

American Tr. Ins. Co. v Batista
2016 NY Slip Op 30003(U)
January 4, 2016
Supreme Court, New York County
Docket Number: 651292/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

Index No.
651292/2015

**DECISION
and ORDER**

Mot. Seq. 1

PABLO BATISTA, ET. AL.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Defendants Francois Jules Parisien, MD, PC, d/b/a Jules Parisien MD, Ksenia Pavlova, DO, and Maiga Products Corporation (collectively, "Movants") move pursuant to CPLR 3211(a)(2)(lack of subject matter jurisdiction), (7)(failure to state a claim), and (8) (lack of personal jurisdiction), to dismiss the Complaint. Plaintiff opposes.

First, Defendants argue that Plaintiff has failed to state a cause of action for declaratory relief and dismissal is warranted under CPLR 3211(a)(7).

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex. rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D. 2d 91 [1st Dept 2003])(see CPLR 3211[a][7]).

An insurer is entitled to commence an action seeking a declaratory judgment that there is no coverage under the policy of insurance for No-Fault benefits if an applicant for benefits breached a condition precedent to coverage pursuant to the No-Fault Regulation. (*See generally American Tr. Ins. Co. v. Solorzano*, 968 N.Y. 3d 449 [1st Dept. 2013]). “To the extent the petitioner seeks a declaration of the rights and obligations of plaintiff under New York’s No-Fault Regulation (11 NYCRR 65 et. seq.), the complaint states a justiciable controversy between the parties, and is not subject to dismissal for failure to state an action.” (*Eveready Ins. Co. v. Felder*, 2013 WL 1212748 [N.Y. Sup. July 18, 2013]). “A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration.” (*State Farm Mut. Auto. Ins. Co. v. Anikeyeva*, 89 A.D.3d 1009, 1010 [2d Dep’t 2011]).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person’s assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. (*See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dept 2011]).

Here, Plaintiff brings this declaratory action seeking a declaration that Defendants are not eligible for no-fault benefits stemming from a February 10, 2014 motor vehicle accident based on the failure to comply with a condition

precedent to the subject insurance policy and No-Fault Insurance Regulations. The Complaint sufficiently pleads that Defendants submitted claims to Plaintiff, and as such, there is an actual controversy to adjudicate here. Accepting the allegations as true, the four corners of the Complaint state a claim for a declaration of rights concerning the subject insurance policy and No-Fault Regulations.

Defendants also seek to dismiss the Complaint due to improper service. Defendants claim that Francois Jules Parisien, MD, P.C. d/b/a Jules Parisien, MD, and Ksenia Pavlova DO were not properly served.

CPLR §3211(a)(8) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant.”

A process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). “The mere denial of receipt of service is “insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service.” (*First Ave. Owners Corp. v. Riverwalk Garage Corp.*, 6 Misc. 3d 439, 442 [Civ. Ct. 2004]). “A conclusory denial not accompanied by ‘further probative facts’ does not require a traverse hearing.” (*Id.*).

Under CPLR § 308(2), if a summons is served “within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served,” it must also be mailed “to the person to be served at his or her last known residence” or “by first class mail to the person to be served at his or her actual place of business ...”. “Personal service by way of delivery to a suitable person at a defendant's actual place of business is allowed because it is presumed that the business relationship between the deliverer and the defendant will induce the prompt redelivery of the summons to the defendant.” (*Glasser v. Keller*, 149 Misc. 2d 875, 877 982 [Sup. Ct. 1991]).

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D. 3d 459 [1st Dept. 2004]).

Here, as for service upon Ksenia Pavlova DO, Plaintiff provides an affidavit of service which shows that service was made on Pavlova by way of substituted service pursuant to CPLR §308(2). According to the affidavit of service, the process server served Pavlova at 1786 Flatbush Avenue, Brooklyn, NY, 11210, the

address of Defendant's actual business. The process server served Pavlova by delivering a copy of the summons and complaint to "Dovid 'S,'" "a person of suitable age and discretion." The individual is identified as a "female," having "white" skin color and black hair, being an approximate age of 25, and having a height of 5'3 and weight of 120 pounds.

The affidavit of service also notes, "PERSON SPOKEN TO REFUSED TO STATE TRUE LAST NAME." The affidavit of service also states that the process server mailed a copy of the Summons and Complaint to Pavlova at Pavlova's actual place of business at 1786 Flatbush Avenue, Brooklyn, NY, 11210 and "deposited said wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service ... on May 14, 2014 by REGULAR FIRST CLASS MAIL in an envelope marked PERSONAL & CONFIDENTIAL and not indicating the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served."

Pavlova submits an affidavit. Pavlova acknowledges that she has an office at 1786 Flatbush Ave., Brooklyn, New York." Pavlova states, "I never received the Summons and Verified Complaint in the manner described in plaintiff's affidavit of service." Pavlova states, "Dovid S" is "not employed by me and indeed I do not know who this person is. Moreover, I have never designated anybody as my agent to accept service of process on my behalf ... I also did not receive the allegedly mailed copy of the Summons and Complaint that was sent to my office."

As to Francois Jules Parisien, M.D., P.C., Defendants state that Francois Jules Parisien, M.D., P.C., is not an active corporation, does not conduct business in New York, and was dissolved nearly ten years. Defendants submit a print out from the New York State Department of State Division of Corporations website pertaining to Francois Jules Parisien, M.D., P.C. Defendants contend that since Plaintiff cannot sue a non-existent entity, it lacks personal jurisdiction over Francois Jules Parisien. Defendants further argue that to the extent that Plaintiff seeks to sue Dr. Parisien in her personal capacity, Plaintiff improperly served the Secretary of State pursuant to BCL 306. In its opposition papers to Defendants' motion to dismiss, Plaintiff does not address these alleged issues in service on Francois Jules Parisien.

Accordingly, Defendants' motion to dismiss, pursuant to CPLR §3211(a)(7), is denied. Further, a traverse hearing is directed concerning whether service was properly effected upon Pavlova. Lastly, Defendants' motion to dismiss defendant

Francois Jules Parisien, M.D., P.C., based on an alleged failure to properly effect service upon Francois Jules Parisien, M.D., P.C., is granted without opposition.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss pursuant to CPLR §3211(a)(7) is denied; and it is further

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing with respect to service upon defendant, Ksenia Pavlova DO, and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that Defendants' motion to dismiss as against defendant Francois Jules Parisien, M.D., P.C., based on improper service is granted without opposition, and the action is dismissed against Francois Jules Parisien, M.D., P.C., and the Clerk shall enter judgment accordingly; and it is further

ORDERED that all other defendant Maiga Products Corporation shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief is decided.

DATED: JANUARY 4 2016

JAN 04 2016


EILEEN A. RAKOWER, J.S.C.