Hertz Vehs., LLC v Best Touch PT, P.C.
2017 NY Slip Op 31206(U)
June 2, 2017
Supreme Court, New York County
Docket Number: 156148/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C. **PART** 2
Justice

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HERTZ VEHICLES, LLC,

Plaintiff,

- v -

BEST TOUCH PT, P.C., DANIEL COHEN, M.D., BLANO MEDICAL, P.C., EVERGREEN ACUPUNCTURE, P.C., FJ ORTHOPAEDICS AND PAIN MANAGEMENT, P.L.L.C., F-R MOBILE PHYSICIAN, P.C., GC CHIROPRACTIC, P.C., KENSINGTON RADIOLOGY GROUP, P.C., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MANHATTAN BEACH PHARMACY, INC., STONE ACUPUNCTURE, P.C., STRESSCARE BEHAVIORAL & PSYCHOLOGICAL SERVICES, P.C., STATE CHIROPRACTIC, P.C., OASIS MEDICAL AND SURGICAL GROUP, MIISUPPLY, L.L.C., JENNIFER BELLEVUE, JOANNE ALEXIS

Defendant.

INDEX NO. 156148/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this application to/for Default Judgment

Upon the foregoing documents, it is

ordered that the motion is denied with leave to renew upon proper papers.

In this declaratory judgment action, plaintiff Hertz Vehicles, LLC seeks an order, pursuant to CPLR 3215, seeking a default judgment against defendants Best Touch PT, P.C., Blano Medical, P.C., Evergreen Acupuncture, P.C., FJ Orthopaedics and Pain Management, P.L.L.C., F-R Mobile Physician, P.C., GC Chiropractic, P.C., Kensington Radiology Group, P.C., Metro Pain Specialists Professional Corporation, Manhattan Beach Pharmacy, Inc., Stone Acupuncture, P.C., Stresscare Behavioral & Psychological Services, P.C., State Chiropractic, P.C., Oasis Medical and Surgical Group, Miisupply, L.L.C., Jennifer Bellevue, and Joanne Alexis due to their its failure to answer or otherwise appear in this matter. There is no opposition to the motion. After a review of the papers presented, as well as the relevant statutes and case law, **the motion is denied with leave to renew upon proper papers.**

This action was commenced by plaintiff Hertz Vehicles, LLC against defendants Best Touch PT, P.C., Daniel Cohen, M.D., Blano Medical, P.C., Evergreen Acupuncture, P.C., FJ Orthopaedics and Pain Management, P.L.L.C., F-R Mobile Physician, P.C., GC Chiropractic, P.C., Kensington Radiology Group, P.C., Metro Pain Specialists Professional Corporation, Manhattan Beach Pharmacy, Inc., Stone Acupuncture, P.C., Stresscare Behavioral & Psychological Services, P.C., State Chiropractic, P.C., Oasis Medical and Surgical Group, and Miisupply, L.L.C. (hereinafter "the medical provider defendants"), as well as defendants Jennifer Bellevue and Joanne Alexis ("the claimants") (hereinafter collectively "the defendants") on or about July 22, 2016. Ex. A. In the complaint, plaintiff alleged, inter alia, that the claimants were passengers in a vehicle insured by plaintiff which was involved in a collision with another vehicle in Brooklyn, New York on July 29, 2015 and that, although the driver of the insured vehicle, Bruno Olvens, was not injured and the said vehicle sustained only $302.60 in damage, the medical provider defendants submitted to plaintiff in excess of $30,000 in bills for services rendered to the claimants. Ex. A, at pars. 19, 24-25. Thus, alleged plaintiff, there was a "strong possibility" that the "loss was staged or intentionally caused and/or that the treatment [claimants underwent as a result of the incident] was not related to the collision." Ex. A, at par. 26. Although all of the defendants have been served with process, only Daniel Cohen, M.D. has answered.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against all defendants except Dr. Cohen due to their failure to answer or otherwise appear in this matter. In support of the motion, plaintiff submits, inter alia, two attorney affirmations and the affidavit of its claims representative, Jeremy Rothenberg. Plaintiff claims that, since the medical provider defendants and defendant Alexis all failed to appear for EUOs, they failed to satisfy a condition precedent to coverage under its policy. Plaintiff further asserts that, although defendant Bellevue appeared for an EUO, her inaccurate and inconsistent testimony gave rise to a "founded belief" that claimants' injuries were not caused by the alleged accident.

