Giamundo v Dunn

2021 NY Slip Op 34024(U)

January 5, 2021

Supreme Court, Queens County

Docket Number: Index No. 709389/2020

Judge: Pam Jackman Brown

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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

SHORT FORM ORDER

Present: Hon. Pam Jackman Brown, JSC

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MARIA GIAMUNDO,

Plaintiff,

-against-

CLEVELAND DUNN 2, ROBERT EARL DUNN, FOR SUMMARY KAREN A. SAUTER INSURANCE AGENCY INC. JUDGMENT and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants.

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Index No.: 709389/2020

Motion Date: 10/5/2020

Cal. No.: 17

Mot. Seq. No.: 005

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COUNTY CLERK
QUEENS COUNTY

The following numbered papers were read on this motion by Defendants, Karen A. Sauter Insurance Agency, Inc. (Sauter Agency) and State Farm Automobile Insurance Company (State Farm), seeking, among other things, summary judgment, pursuant to CPLR § 3212.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Notice of Motion- Affidavits, Affirmations, Memorandum of Law, Exhibits Annexed	6 - 7, 25	8 - 24
Answering Affirmation - Exhibits Annexed	26	27 - 31
Reply Affirmation Annexed	32	

Upon the foregoing papers, it is ordered that this motion by Defendants, Sauter Agency and State Farm, for, among other things, summary judgment, pursuant to CPLR § 3212, is determined as follows:

Plaintiff, the owner/operator of a motor vehicle which was insured by Defendant, State Farm, procured through Defendant, Sauter Agency, was involved in an accident in

Queens County on December 20, 2011, with a vehicle owned by Defendant, Robert Earl Dunn, and operated by Defendant, Cleveland Dunn 2nd. Rose Smith Dunn was a passenger in the Dunn vehicle. Both Plaintiff and Rose Smith Dunn were injured in the accident.

Plaintiff, through her attorney, sought to collect SUM coverage from her State Farm policy. State Farm denied such claim, as Plaintiff's SUM coverage limits of $25,000/$50,000 were less than the $30,000/$60,000 bodily liability limits of the Dunn vehicle. Thereafter, on October 25, 2012, Plaintiff commenced this action against the Dunns to recover for personal injuries sustained, and against State Farm and Sauter Agency, asserting the negligence of said Defendants in not providing her with SUM limits equal to her bodily injury policy limits of $250,000/$500,000.

In August 2015, Defendants, Sauter Agency and State Farm's motion for summary judgment, seeking dismissal of the complaint, was granted. Plaintiff appealed such decision. In September 2015, Plaintiff's claim against the Dunns was settled for the full amount of their policy, and the case against them was discontinued.

Meanwhile, in early 2015, the Dunns commenced an action for personal injuries against Plaintiff in Kings County. Pursuant to its insurance agreement with Plaintiff, State Farm assigned counsel for Plaintiff, to defend that action. In July 2016, following discovery and a trial, a jury found Plaintiff to be solely liable for causing the subject accident. Thereafter, pursuant to its right under the insurance agreement, State Farm settled the claims of the Dunns against Plaintiff, within the policy limits.

In January 2018, the Appellate Division reversed the 2015 dismissal of Plaintiff's complaint against the remaining Defendants. In November 2018, Defendants' moved to amend their answer to add an affirmative defense of collateral estoppel, which was opposed by Plaintiff, but, ultimately, granted. In January 2019, Plaintiff served an amended complaint, in response to Defendants' amended answer, adding a Third Cause of Action for breach of contract, for the alleged failure to procure SUM insurance of $250,000/$500,000, and a Fourth Cause of Action, against State Farm, only, asserting fraud, breach of contract, and bad faith.

Defendants move for summary judgment, dismissing Plaintiff's amended complaint based on collateral estoppel and/or statute of limitations grounds, pursuant to CPLR § 3211 (a) (5); failure to state a cause of action, pursuant to CPLR § 3211 (a) (7); and failure to comply with CPLR § 3016 (b). Plaintiff opposes.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 NY2d

1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v. Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v. Buitriago*, 107 AD3d 977 [2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). On Plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving Defendants (*see Monroy v. Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v. Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (*see Bravo v. Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v. Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v. Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v. Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v. Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v. Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v. Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v. Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v. Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Defendants contend that summary judgment dismissing the complaint is warranted pursuant to CPLR § 3211 (a) (5), on the basis of collateral estoppel, with regard to the jury verdict in the Kings County action brought by the Dunns. Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party' (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see Napoli v. Breaking Media, Inc.*, 187 AD3d 1026 [2d Dept 2020]; *Broder v. Pallotta & Assoc. Dev., Inc.*, 186 AD3d 1189 [2d Dept 2020]). The party seeking to invoke collateral estoppel

has the burden of showing the identity of issues, while the party attempting to avoid the application of the doctrine must establish the lack of a full and fair opportunity to litigate (*see Matter of Dunn*, 24 NY3d 699 [2015]; *Astoria Landing, Inc. v. New York City Council*, 186 AD3d 1593 [2d Dept 2020]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*FC Notes SVC, LLC v. United General Title Ins. Co.*, 146 AD3d 935, 936 [2017], quoting *Conason v. Megan Holding, LLC*, 25 NY3d 1, 17 [2015]; *see Glass v. Del Duca*, 151 AD3d 941 [2d Dept 2017]).

Issue preclusion requires, among other things, that the identical issue was decided on the merits in the prior action and is decisive in the present action (*see City of New York v. Welsbach Elec. Corp.*, 9 NY3d 124 [2007]; *Deutsche Bank Natl. Trust Co., 188 AD3d 995 [2d Dept 2020]; Fowler v. Indymac Bank, FSB*, 176 AD3d 682 [2d Dept 2019]). Such is not the case in this litigation. The trial in Kings County determined that Plaintiff was liable for causing the subject accident. It did not address whether State Farm "breached a contract" with Plaintiff by failing to provide the alleged "requested" higher SUM limits. It is conceded by movants that had the higher SUM limits attached to Plaintiff's insurance policy, Plaintiff would have had available to her an amount in excess of the Dunn's bodily injury policy limits, under the SUM benefits of her policy. As Plaintiff recovered the full amount of insurance available from the Dunns, the issue of Defendants' alleged breach of contract, and not Plaintiff's liability for the accident, is what is determinative in the instant action. As such, said trial determination did not involve an "identical issue" as raised in the instant action, nor was it "decisive" in deciding the present action. Therefore, while Plaintiff has failed to demonstrate that she did not have a full and fair opportunity to contest the prior determination (*see Auqui v. Seven Thirty One Ltd., Partnership*, 20 NY3d 1035 [2013]; *Kleinknecht v. Siino*, 165 AD3d 936 [2d Dept 2018]), such a showing was unnecessary, as movants have failed, initially, to evidence that the first element of collateral estoppel applied herein.

The branch of Defendants' motion seeking to dismiss the breach of contract causes of action in the complaint as being time-barred is without merit. While an action for breach of contract has a six year statute of limitations (CPLR § 213 [b]), and the amended complaint, which included the breach of contract causes of action, was served over eight years after the accident, the doctrine of relation-back applies, to remove this action from a violation of the statute of limitations. CPLR § 203 (f) states, in relevant part, that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences ... to be proved pursuant to the amended pleading." Such statute provides that Plaintiff may correct or enlarge her complaint by adding either

a new claim or a new party, even after the statute of limitations has expired, where, as here, the Defendants had "prior knowledge of the claim and an opportunity to prepare a proper defense ... and (such claim) did not result in surprise or prejudice" (*Catnap, LLC v. Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1106 [2d Dept 2019]; *see Buran v. Coupal*, 87 NY2d 173 [1995]; *Cdx Labs, Inc. v. Zila, Inc.*, 162 AD3d 972 [2d Dept 2018]).

Defendants move to dismiss the Third and Fourth Causes of Action of the amended complaint, pursuant to CPLR § 3211 (a) (7), for lack of evidence to prove a stated cause of action, on the ground that Plaintiff failed to demonstrate that "a specific request was made for the coverage in question," citing *Hoffend & Sons, Inc. v Rose & Kieman, Inc.*, 7 NY3d 152, 155 [2006]). While the Court in *Hoffend* found that Plaintiff had failed to show that it had made a "specific request for coverage," as Plaintiff's principal did not remember asking for such coverage, the facts in that case contained more evidentiary support for the Defendant's reasoning than do the facts in this case. In *Hoffend*, Plaintiff's principal was an experienced businessman, and the insurance company not only supplied Plaintiff with a written proposal, but sent the Plaintiff a separate letter explaining the limited coverage in the policy, leading the Court to conclude that the insurance company "made it clear" that the coverage being questioned by Plaintiff was not included in Plaintiff's policy. None of those facts exist in the instant matter. Further, in *Hoffend*, the Court concluded that "a general request for coverage will not satisfy the requirement of a specific request *for a certain type of coverage*" (at 157-158) (italics mine). Here, Plaintiff already had SUM coverage. The issue concerns the amount of said coverage.

"An insurance broker may be held liable under theories of breach of contract or negligence for failing to procure insurance upon a showing by the insured that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction" (*Da Silva v. Champ Constr. Corp.*, 186 AD3d 452, 453 [2d Dept 2020]). In the case at bar, Plaintiff claims, in her complaint, in the amended complaint, and in her deposition testimony, that she "made specific request(s) to the broker and the requested coverage was not procured" (*Da Silva v. Champ Constr. Corp.*, 186 AD3d at 818; *see MAAD Constr., Inc. v. Cavallino Risk Mgt., Inc.*, 178 AD3d 816 [2d Dept 2019]). Plaintiff alleges that she told Karen Sauter, the broker, that "I want the best coverage." and that Ms. Sauter "Assured me that I did have the best coverage." She also stated that she always asked for the "maximum coverage," and assumed that is what she had. At her deposition, Plaintiff was asked by Defendants' counsel, if prior to the policy renewal immediately before the date of accident, "did you ask Karen to increase your SUM?," to which Plaintiff replied "No, I would not have known to do that." Such a statement fails to demonstrate, as a matter of law, that Plaintiff admitted to not making a "specific request" for coverage. Further, the fact that Plaintiff possessed a bodily injury

policy in the combined total amounts of $250,000/$500,00, yet had SUM coverage of only $25,000/$50,000, "arguably supports Plaintiff's claim ... the coverage Defendant obtained hardly made sense" (*American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 NY3d 730, 736 [2012]). "[A]n insured should have a right to 'look to the expertise of its broker with respect to insurance matters' (*Baseball Off. of Commr. v. Marsh & McLennan*, 295 AD2d 73, 82 [1st Dept 2002] .... The failure to read the policy at most may give rise to a defensive of comparative negligence but should not bar altogether an action against a broker" (*American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 NY3d at 736-737).

The evidence generated by Defendants', "own submissions demonstrated that there are triable issues of fact" (*Yao Zong Wu v. Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; *see Lozado v. St. Patrick's RC Church*, 174 AD3d 879 [2d Dept 2019]; *Karwowski v. Grolier Club of City of N.Y.*, 144 AD3d 865 [2d Dept 2016]), which must be determined by a trier of the facts (*see Sucre v. Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712 [2d Dept 2020]; *Flaccavento v. John's Farms*, 173 AD3d 1141 [2d Dept 2019]).) Consequently, as issues of fact exist as to whether Plaintiff requested specific coverage, and whether Defendant, Sauter Agency, failed to secure a policy as requested, summary judgment on behalf of Sauter Agency, on the Third Cause of Action, is denied, while summary judgment, on that cause of action, on behalf of State Farm, is granted.

The branch of Defendants' motion seeking summary judgment dismissing the Fourth Cause of Action, which refers to Defendant, State Farm, only, is granted. In such cause of action, Plaintiff claims that State Farm provided her with a "lack luster defense;" that it breached the "contractual requirement to represent her;" that it proceeded in" bad faith;" and that it did not permit her to appeal the *Dunn* decision. However, an insurance company is not vicariously liable for the negligence of defense counsel retained by it to defend the insured (*see Feliberty v. Damon*, 72 NY2d 112 (1988). Contrary to Plaintiff's contention, the *Feliberty* case is analogous to the case at bar, as, among other things, Plaintiff, herein, asserts that the assigned "law firm performed inadequately" (*Feliberty v. Damon*, 72 NY2d at 117).

The insurer's duty to defend is "delegable," and the law firm's client was Plaintiff, not the insurer, so the law firm assigned to Plaintiff's defense was an "independent contractor" (see *Feliberty v. Damon*, 72 NY2d at 120). Plaintiff has not contested that fact. As such, "[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its clients" (Ibid). Generally, the insurer may not be held liable for the independent contractor's negligent acts (*see Singh v. Sukhu*, 180 AD3d 834 [2d Dept 2020]; *Shusterich v. Kleinman*, 171 AD3d 1236 [2d Dept 2019]), and Plaintiff has demonstrated no reason to consider any exception to such general rule. Further, the independent contractor law firm is not, by law, insulated from liability for any wrongdoing, yet, Plaintiff has chosen to sue it herein.

Additionally, Plaintiff's claim that she was "not allowed to appeal" the Dunn decision, is without merit, as the specific terms of her insurance contract with State Farm, provide that State Farm has the "exclusive right to settle ... without the insured's consent." Also, Plaintiff had a contractual duty to cooperate with her insurer in "making settlements," and such settlement was made within the policy limits, so no excess judgment was charged to Plaintiff, and no viable instance of "bad faith" is alleged.

The branch of Defendants' motion seeking summary judgment dismissing the Fourth Cause of Action, on the grounds that it failed to comply with CPLR § 3016 (b), which requires that "where the cause of action is grounded in misrepresentation or fraud, the circumstances constituting the wrong shall be stated in detail" (*651 Bay Street, LLC v. Discenza*, – AD3d –, 2020 NY Slip Op. 07331 [2d Dept 2020}; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]; *Qureshi v. Vital Transp. Inc.*, 173 AD3d 1076 [2d Dept 2019]), is denied as moot.

The parties' remaining arguments and contentions are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branches of Defendants' motion seeking dismissal of the complaint on summary judgment, on the grounds of collateral estoppel and statute of limitations, pursuant to CPLR § 3211 (a) (5), are denied. The branch of said motion seeking summary judgment on Plaintiff's Third Cause of Action, is granted, as to Defendant, State Farm, and denied, as to Defendant, Sauter Agency. The branch of the motion for dismissal of the Fourth Cause of Action, alleging, among other things, fraud against Defendant, State Farm, is granted.

Dated: January 5, 2021
Jamaica, New York

HON. PAM JACKMAN BROWN, J.S.C.

FILED

1/5/2021
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COUNTY CLERK
QUEENS COUNTY