company must either answer the complaint or make a motion extending its time to answer by April 12, 2021.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.