

Country-Wide Ins. Co. v Jeffers
2015 NY Slip Op 31852(U)
October 6, 2015
Supreme Court, New York County
Docket Number: 150808/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
*Justice*PART 13

COUNTRY-WIDE INSURANCE COMPANY,

INDEX NO. 150808/2015
MOTION DATE 09-30-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. Plaintiff,
-against-

IAN JEFFERS ("eligible Injured Party Defendant").

and

MIDDLE VILLAGE DIAGNOSTIC IMAGING, P.C., QUALITY
CUSTOM MEDICAL SUPPLY, INC., AVALON RADIOLOGY, P.C.
DARREN T. MOLLO DC, PROMPT MEDICAL SERVICES, P.C.,
CHARLES DENG ACUPUNCTURE, P.C., JULES FRANCOIS
PARISIEN MD, NOEL BLACKMAN PHYSICIAN P.C., PENN
CHIROPRACTIC P.C., MADISON PRODUCTS OF USA INC.,
and KSEНИЯ PAVLOV DO ("Medical Provider Defendants").Defendants.The following papers, numbered 1 to 8 were read on this motion pre-answer motion to dismiss,
cross-motion for summary judgment.

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

PAPERS NUMBERED1 - 3Answering Affidavits — Exhibits 4 - 7Replying Affidavits 8Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that this pre-answer motion to dismiss brought by defendants DARREN T. MOLLO DC, PROMPT MEDICAL SERVICES, P.C., CHARLES DENG ACUPUNCTURE, P.C., JULES FRANCOIS PARISIEN MD, NOEL BLACKMAN PHYSICIAN P.C., PENN CHIROPRACTIC P.C., MADISON PRODUCTS OF USA INC., and KSEНИЯ PAVLOV DO (collectively known herein as the "Moving Defendants") is granted to the extent of dismissing the Second Cause of Action for injunctive relief, denied as to the First Cause of Action for a declaratory judgment. Individual defendant DARREN T. MOLLO DC's motion dismissing the Complaint as against him is granted, the cross-motion brought by Plaintiff COUNTRY-WIDE INSURANCE COMPANY (herein "Country-Wide") for summary judgment is denied, the portion of the cross-motion seeking a 120-day extension to serve individual defendant DARREN T. MOLLO DC is granted.

Country-Wide commenced this action seeking a declaratory judgment that it is not obligated to provide No-Fault coverage for defendant Ian Jeffers (herein "Claimant"), and seeking injunctive relief enjoining the defendants from further seeking No-Fault claims in this matter. This action arises from an accident on June 10, 2014. Country-Wide assigned the accident claim number 000296305-002 under policy number RS808881013.

Claimant received various medical services from the Moving Defendants in relation to the injuries he allegedly sustained during the June 10, 2014 vehicle collision. After filing the Summons and Complaint, Country-Wide served the Moving Defendants by serving the corporate defendants through the New York State Secretary of State, and by serving the individual defendants Ksenia Pavlov and Jules Francois Parisien at their principal places of business. Individual defendant Darren T. Mollo was improperly served through the Secretary of State.

The Moving Defendants now move pre-answer to dismiss the Complaint pursuant to CPLR § 3211(a)(2),(7) and (8). The Moving Defendants argue that this Court lacks jurisdiction over the individual defendants because they were improperly served; that the Court lacks subject matter jurisdiction over this declaratory judgment action; and that the Complaint fails to state a cause of action upon which relief may be granted.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (*Union Brokerage, inc., v. Dover Insurance Company*, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept., 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (*Quinones v. Schaap*, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept., 2012]). The complaint must be liberally construed, the factual allegations deemed to be true, and the non-moving party granted the benefit of every possible favorable inference.

CPLR § 3001 allows the court to "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." On a pre-answer motion to dismiss a declaratory judgment action, the only question is "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, 934 N.Y.S.2d 196, 198 [2nd Dept., 2011]). A motion to dismiss a declaratory judgment cause of action should be denied "[w]here a cause of action is sufficient to invoke the court's power to render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy" (*Id.*, 199)

Country-Wide alleges in its Complaint that this action is one for declaratory relief based upon Claimant's failure to appear for EUOs that were timely scheduled in relation to the June 10, 2014 vehicle collision (see Complaint, PP 26-41). Country-Wide further alleges that it denied No-Fault coverage to Claimant and his providers after Claimant failed to appear for two timely scheduled EUOs (see Complaint, PP 43-46).

The Complaint sufficiently states a cause of action for declaratory relief by presenting a justiciable controversy to invoke the Supreme Court's power to render a declaratory judgment. Due to the justiciable controversy, this Court also has subject matter jurisdiction to proceed in this declaratory judgment action (see CPLR § 3211[a][2]).

The Complaint fails to state a cause of action for injunctive relief. Country-Wide merely states that it "will suffer irreparable harm without a permanent stay of arbitrations, lawsuits, and/or claims by Defendants relating to No-Fault claims." (see Complaint, PP 53). Country-Wide fails to state a likelihood of success on the merits and the balance of equities tipping in its favor (see *Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]). The cause of action for injunctive relief enjoining defendants from seeking arbitrations, lawsuits, and/or claims in regards to Claimant's accident fails to state a cause of action and is therefore dismissed.

"To successfully oppose a pre-answer motion to dismiss a complaint pursuant to CPLR § 3211(a)(8), the plaintiff need only make a *prima facie* showing that personal jurisdiction exists" (*Bill-Jay Mach. Tool Corp. v Koster Indus., Inc.*, 29 A.D.3d 504 at 505, 816 N.Y.S.2d 115 [2nd Dept., 2006]).

Country-Wide annexes proof that it properly served the corporate defendants through the Secretary of State (see Cross-Moving Papers, Exhibits D-H). Country-Wide also offers proof of proper service on individual defendants Ksenia Pavlov and Jules Francois Parisien by serving someone of suitable age and discretion at their principal place of business.

However, Country-Wide improperly served individual defendant Darren T. Mollo through the Secretary of State in violation to CPLR § 308. Dismissal of the Complaint for lack of personal jurisdiction is proper only as to individual defendant Darren T. Mollo. Country-Wide cross-moves for a 120-day extension to properly serve Mollo. This Court, in its discretion pursuant to CPLR § 3012(d) grants Country-Wide's application for an extension of time to serve Mollo.

Country-Wide cross-moves for summary judgment in its favor. Country-Wide argues that it is entitled to a declaratory judgment because Claimant failed to appear for two duly scheduled EUOs in violation of a condition precedent for No-Fault coverage pursuant to 11 NYCRR § 65-1.1 and § 65-3.5(e). In support of summary judgment, Country-Wide annexes the Claimant's application for No-Fault benefits; the EUO scheduling letters; transcripts from the second EUO wherein Claimant failed to appear; and the denial of No-Fault benefits under the Claimant's claim.

In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that *prima facie* showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

11 NYCRR 65-1.1 states, in relevant part, that "[u]pon 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."

Country-Wide is not entitled to summary judgment as to the declaratory relief it seeks in this action. Country-Wide has not stated a reasonable basis for originally requesting the EUOs. An affirmation submitted in support of summary judgment by Annie Pursaud, an employee of Country-Wide, does not state the reasonable basis for requesting the EUOs. Pursaud states that as an EUO Clerk for Country-Wide she can attest to the accuracy, completeness, and timeliness of the letters requesting an EUO, but does not state the basis for requesting the EUOs of the Claimant.

Accordingly, it is hereby ORDERED that the moving defendants' motion - DARREN T. MOLLO DC, PROMPT MEDICAL SERVICES, P.C., CHARLES DENG ACUPUNCTURE, P.C., JULES FRANCOIS PARISIEN MD, NOEL BLACKMAN PHYSICIAN P.C., PENN CHIROPRACTIC P.C., MADISON PRODUCTS OF USA INC., and KSENNIA PAVLOV DO - dismissing the Complaint is granted to the extent of dismissing the cause of action for injunctive relief, denied as to the cause of action for declaratory relief, and it is further,

ORDERED, that the individual defendant DARREN T. MOLLO DC's motion to dismiss the Complaint against him for failure to properly serve him is granted, and it is further,

ORDERED, that Plaintiff COUNTRY-WIDE INSURANCE COMPANY's cross-motion is granted to the extent of granting Plaintiff a 120-day extension to properly serve defendant DARREN T. MOLLO DC, the remainder of the motion is denied, and it is further,

ORDERED, that within 30 days from service of a copy of this Order with Notice of Entry, the moving defendants serve and file an answer to the complaint.

MANUEL J. MENDEZ

J.S.C.

ENTER: ---


MANUEL J. MENDEZ

J.S.C.

Dated: October 6, 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE