

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38
Justice

FRANCES MELIA, x
Plaintiff,

Index
Number 712223 2018

-against-

Motion
Date January 28, 2019

COUNTRY-WIDE INSURANCE COMPANY,

Motion Seq. No. 1

Defendant.

The following numbered papers read on this motion by defendant Country-Wide Insurance Company (Country-Wide) to dismiss the complaint on either the basis that plaintiff lacks standing to commence this declaratory judgment action under CPLR 3211(a)(3) or that a prior action is pending under CPLR 3211(a)(4) or, alternatively, for dismissal of the claim for punitive damages pursuant to CPLR 3211(a)(7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 2-10
Answering Affidavits - Exhibits.....	EF 15-17
Reply Affidavits.....	EF 18

Upon the foregoing papers it is ordered that the motion is determined as follows:

This matter arises out of a motor vehicle accident that occurred in 2014, in which plaintiff Frances Melia(Melia), a pedestrian, was seriously injured. Melia commenced a negligence action in this court under Index No. 708307/15 (2015 action) against Biswanan Jagmohan (Jagmohan), the owner and operator of the truck involved in the incident. That vehicle was insured by Country-Wide under a liability policy with a coverage limit of \$25,000 per person. A separate action commenced by Melia against additional defendants was consolidated with the 2015 action pursuant to a so-ordered stipulation dated March 16, 2016, at which time Country-Wide became a defendant in the 2015 action.

Thereafter, Justice Kevin J. Kerrigan in an order dated March 14, 2018, denied a motion by Melia and cross motion by Country-Wide for declaratory relief in the 2015 action, as the claims alleged sounded in negligence and fraud. An insurance coverage issue was raised in that pleading and by order dated

March 14, 2018, Country-Wide's separate motion for severance was granted. On April 20, 2018, Country-Wide commenced a declaratory judgment action against Melia and Jagmohan in the Supreme Court, New York County, under Index No. 153639/18. On August 7, 2018, Melia commenced this declaratory judgment action in Queens Supreme Court. By order dated September 20, 2018, defendant Melia's motion to change venue of the New York County action to Queens County was granted and later affirmed by the Appellate Division, First Department by order entered on February 7, 2019.

In the interim, on May 2, 2018, a jury verdict was reached in the 2015 action and later set aside by order of Justice Richard G. Latin dated July 30, 2018. The jury found Jagmohan negligent, but not a substantial factor in causing the accident. The court in its order directed the verdict in favor of plaintiff to the extent that defendant Jagmohan was a proximate cause of the accident and ordered the case proceed to a damages trial that encompassed the issues of comparative fault of the parties. On October 31, 2018, the second trial resulted in a verdict against Jagmohan in the amount of \$800,000. Court records indicate that motion sequence number 20, originally returnable on January 31, 2019, by defendant Jagmohan to set aside the current verdict has yet to be submitted.

Country-Wide presently contends that plaintiff has not satisfied a condition precedent necessary to seek direct relief against Country-Wide under Insurance Law § 3420(a)(2). An action against an insurer of a tortfeasor cannot be maintained unless a judgment against the insured shall remain unsatisfied for a period of thirty days from the service of notice of entry of the judgment. While a jury verdict has been awarded in favor of Melia in the sum of \$800,000, a judgment has not been entered and a motion to set aside the verdict has been made. In the instant case, Melia is not in privity with Country-Wide and may only pursue a direct action against an insurance carrier under the strict parameters of Insurance Law § 3420(a)(2). Clearly, Melia's action for a declaratory judgment is premature based on a lack of standing and, thus, warrants dismissal. (See *Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004]; *Azad v Capparelli*, 51 AD3d 956 [2d Dept 2008]; cf *Batista v Global Liberty Ins. Co. of N.Y.*, 135 AD3d 797 [2d Dept 2016].)

Accordingly, this action is dismissed and all other requests for relief are denied as moot.

Dated: March 25, 2019


CARMEN B. VELASQUEZ, J.S.C.

