Country-Wide Ins. Co. v East Coast Acupuncture PC
2016 NY Slip Op 32379(U)
November 30, 2016
Supreme Court, New York County
Docket Number: 150909/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- against -

DECISION AND ORDER
Index No.: 150909/15
Mot. Seq. No. 001

GUILLERMO PENA

("Eligible Injured Party Defendant"),

And

EAST COAST ACUPUNCTURE PC, GUY VILLANO, D.C., COLUMBUS IMAGING CENTER, LLC, NOEL BLACKMAN PHYSICIAN, P.C., HEALTHWAY REHABILITATION, P.T. P.C., VERASO MEDICAL SUPPLY CORP., DUNAMIS REHAB PT PC, ELECTROPHYSIOLOGIC MEDICAL DIAGNOSTIC PC, PRO EDGE CHIROPRACTIC P.C., NEIGHBORHOOD RX CORP., SOVERA MEDICAL SUPPLY CORP. AND LLJ THERAPEUTIC SERVICES PC

("Medical Provider Defendants").

Defendant(s).

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOT. OF MOT. AND AFF. IN SUPPORT	1-2 (Exs. A-J)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company moves,

pursuant to CPLR 3215, for a default judgment against defendants Guillermo Pena ("Pena") and East Coast Acupuncture PC, Guy Villano, D.C., Columbus Imaging Center, LLC, Noel Blackman Physician, P.C., Healthway Rehabilitation, P.T. P.C., Veraso Medical Supply corp., Dunamis Rehab PT PC, Electrophysiologic Medical Diagnostic PC, Pro Edge Chiropractic P.C., Neighborhood Rx Corp., Sovera Medical Supply Corp. and LLJ Therapeutic Services PC ("the medical provider defendants")[1] due to their failure to answer or otherwise appear in this action. After a review of the motion papers, which are unopposed, as well as a review of the relevant statutes and case law, **the motion is denied with leave to renew upon proper papers.**

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an alleged automobile accident on May 29, 2014 in which defendant Guillermo Pena was allegedly injured. Ex. A, at par. 31. On or about January 30, 2015, plaintiff commenced the captioned action against defendant Pena and the medical provider defendants, which allegedly treated Pena for injuries arising from the incident. Ex. A. In its complaint, plaintiff alleged that it was entitled to a declaration that defendants were not entitled to no-fault benefits pursuant to the policy of insurance it issued covering the vehicle involved in the accident since Pena failed to comply with a condition precedent to coverage by twice failing to appear for duly scheduled independent orthopedic, chiropractic and neurological medical examinations ("IMEs"). Ex. A. The IMEs, scheduled by letters dated September 4 and 22, 2014, were to be conducted on September 18 and October 2, 2014, respectively. Exs. D and E.

[1]Defendants Pena and the medical provider defendants will hereinafter collectively be referred to as "defendants."

The medical provider defendants were served with the summons and complaint on March 24, 2015 via the Secretary of State. Ex. B. Pena was served by service on his co-tenant, a person of suitable age and discretion, at his home on March 31, 2015. Ex. B. A copy of the summons and complaint was then mailed to Pena at his actual place of residence on April 1, 2015. Ex. B. Proof of service on Pena was filed with this Court on April 8, 2015. NYSCEF Doc. No. 2. Despite such service, all of the defendants failed to join issue or otherwise appear in this matter.

On August 18, 2016, plaintiff filed the instant motion, pursuant to CPLR 3215, for a default judgment against defendants. NYSCEF Doc. No. 4. In support of the motion, plaintiff submits, inter alia, an attorney affirmation; the summons and complaint[2]; affidavits of service; an affirmation of additional mailing of the summons and complaint on the medical provider defendants pursuant to CPLR 3215(g), notices for Pena to appear for IMEs on September 18 and October 2, 2014; a denial of coverage issued due to Pena's failure to appear at IMEs; the affidavits of Sandra W. Garcia, an IME clerk for plaintiff who avers that she timely mailed the IME notices to plaintiff, Fatima Zuhra, an administrative assistant in plaintiff's Medical Evaluations Unit, who attests that Pena failed to appear for his IMEs, and Jessica Mena-Sibrian, a No-Fault Litigation/Arbitration Supervisor, who attests as to when plaintiff received bills from the medical provider defendants and that plaintiff disclaimed no-fault coverage on the ground that Pena violated the conditions of the policy by failing to appear for IMEs. Finally, plaintiff appends as an exhibit the denial of coverage issued to Pena and copied to the medical provider defendants) arising from the latter's failure to appear for IMEs.

[2]Although the complaint is referred to as "verified", the verification, by a principal of plaintiff, is invalid since it is not notarized.

POSITION OF THE PLAINTIFF:

Plaintiff argues that it is entitled to a declaratory judgment upon default against defendants pursuant to CPLR 3215 due to their failure to answer the complaint. Specifically, plaintiff claims that it is entitled to a declaration that it is not obligated to provide no-fault coverage since plaintiff failed to appear for duly designated IMEs on two occasions. Although plaintiff concedes that the motion for default was not filed within one year of defendants' defaults, as required by CPLR 3215(c) (Aff. In Support, at par. 5), it nevertheless insists that it is entitled to the relief prayed for since it had a valid excuse for the delay, i.e., that a paralegal miscalculated the time from which the default ran - and that it established a meritorious claim, i.e., that it owed no coverage pursuant to the policy since Pena failed to establish a condition precedent for coverage by appearing for an IME.

LEGAL CONCLUSIONS:

Untimely Motion for Default

> "When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." CPLR 3215(a). To succeed on a motion for default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3215:16, at 557. CPLR 3215(c) states, *inter alia*, that, "if [a] plaintiff fails to take proceedings for entry of judgment within one year after default, the court shall not enter judgment but shall dismiss the complaint as abandoned. . . unless sufficient cause is shown as to why the complaint should not be dismissed." To demonstrate "sufficient cause", a plaintiff must present a valid excuse for the delay and a meritorious claim. *Valentin v Rinder*, 65 AD2d 716 (1st Dept 1978). Pursuant to CPLR 2005, law office failure no longer constitutes a per se unreasonable excuse for a party's default or delay. *LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 (1st Dept 1999). The extent of an attorney[']s negligence "must instead be weighed against

> the merits of the claim and the lack of prejudice to the other side." [*Sanchez v Javind Apt. Corp.*, 246 AD2d 353, 355].

JP Morgan Chase Bank, N.A. v St. Anthony Pharmacy Inc., 2008 N.Y. Misc. LEXIS 9353 (Sup Ct New York County).

As noted above, plaintiff concedes that it failed to bring the instant motion within one year of the defendants' defaults in answering as required by CPLR 3215(c). Aff. In Supp., at par. 5. However, plaintiff maintains that it has established "sufficient cause" for bringing the motion after the one year deadline, asserting that "[t]he paralegal responsible for the handling of the default judgment matters inadvertently miscalculated the dates in which default can be brought against the defendants based on the dates from which [p]laintiff filed their Notice Pursuant to CPLR 3215(g)(4)." *Id.* Although this proffered excuse is "not compelling" (*LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d at 28), the Appellate Division, First Department has held that an attorney's failure to track the progress of an action constituted excusable law office failure that reasonably explained a failure to timely move for default where a meritorious cause of action existed and defendant was not prejudiced. *See Bazac v Odelia Enters. Corp.*, 272 AD2d 226 (1st Dept 2000).

Although plaintiff does not specifically argue that it has a meritorious claim, the affidavits of its employees, Garcia, Zuhra, and Mena-Sibrian, reflect that plaintiff twice requested that Pena appear for IMEs and that he twice failed to do so. Exs. F, G and H. Thus, this Court finds the claim to have sufficient merit to withstand a dismissal pursuant to CPLR 3215(c).

Further, although plaintiff does not assert that the granting of this motion would not prejudice defendants, it is evident that no prejudice would arise from the granting of this motion. As noted above, plaintiff filed the affidavit of service with respect to service on Pena on April 8, 2015.

NYSCEF Doc. No. 2. Service was therefore complete 10 days thereafter. See CPLR 308(2). Plaintiff thus had until May 8, 2016 to move for a default against Pena. Ex. B. The treating provider defendants were served via the secretary of state on April 24, 2015. Ex. B. Thus, plaintiff had until May 24, 2016 to move for a default against the medical provider defendants. However, plaintiff did not move for a default against defendants until August 18, 2016 (NYSCEF Doc. No. 4), approximately three months after the one year deadline for doing so. This Court, in its discretion, finds that such delay was minimal and did not result in prejudice to defendants. *See LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d at 28. Indeed, by failing to oppose this motion, defendants have failed to adduce any argument regarding how or why they would be prejudiced by allowing this Court to consider plaintiff's motion for default.

Merits of Plaintiff's Motion for Default

No fault claims arising from motor vehicle injuries in New York State are governed by 11 NYCRR 65-1.1 *et seq.* Section 65-3.5 sets forth claims procedures and section 65-3.6 sets forth follow-up procedures.

> In general, once an insurer receives a claim from a medical provider who has allegedly provided services to an individual injured in an automobile incident, the insurer has 10 days to send to the provider a verification forms [sic]. After receipt of the completed verification form, the insurer may request additional information - e.g. an Examination Under Oath (EUO) or an [IME] - within 15 days.
>
> When the additional verification required by the insurer is an IME, the insurer "Shall schedule the examination to be held within 30 calendar days from the date of receipt of prescribed verification forms." 11 NYCRR 65-3.5(d). The same follow-up procedures that apply to EUOs apply to IMEs. *See Unitrin*

> *Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD23d 559 (1st Dept 2011). The regulations also provide that "[t]he eligible injured person shall submit to [IMEs] by physicians selected by, or acceptable to, [the insurer], when, and as often as the [insurer] may reasonably require." *See* 11 NYCRR 65-1.1(d), Sec. 1, Proof of Claim [d]. The failure to appear for IMEs as requested by the insurer is a breach of a condition precedent to coverage under the no-fault policy. *Unitrin Advantage Ins. Co.*, 82 AD3d at 560.

Warner Ins. Co. v Camara, 2016 N.Y. Misc. LEXIS 3569 (Sup Ct New York County 2016).

Here, although plaintiff provided proof that it sent Pena notices to appear for IMEs, and that he failed to appear for the examinations, it is not entitled to a default judgment since it failed to establish that it strictly adhered to the no-fault regulations. Specifically, plaintiff's motion is silent as to whether the IMEs were scheduled within 30 calendar days from the date it received the completed verification forms or, indeed, when or if it sent such verification requests. See 11 NYCRR 65-3.5(d). Indeed, no such completed verification forms are annexed to the motion nor are the specific dates for when verifications were requested or received contained in the NF-10 annexed as Exhibit I. Thus, this Court is constrained to deny the motion with leave to renew upon proper papers.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion seeking a default judgment against defendant pursuant to CPLR 3215 is denied with leave to renew upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: November 30, 2016

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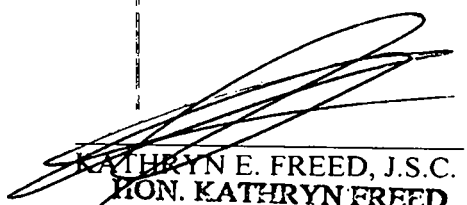

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT