Government Empls. Ins. Co. v Central Broadway Med., P.C.
2015 NY Slip Op 30333(U)
March 11, 2015
Supreme Court, New York County
Docket Number: 151591/2013
Judge: Arthur F. Engoron

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, and GEICO GENERAL INSURANCE COMPANY,

Index Number: 151591/2013

Sequence Number: 002

Plaintiffs,

Decision and Order

- against -

CENTRAL BROADWAY MEDICAL, P.C.,

Defendant.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendant's motion to vacate the default judgment against it entered on October 16, 2013:

Papers Numbered:

Notice of Motion - Affirmations - Exhibits 1
Affirmation in Opposition - Exhibits 2
Reply Affirmation - Exhibits 3

Upon the foregoing papers, defendant's motion is denied.

The facts and procedural history of this case are simple and straight-forward. This is a declaratory judgment action commenced by plaintiffs, Government Employees Insurance Company, GEICO Casualty Company, GEICO Indemnity Company and GEICO General Insurance Company (collectively, "GEICO"), "no-fault" insurers, against defendant Central Broadway Medical, P.C. ("CBM"), a medical services provider that submitted no-fault claims to GEICO for medical services allegedly provided to GEICO's insureds. The instant complaint, e-filed on February 21, 2013, sought a declaration that GEICO has no duty to pay any of the no-fault claims submitted by CBM for which CBM failed to appear for an Examination Under Oath ("EUO").

On February 27, 2013, the summons and complaint were served upon CBM via the Secretary of State, pursuant to BCL § 306. On March 8, 2013, additional copies of the pleading were served upon CBM at 770 Broadway, 2nd Floor, New York, New York 10003 ("770 Broadway"), the address on file with the Secretary of State for such service. Upon CBM's failure to answer or otherwise appear in this matter, on June 21, 2013 GEICO moved for a default judgment against

CBM. The motion was returnable in Room 130 on July 17, 2013 and served upon CBM at 770 Broadway.

It is undisputed that CBM itself received the default judgment motion in early July 2013. CBM's attorneys received the motion 7-10 days prior to the July 17, 2013 return date and, on July 16, 2013, one day prior to the return date, requested a 45-60 day adjournment of the motion to assemble documents in support of its meritorious defense. GEICO did not object to CBM's request, and the motion was adjourned for two weeks, to August 1, 2013. On July 30, 2013, CBM requested another adjournment of the motion, this time to September 10, 2013, for the same reason. GEICO objected to the request. On July 31, 2013, this Court denied CBM's second request for an adjournment upon the ground that CBM had "failed to adequately explain why it was unable to prepare opposition papers in the more than two intervening weeks since obtaining the last adjournment, or why a further, six-week adjournment, would be necessary," noting that opposition to the default motion did not require "voluminous" documents.

Inexplicably, however, CBM failed to oppose the motion and did not appear in court on August 1, 2013, at which time the motion was marked fully submitted. Thus, by Decision and Order dated August 7, 2013, upon GEICO's proper showing and in the absence of any opposition by CBM, this Court granted the motion and directed that the Clerk enter judgment in favor of GEICO. On August 9, 2013, GEICO served the August 7, 2013 Decision and Order with notice of entry upon CBM at 770 Broadway. CBM does not deny receipt of the August 7 Decision and Order with notice of entry. On October 16, 2013, the Clerk entered Judgment in favor of GEICO and against CBM for the relief sought in the complaint. On October 25, 2013, GEICO served the Judgment with notice of entry upon CBM at 770 Broadway. Pursuant to CPLR 2103(b)(2), service of the Judgment with notice of entry was complete on October 30, 2013.

Exactly one year later, on October 30, 2014, CBM moved to vacate the October 16, 2013 default judgment.

Discussion

A party may not be relieved of a default unless it demonstrates a reasonable excuse and a meritorious claim. See Singh-Mehta v Dyrlewski, 107 AD3d 478, 478 (1st Dept 2013) (motion to vacate default properly denied in absence of reasonable excuse and meritorious claim). Although, as is often said, courts prefer to dispose of cases on their merits, courts also are loathe to tolerate deliberate indifference to obligations that the CPLR sets forth clearly.

Here, this Court considers CBM's failure to oppose GEICO's motion for a default judgment to be deliberate and, therefore, not excusable. See, Brown v Suggs, 38 AD3d 329, 330 (1st Dept 2007) (deliberate default is not excusable); ADL Cons., LLC v Chandler, 78 AD3d 407, 407 (1st Dept 2010) (defendant's failure to respond to motion was "willful and calculated to cause delay"). CBM admittedly received GEICO's default judgment motion "in early July 2013," when the motion was "forwarded to CBM" by the landlord of the office suite at 770 Broadway. Although, in this Court's considered view, CBM had sufficient time to prepare opposition papers in the week or two between receipt of the moving papers and the July 17, 2013 return date, CBM obtained a two-week adjournment of the motion, to August 1, 2013. Despite the adjournment –

which, by this Court's calculation, gave CBM at least three weeks to prepare opposition papers – and despite knowing, as of July 31, 2013, that its second request for an adjournment had been denied, CBM failed to oppose the motion or, at the very least, appear in court on August 1, 2013. Under these circumstances, this Court is hard pressed to find any reasonable basis which could excuse CBM's default.

CBM's argument that this Court's denial of CBM's second request for an adjournment constituted an abuse of discretion because it prevented CBM from "securing" necessary documents is unpersuasive and deserving of short shrift. Contrary to CBM's claim, "voluminous" documents addressing the "illness" of Dr. James Avellini, CBM's owner and president, and establishing, as a matter of law, that CBM did not "completely fail" to appear for the January 2013 EUOs, were not required to successfully oppose the default motion. Rather, CBM needed only to submit an affidavit from a person with knowledge containing facts sufficient to explain the delay in answering and a prima facie defense. See Dodge v Commander, 18 AD3d 943, 946 (3rd Dep't 2005) ("While lacking in particulars, these affidavits set forth a prima facie meritorious defense to the action, which is a sufficient quantum of proof for a motion to vacate a default judgment."); Bergen v 791 Park Ave. Corp., 162 AD2d 330, 330 (1st Dep't 1990) ("It is not necessary for defendant to prove its defense, but only to set forth facts sufficient to make out a prima facie showing of a meritorious defense."). Indeed, the affidavit Dr. Avellini submitted on the instant motion, without the attachments, would have satisfied CBM's burden in opposing GEICO's default motion. CBM does not explain why Dr. Avellini did not or could not have submitted such an affidavit in July of 2013, and there is nothing in his affidavit which would lead this Court to a different conclusion.

Simply stated, CBM was given an opportunity to oppose the motion, yet deliberately chose not to do so. Such a course of conduct can only be described as deliberate. See, Brown v Suggs, supra; ADL Construction, LLC v Chandler, supra. The Court also notes, in passing, that although CBM knew of the default order in early August 2013 and the default judgment in late October 2013, it waited a full year to bring the instant motion to vacate its default.

In the absence of a reasonable excuse for CBM's default on the motion, the Court need not address the issue of whether defendant demonstrated a meritorious defense. See, Silva v Honeydew Cab Corp., 116 AD3d 691, 692 (2d Dept 2014):

> Here, the Supreme Court providently exercised its discretion in refusing to accept the plaintiff's explanation for failing to oppose the defendants' separate motions for summary judgment (see, Strunk v Revenge Cab Corp., 98 AD3d 1029, 1030 [2012]; cf. Simpson v Tommy Hilfiger U.S.A., Inc., 48 AD3d 389, 392 [2008]). Accordingly, we need not address whether the plaintiff demonstrated a potentially meritorious opposition to those motions.

CBM's argument that the default judgment should be vacated because GEICO improperly served the summons and complaint at CBM's 770 Broadway address is without merit. CBM admits that

770 Broadway, 2nd Floor, New York, New York is the address on file with the Secretary of State for service upon CBM, and that it received mail -- including GEICO's default motion – at that address. Despite CBM's claim that there are "several" other addresses at which it should have been served, CBM provides not one such address. (Indeed, in apparent recognition that service at 770 Broadway was in fact proper, CBM did not assert lack of personal jurisdiction as an affirmative defense in its proposed answer.) CBM cites no legal authority – and this Court is not aware of any – for its claim that the default judgment should be vacated because GEICO should have served courtesy copies of the pleadings and motion upon CBM's attorneys.

The Court has considered CBM's other arguments and finds them to be without merit.

Accordingly, for the foregoing reasons, CBM's motion to vacate the October 16, 2013 default judgment, is denied in its entirety.

Conclusion
Motion denied.

Dated: March 11, 2015

Arthur F. Engoron, J.S.C.