IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

SHONDA JOHNSON and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY as subrogee of Shonda Johnson	)	**C.A. No. 05C-04-087-CLS**
Plaintiffs	)	
v.	)	
JAMES MICHAEL ROONEY, and DAVID A. DELLORSE, ANGELA DELLORSE and PROGRESSIVE INSURANCE COMPANY	)	
Defendants	)	

Date Submitted: July 26, 2006
Date Decided: October 31, 2006

UPON DEFEDNANT'S MOTION TO DISMISS
DENIED *in part*.

ORDER

Chaneta Brooks Montoban, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Michael I. Silverman, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorney for Defendant.

SCOTT, J

INTRODUCTION

Before the Court is Defendant Progressive Insurance Company's ("Progressive") Motion to Dismiss the Complaint for failure to state a claim and failure of service of process. Because Plaintiffs Shonda Johnson ("Johnson") and State Farm Mutual Automobile Insurance Company ("State Farm") may be entitled to a recovery under the facts as pled, Progressive's Motion to Dismiss is **DENIED** in part.

FACTS

Defendant's Motion to Dismiss arises from a personal injury action. On April 8, 2005, Plaintiffs filed a Complaint for personal injury that resulted from a car accident. This accident occurred on May 10, 2002 when Plaintiff Johnson was driving southbound on Rogers Road in the left lane and entered the intersection of South Heald Street. Plaintiff Johnson alleges that either Defendant James Rooney or Defendant Angela Dellorse negligently ran a red signal and struck her car on the left side, causing it to roll onto its roof.

As a result of this accident, Plaintiff Johnson alleges that she suffered property damage to her car, personal injury, medical expenses and loss of her deductible in the amount of $250.00. Plaintiff State Farm was the insurance carrier for Johnson at the time of the accident. Under its contract,

State Farm insured Johnson for property damage benefits in the amount of $22,736.67 for damage to her car, personal injury protection benefits in the amount of $100,000 and underinsured motorist benefits in the amount of $100,000.

The car driven by Defendants Rooney or Angela Dellorse was owned by Defendant David Dellorse and insured under his policy with Defendant Progressive Insurance Company as of May 10, 2002. In the amended complaint, Plaintiff State Farm alleges subrogation of rights of its insured, Plaintiff Johnson, thereby asking to recover the amounts paid to Johnson from Defendants. However, Defendant Progressive contends that Johnson was not an insured person under its policy. According to Progressive, Plaintiffs have, "not obtained an assignment of the insured's rights that would potentially entitle Plaintiff(s) to pursue an action against (it)."[1] Defendant Progressive, therefore, files this Motion to Dismiss on the basis of failure to state a claim.

In addition, Defendant Progressive files this Motion to Dismiss on the basis of failure of service of process claiming that they did not receive effective service of process of the amended complaint. On October 11, 2005, Plaintiffs filed a Motion to Amend the Complaint to add Defendants

[1] Pl. Mot. To Dismiss at 2.

Angela Dellorse and Progressive. The Court granted this Motion to Amend on November 1, 2005 and filed the amended complaint on November 2, 2005. The amended summons was then sent to the sheriff for service on Defendant Angela Dellorse on November 16, 2005.

Plaintiffs generally assert that Defendant Progressive effectively received service of process. In accordance with 18 *Del. C*. §525,[2] a plaintiff must file service of process on an insurance company with the Insurance Commissioner. Plaintiff, therefore, contends that it effectively made service of process of the amended complaint on Defendant Progressive by filing with the Insurance Commissioner on March 1, 2006. According to Plaintiffs, the Office of the Insurance Commissioner then forwarded an amended complaint and alias summons to Defendant Progressive Insurance Company c/o Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801 and service was perfected. However, as of May 9, 2006, Defendant Progressive contends that service of process of the amended complaint has not been effectuated on it. Plaintiff has not provided

[2] 18 *Del. C*. §525 pertains to service of process against an insurer in Delaware as follows:

> (a) Service of process against an insurer for whom the Commissioner is attorney shall be made by delivering to and leaving with the Commissioner, his or her deputy, or a person in apparent charge of his or her office during the Commissioner's absence, 2 copies of the process, together with fee prescribed in §701 of this title.
>
> (c) Service of process in the manner provided by this section shall for all purposes constitute valid and binding personal service upon the insurer within this State.

Defendant or the Court with any documentation of service upon the Insurance Commissioner.

DISCUSSION

In this Motion to Dismiss, Defendant Progressive asks the Court to dismiss Plaintiffs' claim on the basis of failure to state a claim and failure of service of process. However, Plaintiffs Johnson and State Farm generally contend that "both grounds are without merit and the complaint should not be dismissed".

I. Defendant Progressive is Not Entitled to a Motion to Dismiss Based on the Failure to State A Claim

A court may not dismiss a plaintiff's complaint for failure to state a claim unless it appears to a certainty that the plaintiff may not recover under any set of facts that would entitle him to relief.[3] When evaluating a motion to dismiss, the court's review is limited to the well-pleaded allegations in the complaint, which must be accepted as true.[4] In the instant case, accepting all of the non-conclusory allegations as true, the claim that Plaintiffs lacks standing to pursue any claim against Defendant Progressive Insurance fails as a matter of law.

[3] *Spence v. Funk*, 396 A.2d 967 (Del. 1978); *Nix v. Sawyer*, 466 A.2d 407 (Del. Super. Ct. 1983); *Battista v. Chrysler Corp*., 454 A.2d 286 (Del. Super. Ct. 1982).
[4] *Barni v. Kutner*, 76 A.2d 801 (Del. 1950).

The Court generally finds that an injured plaintiff may not bring an action directly against the tortfeasor's insurance carrier.[5] However, the plaintiff's insurer has rights to subrogation for PIP benefits from a tortfeasor's insurer under Delaware statutory law.[6] 21 *Del. C.* §2118 provides in part:

> (g) Insurers providing benefits….. shall be subrogated to the rights, including claims under any workers' compensation law, of the person for whom benefits are provided, to the extent of the benefits so provided.
>
> (1) Such subrogated rights shall be limited to the maximum amounts of the tortfeasor's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved, except that the insurer providing benefits shall be indemnified by any workers' compensation insurer obligated to make such payments to the injured party.[7]

The Delaware Supreme Court in *Harper v. State Farm* found that 21 *Del. C.* §2118 guarantees the insured prompt receipt of PIP benefits from their insurance carrier, without requiring a determination of fault.[8] According to *Harper*, the statute, therefore, directs the injured party to obtain relief from its insurance carrier.[9] When the injured party does so, the

[5] *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531 (Del. Super. 1990).
[6] *Harper v. State Farm Mut. Auto. Ins. Co.*, 703 A.2d 136, 140 (Del. Super. 1997).
[7] 21 *Del. C.* §2118
[8] *Harper*, 703 A.2d 136, 140 (Del. Super. 1997).
[9] *Id.*

party's insurance carrier automatically acquires rights of subrogation against the tortfeasor's insurer and not the individual tortfeasor.[10]

While *Harper* generally involved a suit by an insured against her insurance carrier, the decision in *Harper* entailed a determination on the statute of limitations applicable to PIP actions, and not on a subrogation of rights issue.[11] The Delaware Supreme Court in *Waters v. State Farm Mut. Auto. Ins. Co.*, therefore, found that *Harper*'s statements on subrogation were made in dicta, "as part of the rationale rather than the actual holding of the case."[12] However, *Waters* generally stated that its "interpretation of Section 2118(g)(1) is not inconsistent with *Harper*".[13] The Court, thereby affirmed *Harper*'s interpretation of 21 *Del. C.* §2118 with one exception; *Waters* made a slight distinction from *Harper*, holding that an insurance company has a statutory right of subrogation against an individual tortfeasor when the tortfeasor is self-insured.[14]

In light of *Harper* and *Waters*, the Court finds that Plaintiff State Farm has standing to sue Defendant Progressive Insurance Company for the PIP benefits it paid on behalf of Plaintiff Johnson. Plaintiffs have the right to reimbursement of these benefits pursuant to 21 *Del. C.* §2118, which

[10] *Id.*
[11] 703 A.2d 136 (Del. Super. 1997).
[12] 787 A.2d 71, 74 (Del. 2001).
[13] *Id.*
[14] *Id.*

provides that an insurance carrier automatically gains rights of subrogation against the tortfeasor's insurer. The Court, therefore, finds that it cannot dismiss Plaintiffs' action against Progressive for failure to state a claim.

II. The Court Cannot Yet Determine Whether Plaintiff's Claim Warrants Dismissal Based on the Failure of Service of Process

Previous courts in Delaware have not prejudiced a Plaintiff simply due to a mistake made by their attorney. The Court in *Fort v. Kosmerl* held that where "the technical requirement of service of process is deficient, not because of any fault attributable to the plaintiff, it would be a 'miscarriage of justice' to now hold that no cause of action may be brought… by reason of expiration of time".[15] *Fort* heavily relied on the reasoning in *Giles v. Rodolico* which found that a Court should base its determination on the merits of a case and not on a technical defect as to the requirements concerning service of process.[16] According to *Giles*, the Superior Court's policy is to "avoid forfeiture of substantive rights".[17]

Following this reasoning, *Fort* held that the circumstances of the case warranted "equitable treatment".[18] The defendant in *Fort* filed a motion to dismiss due to lack of personal jurisdiction, and due to the expiration of the

[15] 2004 Del. Super. LEXIS 69 at *34-35 (citing, *Giles v. Rodolico*, 140 A.2d 263 (Del. 1958)).
[16] *Id.*
[17] *Giles*, 140 A.2d 263, 267 (Del. 1958).
[18] 2004 Del. Super. LEXIS 69.

statute of limitations.[19] The attorney in *Fort* failed to timely mail a notice by registered mail to the defendant non-resident driver.[20] The defendant, therefore, argued that plaintiff's non-compliance with the seven day statutory notice requirement rendered service of process ineffective.[21] Relying on the findings of *Giles*, the *Fort* Court refused to prejudice the plaintiff because of a mistake made by plaintiff's counsel in regard to service of process.[22] On March 11, 2004, the *Fort* Court found that "plaintiff's action abated within the meaning of §8118"[23] and thereby dismissed the action without prejudice.[24]

However, upon the defendant's motion for re-argument, the *Fort* Court addressed the issue of whether it properly considered 10 *Del. C.* §8118, the saving statute.[25] Because the plaintiff filed a personal injury

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[19] *Id*.
[20] *Id*. at *1.
[21] *Id.* at *4.
[22] *Id*.
[23] 10 *Del. C.* §8118, a/k/a the "savings statute", provides in part:

> (a) If in any action duly commenced within the time limited therefore in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

[24] 2004 Del. Super. LEXIS 69 at *35-36.
[25] 2004 Del. Super. LEXIS 100 at *6-7.

civil action within the two-year statute of limitations provided in 10 *Del. C.* §8119,[26] the Court found that it had jurisdiction to determine if plaintiff's claim fell under the savings statute.[27] The Court nevertheless held that "that portion of the Court's Order which held that dismissal of Plaintiff's action constituted an abatement of their action within the meaning of 10 *Del. C.* §8118, was untimely."[28] Accordingly, "an action is abated within the meaning of 10 *Del. C.* §8118 upon affirmance of the judgment of (the) Court."[29] "Only upon the filing of a second law suit, based on the same cause of action," can the Superior Court "consider the practicability of the ameliorative effect of the savings statute to Plaintiff's cause of action".[30] The Court, therefore, vacated the order issued on March 11, 2004 that pertained to the applicability of 10 *Del. C.* §8118.[31]

In line with this reasoning, the Court in *Empire v. Bank of N.Y.* found that a plaintiff must meet two requirements in order to achieve relief for

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[26] 10 *Del. C.* §8119 provides:

> No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained; subject, however, to the provisions of § 8127 of this title.

[27] *Fort*, 2004 Del. Super. LEXIS 100 at *7.
[28] *Id*. at *18.
[29] *Id*.
[30] *Id*. at *23.
[31] *Id*.

failure of service of process under the savings statute.[32] The two requirements are as follow: "(1) they must have duly commenced an action before the statute of limitations barred the action, and (2) the writ which subsequently issues must have been abated."[33] Accordingly, the cause of action abates and 10 *Del. C.* §8118(a) applies only "upon affirmance of the judgment of dismissal in an initial action."[34] In *Empire*, the Court determined that plaintiff met the first requirement because service of its initial action was properly attempted within the statutory time limits.[35] The *Empire* Court also found that the plaintiff fulfilled the second requirement because the Superior Court had destroyed the action against defendant Bank of New York (BNY) and the Supreme Court subsequently affirmed dismissal.[36]

On these findings, the *Empire* Court held that the savings statute became applicable in reference to the defendant BNY, and thereby denied BNY's motion to dismiss.[37] However, it further determined that "the facts (were) less clear" as to the second defendant, James Armistead

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[32] 2001 Del. Super. LEXIS 221 at *4 (citing, *Gaspero v. Douglas*, 1981 Del. Super. LEXIS 818).
[33] *Id.*
[34] *Id.* at *5 (citing, *Gosnell*, 198 A.2d 924, 927 (Del. 1964)).
[35] 2001 Del. Super. LEXIS 221 at *5.
[36] *Id.*
[37] 2001 Del. Super. LEXIS 221 at *7.

(Armistead).[38] Because of insufficient facts regarding service on Armistead, the Court afforded the plaintiff 10 days to supplement the record, "as it appear(ed) that service may have been achieved on the first action filed".[39]

In the case at hand, this Court cannot determine whether Plaintiff falls within the meanings of the savings statute because the action has not yet abated. The Court can, therefore, only decide whether the case warrants dismissal based on failure of service of process. Even so, the Court finds that it has insufficient facts to make this determination. Counsel for Plaintiffs State Farm and Johnson generally contend that it filed the amended complaint with the Insurance Commissioner as required by 18 *Del. C.* §525. If Plaintiffs' counsel in fact did so, it validly served Defendant Progressive. However, Plaintiffs' counsel has not provided Defendant Progressive or the Court with any documentation of service by the Insurance Commissioner. Without this documentation, the Court cannot verify whether service of process took place.

As such, the Court cannot make a determination on Defendant Progressive's Motion to Dismiss for failure of service of process because "it appears that service may have been achieved" on the amended complaint.

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[38] *Id.*
[39] *Id.*

CONCLUSION

For all the foregoing reasons, Defendant Progressive's Motion to Dismiss on the basis of failure to state a claim is hereby **DENIED.** Plaintiff must supplement the record within 10 days as to status of service of process on Defendant Progressive by the Insurance Commissioner. Upon doing so, the Court will reconsider Defendant's Motion based on failure of service of process.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.