

State Farm Mut. Auto. Ins. Co. v Arias

2019 NY Slip Op 33934(U)

July 16, 2019

Supreme Court, Dutchess County

Docket Number: 51259/2017

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on July 16 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY as Subrogee of
Alan Michael Billmaier

Plaintiff,

Index No.: 51259/2017

-against-

DECISION AND ORDER
(Motion Sequences 1, 2 & 3)

JAIRO MANUEL ARIAS, VICTOR M. ARIAS
and MEGAN P. DIMEO

Defendant

-----X
Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Defendant, Dimeo and Plaintiff's Notice of Motion to Strike Defendants Jairo Arias and Victor Arias Answers and Defendant's Dimeo's Motion for Summary Judgment, Dismissing Plaintiff's Complaint as against Defendant Dimeo:

<u>Papers</u>	<u>Numbered</u>
<i>Motion Sequence 1</i>	
Defendant Dimeo's Notice of Motion/ Affirmation of Donald Ford, JrEsq./ Exhibit A	1
Plaintiff's Notice of Motion/ Affirmation of P. Douglas Dodd, Esq./Exhibit A-E ¹	2
<i>Motion Sequence 2</i>	
Defendant Dimeo's Notice of Motion/ Affirmation of Donald P. Ford, Jr. Esq.	3

¹ This motion did not receive a sequence number in CCIS.

RELEVANT BACKGROUND

Plaintiff commenced this action, as subrogee to Alan Billmaier, who was in a motor vehicle accident on or about October 14, 2016. Billmaier and Defendants were traveling West on Interstate 84, when traffic came to an abrupt halt, resulting in the collision of the parties' motor vehicles. Defendant Dimeo's vehicle was struck in the rear by Defendant Arias' vehicle, causing Dimeo's vehicle to strike Billmaier's vehicle. Plaintiff's vehicle was struck from the rear by Defendant Dimeo. See, Affirmation of Donald Ford, Jr. Esq. at paragraphs 3-7 on Motion Sequence 2.

Plaintiff is seeking damages from the Defendants, alleging that both Arias and Dimeo were negligent, careless, and/or reckless and caused the accident. See, Plaintiff's Verified Complaint as Exhibit A on Motion Sequence 2. However, both Plaintiff and Defendant Dimeo seek to strike Defendants Arias' Answer and preclude Defendants Jairo Arias and Victor Arias, from submitting any discovery in opposition to pending motion and complaint as both defendants failed to appear for several scheduled examinations before trial on May 10, 2018, July 3, 2018 and September 12, 2018. Thereafter, counsel for said Defendants Jairo and Victor Arias stated he was unable to locate his clients. See, Affirmation of Donald Ford, Jr., Esq. at paragraphs 3 and 6-10 on Motion Sequence 1; see also, Affirmation of P. Douglass Dodd, Esq. at paragraphs 3-9.

Defendant Dimeo also seeks to have Plaintiff's complaint against her dismissed, as well as any cross-claims of the other defendants on the merits, as she declares that she was not negligent, as her vehicle was struck from the rear and caused to propel into the vehicle in front of her, which was Billmaier's vehicle. See, Affirmation of Donald Ford, Jr., Esq. at paragraphs 7, 11-13 and Defendant Dimeo's Exhibit D on Motion Sequence 2.

DISCUSSION

Striking Defendants Jairo Arias and Victor Arias Answer and Cross-Claims

It is well settled that some of the penalties for refusing to comply with disclosure, range from a party being subject to an order striking out their pleadings or parts thereof, preventing the party from supporting or opposing designated claims or defenses, or production of evidence in support of such claims or defenses. See, CPLR 3126.

In the absence of any reason or excuse for Defendants Jairo and Victor Arias' failure to appear at any of the scheduled examinations before trial, and counsel to said Defendants stated he was no longer able to locate said Defendants, the Answer of Defendants Jairo and Victor Arias shall be stricken. The parties are precluded from presenting any further evidence in this matter or raising any cross-claims against Defendant, Dimeo. *See, Boorman v City of New York*, 34 Misc. 3d 435, 442 (New York County, 2011). Plaintiff and Defendant Dimeo's applications to strike the Answer of Defendants Jairo and Victor Arias and preclude said Defendants from submitting further evidence is **granted**.

Defendant's Application for Summary Judgment

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision. A party demonstrating that its vehicle was stopped when it was struck from the rear, causing the stopped vehicle to propel into the rear of the vehicle in front it, has established its prima facie entitlement to judgment as a matter of law. *See, Hauswirth v Transcare New York, Inc.*, 97 A. D. 3d 792, 793-94 (2nd Dept. 2012).

Here, Defendant Dimeo presents a nonnegligent explanation, for the car accident, supported with proof, that Dimeo's motor vehicle was struck from the rear and caused to propel into Billmaier's motor vehicle. There is no opposition to this application to dismiss Plaintiff's complaint against her, and/or any cross-claims made by Defendants Jairo and Victor Arias. As a matter of law Defendant Dimeo is entitled to summary judgment. As such, Defendant's application for summary judgment, dismissing Plaintiff's complaint against her, and any cross-claims of the other Defendants, Jairo and Victor Arias is **granted**.

Plaintiff's Default Judgment Against Defendants

It is well settled, that merely pleading an amount due and owing without reference to how that number was calculated is a failure of proof that the alleged damages qualify as a "sum certain." A plaintiff is not entitled to a default judgment in the absence of proof of how the amount due and owing was calculated. *See, Collins Fin. Services v Vigilante*, 30 Misc. 3d 908, 914-16 (Richmond County Civil Ct., 2011).

Plaintiff seeks a default judgment against Defendants, Jairo and Victor Arias, in the amount of \$25,155.11, with interest from October 14, 2016, along with cost and disbursements of this action. However, Plaintiff has failed to substantiate the amount requested as relief as no proof has been submitted regarding the amounts due. In the absence of proof Plaintiff's application for a default judgment is **denied**.

Plaintiff shall have thirty (30) days to make further application with proof, regarding its claim for default judgment. Failure to do so timely, may result in this matter being dismissed.

Accordingly, it is hereby,

ORDERED, that Plaintiff's Motion and Defendant Dimeo's Motion to Strike Defendant's Answer and preclude Defendants from submitting further evidence is granted; and it is further

ORDERED, that Defendant Dimeo's Motion for Summary Judgment, dismissing Plaintiff's Complaint and any cross-claims of Defendants, Jairo and Victor Arias, against Defendant Dimeo is granted; and it is further

ORDERED, that Plaintiff shall have thirty (30) days of this Decision and Order, to submit further application with proof for default judgment; and it is further

ORDERED, that Plaintiff's failure to make timely application, may result in this matter being dismissed.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: July 16, 2019
Poughkeepsie, New York

ENTER:

Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.