

<b>Country-Wide Ins. Co. v Penn</b>
2016 NY Slip Op 30949(U)
May 24, 2016
Supreme Court, New York County
Docket Number: 161668/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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Country-Wide Insurance Company,

Plaintiff,

- v -

Index No.  
161668/2014

**DECISION  
and ORDER**

Mot. Seq. 1

Derrick Penn

(“Eligible Injured Party Defendant”),

And

Jules Francois Parisien, MD, Penn Chiropractic, P.C.,  
Prompt Medical Services, P.C.,

(“Medical Provider Defendants”).

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HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced with the filing of the Summons and Complaint on November 24, 2014. The Summons names “Jules Francois Parisien, M.D., P.C.” (“Parisien P.C.”), a corporate entity, as a defendant. The Verified Complaint names “Jules Francois Parisien MD” (“Dr. Parisien”) as an individual defendant; the Verified Complaint describes Dr. Parisien, as “a New York licensed physician transacting and/or doing business in the State of New York.” The Verified Complaint does not name or make reference to Parisien P.C. The only Affidavit of Service provided by Plaintiff shows service upon Parisien P.C. via Business Corporation Law (“BCL”) 306. No affidavit of service is submitted showing service upon Dr. Parisien.

Defendants Dr. Parisien and Penn Chiropractic, P.C. (“Penn Chiropractic”) (collectively, “Movant Defendants”), move pursuant to CPLR §§3211(a)(2) and

(a)(7) to dismiss the Complaint. Movant Defendants contend that the Court lacks subject matter jurisdiction of the subject matter of Plaintiff's claims and Plaintiff has failed to state a cause of action for declaratory relief. Plaintiff further move to dismiss the Complaint as against Dr. Parisien pursuant to CPLR § 3211(a)(8). Plaintiff opposes, and files a cross motion seeking an Order directing default judgment Parisien PC and Penn Chiropractic.

First, Moving Defendants argue that Plaintiff has failed to state a cause of action for declaratory relief and dismissal is warranted under CPLR § 3211(a)(2) and (a)(7). CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex. rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D. 2d 91 [1<sup>st</sup> Dept 2003])(see CPLR 3211[a][7]).

An insurer is entitled to commence an action seeking a declaratory judgment that there is no coverage under the policy of insurance for No-Fault benefits if an applicant for benefits breached a condition precedent to coverage pursuant to the No-Fault Regulation. (*See generally American Tr. Ins. Co. v. Solorzano*, 968 N.Y. 3d 449 [1st Dept. 2013]). "To the extent the petitioner seeks a declaration of the rights and obligations of plaintiff under New York's No-Fault Regulation (11 NYCRR 65 et. seq.), the complaint states a justiciable controversy between the parties, and is not subject to dismissal for failure to state an action." (*Eveready Ins. Co. v. Felder*, 2013 WL 1212748 [N.Y. Sup. July 18, 2013]). "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration." (*State Farm Mut. Auto. Ins. Co. v. Anikeyeva*, 89 A.D.3d 1009, 1010 [2d Dep't 2011]).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1

that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. (*See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dept 2011]).

Here, Plaintiff brings this declaratory action seeking a declaration that Movant Defendants are not eligible for no-fault benefits stemming from motor vehicle accident that occurred on June 10, 2014 based upon claimant Derrick Penn's failure to appear for EUOs on two occasions. The Complaint sufficiently pleads that Movant Defendants submitted claims to Plaintiff, and as such, there is an actual controversy to adjudicate here. Accepting the allegations as true, the four corners of the Complaint state a claim for a declaration of rights concerning the subject insurance policy and No-Fault Regulations. Furthermore, there is no basis to dismiss the Complaint based on an alleged lack of subject matter jurisdiction.

Turning to Defendants' motion to dismiss the Complaint based on a lack of personal jurisdiction, Defendants claim that Dr. Parisien was not properly served and move to dismiss pursuant to CPLR §3211(a)(8).

CPLR §3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant."

Here, according to Plaintiff's affidavit of service, Plaintiff served Dr. Parisien, who has been sued in his personal capacity, in accordance with BCL 306(b) by delivering the Summons and Complaint to the Secretary of State. Dr. Parisien states that he never designated the Secretary of State to act as his authorized agent, nor is he a corporation that could be served pursuant to BCL 306(b). Dr. Parisien further states, "Plaintiff made no effort to serve me personally at a location where I was likely to receive proper notice of this action." Dr. Parisien also states, "I can definitely state that I did not receive the Summons and Verified Complaint relating to this action from the Secretary of State or from anyone else." The Court further notes that the affidavit of service submitted by Plaintiff shows service was on Parisien PC pursuant to BCL 306(b), not upon Dr. Parisien.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss pursuant to CPLR § 3211(a)(2) and (a)(7) is denied; and it is further

ORDERED that Defendants' motion to dismiss the Complaint as against Francois Jules Parisien, MD, pursuant to CPLR § 3211(a)(8) is granted, and the Complaint is dismissed as against Francois Jules Parisien, MD, in his personal capacity and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendant Penn Chiropractic, P.C., shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof; and it is further

ORDERED that Plaintiff's cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MAY 24 2016

**MAY 24 2016**

  
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EILEEN A. RAKOWER, J.S.C.