FOR PUBLICATION

IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARIANAS INSURANCE COMPANY, **Plaintiff,** **vs.** **ISMAIL HOSSAIN, CHENG HU ZHENG, and CHUN HONG GAO MANGARERO,** **Defendants.** _____	**CIVIL ACTION NO. 11-0307** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER was heard on February 29, 2012, at 1:00 p.m. in Courtroom 217A on a motion to dismiss. Marianas Insurance Company (hereafter, "Plaintiff") was represented by Mark A. Scoggins, Esq. Ismail Hossain ("Hossain"), Cheng Hu Zheng ("Zheng") and Chun Hong Gao Mangarero ("Mangarero") (collectively, "Defendants") were represented by Joseph E. Horey, Esq. The Court, having had the benefit of written briefs and oral argument from counsel, now enters this written Order.

II. FACTUAL BACKGROUND

On or about September of 2011, Hossain obtained car insurance for his 2006 Toyota Corolla from Plaintiff. (Compl. at 2.) On August 3, 2011, Hossain permitted Zheng to drive the vehicle.[1] (*Id.*)

[1] Presumably, under these facts, Zheng would be considered an "insured" under the insurance policy. 9 CMC § 8205(b) ("All [motor vehicle liability insurance] policies shall provide . . . coverage not only of the owner of the vehicle . . . but also, any other person who operates such vehicle within the Commonwealth, with the vehicle owner's permission[.]")

While Zheng was operating the vehicle, he was involved in an automobile accident with another driver. (*Id.*) Thereafter, Plaintiff paid the other driver $20,000 in damages and obtained a subrogation agreement.

On November 8, 2011, Plaintiff filed their Complaint against Defendants seeking reimbursement of the $20,000; post-judgment interest; and reasonable attorney fees. (*Id.* at 3.) The Complaint alleges that Hossain negligently entrusted the vehicle to both Zheng and Mangarero and that Mangaero also negligently entrusted the vehicle to Zheng. (*Id.* at 2.) The Complaint also alleges that Zheng was at fault for the accident. (*Id.*)

On January 6, 2012, Defendants filed their Motion to Dismiss pursuant to NMI R. Civ. P. 12(b)(6) where they argued that Plaintiff's Complaint fails to state a claim upon which relief can be granted. (Mot. at 1.)

III. MOTION TO DISMISS PURSUANT TO NMI R. Civ. P. 12(b)(6)

A. Legal Standard

The purpose of a motion to dismiss under Rule 12(b)(6) for failure to state a claim is to test "the sufficiency of the allegations within the four corners of the complaint." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).[2] Under Commonwealth Rule of Civil Procedure 8(a)(2), a pleading must contain "a short and plain statement of the claim ***showing*** that the pleader is entitled to relief." (emphasis added). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[3] The Supreme Court has explained that the Rule 8 pleading standard rests on two principles. *First*, "the tenant that the court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Even though showing an entitlement to relief "does not require 'detailed

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[2] "[W]hen interpreting our rules of civil procedure, which are patterned after the federal rules, we will principally look to federal interpretation for guidance." *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16.

[3] *Id.*

factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). *Second*, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. If the pleadings "do not permit the court to infer more than mere possibility of misconduct, the complaint has alleged – but it has not '**show[n]**' – 'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2) (emphasis added)).

B. Discussion

Defendants contend that Plaintiff's Complaint fails to state a claim upon which relief can be granted. (Mot. at 1.) To support this contention Defendants reference the well-recognized common law anti-subrogation rule which provides "that an insurer has no right of subrogation against its own insured for a claim arising from the insured's own negligence." (Mot. at 2-3 (citing cases).)

In opposition, Plaintiff offers two reasons why the anti-subrogation rule should not apply here. *First*, Plaintiff contends that, at the time of the accident, Zheng was engaged in a criminal activity by operating an "illegal taxi" in violation of 9 CMC § 2301(a)(1). (Opp. at 4.) *Second*, Plaintiff argues that the insurance policy has a provision excluding "liability coverage for damage caused when the vehicle is used as a public or livery conveyance, and also excludes coverage when the vehicle is used for business purposes." (Opp. at 5.) Perplexingly, at oral argument, Plaintiff took the position that at the time of the accident the insured was covered by the insurance policy.

1. The Anti-Subrogation Rule

In general, "no right of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty." 16 Rhodes, Couch on Insurance 2d § 61:136. *See also* 43 Am. Jur. 2d Insurance § 1794 (2012) ("[A]n insurer cannot bring a subrogation claim against its own insured, [however,] an insurer . . . may be reimbursed out of the funds received by the insured in satisfaction of his or her claim against the third person."). This principle is clearly stated in *Home Ins. Co. v. Pinski Bros.*, 500 P.2d 945, 950 (Mont. 1972), an action in subrogation against its own insured on the same loss would:

> (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer;

> (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured.

Therefore, the anti-subrogation rule serves to prevent the insurer from obtaining a judgment for the loss from its own insured as well as avoid any conflict of interest with its insured. One possible way around this conundrum is for the insurer to make a successful showing that the insured was acting outside the scope of the policy agreement, which would preclude the anti-subrogation rule from acting as a complete bar.

2. Outside the Scope of Liability Coverage

Initially, the Court recognizes that Plaintiff made an inconsistent statement during oral argument. When asked by the Court whether the insured was covered at the time of the accident, Plaintiff answered in the affirmative. This position is inconsistent with Plaintiff's arguments made in opposition to Defendants' Motion. Indeed, Plaintiff offered two theories in opposition: (1) that at the time of the accident Zheng was engaged in an illegal activity; and (2) the insurance policy does not provide liability coverage when the insured is engaged in a business activity such as a public or livery conveyance. Notwithstanding this inconsistency, the purpose of this Motion is to test the sufficiency of the pleadings.

The Complaint sets forth that "Defendants operated the Corolla, or allowed the vehicle to be operated, as a public or livery conveyance in violation of the terms of the [] insurance policy and CNMI law." (Compl. ¶ 11.) These were the same arguments Plaintiff made in opposition to Defendants' Motion. Therefore, the Court must determine whether it is plausible, under the facts pled, Plaintiff could be entitled to relief.

Although the Complaint references the insurance policy, making it part of the pleadings, the policy was never provided as part of the record. Regardless, the Court recognizes that it is typical for insurance policies to exclude coverage under certain circumstances; however, this generally applies to damages claimed by the insured and not an injured third party. *See, e.g., Chun Yan Dong v. Royal Crown Ins. Corp.*, 2010 U.S. Dist. LEXIS 111917 (D. N. Mar. I. Oct. 18, 2010) ("[U]nder the plain

terms of the first and second paragraphs, the DUI Exclusion Clause provided no excuse for Royal Crown to refuse to pay Ms. Priest's injury claims.").

Further, Plaintiff cites to *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 606 (N.J. 1978) which recognized the principle that:

> When the insurance company has contracted to pay an innocent person monetary damages due to any liability of the insured, such payment when ***ascribable to a criminal event*** should be made so long as the benefit thereof does not enure to the assured. In furtherance of that justifiable end, under most circumstances it is equitable and just that the insurer be indemnified by the insured for the payment to the injured party. In subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act, is honored.

(emphasis added). Clearly, the above passage recognizes the common law maxim *nullus commodum potest de injuia sua propria*, which provides that "no one can take advantage of his own wrong." *Glus v. Brooklyn*, 359 U.S. 231, 232 (1959). Therefore, it is important to note a key term in the passage, "ascribable to a criminal event." In this case, the "criminal event" is alleged to be the operation of a public or livery conveyance, presumably because Zheng lacked the proper license to operate such a service.

Without question, operating a taxi service in the CNMI without the proper license is a criminal offense. 9 CMC § 2301(a)(1). However, use of the word "ascribable" necessarily supposes the requisite causal link between the criminal event and the injury. *Princeton Ins. Co. v. Chunmuang*, 698 A.2d 9, 17 (N.J. 1997) (holding that an explicit exclusion for "injuries ***resulting from*** the performance of a criminal act" insulated the medical malpractice insurer from liability for damages resulting from a physician's sexual assault) (citing *Ambassador*, 388 A.2d at 606) (emphasis added); *Allstate Ins. Co. v. Malec*, 514 A.2d 832, 837 (N.J. 1986) (holding that an automobile policy exclusion for injuries ***caused*** by an intentional wrongful act did not violate public policy) (citing *Ambassador*, 388 A.2d at 606) (emphasis added). In this case, Plaintiff is up against the seemingly insurmountable hurdle of establishing a causal link between the operation of an "illegal taxi" and the automobile accident.

The issues raised pursuant to this Motion require resolution of factual disputes that would be improper for the Court to engage in here. For example, Plaintiff's argument that Defendants' actions

are excluded from liability coverage necessitates an analysis of the policy agreement which, while referenced in the Complaint, was not made part of the record. Similarly, Plaintiff's second contention, regarding criminal conduct, requires the Court to conduct a factual analysis pertaining to the allegations that Defendants were engaged in criminal activities and that there is a causal link to the accident and injuries. However, based on the pleadings, Plaintiff has made a claim showing that the relief sought could plausibly be obtained.

IV. CONCLUSION

Based on the foregoing, the Court hereby **DENIES** Defendants' Motion to Dismiss.

SO ORDERED this 17th day of April, 2012.

PERRY B. INOS, Associate Judge