Hertz Vehs., LLC v Charles Deng Acupuncture, P.C.
2016 NY Slip Op 31050(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 156819/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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HERTZ VEHICLES, LLC,

Plaintiff,

-against-

CHARLES DENG ACUPUNCTURE, P.C., *et al.*,

Defendants.

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Index No. 156819/14

Motion seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendants Charles Deng Acupuncture, P.C. (CDA), Darren T. Mollo, D.C., and Maiga Products Corporation (collectively, movants) move pursuant to CPLR 2221(d) and (e) for an order granting them leave to reargue and renew my decision on plaintiff's prior motion for a default judgment against them and movants' cross motion for an extension of time to answer in this matter, and upon granting leave, denying plaintiff's motion and granting the cross motion. Plaintiff opposes.

In the decision and order dated August 11, 2015, I found that plaintiff had established its entitlement to a default judgment against movants, and others, as follows:

> A failure to appear for a EUO is a violation of no-fault regulations and vitiates any requirement by the insurance company to pay a no-fault claim. (*See Liberty Mut. Ins. Co. v Five Boro Med. Equipment, Inc.*, 130 AD3d 465 [1st Dept 2015] [plaintiff entitled to default judgment declaring it had no duty to pay defendant for no-fault claims; affirmation of plaintiff's counsel sufficient proof that plaintiff mailed EUO letters to defendant, and undisputed that defendant failed to appear for EUOS]; *Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015] [defendants' failure to

> attend EUOs violated condition precedent to coverage that vitiated policy]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618 [1st Dept 2014] [failure to appear for EUOs voids coverage under no-fault policy regardless of timeliness of denial of coverage]).

(NYSCEF 63).

I thus granted plaintiff's motion for a default judgment against movants, and denied movants' cross motion for an extension of time to serve an answer on the ground that movants had failed to establish that plaintiff had not served them properly. I also found that "plaintiff's claims against these defendants have merit as it need not prove that it timely denied their no-fault insurance claims." (*Id.*).

Movants now argue that plaintiff's claims have no merit absent a showing that plaintiff sought the EUOs within the timeframes set forth in the pertinent no-fault regulations, and assert that vacatur of their default is warranted as they were not served personally and did not receive actual notice of the action in time to defend or appear. (NYSCEF 67).

In opposition, plaintiff contends that movants' motion to reargue is untimely and that they raise the same arguments previously made and rejected. Plaintiff also denies that movants have a reasonable excuse for their defaults. (NYSCEF 76).

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). A clarification of decisional law constitutes a

sufficient change in the law on a motion to renew. (*Dinallo v DAL Elec.*, 60 AD3d 620 [2d Dept 2009]).

In September 2015, after my decision was rendered, the Appellate Division, First Department, issued decisions relating to the denial of no-fault claims based on a failure to appear for EUOs, finding that an insurer must establish, *prima facie*, that it requested the EUOs within the required timeframes. (*See Ntl. Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015] [although failure to appear for scheduled EUOs constitutes breach of no-fault regulations, plaintiff failed to establish it requested them within required timeframe]; *Am. Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1st Dept 2015] [plaintiff did not establish at it was entitled to deny no-fault claims based on defendant's assignor's failure to appear for scheduled independent medical examinations absent proof that it timely scheduled examinations]). Here, plaintiff submits no evidence, either with its original motion or in opposing this one, showing that it requested movants' EUOS within the no-fault timeframes, and has thus failed to demonstrate *prima facie* entitlement to a default judgment against movants.

Moreover, a defendant may be entitled to vacatur of a default against it pursuant to CPLR 317, regardless of whether it has a reasonable excuse for the default, upon a showing that it was not personally served, did not receive actual notice in time to defend, and has a meritorious defense. (*Xian v Tat Lee Supplies Co., Inc.*, 126 AD3d 424 [1st Dept 2015]).

Here, even assuming that movants did not assert a reasonable excuse for defaulting, it is undisputed that they were not personally served, they deny in a nonconclusory manner that they received actual notice of the action in time to defend, and they establish a meritorious defense that plaintiff did not request their EUOS in a timely fashion. There is also no indication that they

attempted to evade service. (*Id.*; *see also Gershman v Midtown Moving & Storrage, Inc.*, 123 AD3d 974 [2d Dept 2014]). Additionally, movants moved promptly for relief upon receiving plaintiff's motion for a default judgment.

Thus, in light of recent caselaw and pursuant to CPLR 317, leave to renew is granted, and upon renewal, plaintiffs' motion for a default judgment against movants is reversed and vacated, and movants' cross motion is granted. There being no time limit for filing a motion to renew (CPLR 2221[e]; *see Glicksman v Bd. of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364 [2d Dept 2000] [observing there is no time limit for making motion for leave to renew]), this motion in timely.

Accordingly, it is hereby

ORDERED, that the motion of defendants Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., and Maiga Products Corporation for an order granting them leave to reargue and renew my decision on plaintiff's prior motion for a default judgment against them is granted, and upon renewal, the default judgment issued against them is vacated; it is further

ORDERED, that movants' cross motion for an extension of time to answer in ths matter is granted on condition that they serve and file their answer within 20 days of the date of entry of this order.

ENTER:

Barbara Jaffe, JSC

DATED: June 8, 2016
New York, New York