

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

WARREN WELLS, x Index
Number 3379 2003

Plaintiff,

Motion

Date November 30, 2004

- against -

Motion

Cal. Number 40

COUNTRY-WIDE INSURANCE COMPANY,
BIRANDRANAATH BECHAN, GOVERNMENT
EMPLOYEES INSURANCE COMPANY, MARIE
M. COONS, THE TRAVELERS INDEMNITY
COMPANY OF CONNECTICUT, DROPATI
HAIMNARINE, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY AND
SURUJNARINE BECHAN,

Defendants.

x

The following papers numbered 1 to 12 read on this motion by the
defendant Country-Wide Insurance Company for summary judgment.

	<u>Papers Numbered</u>
<u>Notice of Motion - Affidavits - Exhibits</u>	1 - 6
Answering Affidavits - Exhibits	7 - 9
Replying Affidavits - Exhibits	10 - 12

Upon the foregoing papers it is ORDERED that the motion is
granted, and the complaint as against the defendant Country-Wide is
severed and dismissed.

This is a declaratory judgment action, in which the plaintiff
claims to have been injured in an automobile accident caused by
Balram Bechan. Plaintiff has commenced a separate action for his
injuries, under Index No. 23378/2002. In that action Bechan was
defended by General Assurance Company, which tendered a policy of
\$25,000, in full settlement of the action. Plaintiff claims here,
inter alia, that the defendants Country-Wide and State Farm had
separate policies with the defendants Birandranauth Bechan and

Dropati Haimnarine, which apply to the accident. Country-Wide now moves for summary judgment. It shows the affidavit of one of its employees, to the effect that the policy with Birandranauth Bechan had been in effect prior to the occurrence, but that the policy did not cover the offending auto, and hence was not applicable to the accident; that no policies in effect at the time of the accident covered Balram Bechan; and that Country-Wide properly disclaimed coverage due to late notice of the accident and the action against the Bechan defendants. The employee's affidavit further shows that a policy with Haimnarine had existed, but had been canceled over three years prior to the accident, at Haimnarine's request. Moreover, the policy with Haimnarine did not cover the offending vehicle.

The court notes, first, that the complaint does not allege, and the records of the court do not show, that a judgment has been entered in the plaintiff's favor in the underlying personal injury action. Thus, the plaintiff would not appear to have standing to maintain this action, pursuant to the rule enunciated by the Court of Appeals in Lang v Hanover Ins. Co., 3 NY2d 350 [2004]. There, the Court of Appeals found the recovery of a judgment in the plaintiff's favor to be a condition precedent to suit. Here, the records of the court indicate that the underlying action was dismissed in the Trial Scheduling Part on December 14, 2004.

The standing issue was not raised by the parties, inasmuch as the motion was submitted less than two weeks after the decision in Lang was issued. It is not necessary to allow the parties to brief this issue, since the facts which bring this case within the ruling of Lang are not in dispute and could not be avoided by the plaintiff. Therefore, the motion by the defendant State Farm must be granted.

The court notes that the motion would have to be granted on its merits, regardless of the rule in Lang, for the reasons which follow.

As was stated in Alvarez v Prospect Hospital, 68 NY2d 320 [1986]:

"the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853; Zuckerman v City of New York, 49 NY2d 557, 562; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med.

Center, supra, at p 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, supra, at p 562)."

Here, the movant has made its prima facie showing of entitlement to judgment by the affidavit of its employee. It thereupon became incumbent on the plaintiff to show evidence demonstrating the existence of issues of fact. The plaintiff submits only the affirmation of his counsel, who describes the affidavit of Country-Wide's employee as "self-serving," but does not otherwise show its unreliability, and which relies on the fact that the co-defendant State Farm has stated that its policy was canceled and replaced by one issued by Country-Wide. This cannot be considered proof that Country-Wide's policies with either Bechan or Haimnarine provided coverage for this accident, and so plaintiff has not demonstrated that there are triable issues of fact.

Since the action against Country-Wide is dismissed for failure of a condition precedent which deprives the plaintiff of standing to sue, Country-Wide is not entitled to a declaration that it did not insure the Bechan vehicle (see, Hirsch v Lindor Realty Corp., 63 NY2d 878, 881 [1984]).

Dated: March 4, 2005

J.S.C.