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *See Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, plaintiff has established presumptively valid proof of service of the summons and complaint on the defendants. Exs. B and I. Additionally, plaintiff, through the affirmation of attorney Jason Eson, Esq., has established that all defendants except Dr. Cohen have failed to answer or otherwise respond to the complaint. Eson Aff., at par. 23. However, plaintiff has failed to submit sufficient "proof of the facts constituting the claim." CPLR 3215(f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). Where a verified complaint is submitted in support of a motion for default pursuant to CPLR 3215, it may be used to establish the facts constituting the claim. See CPLR 3215(f). Here, however, since the complaint is verified by plaintiff's attorney (Ex. A), it is "purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." *Martinez v Reiner*, 103 AD3d 477, 478 (1st Dept 2013)(internal quotation marks and citation omitted).

Since it is error to issue a default judgment "without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]), it is incumbent upon plaintiff, in the absence of a complaint verified by one with personal knowledge, to submit an affidavit by one with such knowledge setting forth the facts constituting the claim. However, for the reasons set forth below, a default judgment cannot be granted based on the motion papers submitted.

"New York courts "rarely, if ever" grant declaratory judgments on default "with no inquiry by the court as to the merits." *Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 (1st Dept 1978). Default declaratory judgment actions "'will not be granted on the default and pleadings alone'" but require that the "'plaintiff establish a right to a declaration against . . . a defendant.'" *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 (3d Dept 1986), *quoting National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78 (Sup Ct Albany County 1965)." *de Beeck v Costa*, 39 Misc3d 347 (Sup Ct New York County 2013). Here, since plaintiff has failed to establish its prima facie entitlement to the relief sought, the motion is denied. See *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d at 902.

Initially, plaintiff has not submitted any documentation proving that any of the medical provider defendants submitted claims for treatment of the claimants. Section 11 NYCRR 65-3.8 of the no-fault regulations requires an insurer to pay or deny a claim within 30 days of receipt of proof of a claim. If an insurer does not act within the 30-day period, it 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). Here, plaintiff failed to submit any documentation, other than representations by its claims adjuster, regarding the timing of any denial of claims by the medical provider defendants. Since the failure of a claimant or its assignee to appear for an EUO is a breach of a condition precedent to coverage under a no-fault policy, an insurer can deny all claims by any parties which may be entitled to benefits under such a policy retroactively to the date of the alleged accident, regardless of whether a denial was issued in a timely fashion. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy*, PLLC, 82 AD3d 559, 560 (1st Dept 2011). However, 11 NYCRR 65-3.5(b) requires that insurers request additional verification, including requests for EUOs, within 15 business days after receipt of the verification forms from those claiming coverage under the policy. Since plaintiff has submitted no documentation supporting its argument that it requested the EUOs of the medical provider defendants within the time frame set forth in 11 NYCRR 65-3.5(b), it cannot be granted a default judgment against them. *See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, ___ AD3d ___ (1st Dept February 7, 2017); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).

Although plaintiff submits an application for no-fault benefits (NF-2) by Alexis (Ex. D), the said application does not state when it was received by plaintiff and thus does not support an argument by plaintiff that it timely complied with the no-fault regulations.

In addition, in his affirmation in support of the motion, plaintiff's counsel represents that, although Bellevue appeared for an EUO, "her testimony contained many inaccuracies and inconsistencies that led [plaintiff] to conclude that the underlying loss was not accidental and therefore not an insured event." Eson Aff., at par. 10. However, in his affidavit in support of the motion, Rothenberg, the claims examiner for plaintiff, states that plaintiff's attorney informed him that Bellevue's testimony "contained many inconsistencies that led [plaintiff] to conclude that the underlying loss was not accidental and therefore not an insured event." Rothenberg Aff., at par. 11. Thus, Rothenberg, an individual with knowledge who

bears the burden of setting forth the facts constituting the claim (*Beltre v Babu*, 32 AD3d, at 723) and who maintains that he investigated the claim (Rothenberg Aff., at par. 2), essentially relies on the conclusions of counsel, whose representations do not comprise facts constituting the claim. It is thus unclear whether Rothenberg's conclusions are his or those of counsel.

Further, despite Rothenberg's representation that plaintiff denied the claimants' claims (Rothenberg Aff., at pars. 10 and 12), such denials are not annexed to the moving papers.

Finally, although plaintiff asserts that Bellevue failed to subscribe and return her executed EUO transcript to plaintiff's counsel, the motion does not contain any letter reflecting that the transcript was actually sent to Bellevue for signature.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Hertz Vehicles, LLC is denied with leave to renew upon proper papers; and it is further,

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

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

6/2/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE