Hertz Vehs., LLC v Charles Deng Acpuncture, P.C.
2016 NY Slip Op 30516(U)
March 7, 2016
Supreme Court, New York County
Docket Number: 150823/15
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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HERTZ VEHICLES, LLC,

Plaintiff,

- against -

CHARLES DENG ACPUNCTURE, P.C., DARREN T. MOLLO, D.C., ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC, JULES FRANCOIS PARISIEN, M.D., KSENIA PAVLOVA, D.O., MADISON PRODUCTS OF USA, INC., MIDDLE VILLAGE DIAGNOSTIC IMAGING, P.C., NOEL E. BLACKMAN, M.D., PENN CHIROPRACTIC, P.C., PROMPT MEDICAL SERVICES, P.C., QUALITY CUSTOM MEDICAL SUPPLY, INC., KENRICK JOHNSON, SHAWN HAYLE and VINCENT WINSTON,

Defendants.

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Index No. 150823/15
DECISION & ORDER
(Motion Seq. 001)

DONNA MILLS, J.:

Plaintiff Hertz Vehicles, LLC (Hertz) moves, pursuant to CPLR 3215, for a default judgment against defendants Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., Island Life Chiropractic Pain Care, PPLC, Ksenia Pavlova, D.O., Madison Products of USA, Inc., Noel E. Blackman, M.D., Penn Chiropractic, P.C., and Prompt Medical Services, P.C. (collectively, the Defaulting Medical Providers), and against Kenrick Johnson, Shawn Hayle and Vincent Winston (collectively, the Claimants). With the exception of defendant Prompt Medical Services, P.C., all of the other Defaulting Medical Providers, together with defendant Jules Francois Parisien, M.D., cross-move, pursuant to CPLR 3012 (d), for an extension of time to serve an answer to the complaint.

In support of its motion for a default judgment, Hertz submits an affidavit from Robert Kelly, the Director of the Special Investigations Unit for Hertz, who avers that the Claimants

were allegedly the occupants of a 2012 Ford motor vehicle, owned and self-insured by Hertz, which was allegedly involved in a collision with another vehicle on May 17, 2014 in Brooklyn, New York. According to Mr. Kelly, despite the fact that the police report indicates that none of the five occupants of the Hertz vehicle reported injuries and the damage allegedly suffered by the Hertz vehicle was minimal, requiring less than $250 to fix, the Claimants later reported to have sustained bodily injuries in the collision. Hertz assigned claim number 02-2014-12414 to all claims relating to the May 17, 2014 collision. Mr. Kelly avers that the medical providers named as defendants have submitted "over $40,000" in bills for treatment of the Claimants (Kelly aff, ¶ 6). These claims are allegedly for "mirror and excessive treatment for physical therapy, acupuncture and chiropractic care from the medical provider defendants" (Cmplt., ¶ 22; Kelly aff, ¶ 7).

In order to determine the validity of the claims and alleged injuries, Hertz, by its counsel, twice requested each Claimant to submit to an Examination Under Oath (EUO) by letters dated August 13, 2014 and September 15, 2014. All three Claimants failed to appear on the August 29, 2104 and September 29, 2014 scheduled dates. Mr. Kelly avers that Hertz has denied the claims of the medical provider defendants proceeding as assignees of the Claimants, because the Claimants breached a condition precedent to coverage under the no-fault regulations by failing to appear for EOU's on at least two occasions. A second reason is because Hertz "maintains a founded belief that the underlying collision was a staged event and/or intentionally caused," and that none of the medical treatment they received from the medical provider defendants was medically necessary (Cmplt., ¶ 26; Kelly aff, ¶ 11).

Hertz commenced this lawsuit on January 28, 2015. The complaint's first cause of action seeks a declaratory judgment that the Claimants and the medical provider defendants have no

rights to collect no-fault benefits for the May 17, 2014 collision as a result of the Claimants' failure to appear for EUOs on two occasions. The second cause of action seeks a declaratory judgment that it owes no duty to any of the defendants to pay no-fault claims with respect to this collision on the ground that the Claimants' alleged injuries and subsequent medical treatment were not causally related to an insured event. The third cause of action seeks a temporary stay of all arbitrations, lawsuits and/or claims by defendants relating to no-fault claims of the Claimants arising from the May 17, 2014 collision.

A party's right to recover upon a defendant's default in answering is governed by CPLR 3215, and, pursuant thereto, the moving party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR 3215 [f]; *Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 617 [1st Dept 2012]). However, "'CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action'" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [McGuire, J., concurring], quoting *Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]). In no-fault cases such as this, involving the failure of a claimant to appear for an EUO, a default judgment will not be granted without proof that the EUO scheduling letters were mailed in accordance with the no–fault regulations (*Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]).

A motion for leave to extend the time to answer a complaint may be made under CPLR 3012 (d), which provides that: "[u]pon the application of a party, the court may extend the time to appear or plead . . . upon such terms as may be just and upon a showing of reasonable excuse

for delay or default" (CPLR 3012 [d]). "[A] showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered" (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008] [citations omitted]; *see also Interboro Ins. Co. v Perez*, 112 AD3d at 483; *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 [1st Dept 2011]).

The cross-moving defendants contend that service of the summons and complaint was "patently deficient." Of course, the absence of proper service would be a sufficient and complete excuse for a default in appearing (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *Ismailov v Cohen*, 26 AD3d 412, 413–414 [2d Dept 2006]). Indeed, in the absence of proper service, any default judgment is a nullity (*Fleisher v Kaba*, 78 AD3d 1118, 1119 [2d Dept 2010]).

Service of process was effected on defendants Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., Island Life Chiropractic Pain Care, PLLC, Ksenia Pavlova, D.O., Noel E. Blackman, M.D., and Penn Chiropractic, P.C., six of the eight Defaulting Medical Providers, by leaving the summons and complaint with an individual named Dillon Michel at 1786 Flatbush Avenue, Brooklyn, New York 11210 on February 18, 2015.[1] An additional copy of the papers was also mailed that day to defendants Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., Ksenia Pavlova, D.O., and Noel E. Blackman, M.D., P.C., pursuant to CPLR 308 (2), addressed to the same address.

The service on defendants Charles Deng Acupuncture, P.C. and Penn Chiropractic, P.C. is deficient. As professional corporations, service must be accomplished pursuant to CPLR 311, rather than CPLR 308 (2)'s leave and mail provisions (*Hoffman v Petrizzi*, 144 AD2d 437, 438-439 [2d Dept 1988]; *Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499, 500 [1st Dept 1986]). Both of these entities were served by personal delivery to Dillon Michel, described in the affidavit of

[1] Copies of the affidavits of service are annexed to the Schreiber moving affirmation as exhibit B.

service for Charles Deng Acupuncture, P.C., as "Co-Worker-Front Desk" and, in the affidavit of service for Penn Chiropractic, P.C., as "Front Desk." A front desk employee or receptionist is not considered "an officer, director, managing agent, or cashier of the professional corporation" (*Hoffman v Petrizzi*, 144 AD2d at 439, citing CPLR 311 (a) (1); *see also Bezoza v Bezoza*, 83 AD3d 578, 579 [1st Dept 2011]; *Gleizer v American Airlines, Inc.*, 30 AD3d 376, 376 [2d Dept 2006]), and there is no evidence that this recipient was an agent authorized by appointment or law to accept service on behalf of either of these professional corporations (*see* Rybak affirmation, Ex. A).

Service on defendant Island Life Chiropractic Pain Care, PLLC was also accomplished by leaving a copy of the summons and complaint with Dillon Michel, whose identity and/or title is again described in the affidavit of service only as "Front Desk." As a professional limited liability company, service was required to be in accordance with CPLR 311-a, which requires delivery to a member, manager, or any other agent authorized by appointment or designation to receive process. Again, there is no evidence that the recipient Dillon Michel met any of these requirements.

In support of the cross motion, Darren T. Mollo, D.C. submits an affidavit in which he avers that he does not have an office at 1786 Flatbush Avenue, Brooklyn, New York; that his office is located in Deer Park, Long Island; that he does not employ Dillon Michel; and that he does not even know who this person is (Mollo aff, ¶¶ 3, 5). Hertz's counsel claims that Dr. Mollo is not truthful, because he used this address on a summons he filed in another action in May of 2014. Be that as it may, service in this case was attempted nine months later, and a question of fact has been raised as to whether service was effected on Dr. Mollo's "actual place of business, dwelling place or usual place of abode" (CPLR 308 [2]).

Defendant Ksenia Pavlova, D.O. also submits an affidavit by which she denies receiving the summons and complaint. While Dr. Pavlova admits that she maintains her practice at 1796 Flatbush Avenue, she claims she is not the only physician at this location and that it is a multi-specialty medical facility (Pavlova aff, ¶ 6). Dr. Pavlova also denies knowing Dillon Michel or an individual fitting her description, and denies receiving a copy of the papers by mail (*id.*, ¶¶ 3, 8). "While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing" (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004] [citations omitted]). Dr. Pavlova's affidavit is sufficient to dispute the validity of the substituted service effected on her on February 18, 2015.

Defendant Noel E. Blackman, M.D. was also served by delivery to Dillon Michel at, and mailing to, 1786 Flatbush Avenue. According to the records of the New York Secretary of State's Division of Corporations, "Noel E. Blackman, M.D., P.C." was a domestic professional corporation, but it was dissolved by proclamation on October 26, 2011 (Tomsky affirmation, Ex. A). Accordingly, it was proper to name Dr. Blackman, individually, and the service pursuant to CPLR 308 (2) is facially valid in the absence of any affidavit from him denying receipt of the summons and complaint.

Defendant Madison Products of USA, Inc. was served on February 20, 2015 at 747 Third Avenue, 2nd Floor, New York, New York 10017 by serving an individual named Swan Moore identified as a "Customer Service Representative." There is no question this is the right address for this defendant (*see* Rybak affirmation, Ex. A). In the absence of a sworn denial by a representative of this corporate defendant that the recipient is neither "an officer, director,

managing or general agent, or cashier or assistant cashier" of this corporation (CPLR 311 [a] [1]), nor an agent authorized by appointment or law to accept service on this corporation's behalf (*id.*), an insufficient showing has been made to rebut the process server's affidavit of service.

Accordingly, for the foregoing reasons, I find that defendants Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC and Penn Chiropractic, P.C. have each demonstrated a reasonable excuse for their default in appearing in this action and there is no evidence that the delay in appearing has prejudiced Hertz. Accordingly, Hertz's motion for a default judgment is denied as to these defendants, and their cross motion for an extension of time to appear and plead is granted, on condition that they file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry.[2] As for cross-moving defendant Jules Francois Parisien, M.D., Hertz has never claimed that it was able to serve this defendant (*see* Schreiber affirmation, ¶ 2, n 2), and, in fact, Hertz is not moving for a default judgment against him. The cross motion is denied as to defendants Noel E. Blackman, M.D. and Madison Products of USA, Inc. for failure to offer a reasonable excuse for their default. Defendants Darren T. Mollo, D.C. and Ksenia Pavlova, D.O. have raised issues of fact regarding the validity of the service on them requiring a traverse hearing.

Turning now to Hertz's motion for judgment against the defaulting defendants, who, in addition to defendant Noel E. Blackman, M.D. and Madison Products of USA, Inc., are Prompt Medical Services, P.C. and the three Claimants. Hertz has supplied presumptively valid proof of service upon Prompt Medical Services, P.C. and the Claimants (*see* Schreiber affirmation, Ex. B), and none have appeared in this action.

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[2] The cross-moving defendants specifically seek leave to serve a late answer, as opposed to an extension of time to appear and move for pre-answer dismissal of the complaint pursuant to CPLR 3211.

The cross-moving defendants argue that Hertz has not established a prima facie case for declaratory relief because: (1) Hertz has not demonstrated that any of the medical providers ever submitted claims on behalf of the Claimants; (2) Hertz has not demonstrated compliance with the New York Insurance Law and no-fault regulations with respect to the timing requirements for denying claims and requesting an EUO; and (3) no competent proof has been offered that the accident was intentionally caused.

Hertz did not submit any documentary proof that any of the medical provider defendants submitted claims for treatment of the Claimants in support of its motion. On reply, Hertz submits two "Verification of Treatment by Attending Physician or Other Provider of Health Service," known as a NF-3 form. The first NF-3 was submitted by "Charles Deng AC" for alleged treatment of Claimant Vincent Winston on July 18, 2014. The form is dated August 25, 2014, and seeks payment of $50 (Tomsky reply affirmation, Ex. C). The second NF-3 was submitted by "Jules Francois Parisien" requesting payment of $184.44 for treatment of Claimant Shawn Hayle on July 30, 2014 (*id.*, Ex. D).

The no-fault regulations require an insurer to pay or deny a claim within 30 days of receipt of proof of claim (11 NYCRR 65-3.8). An insurer that fails to comply with the statutory 30-day period is precluded from asserting a defense against payment of the claim (*Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 282-283 [1997]; *A.M. Med. Servs., P.C. v Progressive Cas. Ins. Co.*, 101 AD3d 53, 65 [2d Dept 2012]). Even a claim of fraud must be contested by an insurer within the tight deadlines of the no-fault regime, or else the insurer is precluded from asserting such a claim (*Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 565 [2008]). No proof whatsoever has been offered regarding the timing of any

denial of claims, and thus Hertz has failed to establish a prima facie claim on its second cause of action.

However, since the failure of a claimant to appear for a properly scheduled EUO is a breach of a condition precedent to coverage under the no-fault policy, an insurer has a right to deny all claims by any parties potentially entitled to benefits under Insurance Law § 5103 or their assignees retroactively to the date of the loss, regardless of whether the denials were timely issued (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2d Dept 2006]).

Nevertheless 11 NYCRR 65-3.5 (b) imposes a time limit for insurers to request additional verification, including requests for an EUO, such that any verification request "shall be" made within fifteen (15) business days of receipt of the verification forms (in this case, an NF-3). Hertz submitted no evidence in support of its motion that it requested the EUOs within the time frame set by the no-fault regulations. The cross-moving defendants argue that this requires denial of its motion, citing the First Department's September 15, 2015 memorandum decision and order in *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.* (131 AD3d 851 [1st Dept 2015] [reversing the grant of summary judgment to an insurer seeking a declaratory judgment that policy was breached by claimant's failure to appear for a properly noticed EUO when no proof was offered as to whether the EUO had been requested within the time frame set by 11 NYCRR 65-3.5 [b]).

On reply, Hertz argues that *National Liab. & Fire Ins. Co. v Tam Med. Supply* (131 AD3d 851) is new law, and, at the time the EUOs were requested and up until September 15, 2015, it was "well established law in the First Department that an EUO did not need to be

requested under any strict time limitation, but rather was controlled under the standard of reasonableness. Hertz cites *Eagle Surgical Supply, Inc. v Progressive Cas. Ins. Co.* (21 Misc 3d 49 [App Term, 2d Dept 2008]). However, the issue in *Eagle Surgical Supply* was whether an EUO must be *scheduled* within 30 days of its receipt of a claim pursuant *to subsection (d)* of 11 NYCRR 65-3.5, based on language that once appeared in that regulation. Indeed, the court specifically noted that the EUO letters were timely mailed pursuant to subsection (b) of this regulation (21 Misc 3d at 51).

Hertz further claims that, even if compliance with the time requirements of 11 NYCRR 65-3.5 (b) was necessary in August 2015 when the EUO letters were mailed, it has demonstrated compliance by the submission, on reply, of the two NF-3 forms described above. Even if Hertz could cure its deficiency in its prima facie showing of a meritorious claim regarding the Claimants' default in appearing for EUOs by the submission of evidence on reply (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2015]), the two NF-3 forms offered refer only to assigned claims from Vincent Winston and Shawn Hayle. No evidence is submitted as to any claims submitted as assignee of Kenrick Johnson and no evidence has been offered as to which of the three Claimants were treated by the three defaulting medical provider defendants. Accordingly, the court finds that Hertz has not demonstrated a prima facie case on its first cause of action with respect to either Noel E. Blackman, M.D., Madison Products of USA, Inc. or Prompt Medical Services, P.C. and, thus, Hertz's motion for a default judgment as to these defendants is denied.

As for the third cause of action, absence evidence, of which none has been presented, that any arbitrations or lawsuits have been threatened or commenced, Hertz has not demonstrated the need for a court-ordered stay.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the cross motion to compel plaintiff to accept a late answer, pursuant to CPRL 3012 (d), is granted with respect to defendants Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, and Penn Chiropractic, P.C. on condition that these defendants file an answer to the complaint within 20 days from service of a copy of this order with notice of entry; and the motion is denied as to defendants Noel E. Blackman, M.D. and Madison Products of USA, Inc.; and it is further

ORDERED that the issue of whether service was properly effected on Darren T. Mollo, D.C. and Ksenia Pavlova, D.O. is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the cross motion by these defendants is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the cross-moving defendants shall, within 20 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office in Room 119 at the courthouse located at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that plaintiff's motion for a default judgment is denied, without prejudice to renewal against the defaulting defendants.

Dated: ~~February~~ March 7, 2016

ENTER:

Donna M Mills
J.S.C.

DONNA M. MILLS