

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2019-CP-29-01272

Kimi Finley,

Plaintiff,

v.

Tomeshiona Jackson,

Defendant.

ORDER OF DISMISSAL

RECEIVED

MAR 05 2020

SG Court of Appeals

This matter comes before the Court upon motion by Progressive Northern Insurance Company (“Progressive”) for dismissal of any claim by Plaintiff for proceeds from uninsured motorist coverage. After hearing able arguments of counsel and reviewing the pleadings, this Court grants Progressive’s motion to dismiss.

FACTS

This case arises out of a motor vehicle accident that occurred on or about July 28, 2014 in Lancaster County, South Carolina. As a result of the accident, Plaintiff brought a negligence action in Fairfield County against Defendant Jackson on June 16, 2017.¹ Defendant Jackson was served, according to an Affidavit of Service dated June 19, 2017. However, Defendant Jackson failed to appear or otherwise defend the matter, and the case went into default. Plaintiff filed a Motion for Entry of Default on November 8, 2017. On April 27, 2018, the Court issued an Order of Default and a Statement of Judgment in the amount of \$18,550.70 against Jackson. In doing so, the Court established Jackson’s liability.

Thereafter, Plaintiff first served Progressive, the purported uninsured motorist (“UM”) carrier, with the pleadings in this case on August 5, 2019. Progressive filed its Motion to

¹ This matter was transferred from Fairfield County to Lancaster County by consent order on October 3, 2019.

Dismiss on December 31, 2019 on the basis that Plaintiff failed to timely serve Progressive with the pleadings in the action establishing liability as required by South Carolina Code § 38-77-150.

ANALYSIS

Plaintiff waived her claim for UM coverage by failing to serve Progressive in a timely manner to protect its right to appear and defend in the action establishing liability. The procedure for obtaining UM benefits is set forth in South Carolina Code § 38-77-150, which provides, in pertinent part:

No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

South Carolina Code § 38-77-150(B). Therefore, Plaintiff was required to properly serve Progressive with the “pleadings” in the present action to afford Progressive its right to appear and defend in this action. *See Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 290, 292, 188 S.E.2d 459, 462–63 (1972) (recognizing the previous statute outlining the UM procedure is “clear and not ambiguous” and that UM benefits are only available where the claimant has served the purported UM carrier with a copy of the “pleadings” in the liability action).

The South Carolina Court of Appeals addressed this issue as it pertains to underinsured motorist (“UIM”) coverage in *Ex parte Allstate Insurance Company*, 339 S.C. 202, 205, 528 S.E.2d 679, 680 (Ct. App. 2000). The plaintiff in that case served the UIM carrier while post-trial motions were pending. *Id.* at 205–06, 528 S.E.2d at 681. Nevertheless, the Court held that the plaintiff was not entitled to UIM benefits because the plaintiff failed to preserve the UIM carrier’s right to appear and defend in the action establishing the defendant’s liability. *Id.* The Court in *Ex parte Allstate* recognized that the “intent of the [UIM] statute is that UIM carriers receive notice of actions in

which they may be liable for UIM benefits so that they can protect their interests.” *Ex parte Allstate*, 339 S.C. at 205, 528 S.E.2d at 681.

The UIM statute at issue in *Ex parte Allstate* and the UM statute at issue in this case are largely identical in their requirements that no action may be brought under either statute unless the respective carriers were served with copies of the pleadings in the actions establishing liability. Both UM carriers and UIM carriers have “the right to appear and defend in the name of the [underinsured or uninsured] motorist in any action which may affect its liability.” S.C. Code §§ 38-77-150 and 38-77-160. The intent of the UM statute is the same as that of the UIM statute – plaintiffs allow carriers to receive notice of actions in which they may be liable for UM benefits so that they can protect their interests. *See Ex parte Allstate*, 339 S.C. at 205, 528 S.E.2d at 681; *Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994); *Cooper v. Fischer*, 2016 WL 820920 (Ct. App. Mar. 2, 2016) (affirming dismissal of UIM claim due to plaintiff’s failure to timely serve UIM carrier with pleadings for the action establishing defendant’s liability). Allowing service on a UM carrier after the action has been tried defeats the purpose of granting the UM carrier the right to “appear and defend.” *See Ex parte Allstate*, 339 S.C. at 205, 528 S.E.2d at 681.

Plaintiff failed to serve Progressive until after she had obtained an Order of Default against Jackson. The Order of Default was the matter in which Jackson’s liability was established. Accordingly, Plaintiff waived her right to UM benefits by failing to serve Progressive and to preserve its right to appear and defend Jackson fully, contesting both liability and damages. By the time Progressive was served, it was too late for it to appear and defend this action. Furthermore, at this time, Jackson has no incentive to cooperate and has already suffered an adverse result by the Court’s Order of Default. *See Broome v. Watts*, 319 S.C. 337, 340–41, 61 S.E.2d 46, 48 (1995)

(concluding that defendant no longer has genuine stake in the outcome of an action after settlement, which affects the separate and distinct from the underinsured defendant).

Section 38-77-150 expressly bars UM claims unless the UM carrier is served and allowed to appear and defend in the action establishing liability. Defendant Jackson is liable under the default, and any further claim made against Progressive would be for UM coverage under the Progressive policy. Because Progressive was neither served nor allowed to appear and defend prior to the entry of default, Plaintiff's UM claim is procedurally barred under section 38-77-150. Accordingly, Plaintiff has no claim for UM coverage, and Progressive is entitled to a dismissal of this action. It is therefore

ORDERED, ADJUDGED and DECREED that Progressive Northern Insurance Company's Motion to Dismiss is GRANTED, and

IT IS SO ORDERED.

The Honorable Brian M. Gibbons
Presiding Judge
Lancaster County Court of Common Pleas

January ____, 2020



Lancaster Common Pleas

Case Caption: Kimi Finley VS Tomeshiona Jackson

Case Number: 2019CP2901272

Type: Order/Dismissal

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Certificate of Electronic Notification

Recipients

John Murphy - Notification transmitted on 01-29-2020 08:37:52 AM.

Creighton Coleman - Notification transmitted on 01-29-2020 08:37:52 AM.

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A filing has been submitted to the court RE: 2019CP2901272

Official File Stamp: 01-29-2020 08:37:38 AM
Court: CIRCUIT COURT
Common Pleas
Lancaster
Case Caption: Kimi Finley VS Tomeshiona Jackson
Document(s) Submitted: Order/Dismissal Order/Dismissal
Filed by or on behalf of: Brian M. Gibbons

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

John Robert Murphy for Tomeshiona Jackson
Creighton B. Coleman for Kimi Finley

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means: