

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

<u>Trial/IAS:</u>	<u>Part 42</u>
<u>Motion Date:</u>	<u>8/15/01</u>
<u>Index No.:</u>	<u>18617/00</u>
<u>Mtn. Seq. No.:</u>	<u>001</u>

Present: Honorable Jerald S. Carter

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In the Matter of the Application of
AIU INSURANCE COMPANY,

Plaintiff,

-against-

**OSBERT CAMPBELL, PASCAL DORILAS,
JEAN DEREZIL, EMILE SMITH, JEAN
CLAUDE CLERVEALD and GOVERNMENT
EMPLOYEES INSURANCE COMPANY,**

Defendants.

-----x
The following papers were read on the motion:

Notice of Motion with annexed Affirmation w/ exhibits	1
Affirmation in Opposition w/ Exhibits (Lauzon)	2
Affirmation in Opposition w/ Exhibit (Frenkel)	3
Affirmation w/ Exhibit (Herz)	4
Verified Answer (Lozner & Mastropietro)	5

Plaintiff's Motion seeking an Order pursuant to CPLR §3215 granting the Plaintiff judgment by default against Defendants, Osbert Campbell, Pascal Dorilas, Jean Derezil, Emile Smith, Jean Claude Clerveald is denied. Plaintiff's further application for an Order granting summary judgment against the Defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY ("GEICO"), is similarly denied.

As to Defendants, SMITH and DEREZIL, the Plaintiff has withdrawn its motion by stipulation.

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This is a declaratory judgment action arising out of a motor vehicle accident which occurred on February 26, 1998 at Brooklyn Avenue and Newkirk Avenue, Brooklyn, NY. The police accident report filed reveals that a motor vehicle owned and operated by Defendant SMITH was traveling south on Brooklyn Avenue when it came into contact with a motor vehicle allegedly owned by Defendant CAMPBELL and operated by Defendant DORILAS in a easterly direction on Newkirk Avenue.

AIU asserts that it conducted an investigation which revealed that its insured Defendant CAMPBELL had previously reported his driver's license stolen and was issued a replacement license. AIU further asserts that its (unnamed) investigator determined through an (unnamed) superintendent of a building that Defendant DORILAS (referred to by no less than three different names) lived in the building but that DORILAS would not speak to the investigator. The results of the investigation prompted it to disclaim coverage to Defendant CAMPBELL.

The cursory investigation outlined in Plaintiff's papers fail to offer any basis upon which the Court should grant judgment by default against non-appearing parties. On more than one occasion, the names of the Defendants are misspelled; in reverse order (first/last); or otherwise deficient.

At some point, a claim for uninsured motorist arbitration was filed by Defendants SMITH and DERZEIL against Defendant GEICO. GEICO then filed a petition to stay arbitration in Nassau County Supreme Court.

Plaintiff's application for summary judgment against GEICO is denied as it is well settled that an insurer may never retroactively cancel an insurance policy even if the misrepresentation by the insured is material and the ab initio cancellation would effect the rights of an innocent third

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party. *Aetna v. O'Conner*, 9 NY2d 359; *DiDonna v. State Farm*, 259 AD2d 727, 687 NYS2d 175 (2nd Dept., 1999).

AIU may not escape the liability for claims arising prior to the cancellation period. *National Superlease v. Reliance Insurance Co.*, 123 AD2d 608 (2nd Dept., 1986).

Accordingly, the application is denied.

Dated: Mineola, NY
November 8, 2001

ENTER,

Jules P. Carter
A.J.S.C.

ENTERED
JAN 18 2002
NASSAU COUNTY
COUNTY CLERKS OFFICE