

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

FRED BASSALI,

Plaintiff,

-against-

HARTFORD CASUALTY INSURANCE COMPANY
d/b/a THE HARTFORD INSURANCE COMPANY, and
THE HARTFORD FINANCIAL SERVICES GROUP, INC.,

Defendants,

TRIAL/IAS PART 14

Index No.: 605633-16
Submission Date: 5-24-17
Motion Sequence: 001

DECISION & ORDER

Papers Numbered

Sequence #001

Table listing documents and page numbers: Notice of Motion, Affidavit & Exhibits (1), Memorandum of Law in Support (2), Affirmation in Opposition (3), Reply Memorandum of Law (4).

Upon the foregoing papers, defendants' motion for an Order pursuant to CPLR §3212 granting summary judgment against plaintiff, FRED BASSALI, and dismissing the Verified Complaint with prejudice, in its entirety, is determined as set forth below.

This matter arises out of a claim submitted by plaintiff FRED BASSALI for supplementary uninsured/underinsured motorist ("SUM") benefits under an automobile insurance policy (the "Policy") issued by defendant HARTFORD CASUALTY INSURANCE COMPANY ("HARTFORD CASUALTY") to his mother, Heshmat Bassali. The Verified Complaint, filed on July 26, 2016 (Troisi Affm., Exh. A), asserts two causes of action: the FIRST, sounding in breach of contract, based upon defendants' failure to pay SUM benefits to plaintiff in connection with a motor vehicle accident that occurred on June 12, 2012 (the "Accident"); and the SECOND, sounding in tort, based upon the defendants' alleged deliberate breach of the duty

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to act in good faith. By Stipulation dated September 1, 2016 (*Troisi Aff., Exh. C*), plaintiff withdrew the SECOND Cause of Action, without prejudice. Issue was joined on September 23, 2016 (*Troisi Affm., Exh. B*).

Defendants now move to dismiss the action against them in its entirety, with prejudice, on the ground that plaintiff was not an “insured” under the Uninsured Motorist (“UM”) or SUM provisions of the Policy at the time of the Accident.<sup>1</sup> To qualify as an “insured” under the UM provisions of the Policy, the plaintiff had to be (1) the named insured on the Policy, or a relative of the named insured who resided in the same household as the named insured at the time of the accident; (2) an occupant of a vehicle owned by the named insured at the time of the accident; or (3) an occupant of any vehicle operated by the named insured at the time of the accident (*Messina Affd., Exh 1, Part C, Sec. I, 2[a][1] & [2]*). Under the SUM provisions of the Policy, the same “insured” definitions apply, except that if such status is based upon occupancy of a vehicle owned by the named insured, that vehicle must have been specifically insured for SUM coverage under the Policy (*Messina Affd., Exh 1, Part C, Sec. II, 1[a][1] & [2]*).

In support of their motion to dismiss, defendants submit, among other things: (i) a certified copy of the Policy in effect at the time of the Accident (*Messina Affd., Exh 1*); and (ii) a transcript of plaintiff’s deposition in the personal injury action entitled *Fred Bassali v Saddia Khan and Khurram S. Khan*, Nassau County Index No. 601625/14 (the “Personal Injury Action”), which plaintiff had brought against the owner and operator of the other vehicle involved in the Accident (*Troisi Affm., Exh. D*).

The Court finds that this evidence demonstrates, *prima facie*, that plaintiff was not an insured under the UM or SUM provisions of the policy at the time of the Accident. First, the Declarations page of the Policy lists only Heshmat Bassali as a named insured. Her mailing address is stated as 1 Portico Court, Great Neck, NY 11021. At his deposition in the Personal Injury Action, plaintiff testified that he resided at 81 Hampshire Road, Great Neck, NY 11023, and had lived at that address since 2009 (*Troisi Affm., Exh. D, pp. 5-6*). Thus, by his own admission, plaintiff was neither a named insured under the Policy, nor a relative who resided in the same household as the named insured, at the time of the Accident.

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<sup>1</sup> Defendants assert that THE HARTFORD FINANCIAL SERVICES GROUP, INC. was improperly named as a defendant herein, and the Complaint should be dismissed as against it. Said defendant did not issue the Policy, and was not a party to the Policy. Plaintiff does not address this issue, and thereby concedes it. *Kuehne & Nagel v Baiden*, 36 NY2d 539 (1975); *Brown v George*, 138 AD3d 466 (1<sup>st</sup> Dept. 2016).

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Second, the Policy lists only two vehicles owned by the named insured and insured for SUM coverage – a 2007 Hummer and a 2003 Lexus. Plaintiff testified that on the day of the Accident, he was driving a rented Nissan Altima (*Troisi Affm., Exh. D, pp. 16-17*). Thus, he was not occupying a vehicle owned or operated by Heshmat Bassali, or insured for SUM coverage under the Policy.

In opposition, plaintiff does not dispute that he was neither a designated named insured nor a relative residing in the same household as the named insured at the time of the accident. Nor was he operating a vehicle owned by the named insured, or occupying a vehicle driven by the named insured. Rather, plaintiff argues: (1) that defendants waived their right to disclaim coverage, based upon their failure to disclaim in a timely manner, as required by Insurance Law §3420(d)(2); (2) that, insofar as plaintiff is named as a “driver” on the Declarations Supplemental Page, he qualifies as a “policy level” insured driver; and (3) that the motion for summary judgment is premature insofar as depositions have not yet been conducted.

The Court finds that the opposition is insufficient to defeat summary judgment. With respect to the obligation to disclaim in a timely manner, Insurance Law §3420(d)(2), by its terms, applies only to third-party liability coverage. *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583 (2014); *Minasian v IDS Property Casualty Insurance Company*, 2015 WL 8485257 at n.9 (SDNY Dec. 9, 2015), *aff’d*, 2017 WL 219105 (2d Cir. Jan. 19, 2017). It does not apply to first-party coverage, which plaintiff is seeking here. Moreover, timely disclaimer is not necessary when the claim does not fall within the coverage provisions of the policy. *Harco Constr., LLC v First Mercury Ins. Co.*, 148 AD3d 870 (2d Dept. 2017), citing *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 (2001); *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 (2000). Where, as here, the denial of benefits is based upon a lack of coverage in the first instance, as opposed to a policy exclusion, the rule requiring timely disclaimer does not apply. *Zappone v Home Ins. Co.*, 55 NY2d 131, 137.

The Court turns to plaintiff’s substantive argument that he is insured as a “policy level” driver. Plaintiff relies upon the “definitions” portion of the Policy, which states that,

- A. Throughout this policy, “you” and “your” refer to:
1. The named insured shown in the Declarations;

Plaintiff argues that, insofar as he is listed as a “driver” on the Declarations Supplemental Page, he qualifies as a “policy level” insured. Further, plaintiff notes, he is listed as a “driver” on the Producer Reference Page. At minimum, plaintiff argues, this renders the Policy ambiguous with

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respect to his insured status, and the ambiguity must be construed in his favor, as in *Kennedy v Valley Forge Ins. Co.*, 203 AD2d 930 (4<sup>th</sup> Dept. 1994).

The Court disagrees. The argument asserted by plaintiff has been rejected by controlling authority. In *Matter of Metropolitan Prop. & Liab. Co. v Feduchka*, 135 AD2d 715 (2d Dept. 1987), the Second Department held that, although the claimant was listed as a “driver” on the face sheet and declarations page of a policy, which listed only her parents as named insureds, the claimant was not an insured for purposes of uninsured motorist coverage. The *Kennedy* decision, relied upon by plaintiff, is factually distinguishable from the case at bar. Further, *Kennedy* was distinguished by the Second Department in *Matter of State Farm Mut. Auto. Ins. Co. v Russell*, 39 AD3d 759 (2d Dept. 2007). *Russell* held that the listing of the claimant’s father as a licensed driver on a policy renewal notice did not create any ambiguity in the policy which would render him an additional insured. The Second Department noted that the policy’s declarations page clearly listed someone else as the only named insured, and the policy itself defined the criteria for insured status. Further, the fact that he was insured for “coverage S” under the policy, “did not, without more, provide him with the full panoply of benefits accorded a named or additional insured under the policy.”

Here, the Court finds no ambiguity. The Declarations page lists only Heshmat Bassali as the named insured, and the Policy itself clearly defines the criteria for insured status. The Declarations Supplemental Page identifies plaintiff as a “driver” only with respect to a violation involving one of the insured vehicles, based upon which a surcharge was added to the premium. The Producer Reference Page is not incorporated or referred to in the Policy, and cannot be read to extend or expand its coverage.

As to the argument that summary judgment is premature, “a litigant seeking to avoid summary judgment on the ground that discovery has not been conducted must provide an evidentiary basis demonstrating that discovery may lead to relevant evidence or that the facts essential to opposing the motion are in the movant’s exclusive knowledge and control.” *Sehgal v www.nyairportsbus.com, Inc.*, 100 A.D.3d 860 (2d Dept. 2012). No such showing was made here.

The Court has considered the remaining contentions of the parties, and finds that they do not require discussion or alter the determination herein. Accordingly it is

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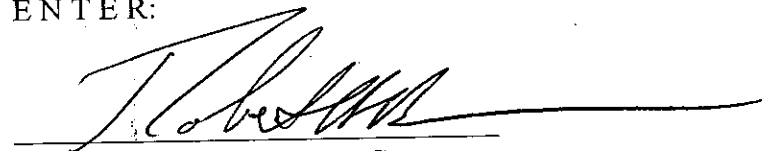
**ORDERED**, that defendants' motion for an Order pursuant to CPLR §3212 granting summary judgment against plaintiff, FRED BASSALI, and dismissing the Verified Complaint with prejudice, in its entirety, is *granted*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: June 16, 2017  
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

**ENTERED**

JUN 21 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE