

**Empire Mar. & Fire Ins. Co. v Franco**

2015 NY Slip Op 31499(U)

August 10, 2015

Supreme Court, New York County

Docket Number: 651779/2013

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

EMPIRE MARINE AND FIRE INSURANCE CO.,

INDEX NO. 651779/2013
MOTION DATE 07-08-2015
MOTION SEQ. NO. 004
MOTION CAL. NO.

Plaintiff,

-against-

EMILE FRANCO, HILDA MENDOZA, SANTA MENDOZA,

(collectively the "Participant Defendants"),

-and-

CRISTOBAL GUERRERO, ELIZABETH MACEO,
JOSE VASQUEZ,

(collectively the "Non-Participant Party Defendants")

-and-

ACCELERATED REHAB AND PAIN MANAGEMENT, P.A.,
AESTHETIC ANESTHESIOLOGY, L.L.C. ALEXANDER
LILEIKA, PT., P.C., ALL OF NY, INC., BARNERT SURGICAL
CENTER, L.L.C., CENTRAL PARK PHYSICAL MEDICINE &
REHABILITATION, P.C., CONTEMPORARY ACUPUNCTURE,
P.C., D.A. CHRIOPRACTIC, P.C., DAILY MEDICAL EQUIPMENT
DISTRIBUTION CENTER, INC., DOSHI DIAGNOSTIC IMAGING
SERVICES, P.C., DYCKMAN NEIGHBORHOOD MEDICAL, P.C.,
EPIC PAIN MANAGEMENT & ANESTHESIA CONSULTANTS,
L.L.C., HMP ORTHOPAEDICS, P.C., DAVID KAPLOWITZ, M.D.,
LAM MEDICAL, P.C. ANGEL LEAL, P.A., ALEXANDER
LILEIKA, PT, MEDICAL PROFESSIONAL GROUP, P.C.,
MILLENNIUM AMBULATORY SURGERY CENTER, L.L.C.,
RICHARD E. PEARL, M.D., QUALITY CUSTOM MEDICAL
SUPPLY, INC., SPINERGY CHIROPRACTIC, P.C.,

(collectively the "Provider Defendants"),

Defendants.

The following papers, numbered 1 to 7 were read on this motion to dismiss action, cross-motion to amend pleadings:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits cross motion

Replying Affidavits

Cross-Motion: X Yes No

PAPERS NUMBERED

1 - 5

5 - 7

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is ordered that Non-Participant Party Defendant Cristobal Guerrero's motion dismissing the complaint as against him, granting him summary judgment on liability, and granting him a protective order is denied, Plaintiff

the Empire Fire and Marine Insurance Co.'s (herein "Empire") cross-motion to amend the Complaint naming all Non-Participant Party Defendants as Participant Defendants and adding Angel Cruz and Elizabeth Nieves-Maceo as Participant Defendants is granted.

On May 23, 2012, Emile Franco rented a vehicle, which was then involved in a vehicle collision on May 25, 2012. On the date of the accident, Emile Franco's rented vehicle, which contained two passengers - Santa Mendoza and Hilda Mendoza (collectively known herein as "Participant Defendants") collided with a vehicle operated by Cristobal Guerrero, which contained two passengers - Elizabeth Maceo and Jose Vasquez (collectively known herein as "Non-Participant Defendants"). The Participant Defendants received medical treatment under their No-Fault claims submitted to Empire.

Empire conducted an investigation and conducted Examinations Under Oath of the Participant Defendants. Empire discovered that several of the Participant Defendants had been involved in similar No-Fault claims in relation to rented vehicles. After commencing this action and obtaining further discovery, Empire obtained cell-phone records for the Participant and Non-Participant Defendants, which showed that all parties involved in the accident communicated with one another prior to the date of loss. The cell phone records also show that the defendant-medical providers and the Participant and Non-Participant Defendants communicated with Angel Cruz, who is the boyfriend of Participant Defendant Emile Franco. Angel Cruz pled guilty to No-Fault fraud in 2002 for engaging in similar acts, and maintains a joint bank account with Emile Franco.

Non-Participant Defendant Cristobal Guerrero now moves to dismiss the complaint for failure to state a cause of action; for summary judgment dismissing the complaint as against him; and alternatively if the complaint is not dismissed as against him, Guerrero seeks a protective order limiting the discovery sought by Empire from him.

Empire opposes the motion and cross-moves for leave to amend the complaint to name all of the Non-Participant Defendants as Participant Defendants to add Angel Cruz as a participant defendant. Empire also seeks to remove Elizabeth Maceo from this action as a mistakenly named party and add Elizabeth Nieves-Maceo as a Participant Defendant and proper party. Empire annexes the proposed Amended Complaint as Exhibit C to the cross-moving papers.

Leave to amend pleadings pursuant to CPLR 3025 (b) should be freely given "absent prejudice or surprise resulting directly from the delay" (*Anoun v. City of New York*, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1<sup>st</sup> Dept., 2011] citing to, *Fahey v. County of Ontario*, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1<sup>st</sup> Dept., 2012] citing to, *Shepherd v. New York City Tr. Auth.*, 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2<sup>nd</sup> Dept., 1987]).

Only counsel for Empire appeared at the duly scheduled oral argument date.

Therefore, Guerrero's motion is denied, on default, and Empire's cross-motion is granted, on default.

Accordingly, it is ORDERED that Defendant Cristobal Guerrero's motion dismissing the complaint, for summary judgment, and for a protective order is denied, on default, and it is further,

ORDERED, that plaintiff's cross-motion for leave to amend the Complaint is granted, on default, and it is further,

ORDERED, that the pleadings as amended in the proposed Amended Complaint annexed to the plaintiff's cross-moving papers as Exhibit C is deemed served upon the defendants upon service on their attorneys of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the caption in this action is amended as follows:

---

**EMPIRE MARINE AND FIRE INSURANCE CO.,**

**Plaintiff,**

**-against-**

**EMILE FRANCO, HILDA MENDOZA, SANTA MENDOZA,  
CRISTOBAL GUERRERO, ELIZABETH NIEVES-MACEO,  
JOSE VASQUEZ, and ANGEL CRUZ a/k/a PEPE CRUZ,**

**(collectively the "Participant Defendants",**

**-and-**

**ACCELERATED REHAB AND PAIN MANAGEMENT, P.A.,  
AESTHETIC ANESTHESIOLOGY, L.L.C. ALEXANDER  
LILEIKA, PT., P.C., ALL OF NY, INC., BARNERT SURGICAL  
CENTER, L.L.C., CENTRAL PARK PHYSICAL MEDICINE &  
REHABILITATION, P.C., CONTEMPORARY ACUPUNCTURE,  
P.C., D.A. CHRIOPRACTIC, P.C., DAILY MEDICAL EQUIPMENT  
DISTRIBUTION CENTER, INC., DOSHI DIAGNOSTIC IMAGING  
SERVICES, P.C., DYCKMAN NEIGHBORHOOD MEDICAL, P.C.,  
EPIC PAIN MANAGEMENT & ANESTHESIA CONSULTANTS,  
L.L.C., HMP ORTHOPAEDICS, P.C., DAVID KAPLOWITZ, M.D.,  
LAM MEDICAL, P.C. ANGEL LEAL, P.A., ALEXANDER  
LILEIKA, PT, MEDICAL PROFESSIONAL GROUP, P.C.,  
MILLENNIUM AMBULATORY SURGERY CENTER, L.L.C.,  
RICHARD E. PEARL, M.D., QUALITY CUSTOM MEDICAL  
SUPPLY, INC., SPINERGY CHIROPRACTIC, P.C.,**

**(collectively the "Provider Defendants"),**

---

**Defendants.**

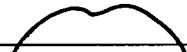
, and it is further,

ORDERED, that the default judgment taken against ELIZABETH MACEO is hereby vacated, and it is further,

ORDERED, that the cross-moving party serve a copy of this Order with Notice of Entry upon the General Clerk's Office (Room 119) and the County Clerk (Room 141B), who are directed to amend their records to reflect the amendment of the pleadings, and it is further,

ORDERED, that the defendants shall serve an Answer to the Amended Complaint within 30 days from the date of service on their attorneys of a copy of this Order with Notice of Entry.

ENTER:

**MANUEL J. MENDEZ**  
**J.S.C.**  
  
\_\_\_\_\_  
**MANUEL J. MENDEZ,**  
**J.S.C.**

Dated: August 10, 2015

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST       REFERENCE