DOCKET NO. AAN-CV22-6049011-S	:	SUPERIOR COURT
DIANE KUBOWSKI	:	J.D. OF ANSONIA/MILFORD
VS.	:	AT MILFORD
FARMER'S INSURANCE GROUP CO.	:	MAY 8, 2023

MEMORANDUM OF DECISION

The instant action is a one-count complaint for breach of the underinsured motorist provision of an insurance policy issued by the defendant, Farmers Insurance Group Company. The matter arises from an October 12, 2020, automobile accident on Interstate 95 in Westport. The plaintiff was a passenger in a vehicle being operated by and owned by Caroline Kubowski to whom the defendant issued its policy, when Josue Santiago Cardenas, who was operating a vehicle owned by Santiago A. Cardenas, struck the vehicle in which the plaintiff was a passenger. The defendant now moves for summary judgment arguing that the plaintiff failed to exhaust all polices of insurance as required by General Statutes § 38a-336(b).[1] For the forgoing reasons, the defendant's motion for summary judgment is granted.

I

The following facts are not in dispute.

[1] General Statutes § 38a-336 (b) states, "An insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, but in no event shall the total amount of recovery from all policies, including any amount recovered under the insured's uninsured and underinsured motorist coverage, exceed the limits of the insured's uninsured and underinsured motorist coverage. . . ."

The accident took place on October 12, 2020. At that time, the tortfeasor, Josue Santiago Cardenas, was insured with State Farm Mutual Automobile Insurance Company and his policy had a per person limitation of liability for bodily injury of $100,000. Also at that time, the car that he was driving was owned by Santiago A. Cardenas who was insured by GEICO General Insurance Company and his policy likewise had a per person limitation of liability for bodily injury of $100,000. When the accident took place, the plaintiff was a passenger in a vehicle being operated by and owned by Caroline Kubowski who was insured by the defendant and her policy provided under insured motorist benefits with a limitation of liability of $250,000 per person.

On July 8, 2022, Josue Santiago Cardenas executed an affidavit for GEICO General Insurance Company acknowledging that he had an automobile insurance policy in force at the time of the accident provided by State Farm Insurance.

On July 18, 2022, in exchange for $100,000, the plaintiff executed a Hold Harmless Agreement and Release in Full of All Claims in which documents she agreed to "save and forever hold harmless Santiago A. Cardenas, Josue Santiago Cardenas ... and GEICO General Insurance Company from any and all liability therefrom." The plaintiff released the same parties from "any and every claim, demand, right or cause of action, of whatever kind of nature, on account of or in any way growing out of any and all personal injuries and consequences thereof ...an accident that occurred on or about the 12th day of October, 2020, at or near Westport, Connecticut ...."

At no time has State Farm Mutual Automobile Insurance Company paid to the plaintiff any amount pursuant to the policy it issued to Josue Santiago Cardenas that was in force at the time of the accident.

The plaintiff served the instant action on the defendant on October 14, 2022.

II

The law governing summary judgment is well settled. "Practice Book § [17-49] requires that judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 568, 197 A.3d 938 (2018), quoting *Marasco* v. *Connecticut Regional Vocational-Technical School System*, 153 Conn. App. 146, 154, 100 A.3d 930 (2014), cert. denied, 316 Conn. 901, 111 A.3d 469 (2015).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . .

"The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict

those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . ." (Internal quotation marks omitted.) *Agosto* v. *Premier Maintenance, Inc.*, supra, 185 Conn. App. 568-69, quoting *Walker* v. *Dept. of Children & Families*, 146 Conn. App. 863, 869-71, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014).

III

There is no dispute that in this case the State Farm Mutual Automobile Insurance Company policy issued to the tortfeasor/operator, Josue Santiago Cardenas, made any payments to the plaintiff. Pursuant to General Statutes § 38a-336 (b), "An insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, but in no event shall the total amount of recovery from all policies, including any amount recovered under the insured's uninsured and underinsured motorist coverage, exceed the limits of the insured's uninsured and underinsured motorist coverage. . . ." In cases such as this, where there is a tortfeasor/operator and a tortfeasor/owner our courts have held that the policies of both must be exhausted before an underinsured motorist benefit is paid.

The seminal case on this issue is *Ciarelli v. Commercial Union Insurance Companies*, 234 Conn. 807, 663 A.2d 377 (1995). The facts in *Ciarelli* are identical. There, a vehicle owned by one person and operated by another "crossed the center line of Foxon Boulevard in New Haven and struck the vehicle being operated by the plaintiff. The operator was cited for failure

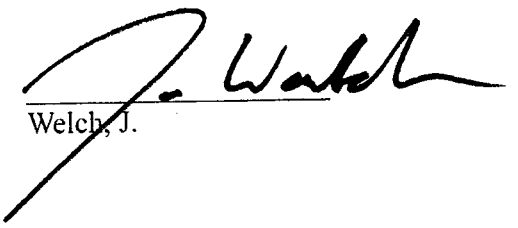
to operate his motor vehicle in the proper lane, and liability was stipulated." Id., 808. The plaintiff settled her claim with owner's insurance carrier for its per person limit thereby exhausting that policy. Id., 808-09. At the time of the accident, the operator was insured for liability coverage with a different carrier. Id., 809. The plaintiff executed a general release of both the owner and the operator and did not attempt to collect against the operator's policy. Id. The plaintiff then filed a claim for underinsured motorist benefits against her own insurance carrier. Id. The Supreme Court affirmed the trial court's finding that the plaintiff did not trigger her underinsured motorist coverage when she only exhausted the owner's liability policy and not the operator's liability policy and held that General Statutes § 38a-336 (b) requires the exhaustion of the operator's policy in addition to the owners' policy to trigger uninsured motorist coverage. Id., 816.

Such is the instant case. The plaintiff attempts to distinguish the matter from *Ciarelli* by reciting challenges with ascertaining availability of coverage from State Farm Mutual Automobile Insurance Company for the actions of Josue Santiago Cardenas. The undisputed record reveals, however, that such information was known at least as to some parties in the matter (and therefore knowable to others) before the plaintiff executed the Hold Harmless Agreement and the Release in Full of All Claims and before the statute of limitations had run as to Josue Santiago Cardenas.

Accordingly, based on the undisputed material facts, the plaintiff has not triggered uninsured motorist coverage by failing to exhaust the tortfeasors liability coverage, and, therefore, judgment shall enter in favor of the defendant.

SO ORDERED.

By the court,



Welch, J.