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

**PRESENT:** ENGORON **PART** 37

Index Number : 162499/2015
FLEMING, PATRICK
vs
CAKAROGLU, BULENT
Sequence Number : 001
DISMISS ACTION

**INDEX NO.** 162499/2015
**MOTION DATE** 5/6/16
**MOTION SEQ. NO.** _____

**The following papers, numbered 1 to** 3 **, were read on this motion to/for** DISMISS AND X-MOTION FOR SJ

**Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits** NOTICE OF CROSS-MOTION FOR SJ **No(s).** 1
**Answering Affidavits — Exhibits** _____ **No(s).** 2
**Replying Affidavits** _____ **No(s).** 3

**Upon the foregoing papers, it is ordered that this motion is**

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):** _____

**Dated:** 8/11/2016

**HON. ARTHUR F. ENGORON** J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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PATRICK FLEMING,

Plaintiff,

-against-

BULENT CAKAROGLU, MURAT GOKSU, and STATE FARM INSURANCE COMPANY,

Defendants.

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Index No. 162499/2015

Motion Seq. No.: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this court states that the following papers, numbered 1 to 3, were used on defendant State Farm Insurance Company's motion to dismiss the complaint and plaintiff's cross-motion for summary judgment as against State Farm:

| | Papers Numbered |
|---|---|
| Notice of Motion - Affirmation - Exhibits (memorandum of law) | 1 |
| Plaintiff's Opposition to Motion (memorandum of law only) | |
| Notice of Cross-Motion - Affirmation - Affidavit | 2 |
| Co-Defendants' Affirmation in Partial Opposition to Motion to Dismiss | 3 |
| State Farm's Opposition to Cross-Motion (memorandum of law only) | |

Upon the foregoing papers, defendant State Farm Insurance Company's motion to dismiss the complaint as against it is granted, and plaintiff's cross-motion for summary judgment is denied.

Background

On December 8, 2015, plaintiff Patrick Fleming commenced this action to recover for serious personal injuries he allegedly sustained on November 1, 2013, as a result of the negligence of defendants Bulent Cakaroglu and Murat Goksu in unloading a truck in the vicinity of 924 2nd Avenue, in Manhattan. Plaintiff alleges that, while unloading the truck, Goksu threw a box into the designated bicycle lane on 2nd Avenue in which plaintiff was riding a bicycle, causing plaintiff to collide with the box, fall off the bike, and sustain injuries. On the day of the accident, Cakaroglu owned the truck; Goksu operated the truck; and State Farm insured the truck.

Although not specifically identified as such, the first cause of action in the complaint (paragraphs 1 - 20) asserts a straight-forward negligence claim against defendants, in which plaintiff alleges that he sustained a "serious injury" within the meaning of Insurance Law 5102(d) as a result of defendants' negligence in the ownership, operation, and unloading of the truck. The second cause of action in the complaint, identified as "Count II: Failure to Provide No-Fault Benefits," alleges, inter alia, that State Farm insured the subject truck and was "lawfully obligated to provide first-party no-fault benefits to the plaintiff in the form of basic economic loss," including lost wages and medical benefits.

On January 22, 2016, Cakaroglu and Goksu served an answer in which they denied the material allegations of the complaint and raised several affirmative defenses.

State Farm now moves to dismiss the complaint for failure to state a cause of action. State Farm argues that the negligence claim should be dismissed as against it for plaintiff's lack of capacity to sue, as plaintiff does not have a judgment against Cakaroglu and Goksu (State Farm's insureds), the non-payment of which would entitle plaintiff to sue State Farm directly under Insurance Law 3420(2). As for the second cause of action, State Farm argues that plaintiff is not entitled to first-party no-fault benefits, as a matter of law, under Walton v Lumbermens Mut. Cas. Co., 88 NY2d 211 (1996), because plaintiff's alleged injuries were caused by "an instrumentality other than the vehicle itself." Walton v Lumbermens Mut. Cas. Co., supra, 88 NY2d at 211.

Plaintiff concedes that the first cause of action for negligence is not stated against State Farm, and otherwise opposes State Farm's motion to dismiss and cross-moves for summary judgment against State Farm. Plaintiff argues that Walton v Lumbermens Mut. Cas. Co., is distinguishable on its facts and does not control. Plaintiff urges that under the No-Fault implementing regulations, specifically, NYCRR 65.12(e), the "use or operation" of a vehicle includes "loading or unloading"; therefore, he is entitled to no-fault benefits because Goksu's unloading of the truck caused his injuries. In partial opposition to State Farm's motion, Cakarogul and Goksu appear to concede that State Farm's policy does not provide no-fault coverage to plaintiff, but urge that the policy must provide liability coverage to Cakarogul and Goksu for plaintiff's "bodily injury claim." State Farm opposes plaintiff's cross-motion upon the ground that it is premature as State Farm has not yet answered the complaint.

Discussion

Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d 83 (1994); Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action).

As noted above, plaintiff concedes that the first cause of action, for negligence, is asserted against Cakarogul and Goksu only, and not against State Farm. Accordingly, the first cause of action, is subject to dismissal as against State Farm, only.

The second cause of action, for first-party no-fault benefits from State Farm, is subject to dismissal for failure to state a cause of action. It is now well-settled that an injured person's entitlement to first-party no-fault benefits under a motor vehicle insurance policy (i.e., coverage for basic economic loss) is contingent upon a showing that the motor vehicle is the "actual instrumentality" that causes the injury. Walton v Lumbermens Mut. Cas. Co., supra 88 at 213, 215 ("The mere fortuity that plaintiff's injury occurred while he was engaged in unloading the truck does not support a claim for no-fault benefits because the vehicle itself was not a cause of

the damage. The vehicle must be a proximate cause of the injury before the absolute liability imposed by the statute arises."); Cividanes v City of New York, 95 AD3d 1, 7 (1st Dept 2012) ("what *Walton* requires for the No-Fault Law to apply is that the motor vehicle itself be the instrumentality which produces the injuries"; injuries sustained during "mere occupancy of or while entering or exiting a vehicle" does not trigger statutory No-Fault coverage);

Assuming the truth of the factual allegations in the instant complaint and giving plaintiff the benefit of all favorable inferences arising therefrom, plaintiff's complaint fails to state a cause of action against State Farm for No-Fault benefits because the truck *was not* the actual instrumentality that caused plaintiff's alleged injuries, the box in the bicycle lane *was* the actual instrumentality of plaintiff's injuries. The complaint alleges, clearly and unequivocally, that plaintiff's injuries occurred when he "was caused to collide with the box and fall off of his bicycle"; there is no allegation that the truck itself collided with, or hit, or otherwise caused plaintiff to fall of his bicycle, and there is no reasonable interpretation of the complaint which would support such a reading. The "mere fortuity" that the box arrived in the bicycle lane during the unloading of the truck is not enough to entitle plaintiff to first-party no-fault benefits. Walton v Lumbermens Mut. Cas. Co., supra 88 at 215. Thus, as a matter of law, plaintiff's alleged accident falls "outside the ambit of the No-Fault Law" because the truck itself was not the proximate cause of plaintiff's injuries. Cividanes v City of New York, supra 95 AD3d at 6. As State Farm is entitled to dismissal of the complaint, plaintiff's cross-motion for summary judgment against State Farm is denied as unavailing.

Although the complaint fails to state a cause of action against State Farm for No-Fault benefits, the complaint adequately states a cause of action against Cakaroglu (owner) and Goksu (operator) for negligence in the use or operation – i.e., unloading – of the truck. See In Argentina v Emery World Wide Delivery Corp., 93 NY2d 554 (1999) (under Vehicle Traffic Law § 388 vehicle itself need not be "proximate cause" of injury to hold vehicle owner vicariously liable for vehicle operator's negligence). Thus, Cakaroglu and Goksu's alleged negligence should trigger liability coverage (i.e., entitlement to a defense and indemnity) under State Farm's policy; the Court, however, can not fully reach this issue as State Farm's policy is not before the Court.

The Court has considered the parties' other arguments, and finds them to be unavailing.

Conclusion

Motion to dismiss the complaint as to defendant State Farm Insurance Company is granted; plaintiff's cross-motion for summary judgment is denied. The Clerk is hereby directed to enter judgment dismissing the complaint as to defendant State Farm Insurance Company, only.

Dated: August 11, 2016

Arthur F. Engoron, J.S.C.