

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IRIS F. RODRIGUEZ, : CIVIL ACTION
MICHELLE M. MUNIZ and :
ANGELICA I. ORTIZ, A MINOR, :
BY AND THROUGH HER PARENT AND :
NATURAL GUARDIAN MICHELLE M. :
MUNIZ AND MICHELLE M. MUNIZ :
IN HER OWN RIGHT :
 :
 :
v. :
 :
 :
WHAI CHAN AND ALLSTATE :
INSURANCE COMPANY : NO. 94-6275

MEMORANDUM ORDER

Plaintiffs claim they were injured when a vehicle operated by Ms. Rodriguez in which Ms. Muniz and her daughter were passengers was struck by a vehicle operated by defendant Chan. Plaintiffs allege that the accident was caused by Mr. Chan's negligence. Plaintiffs allege that at the time Mr. Chan was driving the vehicle with the permission of the owner, Chup Sung Pan, who had in place an automobile liability policy with defendant Allstate. Plaintiffs seek damages from defendant Chan and a declaration that Allstate has a duty under the policy issued to Chup Sung Pan to defend and indemnify Chan.

Defendant Chan has never been served. It appears that plaintiffs have exhausted all attempts to locate Mr. Chan or to identify the general locale where his presence might reasonably

be presumed for purposes of effecting alternative service in a manner consistent with due process.¹

Plaintiffs served Allstate with a copy of their complaint by certified mail at its headquarters in Northbrook, Illinois. Allstate thereafter did not appear, answer or otherwise defend. Plaintiffs seek a default declaratory judgment against Allstate.

It appears from the complaint that plaintiffs are citizens of Pennsylvania, that at the time of the accident Mr. Chan maintained a residence in Woodhaven, New York, that the vehicle he was driving was registered in New York, that the accident occurred in Philadelphia and that the amount in controversy exceeds \$75,000. Allstate is a corporate citizen of Illinois. It thus appears that the court has subject matter jurisdiction.

Allstate conducts continuous and substantial business in Pennsylvania. It appears to have sufficient forum contacts to sustain an exercise of general personal jurisdiction. An exercise of personal jurisdiction, however, also requires proof of proper service and any default judgment entered without such service would be void. See In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999); Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d

1. It is unclear whether Mr. Chan absconded or simply moved on without any forwarding information in the more than two years between the accident and the time service was first attempted.

933, 940 (5th Cir. 1999); Dennis Garberg U Assocs. v. Pack-Tech Intern. Corp., 115 F.3d 767, 771 (10th Cir. 1997).

To sustain service of process on a corporate defendant by certified mail it must appear that such a method of service is authorized by the law of the state in which service is effected or in which the district court is located. See Fed. R. Civ. P. 4(h)(1). It does not appear that such service in these circumstances is permissible under Illinois law. See Ill. Rev. Stat. Ch. 735, §§ 5/2-204 & 5/2-206; Passarella v. Hilton International Co., 1985 WL 3016, *1 (N.D. Ill. Oct. 8, 1985) ("Illinois provisions for service of process on corporations require personal (not mail) service whenever a case involves in personam jurisdiction"). While the Pennsylvania Rules of Civil Procedure are somewhat ambiguous on the point, it appears that a Pennsylvania plaintiff may serve a foreign corporation by certified mail consistent with Rule 404(2). See Morton v. F.H. Paschen, Inc., 1997 WL 381777, *3 (E.D. Pa. June 27, 1997); Acceptance Insurance Co. v. SDC, Inc., 1995 WL 534249, *1 (E.D. Pa. Aug. 31, 1995); City of Allentown v. O'Brien & Gere Engineers, Inc., 1995 WL 380019, *7 (E.D. Pa. June 26, 1995); Trzcinski v. Prudential Property and Cas. Ins. Col., 597 A.2d 687, 689 n.3 (Pa. Super. 1991); Reichert v. TRW, Inc., 561 A.2d 745, 750-51 (Pa. Super. 1989), rev'd. on other grds., 611 A.2d 1191 (Pa. 1992); Goodrich-Amram, Standard Pennsylvania Practice 2d § 424:4 (1991).

Nevertheless, the court cannot conscientiously conclude that service of process was properly effected upon Allstate. The affidavit of service states only that a copy of "the Civil Action Complaint" was mailed to and signed for by Allstate. There is no showing that a proper summons was also served as required by Fed. R. Civ. P. 4(c) and without which service is not complete and personal jurisdiction does not exist. See Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 570 (3d Cir. 1996).²

A court has "substantial discretion" in deciding whether to grant declaratory relief and exercises "sound discretion" in determining whether a default judgment should be entered. See Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995); National wildlife Federation v. U.S., 626 F.2d 917, 923 (D.C. Cir. 1980); Wright, Miller & Kane, Federal Practice and Procedure: civil 3d § 2685 (1998). In addressing a request for a default judgment, a court has the discretion to require proof of the truth of particular averments in the complaint. See Quirindongo Pacheco v. Rolan Morales, 953 F.2d 15, 16 (1st Cir. 1992); Bermudez v. Reid, 733 F.2d 18, 21 (2d Cir. 1984); Peerless Industries, Inc. v. Herrin Illinois Café, Inc., 593 F. Supp. 1339, 1341 (E.D. Mo. 1984).

2. It is possible that this reflects only an inadvertent omission by the affiant and that a proper summons was served with the complaint. If this were the only deficiency, the court would inquire further. There is, however, an equally fundamental reason for denying the motion.

It appears from plaintiffs' pleadings that Allstate may have a substantial defense to any claim for coverage. Plaintiffs acknowledge that they presented claims to an Allstate office in New York which were denied by a senior claim representative for the reason that both the insured and vehicle operator failed to cooperate in an investigation of the claims as required by a standard policy provision. Plaintiffs allege that the failure to cooperate was not "willful" and that Allstate could have obtained needed information from "other sources" and otherwise attempt to mitigate the failure to cooperate but do not deny it.

Plaintiffs provide no basis to conclude that defendant Chan or the insured did not act willfully or otherwise to establish their state of mind. A firsthand account and full cooperation from the potentially covered driver and the insured would appear to be important information to which the insurer was entitled in assessing precisely what occurred and in determining whether Mr. Chan was using the vehicle with permission and for a purpose consistent with coverage. The court cannot conscientiously conclude from plaintiffs' pleadings and submissions that Allstate was obligated to defend or indemnify anyone as a result of the accident in the apparent circumstances.

Moreover, plaintiffs have not presented a legally cognizable claim against Allstate. Plaintiffs contend that whether they may maintain a cause of action directly against the insurer of a tortfeasor is governed by the substantive law of Pennsylvania while acknowledging that a substantial argument

exists for the application of New York law.³ In any event, in the absence of a specific policy provision or, in Pennsylvania, a judgment against an insolvent insured, or, in New York, an unsatisfied judgment, an injured third party may not sue the insurer of a tortfeasor. See Kollar v. Miller, 176 F.3d 175, 181 (3d Cir. 1999); Richards v. Select Insurance Company, Inc., 40 F. Supp.2d 163, 166-67 (S.D.N.Y. 1999).⁴

The reality is that by the time plaintiffs filed suit Mr. Chan had effectively disappeared. There is no prospect of locating him, obtaining personal jurisdiction here over him or

3. As the policy under which plaintiffs claim entitlement was apparently issued in New York to a New Yorker for a vehicle registered in New York, New York would have a significant interest in who may maintain an action based on rights under the policy and in what circumstances. As plaintiffs are Pennsylvania citizens injured in Pennsylvania, Pennsylvania would have a significant interest in issues affecting their compensation. Both states would have a significant interest in fixing the obligations of and limitations on actions against insurers which do business in each state.

4. Plaintiffs' reliance on Nationwide Mut. Ins. Co. v. Cummings, 652 A.2d 1338 (Pa. Super. 1994) for the proposition that a direct action for a declaratory judgment may be maintained by an injured party against a tortfeasor's insurer is misplaced. In that case an insurer sought a declaration regarding the validity of a "non-permissive use" exclusion in its policy. Id. at 1339. It is quite another matter to permit an injured third party to obtain a declaration that an insurer must provide coverage under a policy issued to an insured for any judgment the third party may receive against a tortfeasor. This would circumvent the direct action laws of Pennsylvania and New York and effectively create a right not otherwise recognized despite the fact that the Declaratory Judgment Act is merely remedial and does not itself provide a distinct cause of action. See Richards, 40 F. Supp.2d at 168-69 (direct action law precludes declaratory judgment action against insurer); Avrich v. General Accident Ins. Co., 532 A.2d 882, 884 (Pa. Super. 1987) (driver and passengers injured in collision with other vehicle may not maintain action for declaration of other parties' insurers' obligation to pay any judgment obtained).

securing a valid judgment against him. In these circumstances, there is no legally cognizable claim against Allstate.

Unfortunate though it may be, there are in life some wrongs for which remedies are not in fact available. There is no case here to prosecute. This case should be terminated. Unless plaintiffs can demonstrate some good reason not otherwise apparent why this case should remain active, it will be dismissed and closed on January 10, 2000.

ACCORDINGLY, this day of December, 1999, **IT IS**
HEREBY ORDERED that plaintiffs' Request for Default Judgment
(Doc. #15) is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.