Unitrin Advantage Ins. Co. v Able Orthopedic & Sports Medicine, P.C.
2014 NY Slip Op 31050(U)
April 23, 2014
Supreme Court, New York County
Docket Number: 157322/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

- v -

ABLE ORTHOPEDIC & SPORTS MEDICINE, P.C., EMPIRE CITY LABORATORIES, INC., EXCEL IMAGING, P.C., M&M MEDICAL, P.C., MAIN ACUPUNCTURE HEALTH CARE, P.C., MOON LIGHT PT, P.C., NEW GENERATION MEDICAL SUPPLY, INC., OMEGA DIAGNOSTIC IMAGING, P.C., RICHMOND MEDICAL DIAGNOSTICS, P.C., JYOTI SHAH, M.D., SHASHEK CHIROPRACTIC, P.C., TRIBORO MED SUPPLY, INC., V&T MEDICAL, P.C. and ALLISON BARRETT,

Defendants.

INDEX NO. 157322/2012

MOTION DATE _____

MOTION SEQ. NO. # 3

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: Yes X No

This is an action for a declaration of non-coverage, arising from an alleged hit-and-run vehicular collision on August 24, 2010 (the "Collision"), in which defendant-claimant, Allison Barrett ("Barrett" or "Claimant"), allegedly sustained personal injuries and assigned her rights to collect no-fault insurance benefits to various medical providers, including New Generation.

Plaintiff, Unitrin Advantage Insurance Company ("Unitrin" or "Plaintiff"), commenced this action against Claimant and defendant medical providers to disclaim any no fault insurance coverage obligations relating to the subject incident based on a failure to appear for an ("EUO"), in violation of a condition precedent to coverage under the No Fault Regulations and material breach of Claimant's policy.

Plaintiff previously moved for and obtained a default judgment against defendants, including New Generation Medical Supply ("New Generation"), without opposition, by Order dated July 30, 2013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: _____ J.S.C.

New Generation now moves, by way of order to show cause, pursuant to CPLR §§ 317 and 5015, for an Order vacating the Default Judgment and allowing New Generation to file/compelling Plaintiff to accept a late answer.

Plaintiff opposes.

CPLR § 317 provides, in relevant part:

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

CPLR § 5015 permits the court which rendered a judgment or order to relieve a party from that judgment or order, upon such terms as may be just, if excusable default is shown.

"The distinction between moving under CPLR §§ 5015 and 317 is that, on a motion under CPLR § 317, the defendant does not have to come forward with a reasonable excuse for his default. All that he need demonstrate is that he did not personally receive notice of the pending lawsuit. On a motion under CPLR § 5015, by contrast, the defendant must show that his default was 'excusable.' In both cases the defendant must demonstrate a meritorious defense." (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]).

"On a motion to vacate a default, it is not necessary for a defendant to prove its defense, but only to set forth facts sufficient to make out a prima facie showing of a meritorious defense." (*Aerovias De Mexico, S.A. v. Malerba*, 265 A.D.2d 214, 215 [1st Dep't 1999).

New Generation argues that there is a reasonable excuse for default, on the grounds that New Generation never received the summons and complaint in this suit. New Generation claims that Plaintiff served the summons and complaint in question through the Department of State ("DOS"), and that according to DOS records, the

United States Postal Service ("USPS") returned the subject papers to the DOS on November 13, 2012. New Generation also argues that it never received any interlocutory papers in the underlying matter, despite having practices and procedures in place for the receipt of such papers, and that it did not learn of the default judgment until Plaintiff moved for summary judgment against New Generation in another action pending between the parties, on the grounds of collateral estoppel and res judicata, based on the default judgment.

Service is complete once a summons and complaint are delivered to the Secretary of State, pursuant to BCL § 306, regardless of whether the defendant actually receives notice of the lawsuit. (*Associated Imports, Inc. v. Leon Amiel Publisher, Inc.*, 168 A.D.2d 354 [1st Dep't 1990]). However, the Secretary of State is not considered a Rule 318 "agent," and service on the Secretary of State, pursuant to BCL § 306, does not constitute personal delivery of service on Defendant's designated agent under CPLR § 318, for purposes of CPLR § 317. (*See Eugene Di Lorenzo, Inc.*, 67 N.Y. 2d 138, 142 [1986]).

Accordingly, insofar as New Generation did not personally receive the summons and complaint that were returned to DOS, New Generation sufficiently demonstrates that it did not receive notice of the pending lawsuit, for purposes of CPLR § 317.

With respect to a meritorious defense, CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (4) there is another action pending between the same parties for the same cause of action in a court of any state of the United states; the court need not dismiss upon this ground but may make such order as justice requires

"The purpose of . . . [CPLR 3211 (a) (4)] is to prevent a party from being harassed or burdened by having to defend a multiplicity of suits. In determining whether two causes of action are the same, we consider '(1) [whether] both suits arise out of the same actionable wrong or series of wrongs[] and (2) as a practical

matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy.'" *Rinzler v Rinzler*, 97 A.D.3d 215, 217 (3d Dep't 2012) (internal citations omitted).

Here, Plaintiff's complaint seeks a declaration of non-coverage for New Generation's claim for no-fault benefits arising from the Collision. New Generation argues that it commenced a prior action against Unitrin, on September 1, 2011, for declaratory relief regarding the EUO at issue in the instant complaint, and that this prior action is currently pending in Supreme Court Kings County. New Generation submits the verified complaint filed in the Kings County action, along with various other interlocutory papers filed in that proceeding.

Accordingly, as a practical matter and in light of the relief sought, New Generation has set forth facts sufficient to make out a prima facie showing of a meritorious defense based on a potentially colorable motion to dismiss Plaintiff's complaint, pursuant to CPLR 3211(a)(4).

Wherefore it is hereby,

ORDERED that Defendant's motion to vacate the default judgment as to Defendant, New Generation, is granted; and it is further;

ORDERED that Defendant's motion to compel Plaintiff to accept a late answer from Defendant, New Generation, is granted; and it is further;

ORDERED that Defendant, New Generation, is directed to answer the complaint within 20 days of service of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 23, 2014

J.S.C.

HON. EILEEN A. RAKOWER

[* 5]

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE