

STATE OF MAINE
PENOBSCOT, SS.

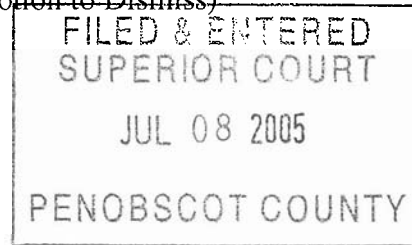
SUPERIOR COURT
CIVIL ACTION
Docket No. CV-04-224

State Farm Mutual Ins. Cos.,
Plaintiff

v.

Order (Motion to Dismiss)

Charles Foster,
Defendant



Pending before the court is the plaintiff's motion to dismiss. The court has reviewed the parties' written arguments on the motion. For the reasons set out below, the court grants the motion.

This subrogation action arises out of a motor vehicle accident that allegedly occurred in August 2002. The parties' submissions reveal that in August 2003, in the Superior Court, Somerset County, the plaintiff's insured commenced an action against the defendant for losses arising out of the incident. All claims in the case at bar fall within the scope of the Somerset County action. The defendant has entered an appearance in the Somerset County case, and, because the claims in that case is contested and because there is nothing to suggest the contrary, that appearance appears to have been timely. The Penobscot County case was commenced in November 2004 – well more than a year after the plaintiff's insured filed suit in Somerset County, and at a time when the defendant was fully aware of the pendency of the Somerset County action. Because the instant claims are also part of the Somerset County action, the Penobscot County case is superfluous and entirely duplicative of the matter now pending in Somerset County. It evidently was initiated because plaintiff's counsel was unaware that the insured had filed suit separately.

Of the various arguments made here by the defendant in opposing the motion, the only one that deserves discussion is the effect of the requested dismissal on his right to trial by jury. The defendant did not request a jury trial in a timely way in the Somerset County action, and his motion for late jury demand was denied. He has made a timely demand for a jury trial in this case. If the Penobscot County action were dismissed, the only trial (which will be held in Somerset County) will be jury-waived. That result, however, obtains directly from the defendant's failure to invoke his right to a jury trial in the Somerset County case. In other words, in the Somerset County action, the defendant had his opportunity to obtain a trial by jury on the claim that happens to underlie the Penobscot County action, and he did not do so properly. The Penobscot County action, which is superceded by the Somerset County case, cannot be sustained for the sole purpose of allowing the defendant a jury trial, when he has waived his right to a jury trial on these very claims because he failed to make a proper demand when he could have done so.

The entry shall be:

For the foregoing reasons, the motion to dismiss is granted. The complaint is dismissed without prejudice to the assertion of the claims in the complaint as part of the action in *Hardenbrook v. Foster*, CV-03-45 (Superior Court, Somerset County).

Dated: July 7, 2005



Justice, Maine Superior Court
JEFFREY L. HJELM

STATE FARM INSURANCE COMPANIES - PLAINTIFF

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SUPERIOR COURT
PENOBSCOT, ss.
Docket No BANS-CV-2004-00224

DOCKET RECORD

vs

CHARLES FOSTER - DEFENDANT
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ROCKWOOD ME 04478
Attorney for: CHARLES FOSTER
DANIEL KNIGHT - WITHDRAWN 04/15/2005
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JAMES E MITCHELL - RETAINED 05/12/2005
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Filing Document: COMPLAINT
Filing Date: 10/08/2004

Minor Case Type: AUTO NEGLIGENCE

Docket Events:

11/02/2004 TRANSFER - REMOVAL TO SUPERIOR COURT EDI ON 11/02/2004 @ 22:00
TRANSFERRED CASE: SENDING COURT CASEID BANDCCV200400399

11/02/2004 FILING DOCUMENT - COMPLAINT FILED ON 10/08/2004

Party(s): STATE FARM INSURANCE COMPANIES
ATTORNEY - RETAINED ENTERED ON 10/08/2004
Plaintiff's Attorney: CHARLES HODSDON

Party(s): CHARLES FOSTER
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 10/08/2004
Plaintiff's Attorney: CHARLES HODSDON

Party(s): CHARLES FOSTER
SUMMONS/SERVICE - CIVIL SUMMONS SERVED ON 09/17/2004
ON DEFENDANT IN HAND.

11/02/2004 Party(s): CHARLES FOSTER
RESPONSIVE PLEADING - ANSWER FILED ON 10/01/2004
Defendant's Attorney: DANIEL KNIGHT

Party(s): CHARLES FOSTER
ATTORNEY - RETAINED ENTERED ON 10/01/2004
Defendant's Attorney: DANIEL KNIGHT

Party(s): CHARLES FOSTER