State Farm Mut. Auto. Ins. Co. v Distinguished Diagnostic Imaging, P.C.
2016 NY Slip Op 32805(U)
February 25, 2016
Supreme Court, Nassau County
Docket Number: 601177/15
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM INDEMNITY COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiffs,

- against -

DISTINGUISHED DIAGNOSTIC IMAGING, P.C.,

Defendant.

TRIAL/IAS PART 37
NASSAU COUNTY

Index No.: 601177/15
Motion Seq. Nos.: 01, 02
Motion Dates: 11/23/15
12/23/15
XXX

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmations, Affidavits and Exhibits	**1**
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	**2**
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01)	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move (Seq. No. 01), pursuant to CPLR § 3215, for entry of a default judgment against defendant.

Defendant opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3012(d), for an order granting an extension of time to interpose an Answer. Plaintiffs oppose the cross-motion.

Plaintiffs prove jurisdiction by annexing a copy of the Affidavit of Service of the Summons and Verified Complaint upon defendant. *See* Plaintiffs' Affirmation in Support Exhibit 2. Plaintiffs prove defendant's default in the Affirmation of Counsel. Plaintiffs prove their claims in the Affidavits of Tina Deppe, a Claims Representative in State Farm's No-Fault Department, Brian Rafalski, a Team Manager for plaintiffs, and the Affirmations of Elizabeth Adels, Esq., Patrick McDonnell, Esq. and Joseph Schwarzenberg, Esq., all counsel for plaintiffs, and the supporting exhibits. *See* Plaintiffs' Affidavits in Support; Plaintiffs' Affirmations in Support; CPLR § 3215(f); *Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (1st Dept. 1987).

The Court notes plaintiffs' compliance with additional service of the Summons and Verified Complaint as required by CPLR § 3215(g)(4)(i). *See* Plaintiffs' Affirmation in Support Exhibit 3.

In opposition to plaintiffs' motion (Seq. No. 01), counsel for defendant submits that "plaintiff's motion for a default judgment should not be granted as Defendant's affidavit demonstrates a reasonable excuse for its failure to interpose a timely Answer. There is also a meritorious defense which shall be demonstrated below."

Counsel for defendant argues, "[i]n the instant case, defendant failed to put in a timely answer because it reasonably believed that their (*sic*) attorneys, Gabriel and Shapiro, LLC., were already aware of the above captioned pending suit. Gabriel and Shapiro LLC is the same counsel previously retained by above captioned defendant to prosecute the collection of underlying no-fault claims that were submitted to Plaintiff and now comprise the claims plaintiff is seeking to obtain a declaration of 'no coverage' on. Defendant believed they were represented by this firm because they were in fact represented by this firm on the *related* actions, but not on the particular

declaratory judgment action that was commenced by the Plaintiff herein. The defendant reasonably believed that its attorneys would have also been notified of the pending suit as the defendant was already represented by this firm in the numerous pending no fault matters that are in fact the subject of this declaratory judgment action. This is a reasonable belief and forms the gravamen of defendant's excuse. Plaintiff arguably should have simultaneously noticed this firm that service of the underlying summons and complaint had been served on the defendant." *See* Defendant's Affirmation in Opposition and Support Exhibit A.

With respect to defendant's claim as to a meritorious defense, counsel for defendant submits that, "[a]n examination of plaintiff's spread sheet ... affixed to its summons and complaint indicates that defendant is precluded as a matter of law from asserting its defense with respect to at least one of the underlying claims. Plaintiff admits receiving a bill for the assignor Javada A Cotton in the amount of $874.43 for date of service 01-02-15 on 01-15-15. Thereafter, plaintiff issued two verification requests in the form of EUO's (*sic*) that were allegedly mailed on 10-16-14 for the date of examination 11-24-14, and 11-12-14 for the date of examination 12-15-14, respectively. Thereafter, plaintiff issued a denial of claim dated 01-21-15, a full 37 days *after* the alleged second EUO no show of 12-15-14. The holding in Westchester Med. Ctr. V. Lincoln Gen. Ins. Co. [citation omitted] requires that in order for this defense to be preserved, it must have been denied timely. It clearly was not by Plaintiff's own admission. [citation omitted]. Furthermore, the alleged 'no-show' affirmations ... are legally insufficient to meet plaintiff's prima facie burden to receive its declaratory judgment. There is a whole line of cases which elucidate the details that a sufficient 'no-show' affidavit must contain. Plaintiff's affirmations are precisely the types of 'proofs' of no show that have been repeatedly rejected by the Appellate

Term Second Department.... In the instant underlying motion, plaintiff's three annexed attorney affirmation fail to adequately demonstrate real personal knowledge of the alleged nonappearance of the defendant... They fail to recite 'all material facts.'... The specific attorneys alleging personal knowledge do not even say with certainty that they were actually assigned to conduct the EUOs in question on that particular date. There are (*sic*) no proof of contemporaneous notes or documentary evidence recording the actual know (*sic*) show made at or about the time of these events. There is no court reporter transcript subscribed and sworn to by the stenographer. A general innocuous reference to the review of 'office records' with nothing else is insufficient to demonstrate personal knowledge and such 'foundation' has been rejected by the Appellate Term." *See* Defendant's Affirmation in Opposition and Support Exhibits B and C.

John Rigney, M.D. ("Dr. Rigney"), owner of defendant corporation, submitted an Affidavit in support of the cross-motion (Seq. No. 02). *See* Defendant's Affirmation in Opposition and Support Exhibit A. Dr. Rigney states that "[d]efendant admittedly failed to put in a timely Answer but now asks leave of this Honorable Court to serve an Answer so that this matter can be decided on the merits. Initially, I was unaware that I had to timely inform my attorneys when I received the underlying Summons and Complaint.... Distinguished Diagnostic P.C. has *ongoing* legal representation from the law firm of Gabriel and Shapiro LLC for the underlying no-fault insurance claims that are the subject of this action. I mistakenly assumed that since I had such ongoing legal representation in all the civil matters that comprise this lawsuit, that my legal representation also extended to this matter, that my attorneys were aware of this related action and that they were similarly noticed. I now understand that my attorneys were not simultaneously served with this Complaint and that my assumption that such legal representation extended to matters pending in the Supreme Court as well as all Civil Courts was an unfortunate

but hopefully understandable mistake. It was not until an impending default motion was filed and served on Distinguished Diagnostic Imaging P.C. that I then realized I was not represented in this matter, that I also needed representation on this new matter, and thus immediately informed my attorneys of the pending default."

In opposition to the cross-motion (Seq. No. 02), counsel for plaintiffs argues "[a]s detailed in Plaintiff's motion for default judgment, service on Defendant was proper. In addition, Defendant does not contest that Plaintiffs served Defendant improperly (*sic*). Defendant's argument that Plaintiffs should have served defense counsel fails. When commencing an action, service must be made on a party to the action. Defense counsel is not a party to this action.... Defendant's reasonable excuse fails. Ignorance of the law is no excuse for failure to comply with the law. This is a basic common-law maxim. When Defendant received the Summons and Complaint, he should not have assumed that his defense counsel **on other matters** was representing him on **this matter**. The face of the Summons lists Defendant and Defendant's address, not defense counsel and defense counsel's address. All Defendant had to do was call defense counsel and he would have known that an Answer needed to be interposed. Defendant's assumption of defense counsel representing him is not a reasonable excuse."

Counsel for plaintiff further asserts that "[d]efendant also fails to set forth a meritorious defense. In this case, the plaintiffs scheduled numerous Examinations Under Oath ('EUOs') in connection with claims submitted to the plaintiffs by the defendant as the assignee of each of the claimants listed in the complaint. At least two (2) EUOs were scheduled in connection with the defendant's claims made as the assignee for each particular claimant/assignor listed in the complaint. The EUO notices were all properly mailed to the defendant. The defendant failed to appear for each and every duly scheduled EUO. The scheduling, mailing and no-show affidavits

and/or affirmation are all annexed to Plaintiffs' motion for default judgment. Appearance at IMEs and EUOs are conditions precedent to the insurer's liability on the policy and an insurer is entitled to deny claims based upon the failure to appear for duly scheduled IMEs and EUOs. [citations omitted]. Nowhere in Defendant's motion do they deny that the EUOs were scheduled, that Defendant failed to appear, or that Plaintiffs timely denied the bills at issue. As such, Defendants have not even made an attempt to detail a meritorious defense. Here, defendant takes issue with one (1) claim out of fifty-one (51) claims, arguing that it was not timely denied. After reviewing the claim, Defendant is wrong. The bill for claimant Javada A. Cotton., for the January 2, 2015 date of service, was received on January 15, 2015. The denial was issued on January 21, 2015, less than thirty (30) days after receipt. Here, Defendant argues that the denial is late because the second EUO no-show was on December 15, 2014. It would be impossible for Plaintiffs to deny bills before they are received. Plaintiffs time to deny starts to run from receipt. Here, the bill was timely denied."

Counsel for plaintiffs adds that, "[p]laintiffs no-show affirmations are legally sufficient. Plaintiffs have met their burden and Defendant has failed to rebut Plaintiffs showing. As set forth in the affirmations, the attorneys scheduled to conduct the EUOs affirm that, based on personal knowledge, and a review of their office's records, that (*sic*) the Defendant failed to appear on those dates. There is no legal requirement to put a statement on the record when a party fails to appear for an EUO. There is no legal requirement to attach the business records reviewed to the no-show affirmations."

On 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 its claim and proof of the defaulting party's default in answering or appearing. To

avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default *and* a potentially meritorious defense to the action (emphasis added). *See Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 932 N.Y.S.2d 109 (2d Dept. 2011); *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202 (2d Dept. 2008).

To compel the acceptance of an untimely pleading, the movant must show a reasonable excuse for the delay *and* a potentially meritorious claim or defense (emphasis added). *See Gibbons v. Court Officers' Benevolent Assn. of Nassau County*, 78 A.D.3d 654, 909 N.Y.S.2d 917 (2d Dept. 2010); *Pristavec v. Galligan*, 32 A.D.3d 834, 820 N.Y.S.2d 529 (2d Dept. 2006).

The showing of a reasonable excuse that a defendant must establish to be able to serve a late answer is the same as that which a defendant must make to be entitled to the vacatur of a default judgment. *See Stephan B. Gleich & Associates v. Gritsipis*, 87 A.D.3d 216, 927 N.Y.S.2d 349 (2d Dept. 2011). The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

A defaulting party's mistake as to, or ignorance of, the law is not a sufficient excuse to support vacatur of a default judgment against him or her. *See Yao Ping Tang v. Grand Estate, LLC*, 77 A.D.3d 822, 910 N.Y.S.2d 104 (2d Dept. 2010); *Everything Yogurt, Inc. v. Toscano*, 232 A.D.2d 604, 649 N.Y.S.2d 163 (2d Dept. 1996).

Even viewing its moving papers (Seq. No. 02) in their best light, the Court finds that defendant has failed to demonstrate both a reasonable excuse for the default and a meritorious defense.

Therefore, defendant's cross-motion (Seq. No. 02), pursuant to CPLR § 3012(d), for an order granting an extension of time to interpose an Answer is hereby **DENIED**.

Plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3215, for entry of a default judgment against defendant is hereby **GRANTED**.

Based upon the default of defendant, it is hereby

ORDERED that defendant failed to appear for the duly scheduled Examinations Under Oath ("EUO"), thereby breaching a condition precedent to No-Fault coverage and violating the No-Fault regulations. And it is further

ORDERED that the claims identified on Exhibit 1 of the subject Summons and Verified Complaint were timely and properly denied for the defendant's failure to appear for the EUOs. And it is further

ORDERED that the defendant has no right to receive payment for bills submitted to plaintiffs and listed on Exhibit 1 of the subject Summons and Verified Complaint because it failed to appear for an EUO requested by plaintiffs and thus breached a condition of coverage and violated its obligations under the No-Fault Laws.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

XXX

ENTERED

MAR 04 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
February 25, 2016