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 1st day of October 2024

HONORABLE FRANCOIS A. RIVERA

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MARTIN ROSENBERG and CHANA ROSENBERG,

Plaintiffs,

- against -

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

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DECISION & ORDER

Index No.: 533760/2022

Oral Argument: 9/5/2024

Cal. No.: 55

Ms. No.: 2

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on November 28, 2023, under motion sequence number two, by Martin Rosenberg and Chana Rosenberg (hereinafter the plaintiffs) for an order:

(1) pursuant to C.P.L.R. § 3211(b), dismissing the second and third affirmative defense in the answer of Allstate Fire And Casualty Insurance Company (hereinafter the defendant or Allstate;

(2) pursuant to § 3212, 3212 (c) and 3212(g) of the C.P.L.R. for summary judgment on the issue of liability in this contractual insurance S.U.M. "(Supplementary Underinsured Motorist) coverage matter; finding, as a matter of law, that the plaintiff's culpable conduct and/or comparative negligence in the happening of the underlying accident, if there be any, plays no role whatsoever in determining an "S.U.M" damages award, inasmuch as there is no provision/language in the entire "S.U.M." insurance agreement between the contracting parties, that provides for a (second) "set-off" or diminution of the coverage amount and/or the amount of recoverable damages for the alleged culpable conduct of the insured/plaintiff, and/or, alternatively,

(3) pursuant to § 3212, 3212 (c) and 3212(g) of the C.P.L.R. for summary judgment on the general issue of liability, and a finding of no comparative negligence by the plaintiff; and

(4) precluding defendant from presenting any evidence at trial regarding its other affirmative defenses asserted in Allstates' answer (4, 5, 6, 7, 8, 9 & 10); for failing to serve a proper and sufficient verified bill of particulars as to its affirmative defenses, pursuant to CPLR § 3022, 3042, 3043, 3044, and in violation of the order of Hon. Rachel E. Freier, dated July 5, 2023 (Exhibit "J"), and

(5) for an order pursuant to and under the penalties of CPLR 3124 and/or 3126 of the case scheduling order of Hon. Rachel E. Frier, dated April 4, 2023 (NYSCEF # 7, Exhibit "F"); as well as a subsequent Hon. Rachel E. Frier dated July 5, 2023 (NYSCEF # 19, Exh. "J"), both of which defendant has failed to fully comply to date,

(6) for a self-executing Order, under the penalties of CPLR 3124 and/or 3126 striking defendant's answer and/or precluding defendant from presenting any evidence at trial or an affidavit in a dispositive motion; regarding its affirmative defenses asserted in defendant's answer; for failing to serve a verified bill of particulars, seriatim, as to all of its affirmative defenses (see Exh."D" & "N"), pursuant to CPLR 3022, 3042, 3043; and/or, alternatively,

(7) for a self-executing, conditional order pursuant to and under the penalties of CPLR 3124 and/or 3126 striking defendant's answer and/or directing compliance by defendant with the "plaintiffs' notice for discovery and inspection" dated February 23, 2023) (see Exh."E" & "O") by a date certain (and, if deemed necessary by the Court, holding an in camera inspection).

-Notice of motion
-Affirmation in support
Exhibits A-O
-Affirmation in opposition
-Affirmation in reply
-Memorandum of law in support
-Statement of material facts by plaintiff (NYSCEF 44)
-Counterstatement of material facts by defendant (NYSCEF 46)
-Response to defendant's counterstatement of material facts by plaintiff (NYSCEF 47)

BACKGROUND

On November 17, 2022, plaintiffs commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On February 2, 2023, the defendant interposed an answer with the KCCO.

As relevant to the instant motion, the defendant's second affirmative defense contends that the plaintiffs' culpable conduct contributed in whole or in part to their alleged damages. The third affirmative defense contends that in the event of any judgment or verdict on behalf of the plaintiff, the defendant is entitled to a set-off or verdict with respect to the amounts of any settlement made to plaintiffs or payments made to the plaintiff for medical and other expenses prior thereto.

The verified complaint alleges forty-two allegations of fact in support of five denominated causes of action. The first cause of action is for supplementary underinsured motorist benefits from the defendant. The second cause of action is denominated as "no deductible or offset." The third cause of action is for breach of contract. The fourth cause of action is denominated as "lack of good faith." The fifth cause of action is for loss of services.

The verified complaint alleges the following salient facts, among other. On Tuesday, December 5, 2017, at approximately 8:00 P.M., the plaintiff, Martin Rosenberg was sitting in his legally parked car, with the engine not running, when his car was struck in the rear by another motor vehicle on 14th Avenue in the vicinity of 44th Street, in Brooklyn, New York. Hana Nahari and Salem Nahari were the driver and owner of the other vehicle that hit the plaintiff's vehicle. On that date they had in force only limited liability coverage $100,000 per person/$ 300,000 per accident; as reflected on the annexed GEICO Indemnity Company "dec sheet" and Salem Nahari's "Affidavit of No Excess Insurance" dated November 20, 2018, attesting, that he had no other coverage besides the $100,000 afforded to him through the aforesaid GEICO Indemnity

Company policy (hereinafter the subject policy).

That at all times hereinafter mentioned, plaintiffs were Allstate's insured under his/their motor vehicle policy # XXX XXX 451[1], affording them with, inter alia, supplementary Uninsured/Underinsured Motorists" (hereinafter SUM) coverage with $ 250,000.00/500,000.00 policy limits. That the plaintiffs, were "insureds" of the defendant as defined under the terms of their policy, affording underinsured motorist coverage, which includes coverage for an accident with circumstances as the one herein. That the plaintiffs, were qualified insureds or covered persons under the defining language of the aforesaid policy; and, that a duly executed SUM application notice of intention to make claim was submitted to the defendant. That, upon information and belief, the underinsured motorist coverage limit under the aforesaid policy was $250,000.00 for each person and $ 500,000 for each accident.

As a result of the aforesaid accident, the plaintiff, Martin Rosenberg, was caused to suffer serious personal injuries. The aforesaid occurrence was caused solely by the negligence of the driver of the other motor vehicle. That, because of the above, the SUM coverage afforded to the plaintiffs under defendant's policy was thereby triggered. That because of the foregoing accident, the plaintiffs are each entitled to recover damages in the sum of the existing coverage of $ 250,000.00/$ 500,000 without any "deductible", reduction, "offset", or diminution for either the $100,000 received by the plaintiffs from GEICO on behalf of the tortfeasor, Hana Nahari and Salem Nahari and without any

[1] Redacted.

"deductible", reduction, "offset" or diminution for any alleged negligence and/or culpable conduct that may be attributable to the plaintiff, Martin Rosenberg.

That defendant has refused, delayed and/or neglect to pay its policy limits when its coverage was triggered and has not acted in good faith in view of all relevant circumstances.

LAW AND APPLICATION

Plaintiff seeks an order pursuant to CPLR 3211 (b) striking the defendant's second and third affirmative defenses. CPLR 3211 (b) authorizes a plaintiff to move to dismiss a defendant's affirmative defense on the ground that it is without merit (*see Coyle v Lefkowitz*, 89 AD3d 1054, 1055 [2d Dept 2011]). "[W]here affirmative defenses 'merely plead conclusions of law without any supporting facts,' the affirmative defenses should be dismissed pursuant to CPLR 3211(b)" *(Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010], quoting *Fireman's Fund Ins, Co. v. Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). The second affirmative defense contends that the plaintiffs' culpable conduct contributed in whole or in part to their alleged damages. The third affirmative defense contends that in the event of any judgment or verdict on behalf of the plaintiff, the defendant is entitled to a set-off or verdict with respect to the amounts of any settlement made to plaintiffs or payments made to the plaintiff for medical and other expenses prior thereto.

The instant action is based on the defendant's alleged failure to properly provide supplemental underinsured benefits to the plaintiffs. It is therefore not a negligence

action but a breach of an insurance contract by the defendant's alleged failure to comply with its purported obligations under the subject insurance contract. The concept of plaintiff's comparative fault does not apply and is therefore stricken. Moreover, the affirmative defenses at issue there was no proffer of supporting facts and merely pleaded conclusions of law. Accordingly, they should be dismissed.

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Giuffrida v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Plaintiffs have moved for an order pursuant to § 3212 granting, among other things, summary judgment on the issue of liability in this contractual insurance SUM "coverage matter; and finding, as a matter of law, that the plaintiff's culpable conduct and/or comparative negligence in the happening of the underlying accident, if there be any, plays no role whatsoever in determining an "S.U.M" damages award.

An insurer's duty to pay SUM benefits does not arise until the insured demonstrates that the limits of his or her bodily injury coverage exceeds the same coverage in the tortfeasor's policy and the limits of all available bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements (*see* Insurance Law § 3420 [f] [2]; *Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 493 [1999]; *Rodriguez v Metropolitan Prop. & Cas. Ins. Co.*, 7 AD3d 775, 776 [2d Dept 2004]). The burden is on the plaintiffs to demonstrate that the limit of his or her bodily injury coverage exceeds the same coverage in the tortfeasor's policy (*id.*). The plaintiffs' evidentiary submission did not meet this burden. Nor did it eliminate all material facts demonstrating that the defendants violated its obligations under the subject insurance policy. The branch of the plaintiffs' motion seeking summary judgment is therefore denied without regard to the defendant's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The balance of plaintiffs' motion sought sanctions against the defendant for alleged disclosure violations. Pursuant to 22 NYCRR 202.7(a), a motion relating to disclosure must be accompanied by "an affirmation that counsel has conferred with

counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR 202.7 [c]). Failure to provide an affirmation of good faith which substantively complies with 22 NYCRR 202.7 (c) warrants denial of the motion (*Winter v ESRT Empire State Building, LLC*, 201 AD3d 842 [2d Dept 2022]). The plaintiffs did not comply with 22 NYCRR 202.7 (a) and (c). The branch of the motion seeking sanction based on alleged disclosure violations is denied without prejudice.

CONCLUSION

The branch of the motion by Martin Rosenberg and Chana Rosenberg for an order pursuant to C.P.L.R. § 3211(b), dismissing the second and third affirmative defense in the answer of Allstate Fire and Casualty Insurance Company is granted.

The branch of the motion by Martin Rosenberg and Chana Rosenberg for an order pursuant to C.P.L.R. § 3212 for an order granting summary judgment in their favor on the issue of liability for the causes of action asserted against Allstate Fire and Casualty Insurance Company is denied.

The branch of the motion by Martin Rosenberg and Chana Rosenberg for an order sanctioning the defendant Allstate Fire and Casualty Insurance Company for various alleged disclosure violations is denied without prejudice.

The foregoing constitutes the decision and order of this Court.

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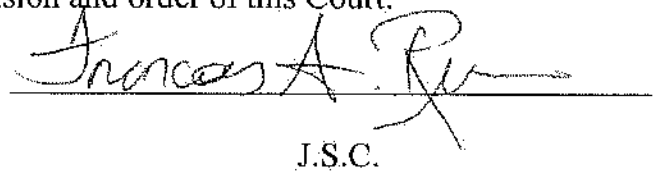

J.S.C.

HON. FRANCOIS A. RIVERA