

Archer v Motor Veh. Accident Indem. Corp.
2012 NY Slip Op 33568(U)
July 13, 2012
Sup Ct, Queens County
Docket Number: 22753/2011
Judge: Howard G. Lane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS Part 6

ALEKSEI ARCHER,

Plaintiff,

-against-

MOTOR VEHICLE ACCIDENT
INDEMNIFICATION CORPORATION,

Defendant.

Index

Number 22753 2011

Motion

Date May 8, 2012

Motion

Cal. Number 1

Motion

Seq. No. 1

The following papers numbered 1 to 11 read on this motion by defendant for dismissal of this action pursuant to CPLR 3211 [a] [5] and plaintiff's cross motion for a default judgment pursuant to CPLR 3215 [a].

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross-Motion - Affirmation in Opposition - Affidavits - Exhibits	5-8
Affirmation in Opposition to Cross-Motion - Affidavits - Exhibits....	9-11

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff claims to have been injured during a hit-and-run incident on January 18, 2008, when he was struck by a vehicle operated by an unidentified driver while walking across the intersection at Beach 29th Street and Brookhaven Avenue in Queens, New York. As a result of this accident, plaintiff alleges to have suffered a fracture to his right fibular, a laceration of his right ear and other unspecified injuries. On April 13, 2011, plaintiff was granted leave pursuant to Insurance Law § 5218 to initiate this action. Defendant now moves for dismissal of this action, contending that plaintiff's claim is barred by both the expiration of the three-year statute

of limitations applicable to personal injury actions (CPLR 214 [5]) and the doctrine of laches. Plaintiff cross-moves for entry of a default judgment against defendant.

Prior to any discussion of defendant's motion to dismiss, it is necessary to first address a threshold issue raised by plaintiff's cross motion, namely the ability of defendant to make a motion for dismissal at this time. Here, plaintiff properly served the summons and verified complaint upon defendant. Plaintiff included in their cross motion papers an affidavit of service attesting to service upon defendant by delivery to an authorized party on October 12, 2011. Defendant also admits to receiving service in their motion papers. Defendant had until November 1, 2011, 20 days after receipt of service, to appear in this action (CPLR 320 [a]) or to make a motion which extended its time to appear (CPLR 3211 [e]). Defendant however failed to do either by the November 1st deadline. Defendant's first response to the complaint is the instant motion to dismiss served on plaintiff on December 27, 2011. Defendant does not seek leave to file a late answer, nor has defendant provided a reasonable excuse for their default. In the absence of a formal request to vacate its default, defendant may not seek affirmative relief (CPLR 2215; *Holubar v Holubar*, 89 AD3d 802 [2011]). As such, defendant's motion for dismissal is denied as untimely.

To succeed on a motion for a default judgment, a plaintiff must establish proper service upon defendant, proof of the facts constituting his claim, and proof of defendant's default in answering or appearing (CPLR 3215 [f]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649[2011]). Upon such a showing, a defendant may still defeat the motion if it can "demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action" (*Atlantic Cas. Ins. Co.*, 89 AD3d at 651). As indicated above, adequate proof exists that service was properly effectuated upon defendant on October 12, 2011.

To establish proof of the facts constituting the claim, a movant may rely on an affidavit by the plaintiff or a verified complaint (CPLR 3215 [f]). Plaintiff has submitted a copy of the verified complaint that was verified by the attorney rather than the plaintiff. While verification by an attorney may satisfy the requirements of CPLR 3020 [d] [3], verification by an attorney without personal knowledge of the facts is insufficient to establish proof of the facts constituting the claim for the purposes of a motion for default judgment (*Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 [2010]). As such, this verified complaint is insufficient.

However, upon a review of the entire record, defendant's initial moving papers include an affidavit of the plaintiff which was first submitted in support of his petition for leave to file this action. This affidavit supplies adequate proof of the facts constituting plaintiff's claim. Plaintiff attests to several relevant facts, including that he was struck by an unidentified vehicle on January 18, 2008 at Beach 29th Street and Brookhaven Avenue, as a result of this accident he suffered various injuries, and after the accident he received treatment for his injuries at St. John's Episcopal Hospital.

It is unnecessary at this time to determine if plaintiff's alleged injuries qualify as

“serious”. In matters involving injuries suffered in an automobile accident, a defendant’s default only establishes the defendant’s liability to the plaintiff (*Abbas v Cole*, 44 AD3d 31, 34 [2007]). The question of whether an injury qualifies as serious, is a matter which is properly answered in the damages phase of a bifurcated action (*id.*).

Accordingly, defendant’s motion to dismiss is denied as untimely. Plaintiff’s cross motion for entry of a default judgment is granted, and this matter is set down for an inquest on damages to be held on Tuesday, October 30, 2012, 2:15 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Boulevard, Jamaica, New York. Counsel are directed to contact the clerk of Part 6 on Monday, October 29, 2012 at (718) 298-1113 to ascertain the court’s availability.

In lieu thereof, plaintiff may submit properly executed affidavits as proof of damages (22 NYCRR 202.46).

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: July 13, 2012

Howard G. Lane, J.S.C.