

Permanent Gen. Assur. Corp. v Remolien
2015 NY Slip Op 30875(U)
May 19, 2015
Sup Ct, New York County
Docket Number: 159511/2014
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

PERMANENT GENERAL ASSURANCE CORP,

Index No.: 159511/2014

Plaintiff,

Motion Date: 05/19/15

- v -

Motion Seq. No.: 001

JOSEPH REMOLIEN, AVALON RADIOLOGY PC,
CHARLES DENG, LAC, JULES FRANCOIS PARISIEN,
MD, KSENIA PAVLOVA, MD, LUQMAN DABIRI,
M.D., MAIGA PRODUCTS CORPORATION, MIDDLE
VILLAGE DIAGNOSTIC IMAGING, P.C., PROMPT
MEDICAL SERVICES, PC, QUALITY CUSTOM
MEDICAL SUPPLY, INC,

Defendants.

The following papers, numbered 1 to 3 were read on this motion for a default judgment declaring no obligation to reimburse

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: ☒ Yes No ☐

Plaintiff PERMANENT GENERAL ASSURANCE CORP, in this
declaratory judgment action, moves for a default judgment,
pursuant to CPLR 3215, for the relief demanded in the Complaint
against defendants JOSEPH REMOLIEN, AVALON RADIOLOGY, PC, CHARLES
DENG, LAC, JULES FRANCOIS PARISIEN, MD, KSENIA PAVOLVA, MD,
LUQMAN DABIRI, MD, MAIGA PRODUCTS CORPORATION, MIDDLE VILLAGE
DIAGNOSITC IMAGING, PC, and PROMPT MEDICAL SERVICES, PC,

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING**

medical/health care companies, who were assigned the rights of reimbursement of defendant assignor JOSEPH REMOLIEN, based upon the failure of defendant assignor to appear for duly scheduled Examination Under Oath (EUO).

As held by the Second Department in Interboro Ins Co v Clennon, 113 AD3d 596, 597 (2nd Dept 2014), citing the First Department in Unitrin Advantage Ins Co v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept 2011):

"The failure to comply with the provision of the insurance policy requiring the insured to submit to an examination under oath...is a material breach of the policy, precluding recovery of the policy proceeds".

This court concurs with plaintiff that defendants' argument that the instant action for a declaratory judgment should be dismissed because prior to the commencement of the instant action defendants Dabiri and Pavlova commenced actions for breach of insurance policies in New York City Civil Court is neither an excuse nor a meritorious defense with respect to the defaults of the defendants in answering or moving. See American Transit Ins Co v Solorzano, 108 AD3d 449 (1st Dept 2013).

However, defendants REMOLIEN, PAVLOVA, PARISIEN, DENG, DABIRI, in each of their affidavits, have raised an issue of fact whether the summons and complaint were properly served on each of them, and a traverse hearing is warranted. Ananda Capital

Partners v Stav Elec Sys, 301 AD2d 430 (1st Dept 2003). However, the affidavit of "MAIGA PRODUCTS CORPORATION" does not state the name of the affiant, i.e. MAIGA PRODUCTS CORPORATION'S alleged "owner and principal", and the signature affixed is illegible. Therefore such affidavit is insufficient to raise an issue of fact with respect to service on such corporation.

Accordingly, it is hereby

ORDERED that plaintiff PERMANENT GENERAL ASSURANCE CORP's motion for a default judgment against defendants AVALON RADIOLOGY PC, MAIGA PRODUCTS CORPORATION, MIDDLE VILLAGE DIAGNOSTIC IMAGING, PC, and PROMPT MEDICAL SERVICES, PC is GRANTED and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff PERMANENT GENERAL ASSURANCE CORP is not obligated to honor or pay claims for reimbursement of the defendants AVALON RADIOLOGY PC, MAIGA PRODUCTS CORPORATION, MIDDLE VILLAGE DIAGNOSTIC IMAGING, PC, and PROMPT MEDICAL SERVICES, PC, with respect to the alleged accident of January 20, 2014 involving defendant JOSEPH REMOLIEN; and it is further

ORDERED that the declaratory judgment action of plaintiff PERMANENT GENERAL ASSURANCE CORP against defendants JOSEPH REMOLIEN, CHARLES DENG, LAC, JULES FRANCOIS PARISIEN, MD,

KSENIA PAVLOVA, MD, LUQMAN DABIRI, MD, and QUALITY CUSTOM MEDICAL SUPPLY, INC, is severed and shall continue against such remaining defendants; and it is further

ORDERED that the motion for a default judgment of plaintiff PERMANENT GENERAL ASSURANCE CORP against defendants JOSEPH REMOLIEN, CHARLES DENG, LAC, JULES FRANCOIS PARISIEN, MD, KSENIA PAVLOVA, MD, and LUQMAN DABIRI, MD and the cross motion of defendants JOSEPH REMOLIEN, CHARLES DENG, LAC, JULES FRANCOIS PARISIEN, MD, KSENIA PAVLOVA, MD, and LUQMAN DABIRI, MD to dismiss the complaint are held in abeyance for the purpose of a traverse hearing to determine whether each such defendant was properly served with the summons and complaint; and it is further

ORDERED that the issue of whether the summons and complaint were properly served upon defendant JOSEPH REMOLIEN, CHARLES DENG, LAC, JULES FRANCOIS PARISIEN, MD, KSENIA PAVLOVA, MD, and LUQMAN DABIRI, MD is referred to a Special Referee to hear and report pursuant to CPLR 4320 and that within thirty (30) days from service of a copy of this Order with notice of entry, the defendants shall cause a copy of this Order with notice of entry, including proof of service thereof, to be filed with the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) who shall arrange a date for a reference to hear and report pursuant to CPLR 4320 and for

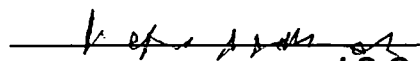
placement at the earliest convenient date upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This is the decision and order of the court.

Dated: May 19, 2015

ENTER:


DEBRA A. JAMES J.S.C.