SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

AMERICAN STATES INSURANCE COMPANY,

Plaintiff,

MOTION DATE: 1/16/10
MOTION SEQ. NO.: 003

-against-

INDEX NO.: 09-018341

SAFECO INSURED DEFENDANT
JOSE CASADO,

INDIVIDUAL CLAIMANT DEFENDANTS
DIXSON GARCIA a/k/a DIXON GARCIA,
ELVYS PEREZ,
SAMY CAMILO,
JOSEPH RICHARDSON,

HEALTHCARE PROVIDER DEFENDANTS
ALROF, INC.,
BROOKLYN HEIGHTS PHYSICAL THERAPY, P.C.,
EAST 75TH STREET DIAGNOSTIC IMAGING P.C.,
G.Z. MEDICAL AND DIAGNOSTIC, P.C.,
MOSAD MEDICAL, P.C.,
BLR CHIROPRACTIC, P.C.,
3 STAR ACUPUNCTURE, P.C.,
ST. LUKES – ROOSEVELT HOSPITAL,
KINGSHWY PSYCHOLOGICAL, P.C.,
NEW HYDE PARK IMAGING, P.C. d/b/a US DIAGNOSTIC
CLINTON PLACE MEDICAL, P.C.,
BR CLINTON CHIROPRACTIC, P.C., and
NEW WAY ACUPUNCTURE, P.C.,

Defendants.

The following papers read on this motion (numbered 1):
Notice of Motion..... 1

The Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to

have the merits of such an adjournment considered in the event that there is a subsequent submission.

Plaintiff AMERICAN STATES INSURANCE COMPANY ("Plaintiff" or "SAFECO"[1]) moves for a default judgment pursuant to **CPLR §3215** against the following defendants based upon their failure to answer or appear:

SAFECO Insured Defendant
JOSE CASADO ("CASADO")

Individual Claimant Defendants
DIXSON GARCIA a/k/a DIXON GARCIA ("GARCIA"),
ELVYS PEREZ ("PEREZ"),
SAMY CAMILO ("CAMILO"),
JOSEPH RICHARDSON "RICHARDSON"),

Healthcare Provider Defendants
EAST 75TH STREET DIAGNOSTIC IMAGING P.C.,
G.Z. MEDICAL AND DIAGNOSTIC, P.C.,
ST. LUKES – ROOSEVELT HOSPITAL ("ST. LUKES-ROOSEVELT"),
KINGSHWY PSYCHOLOGICAL, P.C.,
NEW HYDE PARK IMAGING, P.C. d/b/a US DIAGNOSTIC.

This is a declaratory judgment action arising out of a motor vehicle collision that occurred on July 17, 2008 (the "Collision"), in which a vehicle driven by the SAFECO Insured Defendant CASADO and occupied by passengers GARCIA, PEREZ and CAMILO, allegedly came into contact with a vehicle operated by RICHARDSON, which was either entering or exiting a parking space on the right-hand side of the street. Plaintiff seeks a declaration pursuant to **CPLR §3001** that it is not obligated to provide liability coverage or No-Fault benefits to, or on behalf of, any of the defendants named herein, in connection with the Collision. The Complaint alleges, among other things: (i) that the Collision was not a covered event (i.e., an accident), but rather, was a staged or intentional event; and (ii) that coverage is vitiated by the failure of CASADO and the occupants of the SAFECO insured vehicle to cooperate as required by the applicable policy.

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[1] Plaintiff asserts that "SAFECO" is the trade name for several related underwriting companies that issue automobile insurance policies in the United States. AMERICAN STATES INSURANCE COMPANY is the underwriting company utilized by SAFECO for the issuance of automobile insurance in New York, and the company that issued the subject policy to defendant JOSE CASADO.

In support of its motion for a default judgment, SAFECO offers proof which nominally satisfies the requirements of **CPLR §3215(f)**. Although unopposed, this application nonetheless requires the Court's scrutiny, particularly in view of the breadth of the relief sought. Close examination reveals defects in jurisdiction, and an insufficient demonstration of a *prima facie* right to declaratory relief. *See* **Dole Food Co., Inc. v. Lincoln General Ins. Co.**, 66 A.D.3d 1493, 1494 ("A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[s] establish a right to a declaration," quoting **Merchants Insurance Company of New Hampshire Inc. v. Long Island Pet Cemetery**, 206 AD2d 827. *See also* **Joosten v. Gale,** 129 AD2d 531.

Jurisdiction.

Based upon the Affidavits of Service attached to this motion, the Court finds defects in the service of process upon defendants CASADO, RICHARDSON, and ST. LUKES-ROOSEVELT.

CASADO. According to the Affidavit of Service of Summons (And Complaint), sworn to on September 17, 2009 [Motion Exhibit C], CASADO was served pursuant to **CPLR §308(4)** by affixation of the papers on the door of the premises at 271 E 164 St. #3B, Bronx NY on Wednesday, September 16, 2009 at 8:50 am. The Affidavit of Service attests to two prior attempts at personal service on Monday September 14, 2009 at 5:45 pm and Tuesday September 15, 2009 at 3:15 pm, and a third attempt at the date and time of affixation.

CPLR §308(4) provides that, where service cannot be made pursuant to **CPLR §308(1) or (2)** "with due diligence," the summons and complaint may be affixed to the door of either "the actual place of business, dwelling place or usual place of abode" of the defendant, followed by a subsequent mailing. In this case, Plaintiff has not shown that the requirements of **CPLR §308(4)** have been satisfied. Personal service was attempted on only two dates prior to the date of affixation. All attempts were on weekdays, at times when the defendant could reasonably be expected to be at work or in transit to or from work. No adequate inquiry was shown with respect to CASADO's whereabouts, habits, or schedule of times at home, or place of business. These defects undermine "due diligence." *See* **County of Nassau v. Yohannan,** 34 A.D.3d 620, **O'Connell v. Post**, 442, 27 A.D.3d 630; **Earle v. Valente**, 302 AD2d 353; **Annis v. Long**, 298 AD2d 340; **De Shong v. Marks,** 144 AD2d 623.

Further, there is no evidence that the address used was CASADO's "actual place of business, dwelling place or usual place of abode." Plaintiff provided no documentary

evidence, nor any other form of proof verifying the current validity of the address. Service upon a defendant at his last known address does not satisfy the requirements of **CPLR §308(4).** *See* **Feinstein v. Bergner,** 48 NY2d 234.

Finally, the Court finds insufficient proof of non-military status. Although the Affidavit of Service form contained a "check" in the box indicating that defendant was not in the military, there is no identification of the person who allegedly provided that information, nor any documentary substantiation.

RICHARDSON. The Affidavit of Service of the Summons (and Complaint), sworn to on September 17, 2009 [Motion Exhibit C], attests to service upon RICHARDSON pursuant to **CPLR §308(4)** by affixation of the papers on the door of the premises at 303 Vernon Avenue, 16J, Brooklyn, NY on Wednesday September 16, 2009 at 8:05 am. The prior attempts at personal service were made on the same dates (9/14/09, 9/15/09 and 9/16/09) as the prior attempts upon CASADO. The Court finds that the purported service suffers from the same defects as the service upon CASADO; namely, there is insufficient demonstration of due diligence, and there is no evidence establishing the validity of the address used or the non-military status of the defendant.

Plaintiff submits another Affidavit of Service of the Summons (and Complaint), sworn to on January 7, 2010 [Motion Exhibit G], which attests to service upon RICHARDSON pursuant to **CPLR §308(2)** by delivery to "Joseph Davis," a person of suitable age and discretion at 303 Vernon Avenue, 16J, Brooklyn, NY, on December 31, 2009. Although the process server provided a description of "Joseph Davis" by checking identifying features on the affidavit form, it is unclear who this person is, why he was at the premises and what his relationship was to the defendant, if any. This raises concerns about the reliability of such delivery to confer actual notice upon RICHARDSON. Further, there is no evidence that the premises at which the papers were delivered was the "actual place of business, dwelling place or usual place of abode" of RICHARDSON. None of these designations was selected on the affidavit form, and no documentary substantiation or other proof of valid address was provided. Finally, there is no evidence of an additional mailing to RICHARDSON's last known address within 20 days of delivery, as required by **CPLR §308(2)**, nor proof of non-military status.

ST. LUKES-ROOSEVELT. According to the Affidavit of Service of the Summons (and Complaint) sworn to on September 17, 2009 [Motion Exhibit K], ST. LUKES-ROOSEVELT was served by delivery to "Minerva Carabello/Risk Mgmt, a person of suitable age and discretion" at St. Luke [sic] Roosevelt Hospital in New York, NY. This purported service is ineffective. ST. LUKES-ROOSEVELT is not a "person" who may be served pursuant to **CPLR §308(2)**. (Ironically, the process server checked the box on

the affidavit form indicating that this defendant was not in the military service.) Personal service upon a corporation may be made only by delivery to one of the individuals enumerated in **CPLR §311(a)(1).** Plaintiff was required to ascertain the nature or form of organization of the defendant entity and to determine the appropriate method of service accordingly.

Absent proof of effective service upon CASADO, RICHARDSON, and ST. LUKES-ROOSEVELT, the Court cannot exercise jurisdiction over these defendants.

Merits.

The Court turns to the question of whether or not Plaintiff is entitled to relief as against the remaining seven defendants.

The subject policy provides liability, uninsured motorist and no-fault coverage for bodily injuries resulting from a motor vehicle accident. There is no coverage *ab initio* if the incident in question was not an accident. SAFECO claims that the purported automobile collision was a "staged event" which was intentionally caused by some of the defendants for purposes of generating fraudulent insurance claims. If the incident was deliberate (i.e., not an accident), then none of the defendants is entitled to coverage, regardless of the innocence of any particular defendant, and regardless of whether or not the incident was motivated by fraud or malice. *See* **Matter of Allstate Ins. Co. v Massre**, 14 AD3d 610; **Matter of Government Empls. Ins. Co. v Robbins**, 15 AD3d 484, **State Farm Mut. Automobile Ins. Co. v. Laguerre,** 305 AD2d 490; **Geico v. Shaulskaya,** 302 AD2d 522; **Matter of Metro Med. Diagnostics v Eagle Ins. Co.**, 293 A.D.2d 751; **Progressive Northwestern Ins. Co. v. Van Dina**, 282 A.D.2d 680. Evidence of fraud should be considered in determining the question of whether or not the collision was deliberate. **Matter of Eagle Ins. Co. v. Davis,** 22 AD3d 846.

In support of its motion, Plaintiff submits the Verified Complaint, with attached verification by Eric Pappalardi, Senior Investigator in the Special Investigative Unit of SAFECO Insurance Company of Indiana. The Verified Complaint concludes that the Collision was an intentional or staged incident, based upon several factors, including: (i) that the Collision occurred less than one month after the procurement of the subject policy; (ii) that CASADO could not adequately explain or document the circumstances of the procurement of the policy or the purchase of the insured vehicle; (iii) that the testimony of CASADO and PEREZ in their respective examinations under oath (EUO) was conflicting with respect to the reason for being at the location of the Collision, the events and circumstances prior to the Collision, the color of the SAFECO insured vehicle ("cream" or "grey"), and the events and circumstances subsequent to the Collision,

particularly regarding the occupants' injuries and medical treatment; (iv) that all of the occupants of the SAFECO insured vehicle obtained the same counsel to represent them, and sought medical treatment at the same facilities; and (v) that CASADO disposed of the subject vehicle shortly after the Collision and could not adequately explain the circumstances of, or produce proof regarding, his purported sale of the vehicle.

The Court has found no controlling authority that addresses the quantum and nature of proof required to establish a *prima facie* right to judgment in the so-called "staged accident" context. A leading Second Department case holds that where two out of three collisions occurring within weeks of the policy's inception have been found to be part of a fraudulent scheme, the insurer is entitled to judgment with respect to the third. **Laguerre,** 305 AD2d 490.

Some guidance is offered by the trial courts, which have articulated several factors as indicia of fraud, including: (i) more than one collision within a short time of the policy's inception, (ii) cancellation of the policy shortly thereafter for non-payment of premiums, (iii) similarities among the collisions and interrelationships among the parties, and (iv) inconsistencies in testimony regarding the circumstances of the subject collision and the identities of the individuals involved. Such factors, in various combinations, have been held to constitute a "compelling and persuasive body of circumstantial evidence that the underlying loss resulted from an intentional collision staged for the purpose of insurance fraud." **Matter of National Grange Mut. Ins. Co. v. Vitebskaya**, 1 Misc.3d 774. *See also* **V.S. Medical Services, P.C. v. Allstate Ins. Co.,** 11 Misc.3d 334; **Matter of Progressive County Mut. Ins. Co. v. McNeil,** 4 Misc.3d 1022(A).

This Court believes that it must look to the totality of the circumstances to determine whether an inference can reasonably be made that the Collision was deliberately caused, and that it is not compelled to adopt the formulae suggested by insurance investigators or companion Courts. The evidence in this case, however, does not even rise to the level deemed persuasive by those groups.

There is no evidence that the Collision was one of two or more involving interrelated parties. Plaintiff does not allege that the policy was cancelled for non-payment of premiums. Plaintiff points to no inconsistent testimony regarding the Collision itself or the identities of the individuals involved. To the contrary, upon the Court's own review of the EUO testimony of CASADO and PEREZ, the Court found no material inconsistencies regarding the occurrence of the Collision. In fact, the Court found that the testimony supported the inference that the Collision was an accident. Other than the EUO testimony, Plaintiff provides no evidence regarding the circumstances of the Collision. Plaintiff provides no Police Accident Report, nor any

eyewitness statement suggesting that the Collision was anything but an accident. Accordingly, Plaintiff does not even raise an issue of fact, let alone establish *prima facie*, the deliberate nature of the Collision. *Compare,* **Matter of Aetna Cas. & Sur. Co. v. Perry,** 220 AD2d 497.

The Court finds that SAFECO has not met its burden to set forth a *prima facie* case entitling it to a judgment declaring that the Collision was not an accident as a matter of law. That does not end the inquiry, however. Plaintiff has also invoked certain policy exclusions, which negate coverage where: (i) the injuries were intentionally caused; (ii) the defendants have failed to cooperate in providing discovery required by the policy; (iii) defendants have made fraudulent statements and engaged in fraudulent conduct in connection with the presentation of claims.

The Court finds insufficient proof to grant the relief sought on the basis of policy exclusions. First, there is no evidence of compliance with **Insurance Law §3420** and applicable regulations. *See* **Fair Price Medical Supply Corp. v. Travelers Indemnity Co.,** 42 AD3d 277. Second, as discussed above, Plaintiff fails to show that the Collision was the result of intentional conduct. Third, Plaintiff fails to establish a *prima facie* right to relief on the basis of non-cooperation, insofar as it fails to show that it acted diligently in seeking to bring about any defendant's cooperation, that its efforts were reasonably calculated to obtain such cooperation, and that such defendant's attitude, after cooperation was sought, was one of willful obstruction. *See* **New York Thrasher v. U.S. Liability Ins. Co.,** 19 NY2d 159; **Continental Cas. Co. v. Stradford,** 46 A.D.3d 598. Finally, although the inadequate or inconsistent testimony cited by Plaintiff raises a suspicion of fraud, particularly with respect to the nature and extent of the injuries claimed, it is insufficient to establish that Plaintiff is entitled to wholesale relief from its obligations under the policy, or with respect to any particular defendant. Plaintiff is not left without remedy. To the extent that Plaintiff has complied with the Insurance Law and applicable regulations, it may defend against fraudulent claims in any proceeding in which coverage is sought.

Conclusion

Based upon the foregoing it is

ORDERED, that SAFECO's motion for a default judgment pursuant to **CPLR §3215** is **denied** in its entirety.

Dated: 4/28/11

J.S.C.

ENTERED
MAY 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE