

**DiPasquale v Security Mutual Life Insurance  
Company of New York**

2003 NY Slip Op 30196(U)

September 30, 2003

Supreme Court, New York County

Docket Number: 122062/02

Judge: Paula Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY  
Justice

PART 47

*Dr. Pasquale C. E.*

- v -

*Security Mut Life Ins Co of NY  
etc*

INDEX NO. 122062-02  
MOTION DATE 7/28/03  
MOTION SEQ. NO. 03  
MOTION CAL. NO. 35

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**SCANNED**  
OCT 07 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*motion denied in accordance  
with accompanying memorandum*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 9/2/03

*[Signature]*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 47

-----X  
CHRISTOPHER E. DiPASQUALE,

Plaintiff,

Index No. : 122062/02  
DECISION/ORDER

-against-

SECURITY MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK, BRUCE BOYEA and  
F. DAVID MISTRETTA,

Defendants.

-----X  
**HON. PAULA OMANSKY, JSC:**

Plaintiff Christopher E. DiPasquale (DiPasquale) moves the court to vacate a previous default, and for permission to serve and file an amended complaint (motion sequence iumber 003). For the following reasons, plaintiffs motion is denied.

**BACKGROUND**

Defendant Security Mutual Life Insurance Company of New York (SMLI)' issued DiPasquale two disability insurance policies in 1987 and 1990, respectively. DiPasquale has since commenced a number of actions, both in New York County and upstate, as a result of SMLI's 1995 decision to deny benefit payments pursuant to those policies. This action is the third such matter to come before this court.<sup>2</sup> In one of the previous actions, the court granted

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<sup>1</sup> Co-defendants Bruce Boyea (Boyea) and F. David Mistretta (Mistretta) are corporate officers of SMLI.

<sup>2</sup> The previous two actions bore Index Numbers 601780/98 and 120721/01, respectively. The former consolidated a New York County action with one which DiPasquale had commenced in Broome County, under Index Number 1268/98.

SMLI's motion for summary judgment to dismiss DiPasquale's complaint,<sup>3</sup> on the ground that he had "persistently refused to provide relevant financial information \* \* \* to substantiate his claim, [as] required by his insurance contract, [thus precluding] him from collecting disability benefits." See Reply Affirmation, Exhibit 7, at 6. The events relevant to the disposition of the instant motion are as follows.

DiPasquale, appearing pro-se, filed the summons and complaint in this action on October 7, 2002, but did not serve them on defendants until February 5, 2003. See Affidavit in Opposition, ¶ 4. This action was initially assigned to Justice Lowe of this court. On February 12, 2003, counsel for defendants made a motion for permission to extend their time to move and/or to answer (motion sequence number 001). Id., ¶ 5. Justice Lowe did not decide that motion, however, on March 11, 2003, he granted defendants' application to reassign this action to this court. See Affidavit in Opposition, Exhibit D. Thereafter, on April 14, 2003, this court granted motion sequence number 001, on default, to the extent of permitting defendants until May 23, 2003 to move or to serve an answer. Id., Exhibit G. Although DiPasquale has expressed some confusion, that default is not the subject of the instant motion.

In the meantime, defendants had already served a motion, returnable on April 3, 2002, to dismiss DiPasquale's complaint, pursuant to CPLR 3211 (a) (7) (motion sequence number 002). See Notice of Motion, Exhibit 3. Defendants' counsel claims to have initially served that motion, via Express Mail, on March 17, 2003, and then to have re-served it, also via Express Mail, on March 28, 2003. See Affirmation in Opposition, ¶¶ 7, 12; Affidavit in Opposition, ¶ 3. DiPasquale denies receipt, however, and alleges that defendants' notice of motion arrived via

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<sup>3</sup> The court's order was dated June 29, 2001, under Index Number 601780/98.

regular mail on April 7, 2003, and that he did not discover the Express Mail receipt in his post office box until May 19, 2003. See Affidavit in Support, ¶¶ 4-5. On April 16, 2003, this court granted motion sequence number 002, on default, and instructed the parties to settle the order on notice. See Affidavit in Opposition, Exhibit H. The court eventually signed defendants' proposed order on June 23, 2003. See Reply Affirmation, Exhibit 6. That order dismissed DiPasquale's original, pro se, complaint, awarded defendants the costs of the action, and states that it is:

ADJUDGED that [DiPasquale] is hereby restrained and enjoined from commencing any further litigation against [SMLI], and/or their present or former directors, officers, employees or agents in connection with any claim arising out of the issuance of the insurance policies at issue in this litigation, \* \* \*

Id., at 2. The order entered on this second default is the subject of the instant motion.

In the interim, DiPasquale had retained counsel on or about May 8, 2003. See Affirmation in Support of Motion, at 3. DiPasquale now seeks to vacate his default on motion sequence number 002, and requests permission to serve and file a proposed amended complaint in this action and/or to interpose opposition to that earlier dismissal motion. The proposed amended complaint sets forth one cause of action for breach of contract, and requests compensation for unpaid benefits for the period of July 2001 to the present. See Notice of Motion, Exhibit 2.

#### DISCUSSION

At the outset, the court notes that DiPasquale and his new counsel have apparently confused the default entered on motion sequence number 001 with the default entered on motion sequence number 002. In his current motion, DiPasquale requests the court to "vacat[e] the order

reportedly issued on April 14, 2003, as against the Plaintiff, and issu[e] a corrective order clarifying the Court's intent to allow Plaintiff until May 23, 2003 to answer Defendants Motion to Dismiss or counter-move; \* \* \* [emphasis in original]." See Affirmation in Support of Motion, at 1. The court harbors no such intent. Rather, on April 14, 2003, as a result of DiPasquale's default, the court granted defendants' motion for an extension of time until May 23, 2003 to either move or serve an answer (i.e. motion sequence number 001). See Affidavit in Opposition, Exhibit G. Defendants did, indeed, thereafter interpose a motion to dismiss (i.e. motion sequence number 002). When DiPasquale failed to respond to that motion, the court granted it, on default, in defendants' favor on April 16, 2003. Since DiPasquale now wishes either "to answer Defendants Motion to Dismiss or counter-move," it is, therefore, clear that he is actually seeking to vacate this second default. Accordingly, the court treats the first portion of the instant motion as addressing the default judgment which was signed on April 16, 2003 (and settled on June 23, 2003).

CPLR 5015 (a) (1) provides that the court may relieve a party from a judgment or order upon the ground of "excusable default," as long as that party can also demonstrate the existence of an underlying meritorious cause of action or defense. See e.g. Peacock v Kalikow, 239 AD2d 188 (1<sup>st</sup> Dept 1997). Here, DiPasquale claims that he received notice of the dismissal motion (i.e. motion sequence number 002), via regular mail, on April 7, 2003, which was four days after the motion's return date. See Affidavit in Support, ¶¶ 4-5. Defendants' counsel replies that he initially served the motion papers on March 17, 2003, that he thereafter re-served them on March 28, 2003, and that both attempts at service were made via Express Mail. See Affirmation in Opposition, ¶¶ 7, 12; Affidavit in Opposition, ¶ 3. DiPasquale states that he did not receive any

Express Mail, but that he discovered a notice of attempted delivery thereof in his post office box on May 19, 2003. See Affidavit in Support, ¶ 5. The court notes that that receipt indicates that unsuccessful attempts at delivery were made on March 18 and 19, 2003, and that the envelope was thereafter returned to defendants' counsel marked "unclaimed." See Notice of Motion, Exhibit 4. Based on this evidence, the court finds that DiPasquale may not have been timely served with notice of motion sequence number 002. It is clear that non-receipt of pleadings is a form of excusable default. See e.g. FRE Intern. v Fishman, 199 AD2d 64 (1<sup>st</sup> Dept 1993). Accordingly, the court finds that DiPasquale's default under motion sequence 002 was excusable, and turns to the second inquiry mandated under CPLR 5015 (a) (1).

No relief from a default judgment may be granted unless a movant demonstrates that he or she has a meritorious claim in addition to **an** excusable default. See e.g. Peacock v Kalikow, 239 AD2d 188 supra. Here, DiPasquale's proposed amended complaint alleges breach of contract in the form of non-payment of disability insurance benefits for the period of July 2001 to the present. See Notice of Motion, Exhibit 2. However, on June 29, 2001, the court had already granted summary judgment dismissing DiPasquale's identical breach of contract claim for disability insurance benefits on the ground that he had willfully, and "inexcusably," refused to substantiate that claim over a period of years. See Reply Affirmation, Exhibit 7 at 9. The instant proposed amended complaint, thus, seeks to reinstate a claim which the court previously dismissed on the merits. This is, of course, completely improper. Because DiPasquale's proposed cause of action is plainly meritless, he has, therefore, failed to satisfy the second requirement for relief from a default judgment. Accordingly, the court finds that the first branch of the instant motion must be denied.

The second portion of DiPasquale's motion seeks permission to serve and file an amended complaint, pursuant to CPLR 3025 (b). Ordinarily, leave to amend is freely granted absent prejudice or surprise resulting from the delay. See e.g. Davis & Davis, P.C. v Morson, 286 AD2d 584 (1st Dept 2001). However, such leave will be denied where the proposed amended causes of action are plainly lacking in merit. See e.g. Sharon Ava & Co. v Olympic Tower Assoc., 259 AD2d 315 (1st Dept 1999). Here, as discussed above, there is no merit to DiPasquale's proposed cause of action for breach of contract. Thus, CPLR 3025 (b) does not provide any additional legal basis for granting DiPasquale's application. Accordingly, the court finds that the second branch of the instant motion must also be denied.


#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion of plaintiff Christopher E. DiPasquale for an order, pursuant to CPLR 5015 (a) and/or CPLR 3025 (b), is in all respects denied.

Dated: New York, New York  
September 30, 2003

ENTER

  
\_\_\_\_\_  
Hon. Paula Omansky, JSC