

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd and 11th JUDICIAL DISTRICTS

PRESENT : PESCE, P.J., WESTON PATTERSON and GOLIA, JJ.

STANLEY SCOTLAND,

Appellant,

-against-

NOV 04 2005

NO. 2005-316 Q C

DECIDED

ALLSTATE INSURANCE COMPANY,

Respondent.

Appeal from an order of the Civil Court of the City of New York, Queens County (Charles John Markey, J.), entered November 18, 2003. The order denied plaintiff's motion to dismiss certain affirmative defenses.

Order unanimously affirmed without costs.

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained as a result of an accident which occurred in Queens. He sought to recover under the uninsured motorist endorsement of his automobile liability policy based upon the negligence of an uninsured motorist, as defined by said policy. The policy was issued in Virginia. Defendant insurer, in its answer, interposed various

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affirmative defenses, including three which alleged, in substance, that the action was barred or limited based upon plaintiff's failure to sustain a "serious injury" as defined by Insurance Law § 5102(d). Plaintiff subsequently moved to dismiss those affirmative defenses on the ground that he was not required to prove "serious injury" inasmuch as there was no "serious injury" requirement under Virginia law or under the Virginia uninsured motorist endorsement. The motion was denied by the court below, predicated upon plaintiff's invocation of the jurisdiction of the New York courts when he initiated the lawsuit (alleging that he was a New York resident) and upon the occurrence of the accident in New York. The court stated that the law of New York, which imposes a "serious injury" requirement, would apply, and the instant appeal ensued.

Since this case involves a claim by an insured against his insurer for benefits to which he claims he is entitled under the uninsured motorist endorsement of the liability policy, this action is a contract case, and is distinguishable from an action seeking damages for personal injury which would be brought against the alleged tortfeasor. However, claims for uninsured motorist benefits by an insured against an insurer present issues which are actually a mixture of contract and tort. "Such claims are based on the coverage agreement in the insurance contract which typically limits benefits to sums which the insured would be 'legally entitled to recover as damages' from the uninsured owner or operator. Thus payment of benefits under the contract

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terms depends upon the uninsured motorist's tort liability to the insured" (3-32 No-Fault & Uninsured Motorist Auto Insurance § 32-00).

The Virginia statute regarding uninsured motorist coverage provides that the uninsured motorist endorsement must undertake "to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle" (Va. Code § 38.2-2206 [A] [emphasis added]). The statute further provides that an insured relying upon the uninsured motorist endorsement is required to establish "legal liability" (Va. Code § 38.2-2206 [H]). In our opinion, the term "legally entitled to recover" requires an insured to prove fault and damages just as if he or she had proceeded against the uninsured motorist instead of the carrier (see e.g. Matter of De Luca [MVAIC], 17 NY2d 76, 80-81 [1966]). Implicit in this analysis is that the insured be "legally entitled to recover" in the venue in which he chooses to commence the action. The carrier, therefore, should be able to assert any defenses that would be available to the uninsured motorist, in order to show that the insured is not entitled to recover, whether it be due to comparative negligence, immunity from suit, or the failure to reach the "serious injury" threshold, depending upon the laws of the applicable jurisdiction.

In tort cases brought in this state, New York uses an "interest analysis" in order to determine which jurisdiction has the greater interest in having its law applied to the litigation. Laws distributing the loss after the accident happens, such as contribution or

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charitable immunity, may implicate significant governmental interests (see Matter of Allstate Ins. Co. [Stolarz—N.J. Mfrs. Ins. Co.], 81 NY2d 219, 225 [1993]). Loss-allocating rules are those which “prohibit, assign, or limit liability after the tort occurs” (Padula v Lilam Props. Corp., 84 NY2d 519, 522 [1994]), such as charitable immunity statutes, guest statutes and vicarious liability statutes. New York’s law requiring a “serious injury” threshold has been held to involve issues of loss allocation (see Kranzler v Austin, 189 Misc 2d 369 [App Term, 2d & 11th Jud Dists 2001]; Jean v Francois, 168 Misc 2d 48 [1996]). Where the specific issue raised relates to allocating losses which result from tortious conduct, both the situs of the tort as well as the domiciles of the litigants will be examined (see Neumeier v Kuehner, 31 NY2d 121 [1973]).

The accident location and situs of the loss or injury are in New York. Plaintiff’s counsel has conceded herein that, at the time of the accident, plaintiff had moved from Virginia to New York, and in fact based venue upon his residence in Queens County. Moreover, strong policy considerations underlie New York’s serious injury threshold requirement. The rationale underlying the “serious injury” requirement was to reduce the number of litigated automobile personal injury accident cases by keeping minor personal injury cases out of court (see Licari v Elliott, 57 NY2d 230 [1982]; Kranzler v Austin, 189 Misc 2d 369, supra; see also Restatement [Second] of Conflict of Laws §

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6). Were the New York courts not to apply the threshold requirement, the rationale for the New York law would be seriously eroded.

In view of the foregoing, the law of New York should be applied, and plaintiff should be required to demonstrate that he sustained a "serious injury." Accordingly, the court below did not err in denying plaintiff's motion to dismiss defendant's first three affirmative defenses.