

Country-Wide Ins. Co. v Blenman
2017 NY Slip Op 30308(U)
February 16, 2017
Supreme Court, New York County
Docket Number: 161529/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
COUNTRY-WIDE INSURANCE COMPANY,

Index No.
161529/2014

Plaintiff,

- v -

**DECISION
and ORDER**

IGENIE F. HARRIS BLENMAN, et al.,

Mot. Seq. 005

Defendants.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

This is a declaratory judgment action in which plaintiff Country-Wide Insurance Company ("Country-Wide" or "plaintiff") seeks a judgment declaring that plaintiff has no obligation to pay defendant medical providers' claims for no-fault benefits because of Igenie F. Harris Blenman, the eligible injured party defendant's, breach of a condition precedent to coverage, viz. failure to submit to independent medical examinations, pursuant to the policy of insurance.

By Notice of Motion dated May 9, 2016 and filed on June 21, 2016, Defendants AOM Medical Supply, Inc. ("AOM"), and Prompt Medical Supply, Inc. ("Prompt") (collectively, "movants") move for an order dismissing the complaint as against AOM Medical Supply, Inc., and as against Prompt Medical Supply, Inc., pursuant to CPLR 3215(c), and granting attorney's fees pursuant to Insurance Law section 5106.

Movants submit the affirmation of David Landfair, Esq., annexing: the Summons and Verified Complaint, filed November 19, 2014; affidavits of service on AOM and Prompt, dated January 5, 2015; AOM's Answer, dated May 28, 2015; Prompt's Answer, dated November 19, 2015; plaintiff's Notice of Rejection of AOM's Answer, dated June 1, 2015; plaintiff's affirmation in support of plaintiff's motion to deem plaintiff's affidavits of service timely filed; a copy of this court's order, dated March 25, 2016, granting plaintiff's motion to deem plaintiff's affidavits of service timely filed.

Plaintiff opposes and submits the affirmation of R. Diego Velazquez, Esq., annexing, *inter alia*, the policy of insurance; plaintiff's default judgment motion as against several defendants, including Prompt, filed on July 8, 2016; and plaintiff's summary judgment motion as against several defendants who had interposed an answer, including AOM, filed on July 8, 2016.

On January 5, 2015, plaintiff served AOM and Prompt by service on the Secretary of State pursuant to Business Corporation Law section 306 (BCL 306). AOM and Prompt's time to answer expired on January 25, 2015. (BCL 306[b][1]; CPLR 320[a]). Plaintiff e-filed Affidavits of Service attesting to service on AOM and Prompt on April 30, 2015.

AOM served an untimely answer on May 29, 2015. On June 1, 2015, plaintiff rejected AOM's untimely answer by service of a Notice of Rejection of Pleading. Prompt attempted to serve an answer by first-class mail on November 19, 2015, but failed to e-file its answer.

On February 19, 2016, plaintiff moved for an order deeming service of Plaintiff's Summons and Complaint on all Defendants as timely; or in the alternative, extending the time to file the same. Plaintiff also moved for an Order deeming the filing of the affidavit of service on all Defendants *nunc pro tunc*. By Decision and Order dated March 25, 2016, the Court granted Plaintiff's motion without opposition to the extent that it deemed service of Plaintiff's Summons and Complaint on Defendants as timely. The Court further ordered that the Affidavits of Service as to Defendants, which were filed with the Court on April 20, 2015, were deemed timely filed *nunc pro tunc*.

Movants argue that dismissal of the complaint as abandoned is warranted because plaintiff did not take proceedings for the entry of judgment within one year after AOM and Prompt's default. Movants assert that they were in default as of February 5, 2015.

In response, plaintiff argues that the motion to dismiss must be denied because one year has not passed since service was completed. Velazquez avers that the affidavits of service were not timely returned to his office by Atlas Process Service ("Atlas"). Plaintiff asserts that, pursuant to CPLR 3215(f), plaintiff could not file its motion seeking a default judgment against any non-answering defendants until plaintiff's motion to extend was heard and granted. Plaintiff argues that it has one year from March 25, 2016, the date of the order granting its motion to extend, in order to file for a default judgment. Plaintiff filed motions for default judgment as against Prompt and summary judgment as against AOM on July 8, 2016.

In reply, movants argue that plaintiff has shown no good cause for its failure to take timely proceedings for the entry of default against the movants. Movants further argue that plaintiff's opposition should not be considered because it was served eight days after the return date of the motion.

CPLR 3215(c) provides:

Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

"An application for default judgment must be timely filed within one year of default." (*Nat. Union Fire Ins. Co. of Pittsburgh v. Rucker*, 2010 WL 3738536 [N.Y. Sup. September 15, 2015]). "Failure to do so within the prescribed period may result not only in forfeiture of the default judgment against the defendant, but may also bring about the dismissal of the plaintiff's own complaint as abandoned." (*Id.*). "The court, however, has discretion to excuse, for sufficient cause, the applicant's tardiness, and allow the entry of default judgment after the one-year period expires." (*Id.*). To establish sufficient cause, plaintiff has the burden to proffer reasonable excuse for lateness and demonstrate that the complaint is meritorious." (*Id.*).

Upon a defendant's motion to dismiss the action for failure to prosecute under CPLR 3215(c), it is "plaintiff's burden to show a lack of intent to abandon the action, and to demonstrate both a reasonable excuse for the period of non-prosecution and merit to the action." (*Sports Legends, Inc. v. Carberry*, 38 A.D.3d 470 [1st Dept 2007]).

Here, while Plaintiff moved to have the affidavits of service deemed timely, Plaintiff did not move for a default judgment. Indeed, Plaintiff rejected an answer that was served as untimely on June 1, 2015; clearly Plaintiff took the position in this litigation that the time to answer had passed by June 1, 2015. Still, Plaintiff did not move for a default judgment until more than one year from that rejection.

Based upon the foregoing, it is hereby

ORDERED that the motion to dismiss the complaint as abandoned pursuant to CPLR 3215(c) as against AOM Medical Supply, Inc. and Prompt Medical Supply,

Inc. is granted; and the action is dismissed as against AOM Medical Supply, Inc. and Prompt Medical Supply, Inc.; and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 16, 2017

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Eileen A. Rakover, J.S.C.