

Allstate Ins. Co. v Ammonds
2015 NY Slip Op 32970(U)
January 21, 2015
Supreme Court, Queens County
Docket Number: 700973/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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ALLSTATE INSURANCE COMPANY,

Plaintiff,

- against -

Index No.: 700973/2013
Motion Date: 12/02/14
Motion No.: 3
Motion Seq.: 2

MARK AMMONDS, ADVANCED NEUROLOGICAL CARE, P.C., ADVANCED ORTHOPAEDICS, P.L.L.C., AAAMG LEASING CORP., COMPLETE MEDICAL CARE SERVICES OF N.Y., P.C., FRANKLIN HOSPITAL, INNOVATIVE ORTHOPEDIC AND SPINE ASSOCIATES OF N.Y., P.L.L.C., JEFFREY W. ROSENBERG D.C., P.L.L.C., MILLENNIUM LABORATORIES, INC., NORTH AMERICAN PARTNERS IN ANESTHESIA, L.L.P., PATCHOGUE OPEN MIRE, P.C., D/B/A SOUTHWEST NASSAU RADIOLOGY,

Defendants.

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The following papers numbered 1 to 13 were read on this motion by defendant, Mark Ammonds, for an order pursuant to CPLR 5015(a) vacating the defendant's default and granting leave to serve a late answer:

Papers Numbered

- Notice of Motion-Affidavits-Exhibits.....1 - 5
- Memorandum of Law in Opposition-Affidavits-Exhibits..6 - 10
- Reply Affirmation.....11 - 13

This is an action in which the plaintiff, Allstate Insurance Company, seeks a judgment declaring that the defendant Insured, Mark Ammonds, made a material misrepresentation under the terms and conditions of the automobile insurance policy; that the

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material misrepresentations in the procurement and/or renewal of policies of insurance exclude coverage for any claims submitted by defendant-assignors and defendant assignees; that plaintiff is under no obligation to pay any of the defendants' no fault or third-party claims; that plaintiff is not required to defend and/or Indemnify Mark Ammonds against any claim made under the third-party liability endorsement and provision of said policy of insurance; and, that plaintiff is not required to provide coverage for any uninsured and/or underinsured motorist claim filed under the underinsured motorist provisions.

Plaintiff alleges that on or about October 12, 2003, Allstate Insurance Co. issued defendant Ammonds an insurance policy under Policy Number 903580231 for a 2002 Honda Accord with license plate number CPT 1900. Defendant Ammonds represented to Allstate that he resided at 10 Crocker Avenue, 1st Fl., Johnson City, N.Y. 13790 and that the vehicle was garaged at that address.

On or about June 27, 2004, in connection with the renewal of the policy, defendant notified Allstate that his address had changed from Johnson City, N.Y. to 2520 Vestal Parkway, #101, Vestal, N.Y. 13850 and that the vehicle was garaged at that address.

On or about August 17, 2012, defendant informed Allstate Insurance Co. that he had been involved in an accident on August 3, 2012. Thereafter, defendant submitted a No-Fault application (NF2) in which Allstate established a claim file under claim number 0254901069.

Mr. Ammonds testified thereafter at an Examination Under Oath, that for the past two years he resided at 115-22 203rd Street, St. Albans, N.Y. He further testified that his previous address was a private house located at 2520 Vestal Parkway, #101, Vestal, N.Y.

Plaintiff concludes that defendant Ammonds materially misrepresented his address as Vestal N.Y. rather than his St. Albans, N.Y. address where he resided and garaged the insured vehicle in order to procure lower premiums.

Plaintiff maintains that upon investigation it was determined that 2520 Vestal Parkway, Vestal, N.Y. is associated with a street mall in which four commercial businesses are located, including Hertz, Sprint, Art Nail and United Parcel Service. Plaintiff submits photographs of 2520 Vestal Parkway, as well as a P.O. Box 101 located inside the UPS store. Thus,

plaintiff maintains that pursuant to its investigation the address where plaintiff claimed he garaged his vehicle at 2520 Vestal Parkway was a commercial strip mall and the apartment number that defendant claimed as his residence was in fact a postal box number that he rented at the UPS store at that address. Plaintiff claims that defendant provided Allstate with fictitious residency information in order to fraudulently renew the relevant policy of insurance at a lower premium than he would have been charged had his actual address in Queens County been disclosed. Therefore, plaintiff asserts that the defendant made a material misrepresentation in the procurement and/or renewal of an insurance policy pursuant to New York State Insurance Law § 3105. Plaintiff further maintains that the material misrepresentation in the procurement and/or renewal of the policy of insurance excludes coverage for any claims submitted by the defaulting defendants.

Plaintiff commenced the instant action for a declaratory judgment to exclude coverage by the filing of a summons and complaint on March 20, 2013. Pursuant to the affidavit of service executed by process server, Raishawn Davis, on April 12, 2013, the defendant was served with a copy of the summons and complaint pursuant to CPLR 308(2) on April 10, 2013 by service on a person of suitable age and discretion, to wit, Sarah Ammonds a relative of the defendant at the defendant's usual place of residence. The defendant failed to answer or otherwise appear in the action.

On January 10, 2014, plaintiff moved this Court for an order granting a declaratory judgment against the defendant on default. By decision and order dated April 24, 2010, this Court found that the evidence was sufficient to establish, prima facie, that the insured intentionally misrepresented his address in order to obtain insurance at reduced premiums and that the misrepresentation was material inasmuch as plaintiff would not have issued the policy under the same terms had it known that the insured resided in St. Albans, Queens, N.Y. It was ordered that plaintiff is under no obligation to pay any of the defendants' no fault or third-party claims; that the plaintiff is not required to defend and/or indemnify Mark Ammonds against any claim made under the third-party liability endorsement and provision of said policy of insurance; and that plaintiff is not required to provide coverage for any uninsured and/or underinsured motorist claim filed under the underinsured motorist provisions.

The defendant now moves for an order pursuant to CPLR 5015(a) vacating the default judgment on the ground that the plaintiff did not effectuate service upon the defendant's counsel. In support of the motion defendant's counsel, Joshua

Ram, Esq. submits an affirmation stating that his client, Mr. Ammonds, was involved in a motor vehicle accident on August 3, 2010 in which he allegedly sustained serious physical injuries. He states that Allstate commenced the declaratory judgment action against his client without serving Ammonds' counsel, Krentsel & Guzman, LLP with a copy of the summons and complaint. Counsel contends that the plaintiff has a reasonable excuse for his default in that his counsel was not served with a copy of the summons and complaint and also contends, in a conclusory manner, that the defendant has a meritorious defense. Counsel has not submitted an affidavit from Mr. Ammonds nor has counsel specified a potentially meritorious defense to the declaratory judgment action.

In opposition, plaintiff's counsel, Jennifer McDonald, Esq. asserts that the defendant was properly served pursuant to CPLR 308(2) as evidenced by a copy of the affidavit of service which also states that a copy of the summons and complaint was mailed to the defendant by first class mail. Counsel claims that proper service has been effectuated when the defendant is served and that plaintiff is not statutorily required to serve a copy of the initial pleadings on defendant's attorney. Thus, counsel argues that the default judgment may not be vacated in the absence of a reasonable excuse for the default and a showing of the existence of a meritorious defense. Counsel states that the attorney's affidavit alone is not sufficient to prove lack of service on the defendant nor has counsel, in his affirmation, established a meritorious defense.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto this court finds that the defendant's motion to vacate the default judgment is denied.

Pursuant to CPLR § 5015, a moving party seeking to vacate a default judgment must demonstrate both an excusable default and a meritorious defense (see Kaufman & Satran LLP v Sidbern Estates, Inc., 4 ASD3d 454 [2nd Dept. 2004])

Here, defendant Ammonds has not submitted his own affidavit to rebut the affidavit of the process server indicating that the defendant was properly served with a copy of the summons and complaint and thereafter failed to answer. Further, the defendant has not submitted an affidavit which contains a meritorious defense to the plaintiff's evidence that Ammonds knowingly misrepresented his address for purposes of obtaining a lower premium on his auto insurance. Further, defendant has not cited to any provision in the CPLR that requires service of the

initial pleadings on counsel in order to obtain personal jurisdiction unless an order for substituted service has been obtained where personal service on the defendant is impractical. Therefore, Ammonds is not entitled to relief pursuant to CPLR 5015 (a)(1), as he failed to set forth a reasonable excuse for his default, since the only excuse proffered was that his counsel was not served with process. In addition, Ammonds failed to demonstrate the existence of a potentially meritorious defense to the action (see Bank of Am. v Faracco, 89 AD3d 879 [2d Dept. 2011]).

Accordingly, the defendant's motion for an order vacating the default judgment entered on May 2, 2014 is denied.

Dated: Long Island City, N.Y.
January 21, 2015



ROBERT J. McDONALD
J.S.C.

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