

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 20026/07
RESPONSE INSURANCE COMPANY,	Motion
Plaintiff,	Date November 20, 2007
-against-	Motion
DAVID VITA and LITA VITA,	Cal. No. 10
Defendants.	Motion
-----	Seq. No. S001

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-5
Cross Motion.....	6-9
Reply Affirmations.....	10-15

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

That branch of plaintiff, Response Insurance Company's ("Response") motion for an order pursuant to CPLR 3215 directing the entry of judgment upon default in favor of the plaintiff against the defendant David Vita is hereby granted on default as David Vita failed to appear, submit an Answer, or move with respect to the Complaint herein (see, CPLR 3215). Plaintiff demonstrated the merits of its claim by submitting an affidavit of merits (of Robert J. Daniels, claims representative for Response) as part of its motion (see, CPLR 3215[f]; *Rafiq v. Weston*, 171 AD2d 783 [2nd Dept 1991]); *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]). Additionally, defendant David Vita failed to respond to plaintiff's instant motion.

That branch of plaintiff's motion seeking a declaratory judgment on the grounds that (1) the plaintiff has no obligation to defend and or indemnify defendant David Vita in a personal injury lawsuit commenced by Lita Vita against David Vita in the New York Supreme Court for the County of Queens entitled *Lita v. David Vita*, Index No. 6195/07 ("*the Vita Action*") because of the exclusion contained in the automobile policy issued by plaintiff

to the defendant David Vita, policy no. 1009979, effective 1-22-04 to 7-22-04 ("the Response Policy") which negates liability coverage for any person for bodily injury to the spouse of that person; (2) that the plaintiff has no obligation to defend and or indemnify defendant David Vita in the *Vita Action* pursuant to New York Insurance Law § 3420(g); (3) that the plaintiff has no obligation to defend and or indemnify defendant David Vita in the *Vita Action* because of defendant David Vita's breach of the notice provision contained in the Response Policy; and (4) that the counsel selected by plaintiff to defend defendant David Vita in the *Vita Action* can be relieved as defense counsel based on the spousal liability exclusion in the Response Policy, on New York Insurance Law § 3420(g) and on the defendant David Vita's breach of the notice condition under the Response Policy are granted on default as against defendant David Vita and as against defendant Lita Vita for the reasons stated hereinafter.

In the underlying action, the defendant, Lita Vita brought a lawsuit against her husband, the defendant, David Vita, in New York State Supreme Court for Queens County entitled *Lita Vita v. David Vita*, Index No. 6195/07 ("*the Vita Action*"). In the lawsuit, the defendant Lita Vita claims to have sustained personal injuries as the result of a motor vehicle accident which occurred in Johnston, North Carolina on April 13, 2004. She alleges that her injuries were caused by the negligence of the defendant David Vita in the operation of the motor vehicle in which she was a passenger. At the time of the accident in North Carolina, defendant David Vita was a named insured under a personal automobile policy issued by Response Insurance Company, policy no. 1009979, effective 1-22-04 to 7-22-04.

Response first argues that because of the exclusion contained in the automobile policy issued by plaintiff to the defendant David Vita, policy no. 1009979, effective 1-22-04 to 7-22-04 which negates liability coverage for any person for bodily injury to the spouse of that person, it has no obligation to defend or indemnify David Vita in the *Vita Action*. Response Insurance Company asserts that the Response Policy contains the following condition and exclusion under coverage from PP 01 79 01 96, entitled *Amendment of Policy Provisions - New York*:

II Part A - Liability Coverage

Part A is amended as follows:

F. The following exclusion is added:

We do not provide Liability Coverage for any person:

For "bodily injury" to the spouse of that person. However,

we will provide Liability Coverage for a spouse if named as a third party defendant in a legal action commenced by his or her spouse against another party.

Response next argues also that pursuant to New York Insurance Law § 3420(g), it has no obligation to defend and or indemnify defendant David Vita in the *Vita Action*.

Section 3420(g) provides in relevant part:
No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy as provided in paragraphs one and two of this subsection. This exclusion shall apply only where the injured spouse, to be entitled to recover must prove the culpable conduct of the injured spouse.

Response additionally argues that because of defendant David Vita's breach of the notice provision contained in the Response Policy, it has no obligation to defend and or indemnify defendant David Vita in the *Vita Action*. The relevant portion of the notice provision reads as follows:

Amendment of Policy Provisions - New York:

V. Part E - Duties After An Accident or Loss

Part E is replaced by the following:

Duties After An Accident or Loss

We have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us:

A. We must be notified as soon as reasonably possible of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

2. Send us copies of any notices or legal papers received in connection with the accident or loss as soon as reasonably possible.

Response alleges that the Summons & Complaint were filed in the *Vita Action* on March 7, 2007 and that David Vita acknowledged receipt of the Summons & Complaint on April 2, 2007. Response maintains that it first received notice of the Summons & Complaint and of the lawsuit in the *Vita Action* on June 29, 2007, when it was provided with a Motion to Renew and Reargue a Motion for Default which had been filed and/or served in the *Vita Action*. Finally, Response asserts that on July 9, 2007 and July 12, 2007, it advised the defendant David Vita that it would provide a courtesy defense for him for claims made in the *Vita Action*, but made it clear that the defense would be provided subject to a reservation of Response's right to disclaim coverage under the exclusions and conditions of the policy provisions.

That branch of Defendant Lita Vita's cross-motion to compel plaintiff to accept defendant, Lita Vita's Answer to the Summons & Complaint is rendered moot pursuant to the Stipulation entered into between counsel for plaintiff and counsel for defendant Lita Vita on the return date of this motion.

Defendant Lita Vita also cross-moves for a declaration that Response has a duty to defend and indemnify David Vita in the underlying action entitled *Lita Vita v. David Vita*, Index Number 6195/07. Lita Vita argues that Justice Agate rendered a decision on September 11, 2007, which decision makes clear that Response is not entitled to the relief it is seeking, and that it should be obligated to defend and indemnify David Vita. Ms. Vita further asserts that David Vita was served with the Summons & Complaint which he forwarded to his insurance carrier, Response Insurance Company, and Response failed to timely interpose an Answer. On November 14, 2006, a motion for a default judgment was made and in opposition to that motion, Response attached an affidavit of merit by David Vita stating that his vehicle was rear-ended by another vehicle. Additionally, Ms. Vita argues that Response admits that it had agreed to provide a defense for Mr. Vita, but failed to do so, leading to the default judgment against Mr. Vita. Moreover, defendant Lita Vita states that pursuant to Justice Agate's decision of September 11, 2007, David Vita's "delay in answering and appearing was caused by his insurance carrier (Response Insurance Company)." Defendant maintains that even if Response had no obligation under the policy to defend and indemnify David Vita, once it had agreed to represent him, it had a duty to do so without causing him to be in default. Finally, defendant Lita Vita contends that Response

should be collaterally estopped from now seeking to undo its own negligence in failing to interpose a timely Answer on behalf of David Vita.

In reply, Response denies that its actions or omissions caused a default judgment to be entered against Mr. Vita in the underlying action. Response submits the affidavit of Robert J. Daniels, a claims representative with Response, dated October 12, 2007, which states that Response did not receive notice of the underlying lawsuit until several months after Mr. Vita acknowledged service of the Summons & Complaint in the underlying action. Upon being notified of the underlying lawsuit, Response allegedly retained counsel to defend defendant David Vita as a courtesy pending its determination of the various coverage issues in the case, but Response still intended to file the within declaratory action. Response maintains that a copy of a letter stating such was sent to David Vita and to all counsel involved. Response further contends that the Court in the underlying action did not find that any such delay was caused by Response, or that Response was negligent in any way, particularly in light of the fact that Response is not a party to the underlying action. Response further states that the Court merely found that defendant David Vita's assertions that the delay was caused by his insurance carrier were insufficient to establish an excusable default, citing the following:

"In the case at bar, defendant [David Vita] essentially asserts that his delay in answering and appearing was caused by his insurance carrier. Such an assertion, however, is insufficient to establish an excusable default. [Citations omitted] [Emphasis added]."

Finally, Response asserts that even if Response's acts or omissions somehow contributed to a default being entered against Mr. Vita, there is still no coverage available under the policy because of the Spousal Liability exclusion under New York State Insurance Law § 3420(g), citing *GEICO v. Pagano*, 251 AD2d 452 [2d Dept 1998] and *General Acc. Ins. Co. v. 35 Jackson Avenue Corp.*, 258 AD2d 616 [2d Dept 1999].

Counsel for Lita Vita responds that the issue Response seeks to resolve in this case was the same issue decided by Justice Agate in his decision of September 11, 2007, and so that decision is dispositive of this case. Counsel maintains that in the underlying action, Lita Vita argued that the default judgment should be granted because the delay was due to the insurance

company failure, while David Vita argued that the default was due to his own failure to give notice of the lawsuit to his insurance company. Lita Vita asserts that Justice Agate found in his decision, that as a matter of fact, that the default was due to insurance company failure and not due to Response's claim that David Vita's own failure to send the Summons & Complaint to the insurance company or not timely giving notice to Response.

The Court finds that Response Insurance Company is not obligated to defend or indemnify defendant David Vita in the *Vita Action* because of the exclusion clause contained in the Response Policy which negates liability coverage for any person for bodily injury to the spouse of that person. Under the *Amendment of Policy Provisions - New York* section, it clearly states that liability coverage is not provided for bodily injury to the spouse of that person. As Lita Vita was the spouse of David Vita at the time of the accident, this exclusion exempts Response from having to indemnify or defend Defendant David Vita in the *Vita Action*. Furthermore, pursuant to New York Insurance Law § 3420(g), plaintiff has no obligation to defend and or indemnify defendant David Vita in the *Vita Action*. The underlying action, wherein it is claimed that Defendant David Vita was negligent on the date of the accident, is subject to Insurance Law § 3420(g). This provision states, *inter alia*, that no insurance policy should be deemed to insure against any liability of an insured because of death or injury to his spouse, unless there is an express provision stating such is included in the policy. "Since the underlying [negligence] claim falls within the statutory provision, and the policy issued by [Response] contains no express language specifically extending coverage to interspousal liability, that claim is exempt form coverage (*citations omitted*)." (*GEICO v. Pagano*, 251 AD2d 452 [2d Dept 1998]). As such, Response is insulated from having to provide coverage for David Vita in the *Vita Action* based on Section 3420(g).

Moreover, the Court finds that because of defendant David Vita's breach of the notice provision contained in the Response Policy, it has no obligation to defend and or indemnify defendant David Vita in the *Vita Action*. The notice provision of the Response Policy reserved the right to disclaim coverage if there is a failure to provide *inter alia*, copies of legal papers pertaining to the accident as soon as is reasonably possible, and such failure is prejudicial to Response. Defendant Vita does not deny that Response did not receive notice of the underlying lawsuit until several months after he acknowledged service of the Summons & Complaint in the underlying action. The Court agrees with Responses's contention that "[t]he entry of a default judgment against David Vita in the *Vita Action* materially

prejudices Response in its ability to investigate and defend against this claim." Therefore, Response has no duty to defend or indemnify David Vita in the *Vita Action* based on the breach of notice condition.

The Court finds that despite defendant Lita Vita's contentions, Justice Agate's decision of September 11, 2007, is not dispositive of the issues in the instant motion. Said decision was resolving a motion by Lita Vita against David Vita for a default judgment; and a cross motion by David Vita to vacate his default in answering and appearing and permitting him to interpose an Answer. Despite defendant Lita Vita's contention in the instant motion, Justice Agate did not make a determination as to the cause of the default. The decision merely stated that defendant David Vita's assertion that the delay in answering and appearing was the fault of his insurance carrier, is insufficient to establish an excusable default. Justice Agate did not make a determination as to the truthfulness of Mr Vita's claims, but merely stated that the claims were not adequate to excuse the default.

Furthermore, the Court finds that very shortly after being notified of the *Vita Action*, Response sent letters to David Vita which stated that even though they would provide a defense for Mr. Vita, such defense would be provided *only subject to* a full reservation of Response's right to disclaim coverage pursuant to the exclusions and conditions of the policy. Therefore, Response never *unconditionally* agreed to defend David Vita, but rather merely agreed to continue its investigation of the claims under the policy for this accident, but with a full reservation of rights to disclaim coverage under the Policy.

Accordingly, the portion of plaintiff's motion remaining after the Stipulation entered into on the return date of the motion is granted in its entirety and the defendant Lita Vita's cross motion is denied in its entirety, and it is hereby

ORDERED, that the branch of the motion by plaintiff, Response Insurance Company ("Response") for an order pursuant to CPLR 3215 directing the entry of judgment upon default in favor of the plaintiff against the defendant, David Vita is hereby granted on default as to liability only, as David Vita failed to appear, submit an Answer, or move with respect to the Complaint herein (*see*, CPLR 3215); and it is further

ORDERED, that the branch of plaintiff's motion seeking a declaratory judgment that the plaintiff has no obligation to defend and/or indemnify defendant David Vita in a personal injury

lawsuit commenced by Lita Vita against David Vita in the New York Supreme Court for the County of Queens entitled *Lita v. David Vita*, Index No. 6195/07 ("*the Vita Action*") because of the exclusion contained in the automobile policy issued by plaintiff to the defendant David Vita, policy no. 1009979, effective 1-22-04 to 7-22-04 ("*the Response Policy*") which negates liability coverage for any person for bodily injury to the spouse of that person is granted; and it is further

ORDERED, that the branch of plaintiff's motion seeking a declaratory judgment that the plaintiff has no obligation to defend and/or indemnify defendant David Vita in the *Vita Action* pursuant to New York Insurance Law § 3420(g) is granted; and it is further

ORDERED, that the branch of plaintiff's motion seeking a declaratory judgment that the plaintiff has no obligation to defend and/or indemnify defendant David Vita in the *Vita Action* because of defendant David Vita's breach of the notice provision contained in the Response Policy is granted; and it is further

ORDERED, that the branch of plaintiff's motion seeking a declaratory judgment that the counsel selected by plaintiff to defend defendant David Vita in the *Vita Action* can be relieved as defense counsel based on the spousal liability exclusion in the Response Policy, on New York Insurance Law § 3420(g) and on the defendant David Vita's breach of the notice condition under the Response Policy is granted.

Defendant Lita Vita's cross motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 10, 2007

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Howard G. Lane, J.S.C.