

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 2

<u>MARIA VELASQUEZ,</u>	X	Index No. 12308-07
Plaintiff,		Motion Seq. Nos.: 1 & 2
- against -		Motion Cal. Nos. 28 & 29
GAB ROBINS NORTH AMERICA, INC. _____		By: Weiss, J.
and BIVONA & COHEN, P.C.,		Dated: Nov. 26, 2007
_____ Defendants.		
_____	X	

GAB Robins North America, Inc. ("GAB") has moved for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it. Defendant Bivona & Cohen, P.C. has moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against it.

The complaint and the plaintiff's submissions allege the following: On or about August 18, 2000, Maria Velasquez began a personal injury action in the New York State Supreme Court, County of Queens against the Metropolis Night Club and two other defendants (Velasquez v Metropolis Night Club, Index No. 19677/00). Bivona & Cohen, P.C., a law firm, represented Metropolis Night Club in the action. On or about August 30, 2001, Bivona & Cohen served a discovery response upon the attorney for Velasquez stating that the Reliance Insurance Company provided insurance coverage for Metropolis Night Club in the amount of \$2,000,000. The Reliance Insurance Company subsequently became insolvent, and the New York State Liquidation Bureau became an ancillary receiver.

GAB administered the claim made by Velasquez for the New York State Liquidation Bureau. In July, 2003, defendant GAB sent a letter to defendant Bivona & Cohen and Metropolis Night Club notifying them that the insurance policy had been issued by "a non-admitted carrier in the State of New York." Defendant GAB's letter advised Metropolis Night Club to "hire your own counsel to protect your interests." Neither defendant GAB nor defendant Bivona & Cohen informed the plaintiff's attorney that there was a problem with coverage. On February 19, 2004, the answer of Metropolis Night Club was dismissed for failure to make disclosure. On August 24, 2005, Bivona & Cohen made a settlement offer of \$50,000 on behalf of the Metropolis Night Club, inducing the attorney for Velasquez to discontinue discovery efforts against the other defendants in the personal injury action and to proceed to an inquest against the night club. However, on August 26, 2005, the day of jury selection, Bivona & Cohen withdrew the offer, stating for the first time to the attorney for Velasquez that the night club did not have insurance coverage. On October 11, 2005, the Honorable Laura Blackburne issued an order finding that GAB was "estopped from disclaiming coverage of Metropolis Night Club" and directing a trial on the issues of damages owed by the night club. After an inquest, Justice Blackburne rendered a decision finding Metropolis Night Club liable in the amount of \$130,000, and on March 10, 2006, Velasquez entered a judgment for \$155,290.48, which remains

unsatisfied.

Bivona & Cohen alleges the following: In September 2003, defendant GAB authorized it to resume representing Metropolis Night Club. A Bivona & Cohen telephone memo dated September 18, 2003 reads in relevant part: "This N.Y. case was sent back to Illinois office accidentally; we may resume work on it; attempt settlement; send copy of last report." In November 2003, defendant GAB called defendant Bivona & Cohen and stated that Metropolis Night Club had a New York insurance policy. A Bivona & Cohen telephone memo dated November 4 reads in relevant part: "determination of N.Y. based policy confirmed." However, on August 25, 2005, defendant GAB sent defendant Bivona & Cohen a letter disclaiming coverage for Metropolis Night Club because (1) its policy was issued by Reliance of Illinois, which is not an admitted carrier in New York and (2) the policy's term had ended prior to Velasquez's accident. Bivona & Cohen withdrew its settlement offer, notified the court, and moved to be relieved as counsel.

On May 11, 2007 Velasquez brought the instant action against GAB and Bivona & Cohen seeking to hold them liable for the judgment rendered in the underlying personal injury action. The plaintiff argues that Bivona & Cohen and GAB are liable to her pursuant to the doctrine of equitable estoppel. The plaintiff does not contend that there is any other basis for holding the defendants liable, and she acknowledges that this case is not a

direct action against an insurer for an unsatisfied judgment. (See, Insurance Law § 3420[a][2]; Gottlieb v Blue Ridge Ins. Co., 300 AD2d 541.) She does not challenge GAB's allegation that it served merely as a claims administrator. She does not attempt to argue legal malpractice against Bivona & Cohen, presumably because of the lack of an attorney client relationship (see, Moran v Hurst, 32 AD3d 909), nor does she argue negligence against either defendant.

In regard to Bivona & Cohen, CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1.a defense is founded on documentary evidence\*\*\*." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim\*\*\*." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700,702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.) Leaving aside for the moment the issue of whether plaintiff Velasquez is making proper use of the doctrine of equitable estoppel, "[t]he elements of estoppel are with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that

such conduct will be acted upon by the other party; and (3) knowledge of the real facts.” (Airco Alloys Division, Airco Inc. v Niagara Mohawk Power Corp., 76 AD2d 68, 81; Rashbaum v Tax Appeals Tribunal of State of N.Y., 229 AD2d 723; Walls v Levin, 150 AD2d 873.) The documentary evidence in this case establishes that despite the conflicting messages received from GAB between July and November 2003, the last of which allowed coverage, Bivona & Cohen did not have knowledge that there was no coverage for Metropolis Night Club until the eve of trial in the underlying action. The court notes that the recorded telephone messages and letters submitted by Bivona & Cohen are not hearsay because they are not offered to prove the truth of their content. (See, U.S. v Dupre, 462 F3d 131.)

\_\_\_\_\_ In regard to both defendant Bivona & Cohen and defendant GAB, when determining a motion brought pursuant to CPLR 3211(a)(7), the court “must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory \*\*\*.” (1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770, 770-771; Esposito-Hilder v SFX Broadcasting Inc, 236 AD2d 186.) Plaintiff Velasquez has not adequately stated a cause of action based on equitable estoppel against the two defendants in this action. The doctrine of equitable estoppel cannot be invoked to create a right

that does not already exist. (See, Adirondack Park Agency v Bucci, 2 AD3d 1293; Ruiz v Chwatt Associates, 247 AD2d 308; Gregory v Colonial DPC Corp., III, 234 AD2d 419; Scheurer v New York City Employees' Retirement System, 223 AD2d 379; Hauben v Goldin, 74 AD2d 804.) "The doctrine may be applied in certain unusual factual situations 'when failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right.'" (Wood v Cordello, 91 AD2d 1178, 1179, quoting Hauben v Goldin, supra, 805.) In the case at bar, neither defendant Bivona & Cohen nor defendant GAB issued an insurance policy to the Metropolis Night Club, and no party has a right to insurance coverage from them. The plaintiff's reliance on Serio v U.S. Fire Ins. Co. (41 AD3d 459) is misplaced. In Serio (supra), the State Superintendent of Insurance, as the ancillary receiver of Credit General Insurance Company, a private insurance company, brought an action for a judgment declaring that he was not obligated to defend and indemnify an insured in an underlying personal injury action. Credit General had assumed the defense of its insured in the underlying action without reserving the right to deny coverage. The Appellate Division, Second Department, finding that the insured had been prejudiced by the Superintendent's disclaimer of coverage made after liability had been established in the underlying action and shortly before the damages trial, held that the Superintendent was estopped from denying coverage.

However, the Appellate Division did not invoke the doctrine of estoppel to create a right of coverage which had not previously existed. Although the State Insurance Fund is a state agency, the appellate court noted, it has a function similar to that of a private insurance carrier. (See, Royal Ins. Co. of America v Commissioners of State Ins. Fund, 289 AD2d 807.) Apparently the appellate court viewed the Superintendent of Insurance, the official liquidator of all insolvent insurance companies (see, 68 NYJur2d, "Insurance," § 286), as standing in the shoes of Credit General, administering its assets, and functioning similar to and on behalf of the private insurance carrier. (See, Ins. Law §§7408, 7409, 7410.) The Appellate Division did not employ the doctrine of equitable estoppel to create a right of coverage against a party which was not an insurer or the substitute for the insurer, as plaintiff Velasquez seeks to do here. Finally, the court notes that the order of the Honorable Laura Blackburne finding that GAB was "estopped from disclaiming coverage of Metropolis Night Club" means only that GAB could not deny that Reliance had provided coverage for the injury to Velasquez.

Accordingly, the motions are granted.

Short form order signed herewith.

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J.S.C.