

Chicas v Cassar

2019 NY Slip Op 34344(U)

May 23, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 604647/2017

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

INDEX NO. 604647/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 07/07/2017
ADJ. DATE: 5/22/2019
Mot. Seq. 001-MG

MOTION DATE: 07/27/2017
ADJ. DATE: 5/22/2019
Mot. Seq. 002-MD
e-filed full participation

Julio Chicas,

Plaintiff

-against-

Christopher J. Cassar Esq., Christopher J. Cassar P.C.,

Defendants

90 DAY DEMAND

with

DECISION & ORDER

and

Christopher J. Cassar Esq., Christopher J. Cassar P.C.,

Third-Party Plaintiff

-against-

Victor A. Carr, Esq. and Victor A. Carr and Associates,

Third-Party Defendant

**COUNTY CLERK
DIRECTIVE**

791123/2017

TO:

VICTOR A. CARR & ASSOCIATES
88 SECOND STREET
MINEOLA, NY 11501
516-747-2478

CHRISTOPHER J. CASSAR, PC
13 EAST CARVER STREET
HUNTINGTON, NY 11743
631-271-6596

*Prior to a determination of these motions the court held a conference with the parties on the afternoon of May 22, 2019, the parties discussed the posture of this case with the court, and proposed settlements were made between the parties and respectively rejected. This was placed on the record in open court. Both in conference and in court, it was made clear that no proposed settlement hereof had been or would be conditioned upon either the withdrawal of a complaint to the Grievance Committee, or with the agreement not to file a complaint with the Grievance Committee. See *In re Pobiner*, 240 A.D.2d 67 (2nd Dept. 1998) and DR 1-102(A)(8) -- (22 NYCRR 1200.3[a][8]).*

DEMAND: Plaintiff must resume prosecution of the action and serve and file a note of issue together with a certificate of readiness within ninety days after receipt of this demand, and know that the default by the Plaintiff in complying with this demand within said ninety day period will serve as a basis for a motion by the Court or any party pursuant to CPLR § 3216 for dismissal of the action for unreasonably neglecting to proceed. This action was commenced by filing a summons and complaint on March 13, 2017 and issue was joined by filing an answer on June 7, 2017, the instant motions were made and repeatedly adjourned by the parties and the matter was the subject of a conference before the court. No preliminary conference had been and no motions to compel discovery have been made by either party.

ORDERED that the Clerk of the Court is directed to mail this 90 Demand to file a Note of Issue to the Plaintiff by certified mail to:

VICTOR A. CARR & ASSOCIATES
88 SECOND STREET
MINEOLA, NY 11501

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Third-Party Defendants for an Order pursuant to CPLR Rule 3211(a)(3), dismissing the third-party complaint in its entirety because the third-party plaintiff(s) do not have the legal capacity to sue the third-party defendant(s) for legal malpractice; pursuant to CPLR Rule 3211(a)(7), dismissing the third-party complaint in its entirety for failure to state a cause of action; pursuant to §130-1.1 of the Rules of the Chief Administrator and C.P.L.R. §8303-a, for costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, along with additional financial sanctions against the attorney for the defendants/third-party plaintiffs for the commencement and continuation of the frivolous claims asserted in the third-party action, and for such other, further and different relief as this Court may deem just and proper; and (2) e-filed documents 13-38; and

(3) Notice of Cross Motion by Third-Party Plaintiffs for the imposition of sanctions upon the Third-Party Defendants for the imposition of sanctions; and (4) e-filed documents 27-43; it is:

ORDERED that the Clerk of the Court is directed to mark the Third-Party Action as dismissed; and it is further

ORDERED that the motion (Seq. 001) by Third-Party Defendants to dismiss the Third-Party complaint and for the imposition of sanctions is granted to the extent that the Third-Party complaint is dismissed without prejudice; and it is further

ORDERED that the motion (Seq. 002) by Third-Party Plaintiffs for the imposition of sanctions is in every single respect denied; and it is further

ORDERED that no motion for summary judgment shall be filed later than thirty days after the note of issue is filed; and it is further

ORDERED that Third-Party Defendants are directed to serve upon the Third-Party Plaintiffs a copy of this decision and order with notice of entry as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.* <https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

and it is further

ORDERED that the parties, if they have not done so already, are directed to review the rules of this part found at: https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Rouse.pdf

DECISION

Plaintiff commenced this action on March 13, 2017 for legal malpractice and breach of contract against Defendant attorney and his firm arising out of their alleged representation of the Plaintiff in a tort action arising from an automobile accident on May 4, 2015 in which Plaintiff, while working for Alpha Carting and Contracting SVC, Inc., a garbage removal service, was struck when he was not in the truck. Legal representation of the Plaintiff by Defendants began on or about May 12, 2015. According to the closing statement of Defendants their representation of Plaintiff concluded no later than February 20, 2016. *See e-filed document 20.* This closing statement reflects that the gross recovery for Plaintiff was \$50,000.00, the full amount of the policy carried by the defendant in the tort action. That case was settled before any complaint had been filed in the action and the carrier made payment on December 2, 2015.¹ This payment was distributed with \$33,333.33 being paid to satisfy a Worker's Compensation Lien; \$16,444.08 paid to Defendant for legal fees; and the remainder for disbursements. Nothing was paid to the Plaintiff, in fact, the closing statement provided that Plaintiff owed Defendants \$45.16.

Plaintiff's complaint is founded upon his contention that Defendants failed to pursue Supplemental Under-Insured Motorist Coverage that had been maintained on a vehicle which was involved and owned by the Plaintiff's employer. *See e.g. Matter of Continental Cas. Co. v. Lecei, 47 A.D.3d 509 (2008) coverage of Supplemental Underinsured Motorist Insurance governed by terms of the contract, including whether individual was named insured or occupied the vehicle at the time of the accident.*

¹This closing statement is dated February 20, 2016, see 22 NYCRR § 691.20(d)(1)

Defendants filed a Third-Party Summons and Complaint and filed their verified answer to the complaint in the main action. The Third-Party Plaintiffs allege that the Third-Party Defendants (*Plaintiff's counsel in the main action*) were negligent in pursuing the Plaintiff's claims for SUM coverage. Third-Party Defendants filed a pre-answer motion to dismiss the Third-Party complaint pursuant to CPLR § 3211 and for the imposition of sanctions pursuant to 22 NYCRR Part 130. While the Third-Party Complaint alleges a cognizable legal theory of liability it is completely devoid of facts to support the legal theory advanced. Accordingly, The Third-Party Defendants' motion to dismiss the Third-Party action is granted without prejudice should Third-Party Plaintiffs have a reasonable basis in fact to support such claims.²

Third-Party Plaintiffs have cross moved (Seq. 002) for the imposition of sanctions against Third-Party Defendants; there is no merit whatsoever to this motion and it is denied. Counsel are advised that motions for the imposition of sanctions may themselves be frivolous and subject to sanctions as provided by 22 NYCRR Part 130.

The foregoing shall constitute the decision and order of the court.

Dated: May 23, 2019



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION

²Third-Party Defendant, Victor Carr, Esq., in opposition to the cross motion alleges that he obtained a settlement of the SUM claim for the "full amount available under the policy." See e-filed document 38, *Affirmation of Victor A. Carr at page six, par. 16*. This would vitiate any Third-Party claim of negligence in pursuing the SUM claim.