

State Farm Mut. Auto. Ins. Co. v Lumpkin
2012 NY Slip Op 30827(U)
March 26, 2012
Supreme Court, Nassau County
Docket Number: 19871-I-10
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Plaintiff,

- against -

DECISION AND ORDER

Index No: 19871-I-10

Motion Sequence Nos: 001 and 002
Original Return Date(s): 02-14-11
05-23-11

INDIVIDUAL DEFENDANTS

**STARSHA LUMPKIN
ALPHONSO FOSTER
KI HO KANG
HONG IL UM**

HEALTHCARE PROVIDER DEFENDANTS

**ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, P.C.
DEROSA ORTHOPEDIC SERVICES, P.C.
IN ACUPUNCTURE and KM CARE, P.C.
DR. TAK'S MEDICAL and REHABILITATION, P.C.
SSM PHYSICAL THERAPY OF N.Y., P.C.,**

Defendants.

-----X
P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 2 were submitted on this Order to Show Cause on February 22, 2011, and the following papers numbered 3 to 5 were submitted on this Notice of Motion on May 23, 2011:

	<u>Papers numbered</u>
Order to Show Cause and Affirmation in Support	1-2
Affidavit in Opposition	X
Notice of Motion, Affirmation and Affidavit	3-5
Affidavit in Opposition	X

The motion [Seq. 001] brought by the plaintiff, by Order to Show Cause granted on the 28th

of January 2011 (Sher, J.), for an Order of this Court, pursuant to CPLR 2201, *inter alia*, staying the action entitled DEROSA ORTHOPEDICS, P.C. A/A/O KIHOKANG v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (AAA#41201004238) and all lawsuits and/or arbitrations arising out of a March 26, 2010 accident, pending a resolution of the within action for a declaratory judgment; and the motion [Seq. 002] by the plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, for a Judgment on Default against defendants KIHOKANG, HONG IL UM, ADVANCED MEDICAL DIAGNOSTIC OF QUEENS, P.C., and DEROSA ORTHOPEDIC SERVICES, P.C., are decided as follows:

This action was commenced on October 21, 2010 by the filing of the Summons and Verified Complaint with the Nassau County Clerk's office and the purchase of an index number. The plaintiff seeks a declaratory judgment defining the rights and obligations of the parties under a policy of insurance allegedly issued to defendants STARSHA LUMPKIN and ALPHONSO FOSTER, whose vehicle was allegedly involved in an accident with a pedestrian on March 26, 2010. An Amended Summons and Amended Verified Complaint were filed with the Nassau County Clerk's Office on January 5, 2011 (amending the name of defendant ADVANCED MEDICAL DIAGNOSTICS, PC to ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, PC). The herein below named defendants have been duly and timely served with the [Amended] Summons and [Amended] Verified Complaint in the instant action. With respect to the defendants against whom the plaintiff seeks a default judgment and in accordance with the affidavits of service filed in this action:

a) ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, P.C. was served with the Amended Summons and Amended Verified Complaint pursuant to CPLR 311 on January 11, 2011

by serving a person allegedly authorized to accept service. Proof of service was filed with the Nassau County Clerk's Office on January 25, 2011;

b) DeROSA ORTHOPEDIC SERVICES, P.C. was served pursuant to §306 of the Business Corporation Law on October 27, 2010 and proof of service filed on November 16, 2010;

c) HONG IL UM was personally served on October 27, 2010 pursuant to CPLR 308(1); and

d) KI HO KANG was served pursuant to CPLR 308(4) with service being attempted on three occasions at the defendant's place of abode in Ridgefield, New Jersey, with affixing being done on October 27, 2010, mailing within twenty days thereafter and proof of service having been filed with the Nassau County Clerk's Office on November 16, 2010.

These defendants have failed to appear, answer, seek any extension of time to do so or otherwise move this Court for any relief herein. Neither have they opposed the instant motions. The action against defendants IN ACUPUNCTURE and KM CARE, PC, DR. TAK'S MEDICAL REHABILITATION, PC and SSM PHYSICAL THERAPY OF N.Y., P.C. have entered into stipulations with the plaintiff waiving all claims and the within action has been discontinued against them.

It is alleged that the plaintiff issued a policy of insurance (policy number 0949-589-32A) to defendants STARSHA LUMPKIN and ALPHONSO FOSTER covering a 2005 Mazda automobile. On March 26, 2010, an accident involving the defendant FOSTER's vehicle and a parked 2003 Lexus automobile owned by defendant HONG IL UM occurred in Manhattan. While swerving to avoid another vehicle, defendant FOSTER hit the parked and unoccupied vehicle owned by defendant HONG IL UM. Subsequent to the alleged incident, defendant KI HO KANG, purportedly a pedestrian, alleged that he sustained injuries as a result of being struck by the plaintiff's insured's

vehicle. The pedestrian alleged in his examination under oath that after being struck by the defendant FOSTER's vehicle, he rolled up on the hood of the plaintiff's insured's vehicle, although it is alleged that there was no damage to the vehicle's front hood and/or windshield. Defendant FOSTER denied that his vehicle hit defendant KI HO KANG, nor did defendant KI HO KANG report being struck (and losing consciousness) to the investigating police officer. The plaintiff also points to the defendant pedestrian's traveling from New Jersey to Queens, New York, to be treated at the defendant medical providers. Plaintiff contends that this is the fifth claim since 1996 for injuries sustained to the same body parts by defendant KI HO KANG. The plaintiff contends "that the purported automobile incident of March 26, 2010 and the resulting claim of injuries by the defendant, KI HO KANG, are not the product of a covered event as defined" in the applicable policy of insurance herein.

Defendant KI HO KANG applied for No-Fault Benefits under the policy of insurance issued by plaintiff to defendants LUMPKIN and FOSTER. Plaintiff alleges that any injuries sustained by defendant KI HO KANG were not as a result of the alleged accident and were fabricated by said defendant. Defendant KI HO KANG has not appeared in this action or answered the moving papers, disputing any of the allegations raised by the plaintiff insurer. Plaintiff seeks a declaratory judgment that the incident of March 26, 2010 is not a covered event as the motor vehicle of plaintiff's insured never came into contact with defendant KI HO KANG and as a result, plaintiff is under no obligation to pay any no-fault benefits to this defendant or to medical provider assignees as a result of this claim. Defendant KI HO KANG has sought arbitration of the claim, which was stayed by the aforementioned Order to Show Cause pending a determination of this motion.

There is no opposition to the motion seeking to stay arbitration, despite the fact that the

motion papers were served upon defendants and notice of the temporary restraining notice was given to the attorneys for DEROSA ORTHOPEDIC SERVICES, PC in the aforementioned arbitration (as well as to the defendant). Therefore, based upon the foregoing and the default of the defendants as hereinafter set forth, the arbitration presently pending before the American Arbitration Association by DeROSA ORTHOPEDIC SERVICES, P.C. a/a/o KI HO KANG (AAA#41201004238) is **stayed**. See, e.g., State Farm Mut. Auto Ins. Co. v. Laguerre, 305 A.D.2d 490 (2nd Dept. 2003).

The fact that the defendants are in default of answering or appearing does not necessarily lead to the entry of a default judgment. “Just because the court has jurisdiction over a defaulting defendant does not mean that a default judgment automatically results. Not only is proof of jurisdiction and a default required on a motion for a default judgment, but also ‘proof by affidavit made by the party of the facts constituting the claim ... and the amount due’ (CPLR 3215[e]),” Joosten v. Gale, 129 A.D.2d 531 (1st Dept. 1987).

In support of its motion for a default judgment, the plaintiff has established through affidavits of service that it properly served the Summons and Verified Complaint on the defendants KI HO KANG and HONG IL UM against whom it seeks a default judgment pursuant to CPLR 308, as well as the domestic and/or authorized foreign corporations against whom it seeks a default judgment pursuant to CPLR 311 or Business Corporation Law § 306, and that none of those parties have appeared or otherwise sought relief in connection with this action. It has also established the merits of its claims. More specifically, it has established without opposition that the plaintiff’s insured’s vehicle did not strike the defendant KI HO KANG, as a result of which coverage under the aforementioned policy of insurance does not exist with respect to the injuries claimed by defendant KI HO KANG..See Andromeda Med. Care, P.C. v. NY Cent.Mut. Fire Ins. Co., 26 Misc.3d 126(A)

[App.Term, 2nd Jud Dist, 2009), citing Central Gen. Hosp. V. Chubb Group of Ins. Cos., 90 NY2d 195,199 (1997).

Accordingly, the plaintiff's unopposed motion for a **default judgment** against defendants KI HO KANG, HONG IL UM, ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, P.C. and DEROSA ORTHOPEDIC SERVICES, P.C. is **granted**. It is therefore declared that the insurance policy issued to defendants STARSHA LUMPKIN and ALPHONSO FOSTER does not cover the alleged incident of March 26, 2010 involving defendant KI HO KANG. As a result thereof, the plaintiff has no duty to pay any monies or benefits to any of the defaulting defendants under the aforementioned policy of insurance in any action or proceeding brought to recover damages as a result of the alleged injuries sustained on March 26, 2010 to defendant KI HO KANG or to provide coverage for any claims for no-fault or uninsured motorist coverage made by any of the defaulting defendants under the aforementioned policy in connection with the accident allegedly occurring on March 26, 2010 and involving defendant KI HO KANG.

Thus, after due deliberation, it is, on motion of BRUNO, GERBINO & SORIANO, LLP, attorneys for the plaintiff, it is

ORDERED, that the plaintiff's motions to stay arbitration and for a default judgment against the aforementioned defendants for the relief prayed for in the Amended Verified Complaint is **granted as hereinabove stated**; and it is further

ORDERED, that the plaintiff's attorneys shall serve a copy of this Decision and Order either personally or by first class mail upon all defendants served with the motion papers herein; and it is further

ORDERED, that within SIXTY (60) DAYS hereof, the plaintiff shall settle on notice a

Judgment herein pursuant to CPLR 3001.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 26, 2012

ENTER:


JOEL K. ASARCH, J.S.C.

Copies mailed to:
Bruno, Gerbino & Soriano, LLP
Attorneys for plaintiff

Economy & Economy, P.C.
Attorneys for DeRosa Orthopedics in the underlying arbitration

ENTERED
MAR 28 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE