Decided on March 27, 2006

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

PRESENT: GOLIA, J.P., RIOS and
BELEN, JJ 2005-298 Q C.

Allstate Insurance Company AS SUBROGEE OF EVELYN JONES and MONIQUE JONES, Respondent,

against

Yetish Inc. and ANIBAL DEJESUS, Appellants.

Appeal from an order of the Civil Court of the City of New York, Queens County (Howard G. Lane, J.), entered October 12, 2004. The order denied defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (5).

Order affirmed without costs.

In this action, plaintiff insurance carrier seeks to recoup first-party no-fault basic economic loss payments from defendants, allegedly non-covered persons, that it made to its insured following an accident involving a vehicle driven and owned by defendants. Although the suit was brought outside the three-year statute of limitations for personal injuries, plaintiff claimed entitlement to the two-year toll on the running of the statute of limitations provided by Insurance Law § 5104 (b).

The court below properly denied defendants' motion to dismiss the action. Defendants moved to dismiss solely on the theory that the three-year statute of limitations had run, and raised the issue of plaintiff's insureds' prior lawsuit in Bronx County (in which plaintiff herein allegedly could have asserted a lien upon the

proceeds pursuant to Insurance Law § 5104 [b]).

Although the statute does not specify against which types of compensation such a lien may be asserted, it is well established in case law that a lien representing basic economic

loss benefits paid to an insured can be asserted only against an economic damages award to an insured in a personal injury action, and not against a pain and suffering award (*see e.g. Aetna [*2]Cas. & Sur. Co. v Jackowe*, 96 AD2d 37, 42 [1983]; *Safeco Insurance Co. of America v Jamaica Water Supply Co.*, 83 AD2d 427 [1981]). The alleged lack of any economic damages claim in the complaint in the Bronx action annexed to defendants' reply papers was the rationale for the denial of the motion to dismiss.

The motion to dismiss the present action was properly denied because defendants presented insufficient evidence to establish that the present action was excluded from the ambit of Insurance Law § 5104 (b). Defendants presented a copy of a complaint and an index number, which is not evidence sufficient to establish, at this early stage, that plaintiff's insureds could have or did recover, whether by jury award or settlement, amounts properly attributable to basic economic loss (*see e.g. Aetna Cas. & Sur. Co. v S. Siskind & Sons*, 209 AD2d 215 [1994]), or that plaintiff could have asserted a lien in the prior action and would therefore be barred from commencing the present action by the three-year personal injury statute of limitations. The foregoing determination is without prejudice to defendants again raising the claim that the instant action was barred by the statute of limitations upon a sufficient showing, through documentary evidence, that the plaintiff's subrogors had instituted a prior action against them which had the effect of taking the instant action outside of the tolling provisions set forth in Insurance Law § 5104 (b).

Golia, J.P., Rios and Belen, JJ., concur.
Decision Date: March 27, 2006