

Hertz Corp. v Acupuncture Now, P.C.

2017 NY Slip Op 30853(U)

April 25, 2017

Supreme Court, New York County

Docket Number: 159860/2015

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

THE HERTZ CORPORATION, INCLUDING ALL OF ITS
SUBSIDIARIES AND AFFILIATES, INCLUDING BUT
NOT LIMITED TO HERTZ VEHICLES, LLC and DTG
OPERATIONS, INC. d/b/a DOLLAR RENT A CAR,

Index No.: 159860/2015

Motion Date: 04/25/17

Motion Seq. No.: 001

Plaintiff,

- v -

ACUPUNCTURE NOW, P.C., NOEL BLACKMAN, M.D.,
ELECTROPHYSIOLOGICAL MEDICAL DIAGNOSTIC,
P.C., HEALTHWAY MEDICAL CARE, P.C., KSENIA
PAVLOVA, D.O., SB CHIROPRACTIC, P.C.,
SOVERA MEDICAL SUPPLY CORP., CHERELL DE LOS
SANTOS,

Defendants.

The following papers, numbered 1 to 3 were read on this motion for a default judgment and cross motion to vacate.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):**

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>	
	1
	2
	3

Cross-Motion: **Yes** **No**

Upon the foregoing papers, it is ordered that the cross motion of defendants Acupuncture Now, P.C., Noel Blackman, M.D., Healthway Medical Care, P.C., SB Chiropractic, P.C., Sovera Medical Supply Corp. to vacate the default and extend their time to answer shall be denied and the motion for a default judgment against such defendants shall be granted.

Even assuming arguendo that cross movants set forth a reasonable excuse for their default in answering, i.e. law office failure, to wit, that the papers were misfiled (see Muscarella v

Check One: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**

Herbert Constr. Corp., 2 AD3d 112 [1st Dept 2003] [misplaced file constitutes a reasonable excuse], but cf. Galaxy General Contracting Corp. v 2201 7th Ave Realty, LLC, 95 AD3d 789 [1st Dept 2012] and Pichardo-Garcia v Josephine's Spa Corp., 91 AD3d 413 [1st Dept 2012] [trial court improvidently exercised its discretion in vacating default where "law office failure", i.e. new counsel speculation about excuse of prior counsel and conflict between scheduled appearances, respectively, unsubstantiated]), the cross movants proffer an attorney affirmation only, which is insufficient to state a meritorious defense. Nor do they attach to their cross moving papers a proposed verified answer, which may, if signed by the party, serve as an affidavit of merit.

Moreover, to state a meritorious defense pursuant to CPLR 5015(a)(1), cross movant "is required to submit 'an affidavit, containing evidentiary facts, capable of being established at trial, by a person competent to attest to the meritorious nature of the [defense]'", Figueroa v Luna, 281 AD2d 204, 206 (1st Dept 2001). The arguments of cross movants' counsel that "plaintiff has failed to demonstrate compliance with the Insurance Law and regulations promulgated thereunder" and that "plaintiff has failed to demonstrate the merits of its defense to payments of the claim" do not assert evidentiary "facts" that are capable of being established at trial, but instead constitute general legal contentions about plaintiff's lack of evidence to establish its claim. The cross movants' counsel's further statement that "plaintiff has utterly failed to proffer any proof to support its

conclusory allegations" that the medical treatment rendered to the defendants' assignor at the cost of \$24,000 was unnecessary suffers from the same infirmity, as the burden is on the moving defendant to come forward with admissible evidence that the medical treatments were necessary.

Plaintiff has submitted proof of service of the summons and complaint and proof of service of this motion upon defendants Acupuncture Now, P.C., Noel Blackman, M.D., Healthway Medical Care, P.C., SB Chiropractic, P.C., and Sovera Medical Supply Corp. Plaintiff has further submitted an affidavit of facts pursuant to CPLR 3215 (f). Plaintiff has also submitted proof of the additional mailings of the summons required by CPLR 3215(g)(4). This motion is brought within one year of the default. The court shall therefore grant a declaratory judgment on default against defendants for the relief sought in the Complaint.

Accordingly it is

ORDERED that the cross motion of defendants Acupuncture Now, P.C., Noel Blackman, M.D., Healthway Medical Care, P.C., SB Chiropractic, P.C., Sovera Medical Supply Corp. to vacate their default and extend their time to answer pursuant to that CPLR § 3012(d) is denied; and it is further

ORDERED that the motion of plaintiff for a default declaratory judgment in favor of plaintiff and against defendants Acupuncture Now, P.C., Noel Blackman, M.D., Healthway Medical

Care, P.C., SB Chiropractic, P.C., Sovera Medical Supply Corp. pursuant to CPLR § 3215 is granted; and it is further

ORDERED, DECLARED and ADJUDGED that plaintiff THE HERTZ CORPORATION is not obligated to honor or pay claims for reimbursement as assignees of defendant Cherell De Los Santos to defendants ACUPUNCTURE NOW, P.C., NOEL BLACKMAN, M.D., HEALTHWAY MEDICAL CARE, P.C., KSENIA PAVLOVA, D.O., SB CHIROPRACTIC PC, SOVERA MEDICAL SUPPLY CORP. and that the defaulting defendants have no rights with respect to the September 24, 2014 alleged accident under self-insured claim number 02-2014-26136; and it is further

ORDERED that the action against the remaining parties is severed, and shall continued; and it is further

ORDERED that the remaining parties are hereby directed to attend a preliminary conference on June 13, 2017, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 331, 60 Centre Street, New York, unless judgment has been otherwise granted in this matter.

This is the decision and order of the court.

Dated: April 25, 2007

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.