

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PRESENT: _____

Justice

PART 35

Ronac Griffin

INDEX NO.

100009/03

MOTION DATE

1/10/05

MOTION SEQ. NO.

002

Assicurization Generali

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion / Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

FEB - 9 2005

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Assicuriazioni Generali, United States Branch
to dismiss the Complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the Complaint in its
entirety; and it is further

ORDERED that defendant Assicuriazioni Generali, United States Branch shall serve a
copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 2/4/05

HON. CAROL EDMEAD *S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
RONAE GRIFFIN, an Infant, by her Guardian
SANDRA GRIFFIN,

Plaintiff,

-against-

ASSICURIAZIONI GENERALI, UNITED STATES
BRANCH and STEVEN KRUP, as ADMINISTRATOR
of the Estates of JOSHUA KRUP and ELIZABETH KRUP,

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

Index No.100009/2003

DECISION/ORDER

FILED
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MEMORANDUM DECISION

In this declaratory judgment action, plaintiff seeks a declaration that plaintiff and defendant Steven Krup,¹ as Administrator of the Estates of Joshua Krup and Elizabeth Krup, are entitled to liability insurance coverage under a policy issued by defendant Assicuriazioni Generali, United States Branch ("Generali") to its insureds Joshua and Elizabeth Krup (the "Policy") with respect to a personal injury claim of plaintiff (*discussion infra at p. 2*). Plaintiff also seeks a declaration that Generali must pay to plaintiff, on behalf of Steven Krup, the entire limits under the Policy regarding the personal injury claim "as that claim may be ultimately adjudicated through final judgment or court-ordered stipulation of settlement" Generali now moves to dismiss the Complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action. This motion requires the Court to apply the recently decided Court of Appeals decision in *Lang v Hanover Ins. Co.*, (3 NY3d 350 [2004]).

¹ I. Steven Krup was sued herein as Steven Krup.

Background

This declaratory judgment action is the result of an underlying personal injury action (the “Tort Action”), in which plaintiff Ronae Griffin, an Infant by her Guardian Sandra Griffin, sought damages for injuries plaintiff sustained from exposure to lead paint and dust while she resided in a premises owned by Joshua Krup and Elizabeth Krup (the “Krups”), and managed by Milton Manning. After commencement of the Tort Action, Joshua Krup died, and Elizabeth Krup was substituted as Administratrix of his estate. The Tort Action was tried over three days in January 2002. During the pendency of the trial, but before the trial of the Tort Action was concluded, it was discovered that Elizabeth Krup had died prior to the commencement of the trial, on November 9, 2001. Counsel for Elizabeth Krup, individually and as Administratrix, moved for a stay of the proceedings. The Trial Court² denied the application, and the jury subsequently awarded plaintiff \$2.5 million as against defendants Krups, while absolving the managing agent, Milton Manning, of liability. Thereafter, plaintiff in the Tort Action moved for the entry of judgment pursuant to the jury verdict, and to substitute for the defendant Elizabeth Krup, Steven Krups as Administrator of her Estate, *nunc pro tunc*, which was opposed by counsel for the Krups.³ At oral argument on the return date of the motion, counsel for Steven Krup appeared and advised counsel for the Krups to withdraw its opposition to Steven Krup’s appointment; it was advised that Steven Krup and plaintiff’s law firm, Fitzgerald & Fitzgerald (the “Fitzgerald Firm”) reached an agreement, in which the Fitzgerald Firm agreed to hold Steven

² The trial judge has since retired from the bench. The parties declined to have the trial judge, now sitting as a JHO, decide this matter.

³ Plaintiff also requested that the Trial Court amend the caption to reflect Steven Krup as Administrator of the Estate of Elizabeth Krup and, and the Estate of Joshua Krup.

Krup and the Estates of Joshua and Elizabeth Krup harmless, and in exchange, Steven Krup agreed to be substituted as Administrator (the "Agreement"). The Trial Court granted plaintiff's motion for the substitution "without opposition" and reserved entry of judgment, pending further information on available insurance coverage to satisfy the judgment.

The instant declaratory action by plaintiff against Generali for a determination regarding the scope of insurance coverage under the Policy ensued, and was assigned to Trial Court as well.⁴

Subsequently, on August 17, 2004, Generali moved by order to show cause to intervene in the Tort Action in order to oppose plaintiff's pending application for the entry of judgment. Generali essentially argued that the Agreement served as a basis for Steven Krup's cooperation in facilitating the entry of judgment detrimental to the Krups' insurance carriers, such as Generali, and that the Agreement was the by-product of fraud and collusion.

It is against this backdrop that the Court must now determine whether the instant declaratory judgment action may be maintained. The Court initially finds that notwithstanding the procedural history of this matter, the Court's determinations of plaintiff's motion for the entry of judgment and Generali's motion to intervene in the Tort Action, are not dispositive as to whether Generali's instant motion to dismiss should be granted due to the plaintiff's alleged lack of standing to maintain this action.

⁴ Plaintiff commenced this action on February 24, 2003.

Generali's Motion to Dismiss

Generali contends that plaintiff's instant declaratory action does not provide a basis upon which relief may be granted, in that plaintiff lacks standing to make a claim under the Policy. According to Generali, the provisions of Insurance Law §3420, which provide a right of an injured party to sue an insurer, as plaintiff seeks to do, requires that there be a judgment, notice of that judgment to the insurer, and the failure of the insurer to satisfy that judgment within thirty (30) days. Under First Department caselaw, until such time, a party alleging injuries under a policy issued to another party which the injured party claims covers the risk which caused his or her injury enjoys neither legal standing to make a claim under the policy nor rights under an insurance policy to which she is a stranger.

In opposition, plaintiff argues that Generali's motion is an untimely attempt to reargue a prior order which denied the same relief again sought by defendant on the same grounds. According to plaintiff, Generali's prior application for the same relief resulted in denial, in which the Trial Court pointed out that this action was not one brought pursuant to Insurance Law §3420(b) as a direct action against an insurance carrier for payment of an unsatisfied judgment, but rather, a declaratory judgment action in which there is a justiciable controversy over whether a liability insurance policy covers the damages sustained by plaintiff. Plaintiff further contends that standing to maintain the present action is not premised upon the Insurance Law cited, but on CPLR §3001, which empowers this Court to render a declaratory judgment whether or not relief could be claimed. According to plaintiff, the Second Department recognizes an injured person's interest in a disclaimer dispute regarding insurance coverage, and therefore, allows the injured person, i.e., the plaintiff herein, to bring a declaratory action to determine the effect of the Policy.

Plaintiff also argues that since the entry of judgment is being withheld pending determination of the issue of what insurance coverage is available, it would be unfair to require plaintiff's damages claims to remain in limbo indefinitely. And, if the declaratory judgment action cannot go forward, Generali will receive an undeserved windfall. Thus, the Trial Court's prior rejection of Generali's claimed grounds for relief is the law of the case, and should be undisturbed.⁵

In reply, Generali argues that this motion is not one for reargument. The earlier motion, and subsequent bench ruling were made in a Special Proceeding to which the instant declaratory judgment action is a successor. A timely Notice of Appeal of this Court's bench ruling was served. However, a question exists whether such decision is appealable as the Special Proceeding was converted into a declaratory judgment action.

Analysis

At the outset, the Court determines that Generali's motion to dismiss the complaint herein cannot be deemed as one to reargue. Although Generali moved for the same relief in the Special Proceeding, which was converted into the instant declaratory judgment action, the prior Court ruled that such motion was "deemed withdrawn without prejudice." (Transcript dated February 13, 2003; pages 4-5). Contrary to plaintiff's contention, the So-Ordered Transcript of February 13, 2003 contains no indication that the Trial Court denied Generali's application to dismiss the complaint. Although plaintiff claims that in "denying" Generali's application, the Trial Court "pointed out" that such action was not one brought pursuant to Insurance Law §3420(b) as a direct action against an insurance carrier for payment of an unsatisfied judgment, but rather, a

⁵ Plaintiff subsequently requested that the Court refrain from determining Generali's motion to dismiss, and, instead, determine Generali's motion to intervene in the Tort Action, and enter judgment in the underlying Tort Action (*see discussion infra at p.7*).

declaratory judgment action in which there is a justiciable controversy over whether a liability insurance policy covers the damages sustained by plaintiff, the Transcript is devoid of any such statement by the Court. Therefore, the issue as to whether plaintiff may maintain this action for declaratory relief has not been previously determined.

As to the merits, the recent Court of Appeals case, *Lang v Hanover Ins. Co.*, (3 NY3d 350 [2004]), resolved the conflict in the Departments as to whether a non party to the insurance policy may commence a declaratory judgment action against the insurer for defense or payments under the policy. Prior to *Lang*, the First Department held that injured parties, who are mere “strangers to the insurance contracts” cannot maintain a direct action against the tortfeasor’s insurer to determine the scope of defense or coverage under the insurer’s policy until the condition precedents to suit pursuant to Insurance Law §3420 (a) (2) are met (*see Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6 [1st Dept 1992]). The Second Department, as pointed out by plaintiff, held otherwise (*see Watson v Aetna Casualty & Surety Co.*, 246 AD2d 57 [2d Dept 1997]). The Court in *Lang* settled the issue, holding that since “a judgment is a statutory condition precedent to a direct suit against the tortfeasor’s insurer,” a non party to an insurance policy cannot commence a declaratory judgment action until certain preconditions to suit are satisfied. The Court of Appeals stated:

“Insurance Law § 3420 therefore grants an injured party a right to sue the tortfeasor’s insurer, but only under limited circumstances -- the injured party must *first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company* (see *Thrasher v U.S. Liab. Ins. Co.*, 19 N.Y.2d at 166). As Chief Judge Cardozo described it, ‘the effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater’ (see *Coleman v New Amsterdam Cas. Co.*, 247 NY at 275). Once the statutory

prerequisites are met, the injured party steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company (Emphasis added).
(at 7-8)

In light of this recent holding, plaintiff now requests that the Court refrain from determining Generali's motion to dismiss the declaratory judgment action, and, instead, entertain Generali's motion to intervene in the Tort Action, and enter judgment in the underlying Tort Action in order that the condition precedent to the instant declaratory action may be satisfied. As such, plaintiff's declaratory judgment action could proceed toward final resolution. Plaintiff notes that the declaratory judgment action has already been tried by the Court and post trial briefs already submitted.

Thus, the issues now become: (1) Does *Lang* have retroactive effect to plaintiff's declaratory action which was commenced with preconditions to suit outstanding? If so, (2) How would plaintiff's prematurely commenced action against the defendant insurer Generali be affected if the condition precedent to suit, namely, entry of judgment, is satisfied *after* the commencement of such action?

The Court observes that Generali moved for dismissal arguing lack of standing due to plaintiff's failure to satisfy conditions precedent to suit under First Department caselaw, and such theory is now approved under *Lang*. Also, it cannot be contested that the Trial Court reserved determination of Generali's instant motion, with the parties' approval, pending the Court of Appeals' determination of *Lang*. The parties contemplated that the determination on Generali's motion to dismiss would be controlled by the determination by the Court of Appeals in *Lang*. Thus, the parties must now live with the result of *Lang*, and its effect.

Furthermore, even if this Court directed the entry of judgment in the Tort Action, to date such judgment has not been entered, nor served upon Generali with notice or entry, and it cannot

be said that such judgment remained unsatisfied for 30 days. Also, in her Complaint, plaintiff seeks a declaration that Generali must pay to plaintiff, on behalf of Steven Krup, the entire policy limits under the Policy "as that claim *may be ultimately adjudicated* through final judgment or court-ordered stipulation of settlement" (Emphasis supplied). Thus, plaintiff's failure to allege in the Complaint that the required conditions precedent to suit were satisfied, warrants dismissal pursuant to CPLR 3211(a)(7). And, this Court is not inclined to venture into a time machine and rewrite history to enable plaintiff to satisfy conditions precedent to its prematurely commenced action.

Accordingly, it is hereby

ORDERED that the motion by defendant Generali to dismiss the Complaint pursuant to CPLR 3211(a)(7) is granted, and the Complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: February 4, 2004

A handwritten signature in black ink, appearing to read 'Carol Edmead', is written over a horizontal line.

Hon. Carol Edmead, J.S.C.

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