Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7

NASSAU COUNTY

STATE FARM INSURANCE COMPANY,

Plaintiff,

-against-

ROSEANN LEPPLA, DANIEL B. LEPPLA, DANIEL LEPPLA, MICHAEL MONDELLI and IAN HINTZE,

Defendant(s).

MOTION DATE: 3/11/08
MOTION SEQ. NO.: 004, 005

INDEX NO.: 1783/06

The following papers read on this motion:

Amended Notice of Motion.....1
Notice of Cross Motion.....2
Affirmation in Opposition to State Farm's Motion and in Support of the Leppla Cross Motion.....3
Affirmation in Reply and in Opposition to Cross-Motion.....4
Affirmation in Reply to State Farm's Opposition to the Cross Motion.....5
Reply Affirmation in Support of Cross-Motion.....6
Sur-Reply in Further Support and in Opposition to Cross-Motion.....7

Motion by plaintiff STATE FARM INSURANCE COMPANY and cross-motion by defendants ROSEANN LEPPLA, DANIEL B. LEPPLA, and DANIEL LEPPLA for summary judgment pursuant to **CPLR §3212** are determined as follows.

This is a declaratory judgment action in which plaintiff STATE FARM INSURANCE COMPANY ("STATE FARM") seeks a determination of its obligations under a policy of automobile insurance issued to defendant ROSEANN LEPPLA. Specifically, STATE FARM seeks a declaration that it is not obligated to defend or indemnify MICHAEL MONDELLI ("MONDELLI") or ROSEANN LEPPLA ("ROSEANN"), DANIEL B. LEPPLA ("DANIEL JR.), and DANIEL LEPPLA (collectively, the "LEPPLA defendants") in connection with a personal injury action filed

by IAN HINTZE ("HINTZE") on October 26, 2005 in Supreme Court, Nassau County under Index Number 17026/05 (the "Personal Injury Action").

The Personal Injury Action arose out of an altercation that occurred on Halloween night, November 1, 2004 between two groups of youths, traveling in separate cars along adjacent lanes on Montauk Highway. DANIEL JR. was driving the STATE FARM insured vehicle owned by his mother ROSEANN, in which MONDELLI was a passenger. HINTZE was a passenger in the other vehicle. DANIEL JR. gives the following account, which is substantially undisputed. According to DANIEL JR., when the HINTZE vehicle pulled up alongside the LEPPLA vehicle, a verbal confrontation ensued. A passenger from the LEPPLA vehicle threw an egg into the HINTZE vehicle, and an occupant of the HINTZE vehicle threw a beer bottle at the LEPPLA vehicle, which hit DANIEL JR. in the head. The HINTZE vehicle sped away and DANIEL JR. pursued it. Ultimately, as the vehicles were traveling side by side, MONDELLI shot a projectile from a paint ball gun into the HINTZE vehicle, which struck and injured HINTZE in the eye.

By Short Form Order, dated September 1, 2006 and entered October 3, 2006, this Court granted STATE FARM's motion for a default judgment pursuant to **CPLR §3215** against defendant MONDELLI, declaring that STATE FARM had no obligation to defend or indemnify MONDELLI in connection with the Personal Injury Action.

STATE FARM now seeks summary judgment pursuant to **CPLR §3212** declaring that STATE FARM has no obligation, under the applicable automobile insurance policy, to defend and/or indemnify the LEPPLA defendants in connection with the Personal Injury Action. (STATE FARM maintains that it is providing a defense, with a reservation of rights, pursuant to the LEPPLA's homeowners insurance policy.) STATE FARM denies automobile liability coverage for HINTZE's bodily injury claim on the following grounds: (1) the injury was not caused by an "accident" and is not within the scope of coverage afforded by the policy; (2) the injury did not result or arise "from the ownership, maintenance, or use... of the insured's vehicle;" (3) the passenger, MONDELLI, who caused the injury was not an "insured" under the policy; and (4) the passenger's conduct was an intentional act and is thus excluded from coverage under the policy's exclusions. The LEPPLA defendants cross-move for summary judgment declaring that STATE FARM is obligated to defend the LEPPLA defendants in the Personal Injury Action under the terms of the automobile insurance policy, and to reimburse the LEPPLA defendants for the reasonable legal fees incurred in defending this declaratory judgment action.

The applicable policy provides liability coverage for bodily injury to others "caused by an accident resulting from the ownership, maintenance or use" of the insured vehicle. [Motion Exhibit D.] Setting aside the question of whether or not the event that

caused HINTZE's injury could be deemed an accident from the point of view of the LEPPLA defendants [*see* **Agoado Realty Corp. v. United Intern. Ins. Co.**, 95 N.Y.2d 141], the Court turns to the question of whether or not such occurrence can be said to have resulted from the ownership, maintenance or use of the vehicle.

"In the context of automobile liability insurance coverage, whether an accident has resulted from the use or operation of a covered automobile requires consideration of a three-part test: 1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury." **Zaccari v. Progressive Northwestern Ins. Co.**, 35 AD3d 597, 599, quoting **U.S. Oil Ref. & Mktg. Corp. v. Aetna Cas. & Sur. Co.**, 181 AD2d 768, 768-769 (internal quotations omitted).

The defendants argue, in essence, that use of the car as a means of transportation to the situs of the injury, and the place from which the projectile was launched, makes such use and operation a substantial factor in causing the injury. Further, the injury-producing incident would not have occurred but for DANIEL JR.'s negligence in the operation of his vehicle; namely, his taking the car out for a "joy ride" on Halloween night, his failure to control his passengers, his leaving a paint ball gun in the back seat, and his pursuit of the HINTZE vehicle. For that reason, and because the actual use of the vehicle had not terminated -- the occupants were in the vehicle and the vehicle was moving when the incident occurred – defendants urge the Court to find that the occurrence arose out of the use of the automobile.

However, "[n]ot every injury occurring in or near a motor vehicle is covered by the phrase 'use and operation'. The accident must be connected with the use of an automobile qua automobile. . . . Where the operation or driving function of the vehicle itself is not the proximate cause of the injury, the occurrence does not arise out of its use or operation." **Olin v. Moore,** 178 AD2d 517, quoting **United Services Auto. Ass'n v. Aetna Cas. & Sur. Co.,** 75 AD2d 1022. *Cf.,* **Levitt v. Peluso,** 168 Misc.2d 239.

In **United Services Auto. Ass'n,** 75 AD2d 1022, the Court held that, where a 12-year-old boy was allegedly struck in the eye by a wadded tinfoil gum wrapper while he was riding in the insured's vehicle with five other children, the automobile insurer had no duty to defend or indemnify the driver for any liability arising from the injury. "The fact that the plaintiff was injured by an assault while riding as a passenger does not bring the

claim within coverage since the use of the motor vehicle must be the proximate cause of plaintiff's injuries to come within the ambit of the "use or operation" clause." **Id.** at 510.

The facts in the case at bar are materially indistinguishable from those of **United Services Auto. Ass'n.** Both the case at bar and **United Services Auto. Ass'n** involve underlying claims of negligent supervision of the vehicle's passengers. In both cases, the negligence attributable to the driver did no more than "contribute to the condition which ultimately resulted in the ... injury." *See* **Zaccari,** 35 AD3d at 597. Even if it could be shown that DANIEL JR. drove negligently in pursuit of the HINTZE vehicle, the driving function did not cause the injury. In both the case at bar and the **United Services Auto. Ass'n** case, the vehicle itself was not the instrumentality that caused the injury, as in a collision, malfunction, or loss of control. Rather, the vehicle was merely the location of, and incidental to, the injury-causing assault. *See also* **Empire Ins. Co. v. Schliessman,** 306 AD2d 512.

Accordingly, the Court finds that the STATE FARM automobile insurance policy does not cover liability for HINTZE's injury in the incident of November 1, 2004, because the injury did not result from the use of the automobile, as that concept has been applied in New York appellate jurisprudence. Therefore, the Court need not reach the other grounds for disclaimer proffered by STATE FARM. The Court renders no opinion on the applicability of the STATE FARM homeowners policy.

Based upon the foregoing, it is

ORDERED, that STATE FARM's motion for summary judgment pursuant to **CPLR §3212** is **granted.** And it is further

ORDERED, that the LEPPLA defendant's cross-motion for summary judgment pursuant to **CPLR §3212** is **denied.**

Settle judgment on notice.

ENTER:

Dated: 5/28/08

J.S.C.

ENTERED

JUN 27 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE