

State Farm Fire & Cas. Co. v Thomas

2023 NY Slip Op 32524(U)

July 20, 2023

Supreme Court, New York County

Docket Number: Index No. 160576/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- v -

CHRISTINA THOMAS, CHRISTOPHER ANTONIO HATCHES, CHRISTOPHER JUAN BROOKS, JERRICK ALLISON, SUSAN DENISE LEE, 5- STAR CHIROPRACTIC SERVICES, P.C.,ADJUSTMENT WORK CHIROPRACTIC P.C.,ALLIED CARE PT, P.C.,ALL HEALTH DME INC, AMERICAN MEDICAL INITIATIVES P.C.,ANDREW HALL MD, PLLC,APEX DIAGNOSTICS, INC, ARGYLE PHARMACY, INC, ATLANTIC MEDICAL & DIAGNOSTIC, P.C.,AVENUE MEDICAL CARE, P.C.,CARING ANGELS MEDICAL, P.C.,ESM QUALITY PT, P.C.,ETF MEDEQ, INC, GLENMORE MEDICAL, P.C.,GOAL PHYSICAL THERAPY, P.C.,IDM SUPPLY GROUP, INC, KOSTAS SCLAVOS DC, P.C.,LAKE SHORE CHIROPRACTIC, P.C.,LAURELTON PHARMACY, INC, METAMED SPORTS & SUPPLY, INC, NAYUVITO INC, NEXT GENERATION DIAGNOSTIC IMAGING, P.C.,NEW YORK MEDICAL & DIAGNOSTIC CARE, P.C.,OCEAN BLUE CHIROPRACTIC, P.C.,PAIN MEDICINE TREATMENT, PLLC,PROCORE HEALTH AND TECHNOLOGY, INC, PROFESSIONAL BALANCE PHYSICAL THERAPY, P.C.,QUEENS RADIOLOGY IMAGING, P.C.,RGV MEDICAL EQUIPMENT CORP, RMA BILLING & CONSULTING INC, ROCKAWAYS ASC DEVELOPMENT, LLC,SEDATION VACATION PERIOPERATIVE MEDICINE PLLC,TRINITY MEDICAL HEALTHCARE SERVICES, P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 79, 81

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is ORDERED that the motion is denied as to defendants

Christina Thomas, Jerrick Allison, and Christopher Juan Brooks. Affidavits of service filed on

January 20, 2023, attest to attempted affix and mail service pursuant to CPLR 308(4) on these

defendants. CPLR 308(4) provides that where service cannot, with due diligence, be made by

personal delivery or delivery to a person of suitable age and discretion at a defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant, then service may be made by affixing a copy of the summons to the door of the defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant's last known residence or actual place of business. "[T]he due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008]). At minimum, the process server must make multiple attempts to deliver the summons in person on different days and at different times of day when the defendant or a person of suitable age and discretion are likely to be present (*see Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007]). Further, the process server must make some inquiry "to ascertain [the defendant's] whereabouts or [their] place of business" (*id.*).

Here, plaintiff's process server made attempts to serve defendant Thomas on January 23, 2023, at 4:10 PM and January 25, 2023, at 10:15 AM before affixing the papers to the door of defendant's purported residence on January 27, 2023, at 1:50 PM. Similarly, plaintiff's process server attempted to serve defendants Brooks and Allison on January 12, 2023, at 10:45 AM and 11:18 AM, and January 16, 2023, at 2:15 PM and 2:48 PM, before affixing the papers to the doors of defendants' purported residences on January 18, 2023, at 2:30 PM and 2:50 PM, respectively. The process server's affidavit, however, does not set forth that they made any inquiries as to defendants' whereabouts or their places of business prior to affixing the summons to the doors. Moreover, none of these attempts was made on a weekend, nor in the morning hours prior to the beginning of the workday. Accordingly, the process server did not satisfy the "due diligence" requirement necessary for affix and mail service pursuant to CPLR 308(4) (*see*

Spath, 36 AD3d at 413 [“The three previous attempts to serve Miller . . . were insufficient to satisfy the due diligence requirement. None of these attempts was made on a weekend, nor is there any indication that the process server made any inquiries to ascertain Miller's whereabouts or her place of business”]). Since service of the summons and complaint was defective, plaintiff cannot satisfy its burden to submit proof of service before entry of a default judgment as to these defendants (CPLR 3215[f]); and it is further

ORDERED that the motion is otherwise granted, on default and without opposition, for the reasons set forth in the moving papers (NYSCEF Doc. Nos. 58, 63) and the exhibits attached thereto, in which the court concurs; and it is further

ADJUDGED and DECLARED that STATE FARM FIRE AND CASUALTY COMPANY, is not required to pay any sums, monies, damages, awards and/or benefits to including but not limited to Mandatory Personal Injury Protection (No-Fault), Additional Personal Injury Protection, Uninsured/Underinsured Motorist Coverage, and Supplemental Uninsured/Underinsured Motorist Coverage, any and all medical-payment claims; any and all property-damage claims; any and all bodily-injury-liability benefits, to CHRISTOPHER ANTONIO HATCHES, SUSAN DENISE LEE, 5- STAR CHIROPRACTIC SERVICES, P.C., ADJUSTMENT WORK CHIROPRACTIC P.C., ALL HEALTH DME INC, AMERICAN MEDICAL INITIATIVES P.C., ANDREW HALL MD, PLLC, APEX DIAGNOSTICS, INC, ATLANTIC MEDICAL & DIAGNOSTIC, P.C., AVENUE MEDICAL CARE, P.C., CARING ANGELS MEDICAL, P.C., ESM QUALITY PT, P.C., KOSTAS SCLAVOS DC, P.C., LAKE SHORE CHIROPRACTIC, P.C., METAMED SPORTS & SUPPLY, INC, NEW YORK MEDICAL & DIAGNOSTIC CARE, P.C., OCEAN BLUE CHIROPRACTIC, P.C., PROFESSIONAL BALANCE PHYSICAL THERAPY, P.C., RGV MEDICAL EQUIPMENT

CORP, RMA BILLING & CONSULTING INC, SEDATION VACATION PERIOPERATIVE MEDICINE PLLC A/K/A SEDATION VACATION PERIOP MED, PLLC, and TRINITY MEDICAL HEALTHCARE SERVICES, P.C., in connection with the alleged incident of July 20, 2022, collision under claim number 32-37G3-25X, and any actions brought by the above defendants seeking to recover same are hereby dismissed in accordance with this order; and it is further

ADJUDGED and DECLARED that STATE FARM FIRE AND CASUALTY COMPANY is not required to provide a defense and/or indemnification to any of the above defendants who are an “insured” or an “insured operator” pursuant to those terms as set forth in the instant complaint for declaratory relief, in any current or future proceedings, including, but not limited to, any and all uninsured/ underinsured motorist lawsuits and arbitrations, arbitrations and lawsuits seeking to recover No- Fault benefits and third-party lawsuits and arbitrations arising out of the alleged incident of July 20, 2022, under STATE FARM FIRE AND CASUALTY COMPANY claim number 32-37G3-25X; and it is further

ORDERED that the action is severed and continued as to the remaining defendants.

This constitutes the decision and order of the court.



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| <u>7/20/2023</u> DATE | <hr/> LOUIS L. NOCK, J.S.C. | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART | |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |