

Progressive Max Ins. Co. v Sam

2011 NY Slip Op 30665(U)

March 3, 2011

Sup Ct, Nassau County

Docket Number: 6819/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

PROGRESSIVE MAX INSURANCE CO.,

Plaintiff(s),

-against-

Index No. 6819/10

**Motion Submitted: 12/10/10
Motion Sequence: 001,002**

**RASHIDA SAM, KEITH FRANCIS, ZUWANDA
RUSSELL, LEON LAURIE, ABC PHYSICAL
THERAPY, P.C., ALL BORO PSYCHOLOGICAL
SERVICES, P.C., ART OF HEALING MEDICINE,
P.C., BROAD STREET ACUPUNCTURE, P.C.,
INTERPUBLIC MEDICAL, P.C., KJC
CHIROPRACTIC, P.C., MAXIMILLIAN
MASSAGE THERAPY, P.C., MERMAID
CHIROPRACTIC, P.C., MIY MEDICAL
SERVICES, P.C., NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION, CONEY
ISLAND HOSPITAL, NOVA ACUPUNCTURE,
P.C., OMEGA DIAGNOSTIC IMAGING, P.C.,
QUALITY DIAGNOSTIC IMAGING, P.C., SHORE
MEDICAL DIAGNOSTIC, P.C., and
WESTENDBAY ENTERPRISES, INC.,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by plaintiff for an Order granting judgment on default¹ pursuant to CPLR § 3215 as to the following defendants:

Zuwanda Russell, Leone Laurie, ABC Physical Therapy, P.C., Art of Healing Medicine, P.C., Broad Street Acupuncture, P.C., Interpublic Medical, P.C., KJC Chiropractic, P.C., Maximillian Massage Therapy, P.C., Mermaid Chiropractic, P.C., MIY Medical Services, P.C., New York City Health and Hospitals Corporation, Coney Island Hospital, Nova Acupuncture, P.C., Omega Diagnostic Imaging, P.C., Quality Diagnostic Imaging, P.C., Shore Medical Diagnostic, P.C., and Westendbay Enterprises, Inc.,

and granting an extension of time to effectuate service and for substituted service pursuant to CPLR § 306-b and CPLR § 308(5) upon the following defendants:

Rashida Sam and Keith Francis

and for an Order granting summary judgment against defendant Allboro Psychological Services, P.C. (“Allboro”).

Defendant Allboro cross-moves this Court for an Order severing the claims against it from the other defendants, compelling plaintiff to comply with Allboro’s discovery demands, and for sanctions. Allboro’s cross-motion also contains opposition to plaintiff’s summary judgment motion. Plaintiff opposes the cross-motion.

This action arises out of an allegedly “staged” motor vehicle accident, subsequent to which, defendants Sam, Francis, Russell and Laurie submitted fraudulent claims to the defendant service providers for no-fault reimbursement, UIM benefits and liability coverage. Sam and Russell each were issued an automobile insurance policy by plaintiff. Those policies became effective on July 21, 2009 (Sam) and on July 24, 2009 (Russell). At the time of the accident, Sam and Russell were the operators of their respective vehicles. Defendant Francis was Sam’s passenger, and Laurie was Russell’s passenger. Plaintiff alleges that the “accident,” which occurred on July 29, 2009, was intentionally caused.

Specifically, plaintiff seeks a declaration with respect to the subject loss of July 29, 2009, pursuant to the automobile insurance policies issued to defendants Sam and Russell,

¹The action against defendants University Group Medical Associates, P.C. was discontinued by stipulation dated August 17, 2010 and against U&R City Supply, Inc. by stipulation on September 9, 2010.

as follows: 1) that plaintiff has no contractual duty to defend; 2) nor to provide indemnity coverage; 3) nor to provide liability coverage in any pending or future actions for personal injury or property damages that may be brought as a result of the subject loss, and 4) that plaintiff has no duty to provide coverage for any claims for no-fault and/or uninsured motorist benefits made by or on behalf of any of the defendants and/or their assignees in connection with the subject loss of July 29, 2009.

Service upon all of the defendants against whom default judgment is sought, with the exception of defendant Laurie, was timely, none having appeared or otherwise moved this Court for any relief in connection with this application, and the thirty days to do so has expired (*CPLR § 320[a]*).

More than twenty (20) days have elapsed since service by personal delivery and more than thirty (30) days have elapsed since completion of service by all aforementioned methods. Following the service of the Summons and Verified Complaint, all of the aforesaid defendants failed, refused or neglected to appear, answer or otherwise move this Court for any relief in connection with this application.

The time to appear has expired for the following defendants who are now in default:

Zuwanda Russell, ABC Physical Therapy, P.C., Art of Healing Medicine, P.C., Broad Street Acupuncture, P.C., Interpublic Medical, P.C., KJC Chiropractic, P.C., Maximillian Massage Therapy, P.C., Mermaid Chiropractic, P.C., MIY Medical Services, P.C., New York City Health and Hospitals Corporation, Coney Island Hospital, Nova Acupuncture, P.C., Omega Diagnostic Imaging, P.C., Quality Diagnostic Imaging, P.C., Shore Medical Diagnostic, P.C., and Westendbay Enterprises, Inc.,

A judgment on default pursuant to CPLR § 3215 as to the aforementioned defendants is granted.

As to the defaulting defendants only, it is the judgment of the Court that plaintiff Progressive Max Insurance Company has no contractual duty to defend, nor to provide indemnity coverage for, the said defaulting insureds, nor to defend, nor to provide indemnity coverage for, the operators/passengers in the insured vehicles, nor their assignees, for the said losses, in any action for damages arising out of personal injury or property damage as a result of these losses.

As to the defaulting defendants only, Progressive Max Insurance Company has no contractual duty to defend, nor to provide indemnity coverage for the said losses, and that

Progressive Max Insurance Company has no duty to provide coverage for any claims of no-fault and/or uninsured motorist coverage made by the insured operators, as well as the insured guest passengers, nor their assignees, as a result of these losses.

As to the defaulting defendants only, said policies in connection with these claims are null and void and that Progressive Max Insurance Company has no contractual duty to defend any person under such policies in any action or proceeding brought for damages arising out of personal injury or property damage as a result of the said losses.

As to the defaulting defendants only, said policies in connection with these claims are null and void and that Progressive Max Insurance Company has no duty to provide coverage for any claims for no-fault and/or uninsured motorist coverage made by or on behalf of any person or entity in connection with the said losses.

As to the defaulting defendant Russell only, said defendant violated his/her respective obligation to appear for an examination under oath with Progressive Max Insurance Company and therefore plaintiff insurance company has no duty to defend or indemnify the said defaulting defendant, nor their assignees, for any claims of personal injury, no-fault, UM or SUM benefits.

The Court denies plaintiff's motion for a default judgment against defendant Leon Laurie, with leave to renew upon submission of proper papers. The caption of this action names "Leon Laurie" as a defendant. The affidavit of service dated April 23, 2010 states that service upon "Leon Lorraine" was made upon a person of suitable age and discretion, namely "'Jane' Lorraine, Mother." Plaintiff's papers fail to address this discrepancy in service. Thus, plaintiff has not established that service of the Summons and Verified complaint was properly made upon the named defendant, Leon Laurie.

With respect to service upon defendants Sam and Francis, plaintiff made diligent attempts at the known addresses for these parties without success. On April 22, 2010, plaintiff attempted personal service upon defendant Sam, by going to Sam's last known address, located at 85 East 43rd Street, Apt. B1, Brooklyn, New York. Plaintiff asserts in the affidavit of due diligence that the process server was advised that Sam had moved and left no forwarding address.

On April 22, 2010, plaintiff attempted to personally serve defendant Francis at three different addresses: 1) 61 Martense Street, Apt. 4B, Brooklyn, New York; 2) 61 Martense Street, Apt. 61; and 3) 210 Westbury Court, Apt. 3B, Brooklyn, New York. In the affidavits of due diligence, the process server states that Francis was unknown at 61 Martense Street, Apt. 4B, and at 210 Westbury Court, Apt. 3B. With respect to the 61 Martense Street, Apt. 61 address, the process server states that there is no apartment number 61 or 6I.

Plaintiff has demonstrated that service upon said defendants is impracticable and expedited service is plaintiff's only alternative. Plaintiff has attempted to serve said defendants with demonstrated, reasonable diligence at the addresses associated with said defendants. Plaintiff's application that publication be deemed sufficient service, together with an additional 120 days pursuant to CPLR § 306-b in order to extend the time for service, is granted with respect to:

Rashida Sam and Keith Francis

The attorneys for plaintiffs shall submit for review a proposed Order of Publication to the Clerk's Office, 100 Supreme Court Drive, Room #186, Mineola, New York, and, if found to be in accordance with this decision, same will be signed. (See *CPLR § 316(a) and (c)*).

The Court now turns to plaintiff's motion for summary judgment against Allboro, and Allboro's cross-motion for severance and to compel discovery.

Plaintiff has failed to specify and produce evidence, in admissible form, as to which of the individual defendants were provided psychological services by defendant Allboro, when such services were provided, and the amount allegedly due to Allboro. Plaintiff merely alleges in its complaint that, it "has received numerous requests for no-fault reimbursement from [the provider defendants]."

Inasmuch as Allboro served its answer and discovery demands on July 1, 2010, and plaintiff filed the instant motion on July 15, 2010, without responding to Allboro's discovery demands, the Court denies plaintiff's summary judgment motion, and defendant's motion to compel discovery, as premature, with leave to renew (See *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494, 506, 618 N.E.2d 82, 89, 601 N.Y.S.2d 49 (1993); *Cirincione v. Atlantic Hylan Corp.*, 57 A.D.3d 707, 868 N.Y.S.2d 905 (2d Dept., 2008); *Colombini v. Westchester County Healthcare Corp.*, 24 A.D.3d 712, 808 N.Y.S.2d 705 (2d Dept., 2005); *OK Petroleum Distribution Corp. v. Nassau/Suffolk Fuel Oil Corp.*, 17 A.D.3d 551, 793 N.Y.S.2d 152 (2d Dept., 2005); *Rosa v. Colonial Transit, Inc.*, 276 A.D.2d 781, 715 N.Y.S.2d 426 [2d Dept., 2000]). Accordingly, Allboro's request for sanctions is denied as moot.

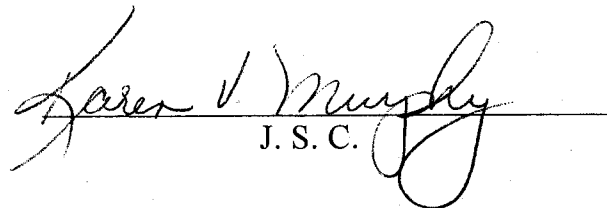
In view of the fact that service has not yet been completed on defendants Laurie, Sam and Francis, Allboro's motion for severance is denied as premature, with leave to renew.

The date for an inquest for an assessment of damages and the direction for a

submission of a judgment with Notice of Settlement in conformity with this decision shall be held in abeyance until further order of the Court and service on the remaining defendants is complete pursuant to CPLR § 316(c). Attorneys for plaintiff shall serve a copy of this Order on all defendants.

The foregoing constitutes the Order of this Court.

Dated: March 3, 2011
Mineola, N.Y.


J. S. C.

ENTERED

MAR 09 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**