

DTG Operations, Inc. v Park Radiology, P.C.

2011 NY Slip Op 32467(U)

September 6, 2011

Sup Ct, NY County

Docket Number: 115136/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

DTG Operations, Inc et al

Plaintiff (s).

INDEX NO. 115136/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Park Radiology et al

Defendant (s).

~~Decision~~ ~~Order~~
Decision + Order

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

SEP 13 2011

NEW YORK COUNTY CLERK'S OFFICE

order judgment

Motion (s) decided in accordance with the accompanying memorandum decision

prior decision order & judgment dated June 15, 2011 is superseded by this corrected decision order & judgment

Dated: Sept. 6, 2011

JG
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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

**Supreme Court of the State of New York
Country of New York: Part 10**

-----x
DTG OPERATIONS, INC. d/b/a DOLLAR RENT
A CAR.,

Plaintiff,

-against-

PARK RADIOLOGY, P.C., BONNE SANTO INC.,
BEST TOUCH PT, P.C., SAS MEDICAL, P.C.,
TARNOFF CHIROPRACTIC, P.C., D & H
REHABILITATION MEDICAL, P.C., MIRA
ACUPUNCTURE, P.C., CABRERA ANESTHESIA
SERVICES, P.C., ADVANCED MEDICAL CARE, P.C.,
BRAND MEDICAL SUPPLY, INC., ROBERT NOAH
WAXMAN, M.D., JOEL TOUSSAINT,
JACQUELINE DESSOURCES TOUSSAINT,
and JADA WORRELL.

Defendants.
-----x

****CORRECTED****
DECISION/ORDER
Index No.: 115136/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
SEP 13 2011
NEW YORK
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Recitation, as required by CPLR 2219 [a], of the papers considered in review of this
(these) motion(s):

Papers	Numbered
Pltf's n/m (3215) w/JRF affirm, KW affid, exhs	1
Stip of settlement (5/27/11)	2

-----x

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff, DTG Operations, Inc. d/b/a Dollar Rent-A-Car ("Dollar")
for a judgment declaring that Dollar owes no duty to pay any of the No-Fault claims filed by
the defendants in connection with a collision that took place on June 2, 2010 ("accident").
Stipulations of settlement have been submitted for defendants Park Radiology, P.C.,
Tarnoff Chiropractic, P.C., and Cabrera Anesthesia Services, P.C. The motion is thus

withdrawn and discontinued against these three defendants.

Dollar has filed proof of service on each domestic corporate defendant. Each was served through the Secretary of State, BCL § 306(b). Diligent attempts were made to personally serve each of the individually named defendants, Jada Worrell ("Worrell"), Jacqueline Dessources Toussaint ("Mrs. Toussaint"), Joel Toussaint ("Mr. Toussaint") and Robert Noah Waxman ("Waxman") (collectively "individual defendants"). CPLR § 308(1). Since the attempts were unsuccessful, Dollar served Worrell by affixing a copy of the summons and complaint to the door of her last known residence on December 17, 2010. CPLR § 308(4). Dollar served Mr. and Mrs. Toussaint by delivering a true copy of the summons and complaint on a co-tenant, a person of suitable age and discretion, at the defendant's last known residence, on December 16, 2010. CPLR § 308(2). Dollar served Waxman by delivering a true copy of the summons and complaint on Sima Smith ("Smith"), a co-worker and a person of suitable age and discretion, at the defendant's last known address, on December 15, 2010. Service was complete with the mailing of the summons and complaint to the last known address of Waxman on December 20, 2010, and to the last known addresses of Worrell, Mr. Toussaint and Mrs. Toussaint on December 28, 2010. CPLR §§ 308(2), (4).

Dollar has complied with the additional notice requirements of CPLR §§ 3215(g)(3)(i), (4)(i) and BCL § 306(b) by mailing a copy of the summons and complaint to each defendant at least 20 days before seeking entry of a default judgment. Despite such notice and additional notice, this motion is submitted to the court unopposed. None of the defendants remaining in this action have answered the complaint or appeared and their time to do so has expired and not been extended by the court. Therefore, this motion will be

considered on default.

A default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Therefore, Dollar is entitled to the relief sought in its complaint, which is supported by the sworn affidavit of Kara Wilkins ("Wilkins"), a claims representative for Dollar, provided plaintiff sets forth its *prima facie* case (Gagen v. Kipany Productions Ltd., 289 A.D. 2d 844 (3d Dept. 2001)).

The individual defendants were occupants of a car owned and self-insured by Dollar when it collided with another vehicle near the intersection of Jamaica Avenue and Elton Street in Brooklyn, New York. According to the police report, Mr. Toussaint, the driver of Dollar vehicle, stated that the accident occurred because the driver of another vehicle failed to stop at a stop sign. Non-party, Robinson Perez, the driver of the adverse vehicle, reported that he was stopped at the stop sign when the Dollar car swerved and struck his vehicle. The individual defendants claimed to have sustained bodily injuries as a result of the accident. Subsequently, Dollar has received medical claims for these individuals in excess of \$30,000, arising from alleged injuries from the accident.

Dollar has asserted five causes of action. They are: for a declaration that the Dollar owes no duty to pay No-Fault claims to defendants, except Mr. and Mrs. Toussaint, with respect to the accident, (1st COA); for a declaration that Dollar owes no duty to pay No-Fault claims to defendants because the alleged injuries of the defendants and subsequent No-Fault treatment submitted by the medical provider defendants were not causally related to the accident (2nd COA); for a declaration that defendants, Best Touch PT, P.C. SAS Medical, P.C., D & H Rehabilitation Medical, P.C. Mira Acupuncture, P.C., and Advanced

Medical Care, P.C., have no standing to recover No-Fault claims with respect to the accident (3rd COA); for a declaration that Dollar owes no duty to pay No-Fault claims to defendants because Mr. and Mrs. Toussaint materially misrepresented the facts and circumstances relating to the accident (4th COA); and for a temporary stay on all No-Fault arbitrations, lawsuits, and/or claims, pending the outcome of this action (5th COA).

Dollar sought verification of the defendants' claims by requesting Examinations Under Oath ("EUO's"), as required under their insurance contract. Mr. and Mrs. Toussaint appeared for the EUOs, but provided suspect and conflicting testimony relating to the circumstances surrounding the accident. Notably, they responded with contradictory answers and Mr. Toussaint avoided answering any questions about the Police Accident Report. Additionally, bills were submitted by the medical provider defendants for treatment that was not actually provided. Copies of the EOU transcripts were sent to Mr. and Mrs. Toussaint to be signed and notarized, as required under their insurance contract, yet they failed to do so without any explanation. Worrell failed to appear for his EUO on two occasions, despite proof that he was notified of these appointments.

Dollar claims that over \$30,000 in no-fault claims have been submitted by the medical providers, which is disproportionate to the accident alleged and raises questions as to the claims' legitimacy. Wilkins contends there was minor damage at the collision scene, yet claimants were treated "heavily" and received "elaborate and nearly identical courses of treatment at the same facilities."

Worrell has not come forward with any explanation for why she did not provide the information demanded or appear for their EUO's, as required. Mr. and Mrs. Toussaint failed to sign and notarize transcripts of their EUO's, as required. Having failed to refute plaintiff's

claims, the court finds that the defendants are not able to prove entitlement to benefits under the insurance policy. Accordingly, plaintiff's 1st, 2nd and 4th causes of action are granted on default.

In its 3rd claim against the defendants, Dollar claims the defendants have no standing to recover for their injuries resulting from the accident, however, this claim is not supported by any facts, nor does the plaintiff articulate what it means.

Dollar's 5th cause of action seeks a temporary stay of all No-Fault lawsuits and arbitrations brought by the defendants pending the outcome of this action relating to the accident. This issue of temporary relief is moot, based on the court's decision as to Dollar's other causes of action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff, DTG OPERATIONS, INC. d/b/a DOLLAR RENT A CAR's motion for entry of a default judgment against defendants, BONNE SANTO INC., BEST TOUCH PT, P.C., SAS MEDICAL, P.C., D & H REHABILITATION MEDICAL, P.C., MIRA ACUPUNCTURE, P.C., ADVANCED MEDICAL CARE, P.C., BRAND MEDICAL SUPPLY, INC., ROBERT NOAH WAXMAN, M.D., JOEL TOUSSAINT, JACQUELINE DESSOURCES TOUSSAINT, and JADA WORRELL is **GRANTED** on default; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff owes no duty to defendants BONNE SANTO INC., BEST TOUCH PT, P.C., SAS MEDICAL, P.C., D & H REHABILITATION MEDICAL, P.C., MIRA ACUPUNCTURE, P.C., ADVANCED MEDICAL CARE, P.C., BRAND MEDICAL SUPPLY, INC., ROBERT NOAH WAXMAN, M.D., JOEL TOUSSAINT, JACQUELINE DESSOURCES TOUSSAINT, and JADA WORRELL, to pay

No-Fault claims with respect to the January 11, 2010 collision under claim number DLZ075710; and it is further

ORDERED that plaintiff's motion for a declaration on its 3rd cause of action, that defendants, BONNE SANTO INC., BEST TOUCH PT, P.C., SAS MEDICAL, P.C., D & H REHABILITATION MEDICAL, P.C., MIRA ACUPUNCTURE, P.C., ADVANCED MEDICAL CARE, P.C., BRAND MEDICAL SUPPLY, INC., ROBERT NOAH WAXMAN, M.D., JOEL TOUSSAINT, JACQUELINE DESSOURCES TOUSSAINT, and JADA WORRELL, have no standing to recover for injuries resulting from the accident, is severed and dismissed without prejudice, since this claim is not supported by any facts; and it is further


ORDERED that plaintiff's 5th cause of action is dismissed as moot; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
September 6, 2011

FILED
SEP 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

Ordered:

Hon. Judith J. Gische, J.S.C.