

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

JERRY BERRY :
Plaintiff : **CASE NO. 2013 CVC 01535**
vs. : **Judge McBride**
GOVERNMENT EMPLOYEES : **DECISION/ENTRY**
INSURANCE COMPANY, et. al. :
Defendants :

Scott A. Kelly, attorney for the plaintiff Jerry Berry, 247 West Court Street,
Sidney, Ohio 45365

William J. Moran, Jr., attorney for Government Employees Insurance Company,
5050 Section Avenue, Suite 420, Cincinnati, Ohio 45212

Humana Insurance Company, P.O. Box 14601, Lexington, Kentucky 40512

This cause is before the court on a motion for default judgment filed by the
plaintiff Jerry Berry as to his claim against Humana Insurance Company.

This case involves a personal injury action brought against the defendant
John Doe No. 1 and an uninsured motorist insurance claim brought against the
defendant Government Employees Insurance Company (hereinafter referred to
as GEICO.”).

The plaintiff also makes the following allegations with regard to Humana Insurance Company in pertinent part:

“5. Defendant Humana Insurance Company (hereafter “Humana”), is engaged in the business of providing health insurance to Ohio and with its Claim Department in Lexington Kentucky. Humana is joined under Ohio Rule 19(A)(1)(2) and (3) since, in their absence complete relief cannot be accorded among those parties; and/or they claim an interest relating to the subject of the action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of their claimed interest, and/or they have an interest relating to the subject of the action as assignors, assignees, subrogors, or subrogees.

6. Humana transacts insurance business in the State of Ohio as that term is defined in Ohio Revised Code Sections 3901.01, et seq. and was the insurer for the Plaintiff at the time of the underlying accident, having contracted directly and/or through their agent to insure the Plaintiff.

COUNT THREE- SUBROGATION

15. Humana may have paid medical expenses on behalf of Plaintiff, in connection with the injuries as set forth in this Complaint.

16. As a result, Humana may have a vested interest in the within action as a result of its subrogation, if one so exists.

17. Humana is being joined in this action to defend and protect its Claim of subrogation, in the amount of \$1,407.77.

WHEREFORE, the Plaintiff demands that Humana appear and represent its interest in the within action or be forever barred from pursuing its subrogation claim.”

The defendant Humana has not filed an answer in this case. A mediation hearing was held in the present case, and the plaintiff has apparently settled his claim against GEICO and is now seeking a default judgment against the

defendant Humana because of Humana's failure to file an answer to the complaint and to assert its interest in this case.

Pursuant to Civ.R. 55(A): "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor * * * ."

The question in this case is whether Humana is a party against whom the plaintiff is seeking "affirmative relief." The plaintiff is not alleging that the defendant Humana is liable to him in any respect. In fact, the complaint does not set forth any claim that the plaintiff has against Humana.

Since the plaintiff does not assert any claim against Humana, there is no basis upon which a default judgment may be rendered. While "a default judgment may be entered [w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules [,] * * * default judgment is improper when the complaint fails to state a claim against the defendant."¹

Moreover, by failing to answer the complaint filed in the case at bar, Humana is at most admitting the allegations in the complaint which are that it has a subrogation interest in the amount of \$1,407.77.²

¹ *Ross v. Shively*, 9th Dist. Summit No. 23719, 2007-Ohio-5118, at ¶ 10; see, also, *Michael D. Tully Co. L.P.A. v. Dollney*, 42 Ohio App.3d 138, 141, 537 N.E.2d 242 (9th Dist.1987); *Perkins v. Nocum*, 9th Dist. Medina No. 10CA0098-M, 2011-Ohio-4167; *Vikoz Enterprises, LLC v. Wizards of Plastic Recycling, Inc.*, 9th Dist. Summit No. 25759, 2011-Ohio-4486.

² See, *Perkins* at ¶ 11.

However, since there is no claim for affirmative relief made in the complaint against Humana to which Humana has a duty to respond, there is a real question as to whether Humana is admitting to anything.³

If Humana did pay out certain monies on behalf of the plaintiff as a result of the defendant's negligence, it clearly has a right to bring a subrogation claim against the defendant to collect reimbursement for its payments.⁴ However, the plaintiff in the case at bar has no viable claim for affirmative relief against Humana. Instead, the plaintiff apparently simply named Humana in the complaint in recognition of the company's potential subrogation interest.

There are certain types of cases where a party may be joined and required to set forth any interest it may have in a business or in property.⁵ However, that does not mean that the same thing can be done in the course of ordinary litigation in order to force a party to assert a claim or be barred from asserting the claim in the future.

The plaintiff's claim against Humana would be ripe for a Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted, but the onus is on Humana to file such a motion, which it has failed to do. Absent a request for affirmative relief by Humana, this court does not have the authority to dismiss the claim sua sponte.⁶ That notwithstanding, the court does not have the authority to

³ See, *Vikoz Enterprises* at ¶ 8.

⁴ See, e.g, *Toney v. Cincinnati Ins. Co.*, 5th Dist. No. 1999CA00092, at *3 (Oct. 25, 1999).

⁵ See, *Vikoz Enterprises* at ¶ 11 (involving receivership proceedings); and, *Settlers Bank v. Burton*, 9th Dist. Summit No. 25759, 2014-Ohio-335, citing *Winemiller v. Loughlin*, 51 Ohio St. 421, 38 N.E. 111 (1894), paragraph two of the syllabus (involving foreclosure proceedings).

⁶ See, *Morgan v. Mikhail*, 8th Dist. Cuyahoga Nos. 04AP-195 and 04AP-196, 2004-Ohio-5792, ¶ 9.

grant judgment in favor of the plaintiff against Humana when the plaintiff has no real claim against the company.

As a result, the plaintiff's motion for default judgment against Humana is not well-taken and shall be denied.

Humana as a subrogor is a proper party in this case pursuant to Civ.R. 19(A). Because Humana has been misaligned as a party-defendant in the case, the court directs that Humana shall be re-aligned as a party-plaintiff.

Humana shall file any claim that it has against either or both of the remaining defendants within 30 days by way of a complaint. If Humana fails to do so within these 30 days, Humana shall be considered to be an involuntary plaintiff. In that event, the court will issue an additional order naming Humana as an involuntary plaintiff and allowing Humana an additional 60 days to file a complaint setting forth its claim(s). Failure to take any action to prosecute its claims within the allotted times may then result in the dismissal of the action as it relates to any possible claim of the plaintiff Humana.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 17th day of September 2014 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride