

**New South Ins. Co. v Harris**

2011 NY Slip Op 32645(U)

September 6, 2011

Supreme Court, Nassau County

Docket Number: 10535/10

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 4**

**NEW SOUTH INSURANCE COMPANY,**

**Plaintiff,**

**MOTION DATE: 6/31/11**

**MOTION SEQ. NO.: 001**

**-against-**

**INDEX NO.: 10535/10**

**DAVID HARRIS, ANDREW SIMPSON, TERRANCE BROWN AND JONATHAN SHARROCK,**

**Participant Defendants,**

**A.H. PHYSICAL THERAPY, P.C.; ALL BORO PSYCHOLOGICAL SERVICES, P.C.; BEST PHYSICAL THERAPY, P.C.; CAREGIVER CHIROPRACTIC, P.C.; COMPREHENSIVE MULTI-SPECIALTY MEDICAL GROUP, P.C.; DARLINGTON MEDICAL DIAGNOSTIC P.C., DOVPHIL ANESTHESIOLOGY GROUP, P.L.L.C.; ESSEX SURGERY CENTER, L.L.C.; HARMONIC PHYSICAL THERAPY, P.C.; JIAN KANG, INC.; K&M CHIROPRACTIC, P.C.; TONG LI, MD; MIY MEDICAL SERVICES, P.C.; MIY MEDICAL SERVICES PC d/b/a MIY MEDICAL CARE, PC; NOVACARE MEDICAL P.C.; RIGHT AID DIAGNOSTIC MEDICINE, P.C.; SANLI ACUPUNCTURE, P.C.; SEARAY MEDICAL, P.C.; SMA MEDICAL LAB, INC.; SYNERGY FIRST MEDICAL GROUP, PLLC; IRA SIEGEL, MD; VALLEY MEDICAL CARE, P.C.; VALLEY STREAM RADIOLOGY, P.C.; ZSA MEDICAL CARE, P.C.,**

**Provider Defendants.**

**The following papers read on this motion (numbered 1):**

**Notice of Motion.....1**

Plaintiff moves for a default judgment pursuant to **CPLR §3215**. 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.

This is a declaratory judgment action predicated upon the claim that a two-car motor vehicle collision which occurred on June 13, 2009 on Canal Street in Manhattan (the "Collision") was an intentional act, rather than an accident. Plaintiff NEW SOUTH INSURANCE COMPANY ("NEW SOUTH") seeks a declaration that it is not obligated: to defend or indemnify any of the Participant Defendants (as designated in the above caption); to pay any claims for No Fault or Uninsured Motorist benefits made by or on behalf of the Participant Defendants; or to pay any No Fault claims submitted by the Provider Defendants (as designated in the above caption); in connection with the underlying Collision.

The action was commenced on June 1, 2010. The Court refers to the motion papers for a recitation of the underlying facts and procedural history of this action. Plaintiff now moves pursuant to **CPLR §3215** for a default judgment against all of the defendants except COMPREHENSIVE MULTI-SPECIALTY MEDICAL GROUP, P.C., ESSEX SURGERY CENTER, LLC, HARMONIC PHYSICAL THERAPY, P.C., IRA SIEGEL, M.D., and SMA MEDICAL LAB, INC., against which the action has been discontinued (the "Discontinued Defendants"); and SEARAY MEDICAL P.C. and ALL BORO PSYCHOLOGICAL SERVICES, P.C., which have appeared in the action (the "Non-Defaulting Defendants").

In support of its motion, plaintiff submits, among other things: (i) a copy of the Summons and Verified Complaint; (ii) proof of service of the Summons and Verified Complaint upon all defendants, (ii) the affirmation of plaintiff's attorney, Michael J. Giordano, Esq., as to the default of all the defendants, other than the Discontinued Defendants and the Non-Defaulting Defendants; (iii) proof of additional notice pursuant to **CPLR §3215(g)**; and (iv) the affidavit of Brinton Esty, an investigator in plaintiff's Special Investigative Unit, sworn to on April 20, 2011 (the "Esty Affidavit"), which attests to the facts constituting the claim.

The Court finds that the above proof, on its face, meets the formal requirements of **CPLR §3215**. The Court has received no opposition to the motion.

With respect to the proof of the merits, plaintiff urges that the Court need only find that a viable cause of action exists. *See Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 70-71. Insofar as the plaintiff seeks broad declaratory relief, however, this Court believes that the proper exercise of its discretion requires a finding that plaintiff has demonstrated a *prima facie* right to the relief sought. *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; *cf.* **New York Mut. Underwriters v Baumgartner**, 19 AD3d 1137, 1141; *See also* **Joosten v. Gale**, 129 AD2d 531.

Plaintiff claims that the Collision was not a legitimate accident, but was intentionally caused for the purpose of generating fraudulent insurance claims. If the Collision was deliberate, 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 whether or not the Collision was deliberate. **Matter of Eagle Ins. Co. v. Davis**, 22 AD3d 846.

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 a non-accident, 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).

In the case at bar, plaintiff points to several facts or circumstances which suggest that the Collision was a deliberate event. First, plaintiff notes the extensive claim history

of defendant DAVID HARRIS, the owner and operator of the plaintiff-insured vehicle. According to the Esty Affidavit, and based upon a claims search of the ISO.com database dated 2/25/11 (the "ISO Search"), which record is authenticated and attached to the motion at Exhibit F, DAVID HARRIS was an insured or claimant in at least eight losses, including the subject loss, that occurred in the period from 2/28/05 through 6/13/09, as reconstructed below for clarity:

- |    |           |                    |          |   |
|----|-----------|--------------------|----------|---|
| 1. | 2/28/05   | Claimant Passenger | Address: | 219-09 130 <sup>th</sup> Drive<br>Laurelton, NY 11413 |
| 2. | 6/23/06   | Insured            | Address: | 136 Jersey Avenue<br>Port Jervis, NY 12771            |
| 3. | 9/11/07   | Insured            | Address: | P.O.Box 311292<br>Jamaica, NY 11431                   |
| 4. | 9/12/07   | Insured            | Address: | P.O.Box 311292<br>Jamaica, NY 11431                   |
| 5. | 11/4/07   | Insured            | Address: | P.O.Box 311292<br>Jamaica, NY 11431                   |
| 6. | 9/10/08   | Insured            | Address: | 136 Jersey Avenue<br>Port Jervis, NY 12771            |
| 7. | 12/19/08  | Claimant           | Address: | 219-09 130 <sup>th</sup> Drive<br>Laurelton, NY 11413 |
| 8. | 6/13/09 * | Insured            | Address: | P.O.Box 311292<br>Jamaica, NY 11431                   |

\* the Collision

The record reveals that three of the above losses took place in the two-month period from 9/11/07 through 11/04/07. In both of the third and fourth losses, occurring one day apart (9/11/07 and 9/12/07, respectively), the driver of the plaintiff-insured vehicle was the same person; namely, Kristian Clark of Jamaica NY.

Second, plaintiff contends that the insured DAVID HARRIS used a false address in his December 22, 2008 application for insurance [attached to Verified Complaint, Mot. Exh. A]. The application indicates a "garaging address" at 136 Jersey Avenue, Port

Jervis, NY 12771 (the "Port Jervis Address"). The Police Accident Report for the Collision also designates the Port Jervis Address as the address of DAVID HARRIS [Mot. Exh. F]. According to the Esty Affidavit, however, a field investigation conducted on July 21, 2009 (one month after the Collision) revealed that the property at the Port Jervis Address was vacant. The owner of the property from August 2005 through April 2010 confirmed that the property had been vacant since May 2008 and that no individual named DAVID HARRIS had ever lived there. [Esty Affidavit, ¶5; Affidavit of Kirk Rother, Mot. Exh. J].

The Court notes that the Port Jervis Address also appears to have been used by DAVID HARRIS to procure insurance prior to December 2008, insofar as it is the address associated with the 6/23/06 and the 9/10/08 losses. The police accident report for the 9/10/08 collision, however, shows a different address for DAVID HARRIS; namely 416 Fernside Place, Far Rockaway, NY 11691 [Mot. Exh. F]. The Court believes that the inconsistency in DAVID HARRIS's address history supports the contention that the addresses used were false or inaccurate.

Third, plaintiff asserts that, despite the fact that no injuries were reported at the accident scene, no-fault billings were submitted on behalf of the Participant Defendants in excess of \$160,000. [Esty Affidavit ¶7; Police Accident Report, Mot. Exh. F.] By contrast, no claims were submitted on behalf of the occupants of the adverse vehicle. [Esty Affidavit ¶7; ISO-Search, Mot. Exh. F]

Finally, plaintiff informs the Court that, according to detective Kevin Mojica of the New York City Police Department, DAVID HARRIS is part of an ongoing investigation for participation in a "ring" involved in staging automobile accidents. The incidents under investigation include the Collision. [Affidavit of Kevin Mojica dated November 3, 2010, Mot. Exh. I]. The Court feels compelled to mention this investigation, if only to note that it was not considered in reaching the determination herein.

Plaintiff also claims that the testimony of two Participant Defendants, TERRANCE BROWN [Mot. Exh. G] and JONATHAN SHARROCK [Mot. Exh. H], in their examinations under oath, was inconsistent with respect to the circumstances of the Collision. Insofar as plaintiff has provided only self-serving excerpts, however, and not the complete transcripts of these examinations, the Court cannot evaluate the validity of this claim.

The Court finds scant evidence concerning the circumstances of the Collision itself, other than the police accident report which indicates that the Collision was a sideswipe. The Court notes that the police accident report regarding the 9/10/08 collision

(sixth in the list above) indicates that the 9/10/08 collision was also a sideswipe [Mot. Exh. F]. Although a recurring manner of collision is considered one of the hallmarks of a staged accident, the significance of the coincidence in this case is unclear, insofar as the differences may offset the similarities. In the Collision, DAVID HARRIS was driving, and the adverse vehicle reportedly struck the plaintiff-insured vehicle. In the 9/10/08 collision, DAVID HARRIS was *not* driving, and the plaintiff-insured vehicle struck the adverse vehicle.

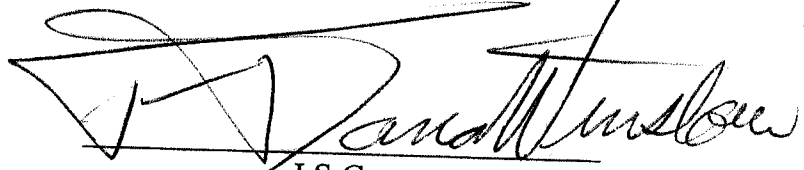
The Court notes that the effective period of the subject policy was December 22, 2008 through June 22, 2009 [Mot. Exh. E]. The Collision occurred on June 13, 2009, only nine days before the policy was due to expire. The timing of the Collision, although not probative in itself, supports doubt as to its accidental nature.

Although the Court cannot point to one particular piece of evidence that leads to the conclusion that the Collision of June 13, 2009 was "staged" or intentional, the Court finds that there is a sufficient body of circumstantial evidence that rises above the level of suspicion or speculation. The Court finds that, viewed as a whole, the evidence regarding DAVID HARRIS's claim history and his apparent lack of candor with respect to his address is sufficient to support an inference that the subject Collision was part of an intentional scheme, and to demonstrate *prima facie* entitlement to the relief sought. In the absence of opposition, it is

ORDERED, that plaintiff's motion for a default judgment pursuant to CPLR §3215 is **granted** as against all defendants except COMPREHENSIVE MULTI-SPECIALTY MEDICAL GROUP, P.C., ESSEX SURGERY CENTER, LLC, HARMONIC PHYSICAL THERAPY, P.C., IRA SIEGEL, M.D., SMA MEDICAL LAB, INC., SEARAY MEDICAL P.C. and ALL BORO PSYCHOLOGICAL SERVICES, P.C.

This constitutes the Order of the Court. Plaintiff shall serve a copy of this Order with Notice of Entry upon all defendants within 15 business days of entry in the records of the Nassau County Clerk.

Date: September 6, 2011

  
J.S.C.

**ENTERED**  
OCT 06 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE