SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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ROWAN LEWIS

Plaintiff,

- v –

COUNTRY-WIDE INSURANCE COMPANY,

Defendant.

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INDEX NO. 650979/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY.

The plaintiff, Rowan Lewis, seeks money damages from the defendant, Countrywide Insurance Company (Countrywide), insurer of his former employer, upon a theory that it breached its duty to settle in an underlying personal injury action. The defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on the grounds, *inter alia,* that the plaintiff lacks standing. The plaintiff opposes. The motion is granted.

On June 4, 2007, the plaintiff sustained injuries in a collision on the Garden State Parkway in New Jersey while a passenger in a vehicle owned by non-party Vertex Construction Corp. (Vertex) and insured by the defendant. The liability policy issued to Vertex provided coverage per person of a maximum of $100,000.00 for personal injuries and property damage and obligated the defendant to defend any action against Vertex alleging such injury or damages. In December 2007, the plaintiff commenced a personal injury action against Vertex in the Supreme Court, Kings County, entitled Lewis v Vertex Constr. Corp., Index No. 45484/07 (the underlying action). On November 15, 2010, the court in the underlying action granted the plaintiff's motion for summary judgment as to liability and a damages trial ensued. The defendant maintained that the plaintiff suffered only a fractured rib as a result of the accident and that other claimed injuries arose from pre-existing conditions. The jury found for the plaintiff in the amount of $750,000.00 for past pain and suffering and $300,000.00 for future pain and

suffering. By an order dated December 6, 2013, that court granted Vertex's motion to set aside the jury verdict to the extent of directing a new trial on past pain and suffering unless the plaintiff stipulated to a reduction in damages. On December 14, 2013, the defendant delivered to the plaintiff a check for $135,125.00, representing tender of its policy limit of $100,000.00 and accrued interest on the policy from the date of the order granting summary judgment on liability. It was enclosed with a letter of Vertex's attorney, in which counsel stated that "the tender of the enclosed check is without prejudice to [Vertex's] rights regarding any appeal from a jury's verdict and/or the pending proposed order regarding defendant's post trial motion to set aside the verdict." By stipulation dated January 24, 2014, the plaintiff and Vertex agreed to reduce the past pain and suffering award from $750,000.000 to $300,000.000. On March 24, 2016, a judgment was entered in favor of the plaintiff and against Vertex in the sum of $751,917.32. The judgment was affirmed by the Appellate Division, Second Department. See Lewis v Vertex Constr. Corp , 170 AD3d 990 (2nd Dept. 2019). The judgment was not paid.

By an "Assignment of Cause of Action" dated December 23, 2019, Anthony Pepe, identified as Vertex's CEO, purported to agree that, in consideration for the plaintiff's agreement to not enforce the judgment against Pepe's personal assets, Vertex was assigning to the plaintiff any bad faith claim it may have against Countrywide. That document stated that Countrywide, "in blatant disregard of the obvious probability of an excess judgment, negligently and in bad faith chose to ignore assignee's reasonable policy limits settlement offer and did not accept same by offering said policy limits. As a result, assignee prosecuted the action to a verdict in damages and obtained a judgment in excess of insurer's policy limits." The document further stated that Countrywide had rejected the plaintiff's "policy limits settlement offer and fail[ed] to tender its policy" and that Vertex "hereby irrevocably assigns to [plaintiff] all causes of action [Vertex] may have" against Countrywide or against Vertex's in-house counsel.

However, in the meantime, Vertex had been dissolved by proclamation by the New York Secretary of State on October 28, 2009, during the pendency of the underlying action. Apparently, neither the plaintiff nor Countrywide was then aware of the dissolution.

In February 2020, the plaintiff commenced this action against Countrywide alleging two causes of action, breach of duty to settle and breach of the implied covenant of good faith and fair dealing and seeking damages of $751,917.32, the amount of the judgment entered against

Vertex. The defendant answered and asserted seven affirmative defenses including lack of standing. Discovery was conducted. The instant summary judgment motion ensued.

A party is entitled to summary judgment upon a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of the motion the defendant submits, *inter alia*, the subject insurance policy, the purported assignment, deposition testimony, correspondence of counsel and a printout from the website of the New York Department of State, Division of Corporations, showing that "Vertex Construction Corp.", formed in 2001, was inactive, having been "dissolved by proclamation" on October 28, 2019, and listing Anthony Pepe of Staten Island as a principal. The defendant argues that the plaintiff lacks standing to bring this action and, in any event, failed to make a proper settlement demand within the policy limits in the underlying action, which is a condition precedent for any bad faith claim.

The defendant has met its *prima facie* burden on the motion and, in opposition, the plaintiff fails to raise any triable issue of fact. The opposition papers consist only of an attorney affirmation which references the defendant's exhibits and an attached expert report. The papers wholly fail to address Vertex's dissolution or the issue of plaintiff's standing. The plaintiff papers are silent on the issue even though lack of standing was asserted by the defendant as an affirmative defense. See 21st Mortgage Corp. v Lin, 210 AD3d 401 (1st Dept. 2022).

The defendant correctly argues and demonstrates that the plaintiff lacks standing to bring the instant action since the 2009 dissolution of Vertex rendered the purported 2019 assignment to him of any "bad faith" claim by Pepe ineffective. Pursuant to Tax Law §203-a, when the Secretary of State issues a proclamation of dissolution for failure to pay taxes, the corporation remains inactive and is not restored to active status until it pays all delinquent taxes. Since Vertex was dissolved by proclamation in 2009 and has not since been reinstated, it was

prohibited from entering into the purported assignment in 2019, some ten years later. The defendant has thus demonstrated that the assignment relied upon by the plaintiff to bring this action is ineffective since there was no right of action to assign.

A dissolved corporation is prohibited from carrying on "new business" after its dissolution absent reinstatement as an active corporation. See Metered Appliances, Inc. v. 75 Owners Corp., 225 AD2d 338, 338 (1st Dept. 1996). Business Corporation Law § 1005(a) provides in part that "'[a]fter dissolution, (1) the corporation shall carry on no business except for the purpose of winding up its affairs." As such, "[w]ith limited exceptions, a dissolved corporation 'does not enjoy the right to bring suit in the courts of this state'". Weiss v Markel, 110 AD3d 869, 871 (2nd Dept. 2013) *quoting* Moran Enters., Inc. v Hurst, 66 AD3d 972, 975 (2nd Dept. 2009); see Matter of 151st St. Discount Liquors, Inc. v New York State Liquor Auth., 189 AD3d 426 (2020) [dissolved corporation lacked capacity to bring CPLR article 78 proceeding]; see also H. Morris & Partners, Ltd. v Opti-Ray, Inc., 290 AD2d 486 (2nd Dept. 2002) [principal of dissolved corporation lacks standing since he is not a successor-in-interest of corporation]. No argument is made that any "limited exception" applies here, such as a continued "winding up" of corporation's affairs. See e.g. BCL §1006; Averbuch v New York Budget Inn, LLC, 172 AD3d 404 (1st Dept. 2019). In that regard, the court notes that the terms of the purported assignment appear to be written to protect personal assets of Pepe rather than protect, dispose or convey any existing remaining assets of Vertex, even though Pepe purported to sign its CEO.

Moreover, although the complaint fails to cite the statute, the essence of the plaintiff's claim against the defendant is one pursuant to Insurance Law § 2601, "Unfair Claim Settlement Practices." However, "the law of this state does not currently recognize a private cause of action under Insurance Law § 2601." Rocanova v Equitable Life Assurance Soc., 83 NY2d 603, 614 (1994); see New York Univ. v Continental Ins. Co., 87 NY2d 308 (1995); Aetna Cas. & Sur. Co. v ITT Hartford Ins. Co., 249 AD2d 241 (1st Dept. 1998). The plaintiff makes no argument in that regard and cites no authority holding otherwise. Thus, even assuming that, contrary to the defendant's assertion, the plaintiff had satisfied the specified condition precedent of making a proper demand, he could not bring the instant bad faith claim. Indeed, in light of the procedural history of the underlying action, any plaintiff would have difficulty establishing that Countrywide acted with "gross disregard" of Vertex's interests in that action. See Pavia v State Farm Mutual Auto. Ins. Co., 82 NY2d 445 (1993); Zurich Am. Ins. Co. v The Ins. Co. of the State of Penn., 209 AD3d 557 (1st Dept. 2022).

The court does not reach the parties' remaining contentions. Any relief not expressly granted herein is denied.

Accordingly, upon the foregoing papers, it is hereby

ORDERED that the defendant's motion for summary judgment pursuant to CPLR 3212 is granted and the complaint is dismissed in its entirety, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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7/14/2023
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[X] GRANTED [ ] GRANTED IN PART [ ] OTHER