

21st Century Ins. Co. v Gaba Med., P.C.

2015 NY Slip Op 31936(U)

October 15, 2015

Supreme Court, New York County

Docket Number: 160530/2013

Judge: Eileen A. Rakower

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
COUNTY OF NEW YORK: PART 15

-----X

21ST CENTURY INSURANCE COMPANY, 21ST CENTURY
CASUALTY COMPANY, 21ST CENTURY PACIFIC INSURANCE COMPANY,
21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST,
21ST CENTURY ADVANTAGE INSURANCE COMPANY
f/k/a AIG ADVANTAGE INSURANCE COMPANY,
21ST CENTURY ASSURANCE COMPANY f/k/a
AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE,
21ST CENTURY AUTO INSURANCE COMPANY OF NEW JERSEY
f/k/a AIG AUTO INSURANCE COMPANY OF NEW JERSEY,
21ST CENTURY CENTENNIAL INSURANCE COMPANY
f/k/a AIG CENTENNIAL INSURANCE COMPANY,
21ST CENTURY INDEMNITY INSURANCE COMPANY f/k/a
AIG INDEMNITY INSURANCE COMPANY,
21ST CENTURY NATIONAL INSURANCE COMPANY f/k/a
AIG NATIONAL INSURANCE COMPANY,
21ST CENTURY NORTH AMERICA INSURANCE COMPANY
f/k/a AMERICAN INTERNATIONAL INSURANCE COMPANY,
21ST CENTURY PINNACLE INSURANCE COMPANY
f/k/a AIG INTERNATIONAL INSURANCE COMPANY OF NEW JERSEY,
21ST CENTURY PREFERRED INSURANCE COMPANY
f/k/a AIG PREFERRED INSURANCE COMPANY,
21ST CENTURY PREMIER INSURANCE COMPANY
f/k/a AIG PREMIER INSURANCE COMPANY,
21ST CENTURY SECURITY INSURANCE COMPANY
f/k/a NEW HAMPSHIRE INDEMNITY COMPANY, INC.,
FARMERS INSURANCE COMPANY OF ARIZONA,
FARMERS NEW CENTURY INSURANCE COMPANY,
FARMERS INSURANCE EXCHANGE,
MID-CENTURY INSURANCE COMPANY,
TRUCK INSURANCE EXCHANGE,
FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN,
FOREMOST PROPERTY & CASUALTY INSURANCE COMPANY,
FOREMOST SIGNATURE INSURANCE COMPANY,
BRISTOL WEST CASUALTY INSURANCE COMPANY,
BRISTOL WEST INSURANCE COMPANY and any and all of their
subsidiaries, affiliates and/or parent companies,

Index No.
160530/2013

Decision and
Order

Mot. #2

Plaintiffs,

-against-

GABA MEDICAL, P.C., A. VEDER, M.D., P.C.,
 MOBILITY EXPERTS MEDICAL, P.C., M. SADEES M.D., P.C.,
 CORNERSTONE MEDICAL DIAGNOSTICS, P.C.,
 INTEGRATIVE PAIN MEDICINE, P.C., A & F MEDICAL, P.C.,
 REHAB CHOICE, P.T., P.C., REHABXPRESS P.T., P.C.,
 GS PHYSICAL THERAPY OFFICE, P.C.,
 SILVER STAR MEDICAL, P.C.,
 HARMONIOUS ACUPUNCTURE, P.C.,
 SUNRISE MASSAGE, P.C., PRESTIGE MEDICAL, P.C.,
 TIAN SHAN ACUPUNCTURE, P.C.,
 AVICENNA MEDICAL ARTS, P.L.L.C.,
 DIGGET CHIROPRACTIC, P.C., HEALTHWORX MEDICAL, P.C.,
 ZAYAS PHYSICAL THERAPY, P.C.,
 NEW YORK ACUPUNCTURE, P.C.,
 ST. CHIROPRACTIC, P.C.,
 FOREST PARK ACUPUNCTURE, P.C.,
 SERGEY GABINSKY, M.D., ALEXANDER VEDER, M.D.,
 LIANA VEDER, M.D., MERAV SADEES, M.D.,
 LESLIE THEODORE, M.D., ADELIYA AKPAN, M.D.,
 ARTHUR ANG, P.T., DEXTER HONTIVEROS, P.T.,
 MICHELLE LOPEZ, P.T. a/k/a MICHELLE ROXAS NATIVIDAD
 GEORGE BISHAY, P.T., JEAN FLEURIVAL, M.D.,
 ELIZABETH KULESZA, M.D., ILYA KOGAN, L.AC.,
 JAMES POLLOCK, M.T., ANDREW CORDARO, M.D.,
 ANNA MIKHAYLENKO, L.AC., CHARLES DIGGETT, D.C.,
 JOSEPH MINTAH, M.D., DINDO ZAYAS, P.T.,
 SVETLANA PERRY, L.AC., AHMED ATEF, P.T.,
 SAKO TARAKHCHYAN, D.C., KAI-HONG QIU, L.AC.,
 LEO BURD, IGOR SOBOLEVSKY, ROBERA GLAZ,
 GARRY KEKTYAR, ROMAN TSOYREF,
 IGOR FARBEROV a/k/a IGOR FARBERON LUBA GODIN,
 ISRAEL KVETNOY, GREGORY MIKHALOV a/k/a GREGORY LEV MIKHAILOV,
 ALLA BURDINA, NATALJA LEBEDEVA a/k/a NATALYA LEBEDEVA,
 VITALIY NAROVYANSKY, VOLODYMYR INOZEMTSOV,
 GARRI MILLMAN, ELLA POGREBINSKY, EDWARD METUTA,
 LASLO BALOG, MARGARITA TIMOFEEV,
 ALEKSEY NIDERGOFFER, MIKHAIL YAMPOLSKY,
 VYACHESLAV DOBRER, NATALIYA DOBRER,
 DMITRI ERLICH and SMART ENTERPRISES OF NY, INC.,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

On November 12, 2013, Plaintiffs commenced this action by filing a summons and complaint. The complaint alleges that Defendants participated in a scheme involving the submission of no-fault insurance claims. Plaintiffs seek a declaratory judgment and monetary judgment against the defendants as a result of an alleged scheme to defraud Plaintiffs through the submission of unlawful and/or fraudulent claims for No-Fault Benefit Benefits.

On December 23, 2014, Plaintiffs moved this Court for (1) a default judgment against numerous defendants, including Roman Tsoyref (“Tsoyref”); (2) leave to serve certain defendants beyond the 120 day time limit of CPLR 306-b, and for such service be deemed effective nunc pro tunc. This motion was adjourned on several occasions in the motion submission due to pending settlement negotiations between Plaintiffs and several defaulting defendants. Plaintiffs’ motion for default judgment was marked fully submitted on June 25, 2015.

On May 12, 2015, Tsoyref moved to dismiss the action: (1) pursuant to CPLR § 3211(a)(8), for failing to serve Tsoyref, or in the alternative, ordering a traverse hearing; (2) pursuant to 306-b; and (3) pursuant to CPLR 308(2). In the alternative, Tsoyref seeks an Order permitting him to file an answer to the Complaint. Plaintiffs oppose Tsoyref’s dismissal of the action. Plaintiffs do not object to the Court granting Tsoyref’s alternative relief for leave to file a late answer.

As set forth in Plaintiffs’ “Affidavit of Attempted Service,” Plaintiffs first attempted to effectuate service on Tsoyref on January 18, 2014, at 2331 Ocean Ave., #2A, Brooklyn, NY, 11229. According to the Affidavit of Attempted Service, “Defendant is unknown according to the current occupant,” and Tsoyref was not served. This service was timely attempted within 120 days from the date the Complaint was filed. A second attempt to effectuate service on Tsoyref was made on June 21, 2014, at which time the Affidavit of Service states that “Ms. Zenovia, Co-Tenant,” a person of suitable age and discretion located at his apartment at 2331 Ocean Avenue, #2A, Brooklyn, New York 11229, accepted the papers. This service was more than 120 days from the date the Complaint was filed. Plaintiffs contends that during the five months between the first attempt to effectuate service on Tsoyref on January 18, 2014, and the second attempt on June 21, 2014, Plaintiffs had been unable to discover an alternative home address for Tsoyref.

In support of Tsoyref's motion to dismiss, Marina Tsoyref, Tsoyref's wife, submits an affidavit which states, "Since January 2003, my husband, my sons, and I have lived at the above address [where service was allegedly made]. No one else resides or has resided in the apartment with us. I do not know of anyone with the name of Zenovia."

CPLR §3211(a)(8) states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant.

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]).

Under CPLR §308(2), if a summons is served "within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," it must also be mailed "to the person to be served at his or her last known residence" or "by first class mail to the person to be served at his or her actual place of business. . .".

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3 d 459 [1st Dept. 2004]).

CPLR §306-b provides that "[i]f service is not made upon a defendant within the [120-day period] provided in this section, the court, upon motion, shall dismiss the action without prejudice... or upon good cause shown or in the interest of justice, extend the time for service." In determining whether an extension of time for service is warranted, the court may consider: (1) diligence, or lack thereof; (2) expiration of the Statute of Limitations; (3) the meritorious nature of the cause of action, (4) the length of delay in service; (5) the promptness of a plaintiff's request for the extension of time; and (6) the prejudice to defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104-06 [2001]).

Tsoyref has raised an issue which must be resolved by a traverse hearing.

Wherefore, it is hereby,

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including Respondents, of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER ¹⁵__, 2015

OCT 15 2015



EILEEN A. RAKOWER, J.S.C