

SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

PROGRESSIVE ADVANCED INSURANCE CO.,

**TRIAL/IAS, PART 3
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION DATE: 5/5/12
MOTION SEQ. NO.: 001**

INDEX NO.: 014525/11

**JOHANNA ESPINOSA, LUIS NIN, JUAN CARLOS
SILVA, NESTOR POCHET, CARLOS ROMERO,
JESSE RAFAEL ROSADO, RAUL BARO, ARGEANIS
DUVAL, 5S & A REHAB PHYSICAL THERAPY PC,
APPLE MEDICAL SUPPLIES INC., BRONX MEDICAL
DIAGNOSTIC PC, FIVE BORO PSYCHOLOGICAL
AND LICENSED MASTER SOCIAL WORK
SERVICES PLLC, GOODWILL ACUPUNCTURE PC,
HU NAM NAM, MAGNOLIA MEDICAL CARE PC,
MOBILITY EXPERTS MEDICAL PC, MOUNT
VERNON PRECISION MEDICAL PC, NOVA
CHIROPRACTIC SERVICES PC, NUCARE
PHARMACY INC, PRO-ALIGN CHIROPRACTIC PC,
ROM MEDICAL PC, SP ORTHOTIC SURGICAL &
MEDICAL SUPPLY INC, STAR MEDICAL &
DIAGNOSTIC PLLC,**

Defendants.

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

Notice of Motion.....1

Plaintiff PROGRESSIVE ADVANCED INSURANCE CO. (Plaintiff or "PROGRESSIVE") moves for a default judgment pursuant to CPLR §3215 as against the following defendants: JOHANNA ESPINOSA, LUIS NIN, JUAN CARLOS SILVA, JESSE RAFAEL ROSADO, RAUL BARO, ARGEANIS DUVAL, 5S&A REHAB PHYSICAL THERAPY PC, APPLE MEDICAL SUPPLIES INC, BRONX MEDICAL DIAGNOSTIC PC, GOODWILL ACUPUNCTURE PC, HU NAM NAM, MAGNOLIA MEDICAL CARE PC, MOBILITY EXPERTS MEDICAL PC, MOUNT VERNON PRECISION MEDICAL PC, NOVA CHIROPRACTIC SERVICES PC, NUCARE PHARMACY INC, PRO-ALIGN CHIROPRACTIC PC, ROM MEDICAL PC, SP

ORTHOTIC SURGICAL & MEDICAL SUPPLY INC, STAR MEDICAL & DIAGNOSTIC PLLC (collectively, the “Defaulting Defendants”). The remaining defendants have either appeared in this action, or the action against them has been discontinued. The Court automatically adjourns all motions that are submitted without opposition for one month, to determine 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.

This is a declaratory judgment action arising out of a motor vehicle collision that occurred on January 10, 2011, at or near the intersection of Webb Avenue and West 190th Street, Bronx County, New York (the “Collision”), between two vehicles: (i) a vehicle, owned by PROGRESSIVE-insured JOHANNA ESPINOSA, driven by LUIS NIN, and containing passengers JUAN CARLOS SILVA and NESTOR POCHE (the “PROGRESSIVE Vehicle”); and (ii) a vehicle owned by CARLOS ROMERO, driven by JESSE RAFAEL ROSADO and containing passengers RAUL BARO and ARGEANIS DUVAL (the “Adverse Vehicle”). According to the Police Accident Report, the PROGRESSIVE Vehicle was making a left turn onto Webb Avenue when it struck the Adverse Vehicle. The driver of the PROGRESSIVE Vehicle reported that there was a vehicle blocking his view of traffic and that he did not see the Adverse Vehicle. [Mot. Exh. C]

Plaintiff seeks a declaration that it is not obligated to provide No Fault, liability or uninsured motorist benefits with respect to any claims arising out of the Collision, on the grounds that: (i) the Collision was not a covered event (i.e., an accident), but rather, was a staged or intentional event; (ii) coverage is vitiated by reason of the misrepresentations or fraudulent conduct on the part of defendants, and/or (iii) coverage is vitiated by reason of the failure of defendants to satisfy conditions precedent to coverage or to verify their claims as required by the applicable policy of insurance. Plaintiff also seeks “reimbursement for all monetary damages, together with the costs and disbursements of this action, from ALL of the defendants, jointly and severally, based upon this obvious fraud attempted to be committed against Progressive.” [Verified Complaint, ¶5]

In support of its motion, plaintiff submits, among other things: (i) a copy of the Summons and Verified Complaint; (ii) proof of service of the Summons and Verified Complaint upon the Defaulting Defendants, (iii) proof of additional notice pursuant to CPLR §3215(g); (iii) the affirmation of plaintiff’s attorney, Frank G. DiSpirito, Esq., and (iv) the affidavit of Adam Figarsky, a “Senior Medical Representative” employed by plaintiff. See CPLR §3215(f). In addition, plaintiff provides, among other things, a certified copy of the Declarations Page of the subject policy; the Police Accident Report;

a purported transcript of a recorded interview of LUIS NIN (which is neither dated nor authenticated, and does not identify the interviewer or the interpreter); transcripts of the Examinations Under Oath of JOHANNA ESPINOSA and JUAN CARLOS SILVA; and proof of plaintiff's attempts to secure the appearance of NESTOR POCHET and LUIS NIN for an Examination Under Oath ("EUO"). The Court has received no opposition to the motion.

Jurisdiction.

The Affidavits of Service attached to this motion raise concerns about the effectiveness of service upon defendants 5S & A REHAB PHYSICAL THERAPY PC, HU NAM NAM, LUIS NIN, and MAGNOLIA MEDICAL CARE PC.

With respect to defendants 5S & A REHAB PHYSICAL THERAPY PC and MAGNOLIA MEDICAL CARE PC, the Affidavits of Service indicate that the Summons & Verified Complaint were delivered to individuals identified "as CLERK" of the respective corporations. Service upon a corporation must be made by delivery to "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." **CPLR §311(a)(1)**. Service may not be made upon a low-level employee such as a clerk unless there is some evidence that the individual was an agent authorized by appointment or law to accept service on behalf of the corporation. *See Covillion v Tri State Serv. Co., Inc.*, 48 A.D.3d 399. Here there is no such evidence, other than language that is part of the standardized form of Affidavit of Service used by the process server: "by delivering a true copy of the [blank] to [blank], who stated they are authorized to accept service for [blank]". This is unconvincing, at best.

With respect to defendant HU NAM NAM, plaintiff submits two "Affidavits of Non-Service" at two different addresses in Bronx County, and an Affidavit of Service, ostensibly pursuant to **CPLR §308(2)**, at "13625 Maple Avenue, Suite 201, Flushing, NY." The address is designated as the defendant's "Abode," but delivery was made to "Ms. Li, Receptionist." The above provokes questions regarding the status of the Flushing address as defendant's residence, whether this is a valid address for service upon defendant HU NAM NAM, and whether "Ms. Li" is a person who can be relied upon to deliver the papers to defendant HU NAM NAM and to verify the defendant's non-military status.

With respect to defendant LUIS NIN, the Affidavit of Service indicates delivery to "MRS. NIN, WIFE," who is described as 60 years old. The Police Accident Report states that LUIS NIN is 32 years old. Although not probative, the age discrepancy and the

incomplete name of the recipient cast doubt on the process server's discernment of the identity and relationship of the person to whom the papers were delivered.

Absent clear and adequate proof of effective service upon 5S & A REHAB PHYSICAL THERAPY PC, HU NAM NAM, LUIS NIN, and MAGNOLIA MEDICAL CARE PC., the Court cannot exercise jurisdiction over these defendants.

Merits.

A plaintiff seeking a declaratory judgment upon default must not only demonstrate formal compliance with CPLR §3215, but must also establish, *prima facie*, the substantive merit of its cause of action. "A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[s] establish a right to a declaration." **Dole Food Co., Inc. v. Lincoln General Ins. Co.**, 66 A.D.3d 1493, 1494, quoting **Merchants Insurance Company of New Hampshire Inc. v. Long Island Pet Cemetery**, 206 AD2d 827; *cf.* **New York Mut. Underwriters v Baumgartner**, 19 AD3d 1137, 1141; *See also* **Joosten v. Gale**, 129 AD2d 531.

In this case, plaintiff seeks a declaration that it is not required to provide insurance benefits for claims arising out of the Collision. Courts interpreting automobile insurance policies such as the one at issue here have consistently held that the obligation to provide insurance benefits applies only to an accidental event or occurrence. To be relieved of the obligation to provide coverage, *ab initio*, an insurer must demonstrate that the incident in question was deliberate or intentional. *See* **Liberty Mut. Ins. Co. v. Goddard**, 29 AD3d 698; **State Farm Mut. Automobile Ins. Co. v. Langan**, 18 AD3d 860; **Matter of Government Empls. Ins. Co. v. Shaulskaya**, 302 AD2d 522; **State Farm Mut. Automobile Ins. Co. v. LaGuerre**, 305 AD2d 490; **Matter of Metro Medical Diagnostics., P.C., v. Eagle Ins. Co.**, 293 AD2d 751. If the incident was deliberate, then none of the defendants is entitled to coverage, regardless of the innocence of any particular defendant, and regardless of whether or not the incident was motivated by fraud or malice. *See* **Liberty Mut. Ins. Co. v. Goddard**, 29 AD3d 698; **Matter of Allstate Ins. Co. v. Massre**, 14 AD3d 610; **Matter of Government Empls. Ins. Co. v. Robbins**, 15 AD3d 484, **State Farm Mut. Automobile Ins. Co. v. Laguerre**, 305 AD2d 490; **Geico v. Shaulskaya**, 302 AD2d 522; **Matter of Metro Med. Diagnostics v Eagle Ins. Co.**, 293 A.D.2d 751; **Progressive Northwestern Ins. Co. v. Van Dina**, 282 A.D.2d 680. An insurer does not have to prove fraud, but evidence of fraud should be considered in determining whether or not the collision was deliberate. **Matter of Eagle Ins. Co. v. Davis**, 22 AD3d 846; **V.S. Medical Services, P.C. v. Allstate Ins. Co.**, 11 Misc.3d 334.

The Court has found no controlling authority that addresses the quantum and nature of proof required to establish a *prima facie* right to judgment in the so-called “staged accident” context. A leading Second Department case holds that where two out of three collisions occurring within weeks of the policy’s inception have been found to be part of a fraudulent scheme, the insurer is entitled to judgment with respect to the third. **Laguerre**, 305 AD2d 490.

Some guidance is offered by the trial courts, which have articulated several factors as indicia of a non-accident, including: (i) more than one collision within a short time of the policy’s inception, (ii) cancellation of the policy shortly thereafter for non-payment of premiums, (iii) similarities among the collisions and interrelationships among the parties, and (iv) inconsistencies in testimony regarding the circumstances of the subject collision and the identities of the individuals involved. Such factors, in various combinations, have been held to constitute a “compelling and persuasive body of circumstantial evidence that the underlying loss resulted from an intentional collision staged for the purpose of insurance fraud.” **Matter of National Grange Mut. Ins. Co. v. Vitebskaya**, 1 Misc.3d 774. *See also* **V.S. Medical Services, P.C. v. Allstate Ins. Co.**, 11 Misc.3d 334; **Matter of Progressive County Mut. Ins. Co. v. McNeil**, 4 Misc.3d 1022(A).

In the case at bar, plaintiff claims that the Collision was not a legitimate accident, based upon the following:

1. None of the occupants of the PROGRESSIVE Vehicle or the Adverse Vehicle reported the loss to plaintiff.
2. The PROGRESSIVE Vehicle, owned by PROGRESSIVE-insured JOHANNA ESPINOSA at the time of the Collision, was previously owned by passenger NESTOR POCHET. JOHANNA ESPINOSA did not mention this at her EUO.
3. A licensed acupuncturist who examined LUIS NIN, JUAN CARLOS SILVA and NESTOR POCHET on behalf of plaintiff reported that none of the defendants needed further acupuncture treatment. Plaintiff does not state whether or not any other medical examinations were conducted by other specialists.
4. Defendant NESTOR POCHET failed to appear for an EUO. Defendant LUIS NIN appeared, but left without submitting to the examination, apparently on the advice of the paralegal who accompanied him.
5. The interview statements of LUIS NIN, and the EUO testimony of JOHANNA ESPINOSA and JUAN CARLOS SILVA contained inconsistencies and

discrepancies, and these defendants were unable to provide some basic information regarding their relationships, their employment and the circumstances preceding and following the Collision. JUAN CARLOS SILVA was requested to provide certain information at a later time, but did not do so. The transcript of JOHANNA ESPINOSA's EUO is not attached.

6. JUAN CARLOS SILVA had a history of three prior losses: in 2005 (involving a vehicle he owned and insured), in 2007 (a motorcycle accident); and in 2008 (about which JUAN CARLOS SILVA denied knowledge). Plaintiff does not assert or demonstrate that any of the other defendants in the instant action were involved in any of these prior collisions.

The Court finds that plaintiff has not met its burden to set forth a prima facie case demonstrating entitlement to the declaration sought. The evidentiary facts offered by plaintiff do not cohere into a persuasive body of circumstantial evidence demonstrating that the Collision was a staged event.

First, none of the hallmarks of a staged accident is present. The subject collision was not one of a series of similar events with interrelated participants. Plaintiff does not assert or demonstrate that the Collision occurred shortly after the inception of the policy. In fact, the declarations page of the subject policy indicates that the policy was in effect at least six months prior to the Collision. There is no evidence that the policy was cancelled for non-payment of premiums. There is no inconsistency in the evidence or the statements attributed to any defendant with respect to the manner in which the Collision occurred or the persons who were occupying the PROGRESSIVE Vehicle and the Adverse vehicle at the time of the Collision.

Second, the facts cited by plaintiff as indicia of fraud have no bearing on the deliberate or accidental nature of the Collision. At most, the inadequacies or inconsistencies in the statements attributed to the defendants go to the defendants' general credibility, or to the nature and extent of the injuries claimed. Moreover, the only competent evidence of such statements is the EUO testimony of JUAN CARLOS SILVA. As stated above, the purported interview of LUIS NIN is not dated or authenticated, and the EUO transcript for JOHANNA ESPINOSA is not attached.

To the extent that plaintiff seeks to vitiate coverage based upon a policy exclusion, such as fraudulent conduct or non-cooperation, it was required to demonstrate compliance with **Insurance Law §3420** and applicable regulations. See **Fair Price Medical Supply Corp. v. Travelers Indemnity Co.**, 42 AD3d 277. With respect to non-cooperation, plaintiff was required to demonstrate that it acted diligently in seeking to bring about the

defendant's cooperation, that its efforts were reasonably calculated to obtain such cooperation, and that such defendant's attitude, after cooperation was sought, was one of willful obstruction. See **New York Thrasher v. U.S. Liability Ins. Co.**, 19 NY2d 159; **Continental Cas. Co. v. Stradford**, 46 A.D.3d 598. Plaintiff has not met its evidentiary burden with respect to either defense to coverage.

Plaintiff is not left without remedy. To the extent that Plaintiff has complied with the Insurance Law and applicable regulations, it may defend against fraudulent claims in any proceeding in which coverage is sought, or pursue reimbursement as allowed by law, upon proper proof.

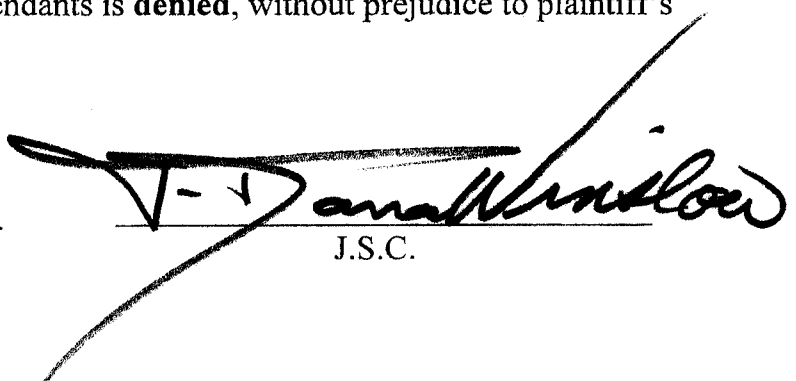
Conclusion

Based upon the foregoing it is

ORDERED, that plaintiff's motion pursuant to CPLR §3215 for a default judgment as against the Defaulting Defendants is **denied**, without prejudice to plaintiff's rights as against individual defendants.

Dated:

July 3, 2012


J.S.C.

ENTERED
JUL 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE