*2012 N.Y. Misc. LEXIS 1543, *; 2012 NY Slip Op 30842U, **

[1]** EDGAR GIRALDO and RAMON MENDEZ, Plaintiff, - against - WASHINGTON INTERNATIONAL INS. CO., Defendant. Index No.: 6034/10

6034/10

SUPREME COURT OF NEW YORK, QUEENS COUNTY

2012 N.Y. Misc. LEXIS 1543; 2012 NY Slip Op 30842U

March 30, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: Giraldo v. Washington Intl. Ins. Co., 33 Misc. 3d 1207A, 2011 N.Y. Misc. LEXIS 4765 (2011)

CORE TERMS: surety, self-insured, unsatisfied, insurer, insured, taxi, driver, cab, surety bonds, notice of entry, affirmative defense, underlying action, bond issued, motor vehicle, yellow, notice, unpaid, summary judgment, direct action, condition precedent, receive notice, tortfeasor's, defaulted, guarantor, offending, obligated, commence, serving, money judgment, inquest

JUDGES: **[*1]** PRESENT: HON. ROBERT J. MCDONALD, Justice.

OPINION BY: ROBERT J. MCDONALD

OPINION

MEMORANDUM

On October 29, 2007, plaintiff, Edgar Giraldo, was operating his vehicle on Fourth Avenue, near its intersection with E. 10th Street in New York County, New York, when his vehicle collided with a yellow taxi cab owned by defendant Fred Weingarten and operated by Koytcho Koev. The plaintiff and his passenger co-plaintiff, Ramon Mendez, were both injured in the accident.

Plaintiffs commenced an action against Weingarten and Koev in June 2010, under Queens County Index No. 18992/2009. Defendant Weingarten was not served with process, however, defendant Koytcho Koev was properly served and defaulted in answering the complaint. By order of this Court dated October 30, 2009, a default judgment was granted against defendant Koev on the issue of liability and the matter was set down for an inquest on the issue of damages. On December 8, 2009, the inquest proceeded **[**2]** before this Court, after which each plaintiff was awarded the total sum of $200,000 as and for past and future pain and suffering. On January 14, 2010, a money judgment was entered in the Queens County Clerk's Office in favor of each plaintiff in the sum of $203,698.63 **[*2]** for damages and interest together with the sum of $1,150.00 in costs and disbursements.

On March 10, 2010, the plaintiffs commenced the instant plenary action against defendant Washington International Insurance Co. ("Washington"). In the complaint, the plaintiffs allege

that Washington is a guarantor under a Self-Insurance Surety Bond for the yellow cab which was involved in the accident with the plaintiffs' vehicle. Plaintiffs allege that more than 30 days have elapsed since service of the judgment on Weingarten and Koev and the judgment remains entirely unsatisfied. The complaint alleges a cause of action against Washington based upon VTL § 349 and Insurance Law § 3420(a)(2) which provides that an action shall accrue against an insurer in favor of a judgment creditor of the insured 30 days after a copy of the judgment with notice of entry is served on both the insured and the insurer if the judgment remains unsatisfied. Plaintiffs claim that they are each entitled to a judgment against Washington, as insurer, in the amount of $204,273.63.

The defendant served a notice of appearance and verified answer with affirmative defense on May 11, 2010. In its affirmative defense Washington **[*3]** states that defendant is a surety company that provides surety bonds for self-insured New York City taxicab medallion corporations. Defendant contends that it is not responsible for the payment of a claim unless and until there is an unpaid judgment against the principal self-insured corporation for which it has provided the bond, which in this case is Besai Cab Corporation. Washington claims it is not liable on the judgment as Besai was not sued and there is no judgment extant against Besai Cab Corporation, the principal on the bond.

Plaintiffs now move pursuant to CPLR 3212 for an order granting summary judgment in favor of the plaintiffs and against defendant in the amount of $204,273.63 for each plaintiff. Counsel contends that defendant is liable for the amount of the judgments as the judgments remained unsatisfied by Koev more than 30 days from service of a copy of the judgment. Counsel submits that the Koev vehicle was covered by the surety bond issued by the defendant and that Insurance Law § 3420(a)(2) as well as VTL § 349 require the defendant to satisfy the judgments in their entirety.

[3]** In her affidavit in support of the motion, plaintiff's counsel states that the offending **[*4]** vehicle was a yellow taxi which was self-insured and was also covered by a surety bond issued by Washington International Insurance Company. She states that the bond provided coverage under the same circumstances as an ordinary motor vehicle liability policy and the operator of a motor vehicle is an insured under the standard New York policy. Plaintiffs assert that Washington's bond covered the vehicle and the driver involved in the accident and therefore it did not matter that Besai was the named insured on the surety. Moreover, plaintiffs allege that the action sought to recover a judgment against Mr. Koev, the driver of the offending vehicle, and not the owner and that Koev is an insured under the bond as the operator of the vehicle (see 11 NYCRR 60-1.1[c][2]).

Upon review and consideration of plaintiff's motion, defendant's affirmation in opposition and plaintiffs' reply thereto, this court finds as follows:

Pursuant to Insurance Law § 3420(a)(2), an injured person who has obtained an unsatisfied judgment against a tortfeasor may commence an action against the tortfeasor's insurer to recover the amount of the unsatisfied judgment, up to the policy limit (see Lang v Hanover Ins. Co., 3 NY3d 350, 820 N.E.2d 855, 787 N.Y.S.2d 211 [2004]; **[*5]** Konig v Hermitage Ins. Co., 940 N.Y.S.2d 116, 2012 NY Slip Op 1659 [2d Dept. 2010]; Marsala v Travelers Indem. Co., 50 AD3d 864, 855 N.Y.S.2d 669 [2d Dept. 2008]).

A plaintiff may only commence a direct action against an insurer to recover on an unsatisfied judgment entered in a negligence action at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer (Insurance Law § 3420 [a] [2]), and this requirement is a condition precedent to the commencement of a direct action against the insurer (Jimenez v New York Cent. Mut. Fire Ins. Co., 71 AD3d 637, 897 N.Y.S.2d 143 [2d Dept. 2010]).

Here, there is no dispute that the on January 14, 2010, a money judgment was entered in the Queens County Clerk's Office in favor of each plaintiff in the sum of $203,698.63 and that a copy

of the judgment together with notice of entry was served on the defendant in the underlying case as well as defendant herein on January 21, 2010. The instant action was commenced on March 10, 2010, more than 30 days thereafter.

Defendants submitted an answer alleging as an affirmative defense that the surety company is not liable for payment of a claim unless there is an unpaid **[*6]** judgment against the principal **[**4]** self-insured corporation for which it has provided the bond. Defendant claims the principal is Besi Cab Corporation whereas the unpaid judgment in this case is against the taxi driver, Koev. This court finds that the affirmative defense is without merit as the surety bond issued by the defendant, pursuant to VTL 370 (1)(b) inures to the benefit of any person legally operating the motor vehicle in the business of the owner and with his permission. Therefore, under the surety bond Washington must indemnify drivers for judgments resulting from their negligent conduct occurring within the scope of their employment. The purpose of the bond is to protect persons who recover a judgment for personal injuries against a taxi company or driver covered by the surety bond.

In opposition to the motion for summary judgment, defendant also raises the claim they did not receive notice of the underlying action in time to defend against it and that it is not collaterally estopped from litigating the merits of the underlying action (see Jimenez, supra). This Court finds that this argument is also without merit. Here, the defendant issued a bond to the taxi company which **[*7]** did not obligate it to defend the underlying lawsuit because the taxi company was self-insured. Under the provisions of the bond, the defendant is obligated to pay each and every unsatisfied judgment against covered persons. As the principal of the bond was self-insured, Washington only provides the statutory bond required by the Vehicle and Traffic Law for the taxi company to be self-insured and is not obligated to defend the action whether it receives notice of the underlying action or not. As surety, the defendant is merely a guarantor of payment (see Cosmopolitan Mut. Ins. Co. v Encarnacion, 59 AD2d 669, 398 N.Y.S.2d 425 [1st Dept. 1977]). Thus, Washington cannot claim that it was deprived of the opportunity to defend the underlying action. Under these circumstances the liability of Washington, as the surety, is measured by the liability of its principal who defaulted in this action.

Therefore, this Court finds that the plaintiffs met their prima facie burden of establishing that they satisfied the condition precedent of mailing the notice to the defendant 30 days subsequent to serving it with a copy of the judgment with notice of entry thereof (see Alejandro v Liberty Mut. Ins. Co., 84 AD3d 1132, 924 N.Y.S.2d 124 [2d Dept. 2011]). **[*8]** In opposition, defendant failed to raise a triable issue of fact. The plaintiffs' motion for summary judgment is, therefore, granted.

However, pursuant to Insurance Law § 3420[a][2] this Court finds that the recovery is confined to the monetary limits of the policy, that being $100,000.00 for each plaintiff, with interest **[**5]** from the date of the judgment.

Settle judgment on notice.

Dated: March 30, 2012

Long Island City, N.Y.

ROBERT J. MCDONALD

J.S.C.

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