IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOSEPH D'ALESSANDRO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 06-548-GMS
	)	
PROGRESSIVE NORTHERN INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

I. BACKGROUND

The plaintiff Joseph L. D'Alessandro ("Mr. D'Alessandro") filed this complaint asserting jurisdiction based upon a federal question and diversity pursuant to 28 U.S.C. § 1331 and § 1332.[1] (D.I. 2.) He proceeds *pro se* and was given leave to proceed *in forma pauperis*. His wife, Olga D'Alessandro ("Mrs. D'Alessandro"), was a co-plaintiff, but she voluntarily dismissed her claims. (*See* D.I. 6, 10.) The complaint alleges that uninsured/underinsured automobile coverage was purchased by Mr. D'Alessandro from the defendant, Progressive Northern Insurance Company ("Progressive"), a company located in Ohio. While not quite clear, Mr. D'Alessandro appears to allege that following an accident, the defendant offered a paltry sum for his loss of consortium claim. Mr. D'Alessandro seeks recovery under state law theories of breach of contract, breach of trust and/or good faith, and fraud in his dealings with Progressive. Pending before the court is Progressive's motion to dismiss and Mr. D'Alessandro's response thereto. (D.I. 20, 21.) Also pending is Mr. D'Alessandro's request for default judgment. (D.I. 22.)

[1]The court dismissed Mr. D'Alessandro's claims of constitutional violations. (D.I. 10.)

II. MOTION TO DISMISS

A. Standard of Review

Rule 12(b)(6) permits a party to move to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff. *Erickson v. Pardus*, –U.S.–, 127 S.Ct. 2197, 2200 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A complaint must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, –U.S.–, 127 S.Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); Fed. R. Civ. P. 8. A complaint does not need detailed factual allegations, however "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965 (citations omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted). The plaintiff is required to make a "showing" rather than a blanket assertion of an entitlement to relief. *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008). "[W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only "fair notice," but also the "grounds" on which the claim rests. *Id.* (citing *Twombly*, 127 S.Ct. at 1965 n.3). Therefore, "'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." *Phillips v. County of Allegheny*, *Id.* at 235 (quoting *Twombly*, 127 S.Ct. at 1965 n.3). "This 'does not impose a

probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Id.* at 234. Because the plaintiff proceeds *pro se*, his pleading is liberally construed and his complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, –U.S.–, 127 S.Ct. 2197, 2200 (2007) (citations omitted).

B. Discussion

Progressive moves for dismissal on the basis that the complaint fails to state a claim upon which relief may be granted. (D.I. 20.) More particularly, Progressive argues that Mr. D'Alessandro's claim for loss of consortium is wholly derivative of his wife's claim and, because she voluntarily dismissed her claim, Mr. D'Alessandro's claim is "non-existent." Progressive further argues that Mr. D'Alessandro does not have standing to assert an uninsured motorist claim. In the alterative, Progressive argues that Mr. D'Alessandro has failed to allege facts indicating bad faith and failed to allege with particularity averments of fraud. Mr. D'Alessandro responds that his spouse is on Social Security disability and unable to represent herself. (D.I. 21.)

Under Delaware law a loss of consortium claim is derivative to that of the injured spouse and is dependent upon the existence of a valid claim by the injured spouse for physical injury against the tortfeasor. *Mergenthaler v. Asbestos Corp. of Am.*, 534 A.2d 272, 280-81 (Del. Super. Ct. 1987). A claim for loss of consortium consists of three elements: (1) the party asserting the claim must have been married to the person who suffered the physical injury at the time the injury occurred; (2) as a result of the physical injury, the spouse asserting the loss of consortium claim must have been deprived of some benefit which formerly existed in the

marriage; and (3) the physically injured spouse must have had a valid cause of action for recovery against the tortfeasors. *Newman v. Exxon, Corp.*, 722. F. Supp. 1146, 2148 (D. Del. 1989) (citing *Jones v. Elliott*, 551 A.2d 62, 63-64 (Del. 1988).

As discussed above, Mrs. D'Alessandro voluntarily dismissed her claims. Inasmuch as there no longer exists a valid cause of action for recovery under Delaware law, the loss of consortium claim is extinguished. Similarly, Mr. D'Alessandro has no standing for the remaining claims since all are dependent upon Mrs. D'Alessandro's dismissed claims and Mr. D'Alessandro's derivative loss of consortium claim. The complaint fails to state a claim upon which relief may be granted. Therefore, the court will grant the motion to dismiss.

III. Default

Mr. D'Alessandro moves for default on the basis that Progressive's motion to dismiss was not timely filed. Entry of default judgment is a two-step process. Fed. R. Civ. P. 55(a), (b). A party seeking to obtain a default judgment must first request that the Clerk of the Court "enter. . .the default" of the party that has not answered the pleading or "otherwise defend[ed]," within the time required by the rules or as extended by court order. Fed. R. Civ. P. 55(a). Timely serving and filing a motion to dismiss under Fed. R. Civ. P. 12(b), precludes entry of default. *See Francis v. Joint Force Headquarters Nat'l Guard*, Civ. No. 05-4882(JBS), 2006 WL 2711459 (D.N.J. Sept. 19, 2006). Even if default is properly entered, the entry of judgment by default pursuant to Rule 55(b)(2) is within the discretion of the trial court. *Hritz v. Woma Corp.*, 732 F.2d 1178, 1180 (3d Cir. 1984).

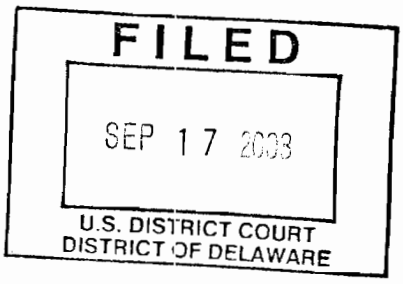
Mr. D'Alessandro's complaint fails to state a claim upon which relief may be granted. Accordingly, the court exercises its discretion and will deny the request for default.

IV. CONCLUSION

Based upon the foregoing analysis, the court will grant Progressive's motion to dismiss and will deny Mr. D'Alessandro's request for default. An appropriate order will be entered.

CHIEF, UNITED STATES DISTRICT JUDGE

Sept 17, 2008
Wilmington, Delaware



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOSEPH D'ALESSANDRO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 06-548-GMS
	)	
PROGRESSIVE NORTHERN INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

At Wilmington this 17th day of Sept., 2008, for the reasons set forth in the Memorandum issued this date

1. The defendant Progressive Northern Insurance Company's motion to dismiss is **GRANTED**. (D.I. 20.)

2. The plaintiff Joseph L. D'Alessandro's request for default is **DENIED**. (D.I. 22.)

CHIEF, UNITED STATES DISTRICT JUDGE