

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

NEW SOUTH INSURANCE COMPANY

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

**INITIAL MOTION DATE:
2/17/08**

-against-

**MOTION SEQ. NO.: 002
INDEX NO.: 05432/07**

**JAMES DOBBINS, SR., JAMES DOBBINS, JR.,
FELITA DOBBINS, JAMIE DOBBINS,
ADRIENNE DORNS,**

Defendant.

The following papers read on this motion (numbered 1):

Notice of Motion 1

The Court automatically adjourns all motions that are submitted without opposition for one month, whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

Upon the foregoing papers, leave to renew and reargue the prior order of this Court dated November 21, 2007 (the "Prior Order") is **granted** pursuant to **CPLR §2221**, and upon renewal and reargument, the motion is determined as follows.

The Court refers to the Prior Order for a full recitation of the underlying facts and procedural history. In the Prior Order, the Court denied plaintiff's motion for a default judgment declaring that there was no coverage under the applicable automobile insurance policy (the "Policy") with respect to a collision that occurred on July 31, 2006 (the "Incident"). The Court held that plaintiff had not made the requisite showing that the Incident was not an accidental event or occurrence, as is necessary to vitiate coverage *ab initio*. Noting that the plaintiff had neglected to attach a copy of the Policy, the Court declined to consider the other basis for a default judgment proffered by plaintiff; namely

that JAMES DOBBINS, JR. (“JAMES JR.”), FELITA DOBBINS (“FELITA”) and JAMIE DOBBINS (“JAMIE”) were not “covered persons” or “eligible injured persons” under the Policy and therefore were not entitled to coverage. Plaintiff has cured that omission, thus allowing the Court to address plaintiff’s proof on that issue.

JAMES JR., FELITA and JAMIE have filed claims for No-Fault benefits under the Policy for injuries allegedly sustained in the Incident. Plaintiff asserts that JAMES JR., FELITA and JAMIE were not “covered persons” or “eligible injured persons” as defined in the Policy because they were not in the vehicle driven by their father JAMES DOBBINS, SR. (“DOBBINS”) at the time of the Incident. Rather, plaintiff argues, there were no passengers in the vehicle driven by DOBBINS, and therefore, the claims of JAMES JR., FELITA and JAMIE are fraudulent.

Plaintiff relies on the Form MV-104 filed by the driver of the adverse vehicle, Manny E. Paradiso, which indicates only one occupant in the vehicle driven by DOBBINS. The Affidavit of Brinton Max Esty, plaintiff’s investigator, sworn to on July 17, 2007, refers to Mr. Paradiso’s statement, in the MV-104 and in a subsequent interview, that DOBBINS was the sole occupant. These statements, however, are inadmissible hearsay, and cannot be relied upon to support plaintiff’s *prima facie* showing of entitlement to the relief sought. Although, as plaintiff contends, defaulters may be deemed to have admitted the facts alleged in the complaint, that rule can only apply where the allegations were made or verified by someone with first-hand knowledge. *See Woodson v. Mendon Leasing Corp.*, 100 NY2d 62; *State v. Williams*, 44 AD3d 1149. In the case at bar, plaintiff’s attorney verified the Complaint, and plaintiff’s investigator lacked first-hand knowledge of who was in the DOBBINS vehicle at the time of the Incident.

Plaintiff also cites inconsistencies in the testimony of JAMES JR., FELITA and JAMIE in their No-Fault examinations under oath, with respect to the circumstances of the Incident and the description of the adverse vehicle. The Court finds these to be inconclusive and insufficient to demonstrate that the purported passengers were not in the DOBBINS vehicle at the time of the Incident.

The Court determines, however, that defendant DOBBINS’ own admissions support the inference that at least one of the defendants, JAMIE, was not in the vehicle at the time of the Incident. DOBBINS’ MV-104 indicates only two adult passengers, FELITA and JAMES JR. That is consistent with DOBBINS’ telephone report of the Incident to the plaintiff’s claim representative on the day following the Incident. The Court thus determines that plaintiff is entitled to a judgment declaring that JAMIE was not a “covered person” or “eligible injured person” under the Policy.

Based upon the foregoing, it is

ORDERED, that plaintiff's application for a default judgment pursuant to CPLR §3215 is **denied in part and granted in part**. It is **denied** as it pertains to defendants JAMES DOBBINS JR. and FELITA DOBBINS. It is **granted** as it pertains to defendant JAMIE DOBBINS.

This constitutes the Order of the Court. Plaintiff shall serve a copy of this Order upon all defendants within 15 days of entry. Proof of such service shall be a condition precedent to any subsequent application by or on behalf of plaintiff in this action.

ENTER:

Dated:

June 30, 2008 *[Signature]*
J.S.C.

ENTERED

JUL 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE