American Tr. Ins. Co. v Rosales-Calderon

2017 NY Slip Op 31240(U)

June 7, 2017

Supreme Court, New York County

Docket Number: 651581/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2
--X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

ALAN D. ROSALES-CALDERON, ADVANCED MULTI-MEDICINE & REHAB, B & A CHIROPRACTIC PLLC, BROOKHAVEN ANESTHESIA ASSOCIATES, L.L.P., ENGRACIA O. LAZATIN, M.D., P.C., HILLS CHIROPRACTIC, P.C., INTEGRATED CHIROPRACTIC, P.C., MELVILLE SURGERY CENTER, LLC, NASSAU HEALTH CARE CORPORATION, NASSAU HEALTH CARE CORPORATION d/b/a NASSAU UNIVERSITY MEDICAL CENTER, and STAND-UP MRI OF CARLE PLACE, P.C.,

Defendants.
--X

DECISION AND ORDER
Index No.651581/2015
Mot. Seq. No. 002

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
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1, 2 (Exs. A-D)
AFFIRMATION IN OPPOSITION	3(Exs 1-2)

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

In this declaratory judgment action, defendants ADVANCED MULTI-MEDICINE & REHAB, B & A CHIROPRACTIC PLLC, and ENGRACIA O.LAZATIN, M.D., P.C., all represented by The Odierno Law Firm, P.C. (hereinafter the " Odierno defendants"), move, pursuant to CPLR 2221(a) to stay, vacate or modify a prior order granting summary judgment against said defendants and pursuant to CPLR 505(a)(1) vacating a judgment on default issued by this Court on

July 13, 2016. This Court found that the individual defendant, Alan D. Rosales-Calderon, was not an "eligible injured person" entitled to no-fault benefits under American Transit policy CAP 613666, Claim No.: 777354-02. The Court additionally held that plaintiff American Transit Insurance Company was not obligated to honor or pay claims for reimbursement for any and all claims of, *inter alia,* the Odierno defendants.

FACTUAL AND PROCEDURAL BACKGROUND:

The captioned action arises from an alleged automobile accident that occurred on June 24, 2014, in which defendant Rosales-Calderon allegedly sustained personal injuries while riding in a vehicle owned by American Transit's insured, All Seasons Inc., covered by insurance policy No. CAP 613666. American Transit commenced the captioned action by filing a summons and verified complaint on or about May 8, 2015. On or about August 14, 2015, American Transit discontinued the action as against Nassau Health Care Corporation and Nassau Health Care Corporation d/b/a Nassau University Medical Center. Ex. F; Aff. in Supp. of Mot., at FN 3. Issue was joined by the service and filing of an answer by defendants Advanced Multi-Medicine & Rehab, B & A Chiropractic PLLC, and Engracia O. Lazatin, M.D., P.C. on or about February 11, 2016. For the complete history of this case and the legal conclusion of this Court, please see the Decision and Order issued on July 13, 2016 (NYSCEF Doc. 21) and the Amended Order dated July 26, 2016. NYSCEF Doc. 23.

POSITION OF THE PARTIES:

The Odierno defendants now move to vacate this Court's prior at decision arguing, in the

Affirmation in Support by their attorney Paul A. Bargelline, Esq., that the IME scheduling letters annexed as Exhibit "A" were sent to the wrong attorney's office, so that the injured party and individual defendant Rosales-Calderon never received notice of the scheduled IMEs. They allege that Rosales-Calderon was actually represented by the law firm of Suris & Associates, located at 999 Walt Whitman Road, Melville, New York, and annex as Exhibit "B" to their papers, letters allegedly sent to plaintiff indicating that they were retained by Rosales-Calderon, as well as a copy of a certified-return receipt requested mailing to plaintiff. The Odierno defendants additionally allege that Rosales-Calderon did not respond to the letters because he cannot read English. Based of these facts, the Odierno defendants move this court to vacate or modify its prior order.

Additionally the attorney for the Odierno defendants avers that he never responded to both the Summary Judgment motion and the default motion by plaintiff because they "do not have a record of the plaintiff's motion being received." Further he avers that, since the Odierno defendants filed an answer, he would not have assumed that the default motion applied to them even if he had known about it the application. He additionally argues that he should have been allowed to conduct discovery before the summary judgment motion was granted.

Said defendants further argue that they have a meritorious defense because the verification requests served by plaintiff have serious service issues since they were served on the wrong law firm and also because Rosales-Calderon cannot understand English.

Plaintiffs, by their attorney, Justin Rothman, an associate of the Law Office of Daniel J. Tucker, in his Affirmation in Opposition, argue that the instant motion to vacate must be denied. Additionally, he argues that defendants fail to set forth a reasonable excuse for their default as well as a meritorious defense.

Plaintiff notes that defendants' excuse for their default is essentially one of law office failure, pointing out that such a claim may be accepted as a reasonable excuse where it is supported by detailed and credible facts, which, it maintains, are not proffered here. Instead defendant s' attorney simply states that his records do not indicate that a motion was received. Plaintiff notes that its papers include the affidavit of service of Donovan McPherson, who averred that he mailed the Notice of Motion and Affirmation in Support and the subsequent Notice of Entry to the same address of defendants' attorney at 560 Broadhollow Road, Suite 102, Mellville, NY 11747. See Exhibit "A" to plaintiff's motion and Exhibit "D" of defendants' papers. Therefore defendants have acknowledged receiving the Notice of Entry, thereby admitting that they were sent to the correct address, without setting forth any reason other than a bare denial of receipt for their not having received all of the papers. Plaintiffs argue that such a bare denial is insufficient to rebut proof of service.

Plaintiffs further argue that defendants' defense that their discovery demands should have been addressed before summary judgment was granted lacks merit because defendants failed to establish that summary judgment was premature by failing to establish what information they would have hoped to obtain had discovery gone forward.

Plaintiffs also argue that defendants' second defense, that Rosales-Calderon does not read English, is utterly without merit because they offer absolutely no proof of that fact. Defendants submit no affidavit from Rosales-Calderon, only a bare and conclusory statement from defendants' attorney representing that she cannot read English. However, the affirmation of an attorney who lacks personal knowledge of the facts has no probative value. Plaintiff further undermines this argument by defendants by submitting a contract allegedly signed by Rosales-Calderon which is

totally in English. Ex. B to Defendants' Motion.

Plaintiffs also urge that defendants' third defense, that the IME letters were sent to the wrong attorney's office, also lacks merit. They note that no affirmation is proffered from the attorneys whom defendants allege represented Rosales-Calderon, only, once again, a bare and conclusory statement from the defendants' attorney. They note that the certified receipt was not signed by plaintiff's office, which, had it actually been received, it certainly would have been. Therefore all this receipt proves is that the letter of representation was never received by plaintiff. They also note that if, indeed, Rosales-Calderon did not speak English, then the retainer contract was of questionable validity. Plaintiff again points out that an affirmation from an attorney who lacks personal knowledge of the facts, has no probative value and is insufficient to prove the facts of a matter.

Finally, plaintiff also annexes to its papers a copy of the letter it received from the law firm of Ikhilov & Associates, which stated that it represented Rosales-Calderon and to which plaintiff addressed its IME letters. See Defendants' Exhibit "A" annexed to its moving papers and Plaintiff's Exhibit "B"annexed to its opposing papers.

Conclusions of Law:

It is well-settled that a defendant who moves to vacate a default pursuant to CPLR 5015 (a)(1) must establish a reasonable excuse for the default as well as a meritorious claim. *See Matter of Delybe C. (Sonia S.),* 121 AD3d 467 (1st Dept 2014); *60 E. 9th St. Owners Corp. v. Zihenni*, 111 AD3d 511 (1st Dept 2013). Defendant has failed to establish its entitlement to relief pursuant to this section.

Initially, defendant has not set forth a reasonable excuse for its default in responding to the motion. Defendants' excuse for its failure to answer is that they were never served with the motion. However, as noted above, the affidavit of the process server presumptively establishes that defendants were served with process. Thus, defendants' bare denial of receipt of the motion does not constitute an excusable default pursuant to CPLR 5015(a)(1) and does not provide a basis for vacating the judgment against them. *See Matter of Nazarian*, 225 AD2d 265 (1st Dept 1998).

Nor has defendant established a meritorious defense to plaintiff's claims. Although defendants also proffer an excuse for the failure of Rosales-Calderon to appear at the scheduled IMEs, *i.e.*, that the IME letters were sent to the wrong law offices, defendants again fail to offer an affidavit from a person with knowledge of the facts. As a further argument as to why Rosales-Calderon failed to respond to the letters addressed to his home, defendants, by their attorney, allege that Rosales-Calderon does not speak English. Again, defendants fail to offer an affidavit from someone with personal knowledge. Presumably, Rosales-Calderon or his alleged attorneys would have been equally interested in responding to plaintiff and in vacating this Court's Order. Therefore defendant's contentions regarding both the identity of the law firm representing Rosales-Calderon, as well as his alleged inability to understand English, are conclusory and insufficient to constitute a meritorious defense which would warrant a vacatur of this Court's previous order. *See Martinez v Government Empls. Ins. Co.*, 113 AD3d 425 (1st Dept 2014); *Northern Source, LLC v. Kousouros*, 106 AD3d 571 (1st Dept 2013); *Peacock v Kalikow*, 239 AD2d 188 (1st Dept 1997).

This Court also finds defendants' argument that their discovery demands should have been addressed before summary judgment, is without merit.

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

ORDERED that the motion by defendants Advanced Multi-Medicine & Rehab, B & A Chiropractic PLLC, and Engracia O. Lazatin, M.D., P.C. is denied in all respects; and it is further,

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

Dated: June 7, 2017

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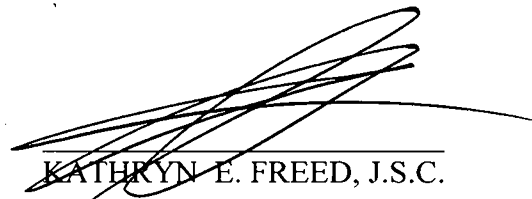

KATHRYN E. FREED, J.S.C.

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT