M.V.B. Collision Inc. v State Farm Ins. Co.
2018 NY Slip Op 28043 [59 Misc 3d 406]
February 20, 2018
Fairgrieve, J.
District Court of Nassau County, First District
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[*1]

M.V.B. Collision Inc., Doing Business as Mid Island Collision, as Assignee of David Stulberger and Others, Plaintiff,
v
State Farm Insurance Company et al., Defendants.

District Court of Nassau County, First District, February 20, 2018

APPEARANCES OF COUNSEL

Hurwitz & Fine, *P.C.*, Melville, for defendants.

Steven F. Goldstein, *LLP*, Carle Place, for plaintiff.

{**59 Misc 3d at 406} OPINION OF THE COURT

Scott Fairgrieve, J.

{**59 Misc 3d at 407}Defendants move for an order pursuant to CPLR 3211, dismissing the complaint on the grounds that plaintiff has no legal capacity to sue.

Plaintiff commenced this action against defendant State Farm Insurance Company, and the insurance adjusters employed by State Farm, concerning claims resulting from collision damages sustained by State Farm insureds.

The verified complaint, dated August 1, 2016, provides the following allegations regarding the causes of action asserted.

Verified Complaint

State Farm issued an automobile policy to David Stulberger to insure a 2015 Nissan Rogue for collision damage. The said Nissan Rogue was involved in an accident on May 11, 2016. State Farm sent a representative who determined that the Nissan should be repaired. [*2]Plaintiff repaired the Nissan at a cost of $14,101.80. State Farm offered $9,960.36. It is alleged that the difference between $14,101.80 and $9,960.36, or $4,141.44, is a debt owed to plaintiff by David Stulberger. David Stulberger has the right to pursue State Farm for the difference but has instead assigned his right of enforcement to plaintiff.

Jaqueline Drouillard insured her 2016 Mercedes Benz C300 STD four-door sedan with State Farm. The Mercedes was involved in a motor vehicle accident on April 2, 2016, which resulted in the vehicle being repaired by plaintiff at a cost of $13,523.04. State Farm offered $8,052.21 for the repairs. The difference between $13,523.04 and $8,052.21, or $5,470.83, constitutes a debt owed by Jaqueline Drouillard to plaintiff. Jaqueline Drouillard has the right to pursue State Farm for this debt but she has assigned her right to plaintiff to recover the difference.

State Farm issued a policy for Kwesi Evangelist's 2014 Mercedes Benz C300. This Mercedes Benz C300 was involved in an accident on May 16, 2016. Plaintiff repaired the Mercedes at a cost of $10,025.06. State Farm offered $7,982.54 leaving a difference of $2,042.52. Kwesi Evangelist assigned to plaintiff his right to recover this debt from State Farm.

The first cause of action is designated "(Breach of Contract as to David Stulberger)." It is alleged that State Farm breached its contractual obligation by failing to pay the debt owed by its insured, David Stulberger, in the sum of $4,141.44 to plaintiff. David Stulberger assigned his claim against State Farm to plaintiff.{**59 Misc 3d at 408}

The second cause of action is designated as "(Breach of Contract as to Jaqueline Drouillard)." It is alleged that State Farm breached its contractual obligation to pay the difference of $5,470.83 pertaining to the debt owed by its insured, Jaqueline Drouillard, to plaintiff. Jaqueline Drouillard assigned her claim against State Farm to plaintiff.

The third cause of action is described as "(Breach of Contract as to Kwesi Evangelist)." It is alleged that State Farm breached its contractual obligation by failing to pay the debt owed by its insured, Kwesi Evangelist, in the sum of $2,042.52. Kwesi Evangelist assigned this claim against State Farm to plaintiff.

The fourth cause of action asserts a negligence claim against defendant Michael Thompson

concerning the adjustment of the damage sustained by the vehicle owned by David Stulberger. It is further alleged that defendant Michael Thompson violated New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64) in failing to properly adjust the claim.

The fifth cause of action asserts a negligence claim against defendant Michael Thiele for failing to properly adjust the damage sustained by the vehicle owned by Jaqueline Drouillard. There is an allegation that defendant Michael Thiele failed to properly perform his duties in violation of New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64).

The sixth cause of action alleges a negligence action against defendant John Seara regarding the adjustment of the vehicle owned by Jaqueline Drouillard. It is also alleged that defendant John Seara violated New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64).

The seventh cause of action asserts negligence against defendant John Knapic concerning his adjustment of the vehicle owned by Jaqueline Drouillard and that he violated New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64).

Defendant State Farm argues that plaintiff cannot enforce the contractual rights of the insureds because plaintiff is not an assignee under the policies. It is claimed that since State Farm did not consent to the assignments by its insureds, no rights to sue can be asserted by plaintiff. [*3]Defendant State Farm also maintains that no claim can be asserted because the vehicles were returned to their pre-accident condition. It is also contended that there is no proof that plaintiff attempted to collect the sums owed by State Farm's insureds.{**59 Misc 3d at 409}

Defendant State Farm asserts that the following language in the State Farm policy prohibits the alleged assignments by State Farm insureds (policy at 30):

"**8. Assignment**

"No assignment of benefits or other transfer of rights is binding upon ***us*** unless approved by ***us***."

Defendants insist that causes of action numbered 4-7 must be dismissed because:

1. the adjusters were performing for a disclosed principal;

2. no duty of care exists between plaintiff and the adjusters; and

3. there is no private right of action for violating New York State Insurance Law and 11

NYCRR 216.7 (Regulation 64).

Opposition to Motion

In opposition to the motion to dismiss, plaintiff maintains that the assignments here are valid because:

> "6. By the policy's own language, the insured may not assign any of his/her benefits or rights **under the contract**. The subject Assignments in the case at bar do not purport to assign any benefits or rights the assignors have under the contract. They assign to Plaintiff the right to pursue STATE FARM, by means of a lawsuit or otherwise, for its refusal to pay for 'any and all claims arising out of the adjustment, repair, and payment of physical damage . . .' The subject Assignments thereby assign to Plaintiff the assignors' rights to sue Defendant, STATE FARM INSURANCE COMPANY, for breach of their policies by it in refusing to pay the subject claims. Copies of three (3) subject Assignments are annexed hereto as Exhibit 'A'.
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> "7. The provision in the STATE FARM policies, which were breached by it, states specifically that STATE FARM will pay the cost to repair the covered vehicle, minus any applicable deductible (*See* 'Exhibit E' to Defendants' Motion, p.18 'Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage').
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> "8. In light of the fact that Plaintiff, M.V.B. COLLISION, INC., is suing STATE FARM for breach of the subject insurance policies as assignee of the three (3) STATE FARM insureds, Defendants' reliance{**59 Misc 3d at 410} on the *Sillman* and *R/S Assoc.* cases is misplaced, as those pertain to situations where the Assignments were of rights and/or benefits **under the policies**.
>
> "9. In light of the aforementioned facts, the lack of contractual privity between Plaintiff and Defendant, STATE FARM, is irrelevant, as it is not required where there is a valid Assignment."

Decision

The motion for summary judgment to dismiss the first three causes of action is denied. The assignments by the State Farm insureds to plaintiff are valid and are not prohibited by the subject clause in the State Farm policy.

[*4]

In *Ardon Constr. Corp. v Firemen's Ins. Co. of Newark, N.J.* (16 Misc 2d 483 [Sup Ct, Kings County 1959], *affd* 11 AD2d 766 [2d Dept 1960]), defendant Firemen's Insurance Company issued a

policy covering fire loss for its insured's building. The building was partially destroyed by fire. The insured assigned its claim to recover under the policy to the contractor plaintiff Ardon Construction Corp. The defendant contended that the assignment was ineffective because of a provision in the policy prohibiting its assignment. The lower court held that rights under a policy of insurance may be assigned after a fire loss despite the anti-assignment clause:

> "Defendant contends further that the complaint is insufficient because of the provision in the policy prohibiting its assignment. While the policy itself is not before the court, since it has been alleged to be a standard policy, the court may judicially notice its provisions (*Raegener v. Willard*, 44 App. Div. 41). Pursuant to section 168 of the Insurance Law the standard provision is that 'Assignment of this policy shall not be valid except with the written consent of this Company.' This provision, as every provision in a policy, must be strictly construed against the insurer. There is no interdiction by its terms against the assignment of an existing claim as distinguished from the policy itself. It has long been the doctrine of this State that rights under a policy of insurance may be assigned after loss, notwithstanding a clause in the policy forbidding assignments (*Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Brichta v. New York Lafayette Ins.* {**59 Misc 3d at 411} *Co.*, 2 Hall 372; *Courtney v. New York City Ins. Co.*, 28 Barb. 116). In fact, it has been held that a provision in an insurance policy prohibiting a transfer of the insured's interest after loss would be illegal and void (*Carrol v. Charter Oak Ins. Co.*, 40 Barb. 292). Moreover, the existence of the prohibition against assignment in the policies proved no bar to the determinations by the court in *Washington Assur. Co. v. Duncan* (207 Misc. 1042, *supra*) and *Brewer v. North Riv. Ins. Co.* (137 N. Y. S. 2d 909)." (*Ardon Constr. Corp.*, 16 Misc 2d at 488.)

On the appeal, the Second Department in *Ardon* affirmed, stating that it was in accord with the views expressed by the Supreme Court.

In *Arrowood Indem. Co. v Atlantic Mut. Ins. Co.* (96 AD3d 693, 694 [2012]), the First Department also held that a no-transfer prohibition in an insurance policy was ineffective to bar an assignment after a loss has occurred:

> "The APA states that premerger product liability claims remain excluded liabilities, and the APA also contains a 'no-transfer' clause; however, under New York law, '[t]he enforceability of a no-transfer clause in an insurance contract is limited' (*Globecon Group, LLC v Hartford Fire Ins. Co.*, 434 F3d 165, 170 [2d Cir 2006] [applying New York law]). New York generally follows the majority rule that a no-transfer provision in an insurance contract is 'valid with respect to transfers that were made prior to, but not after, the insured-against loss' (*id.*; *see also Kittner v Eastern Mut. Ins. Co.*, 80 AD3d 843, 846 n 3 [2011], *lv dismissed* 16 NY3d 890 [2011]). As noted by the motion court, this principle is based on a judgment that while 'insurers have a legitimate interest in protecting themselves

> against additional liabilities [that they] did not contract to cover, once the insured-against loss has occurred, there is no issue of an insurer having to insure against additional risk' and, 'in that circumstance, the only question is who the insurer will pay for the loss' (*Viking Pump, Inc. v Century Indem. Co.*, [*5]2 A3d 76, 103 [Del Ch 2009] [applying New York law])."

Likewise, the Third Department held in [*Kittner v Eastern Mut. Ins. Co.* (80 AD3d 843](#) [2011]) that the insurance company's consent was required only for assignment of policy before{**59 Misc 3d at 412} loss. Thus, consent was not required for the insured manufacturer to assign its claims to its principal after the fire loss:

> "Contrary to defendant's argument, while the insurance policy contains a provision that the '[a]ssignment of this policy is not valid without [defendant's] written consent,' this anti-assignment provision applies only to assignments before loss (*see Globecon Group, LLC v Hartford Fire Ins. Co.*, 434 F3d 165, 171 [2d Cir 2006]; *Travelers Indem. Co. v Israel*, 354 F2d 488, 490 [2d Cir 1965]; *Ardon Constr. Corp. v Firemen's Ins. Co. of Newark, N.J.*, 16 Misc 2d 483, 488 [1959], *affd* 11 AD2d 766 [1960])." (*Id.* at 846 n 3.)

As the Supreme Court of New Jersey recently noted in *Givaudan Fragrances Corp. v Aetna Cas. & Sur. Co.* (227 NJ 322, 151 A3d 576 [2017]), once a loss has occurred, an assignment is regarded as a chose in action under the policy. There is a strong public policy against restraints on alienation of choses in action, and assignment after loss is no longer regarded as a transfer of the policy:

> "The majority rule in the United States is that a provision that prohibits the assignment of an insurance policy, or that requires the insurer's consent to such an assignment, is void as applied to an assignment made after a loss covered by the policy has occurred. *Conrad Bros. v. John Deere Ins. Co.*, 640 *N.W.*2d 231, 237-38 (Iowa 2001); *see also 3 Couch on Insurance* § 35:8 (3d ed. 2016) (observing that 'the great majority of courts' adhere to this rule). In *Conrad Bros.*, *supra*, the Iowa Supreme Court explained the rationale underlying the majority rule:

> " '[O]nce the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. Instead, it is a transfer of a chose in action under the policy. At this point, the insurer-insured relationship is more analogous to that of a debtor and creditor, with the policy serving as evidence of the amount of debt owed. Moreover, if we permitted an insurer to avoid its contractual obligations by prohibiting all post-loss assignments, we could be granting the insurer a windfall.'

> "[640 *N.W.*2d at 237-38 (emphasis added) (citations {**59 Misc 3d at 413}omitted); *see*

> *also Ocean Accident*, *supra*, 100 *F.*2d at 446 (quoting *2 May on Insurance* § 386).]
>
> "The majority rule is an exception to the general principle that parties to a contract may freely limit assignment of their contractual rights. The principle underlying the rule is a deeply rooted public policy against allowing restraints on alienation of choses in action. *See Bolz v. State Farm Mut. Auto. Ins. Co.*, 274 *Kan*. 420, 52 *P*.3d 898, 904, 908 (2002) (adopting majority rule and rejecting insurer's position 'that the public policy in favor of freedom of contract is superior to the public policy in favor of free assignment of choses of action'); *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 *S.W.*3d 680, 688 (Ky. 2012) (finding majority rule 'fully consistent with [Kentucky's] prior holdings adverse to contractual provisions tending to restrain the alienability of choses in action'). New Jersey similarly recognizes choses in action as personal property and disfavors any attempt to [*6]restrict alienation of that property. *Morris v. Glaser*, 106 *N.J. Eq.* 585, 610, 151 *A.* 766 (Ch. 1930) ('[A] chose in action has almost time out of mind been assignable.'), *aff'd*, 110 *N.J. Eq.* 661, 160 *A.* 578 (E. & A. 1932); *see also N.J.S.A.* 1:1-2 (including choses in action in statutory definition of 'personal property').
>
> "The rule also embodies a recognition that 'once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer.' *17 Williston on Contracts* § 49:126 (4th ed. 2016)." (227 NJ at 339-340, 151 A3d at 586-587.)

Other authorities consistent with the above include *Travelers Indem. Co. v Israel* (354 F2d 488 [2d Cir 1965]); *Globecon Group, LLC v Hartford Fire Ins. Co.* (434 F3d 165 [2d Cir 2006]); *SR Intl. Bus. Ins. Co., Ltd. v World Trade Ctr. Props., LLC* (375 F Supp 2d 238 [Dist Ct, SD NY 2005]); *In re Viking Pump, Inc.* (148 A3d 633 [Del 2016]); and 69 NY Jur 2d, Insurance §§ 1165, 1166.

Next, the fourth through seventh causes of action, asserted against the four insurance adjusters based upon negligence, are dismissed. (*See O'Keefe v Allstate Ins. Co.*, 90 AD3d 725 [2d Dept 2011]; *Bardi v Farmers Fire Ins. Co.*, 260 AD2d 783 [3d Dept 1999]; *M.V.B. Collision Inc. v Allstate Ins. Co.*, 56 Misc 3d 238 [Nassau Dist Ct 2017].) Simply stated, there is no action{**59 Misc 3d at 414} against an individual adjuster based upon violation of New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64). (*See Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603 [1994]; *Nick's Garage Inc. v Nationwide Mut. Ins. Co.*, 101 F Supp 3d 185 [Dist Ct, ND NY 2015]; *M.V.B. Collision Inc. v Allstate*.)

Conclusion

1. Causes of actions numbered 1-3, based upon the assignments by the defendant's insureds to plaintiff, are viable.

2. Causes of actions denominated 4-7 against the individual adjusters, based upon negligence and New York State Insurance Law and 11 NYCRR 216.7 (Regulation 64), are dismissed.