

Hertz Vehs., LLC v Westchester Radiology
2018 NY Slip Op 30112(U)
January 19, 2018
Supreme Court, New York County
Docket Number: 156146/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

HERTZ VEHICLES, LLC,

INDEX NO. 156146/2016

Plaintiff,

MOTION DATE 8/22/17

- v -

MOTION SEQ. NO. 001

WESTCHESTER RADIOLOGY et al.,

Defendants.

The following papers, numbered 30–39, were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Exhibits A–G—Proof of Service | Nos. 30–39

Motion by Plaintiff Hertz Vehicles, LLC (“Hertz”) pursuant to CPLR 3215 for entry of a default judgment against defendants Westchester Radiology & Imaging, P.C. (“Westchester”), Sun Chiropractic Services, P.C. (“Sun”), Lenox Hill Radiology and Medical Imaging Associates, P.C. (“Lenox Hill”), Haar Orthopaedics & Sports Medicine, P.C. (“Haar”), Contemporary Orthopedics, P.L.L.C. (“Contemporary”), APS Chiropractic Services, P.C. (“APS”), First Alternative PLM Acupuncture, P.C. (“First”), and Alraed Physical Therapy, P.C. (“Alraed” and, together with Westchester, Sun, Lenox Hill, Haar, Contemporary, APS, and First, the “Defaulting Defendants”) is denied.

BACKGROUND

I. Plaintiff’s Allegations

This case arises from an incident on July 2, 2015, where defendants Carmen Padilla and Erike Pereira (the “Claimants”) were allegedly involved in a motor vehicle accident while in a vehicle insured by Plaintiff. The Claimants made a claim to Plaintiff as purportedly eligible injured persons under claim No. 02-2015-27240.

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

Plaintiff alleges that the collision was fraudulent. Plaintiff further alleges that the Defaulting Defendants each failed to appear for twice-duly demanded EUOs.

II. The EUO Requests

Plaintiff alleges in its affirmation and affidavit of merit that its EUO requests of each Defaulting Defendant were timely and proper as follows:

a. Westchester Radiology & Imaging, P.C.

Plaintiff alleges that Hertz received a bill from Westchester on November 5, 2015. The first EUO request was sent on December 15, 2015, scheduling an EUO for December 29, 2015. After Westchester failed to appear for the EUO, the second EUO request was sent on January 8, 2016, scheduling an EUO for January 22, 2016, for which Westchester again failed to appear.

b. Sun Chiropractic Services, P.C.

Plaintiff alleges that Hertz received a bill from Sun on September 18, 2015. The first EUO request was sent on December 15, 2015, scheduling an EUO for December 29, 2015. After Sun failed to appear for the EUO, the second EUO request was sent on January 8, 2016, scheduling an EUO for January 22, 2016, for which Sun again failed to appear.

c. Lenox Hill Radiology and Medical Imaging Associates, P.C.

Plaintiff alleges that Hertz received a bill from Lenox Hill on October 29, 2015. The first EUO request was sent on December 15, 2015, scheduling an EUO for December 29, 2015. After Lenox Hill failed to appear for the EUO, the second EUO request was sent on January 8, 2016, scheduling an EUO for January 22, 2016, for which Lenox Hill again failed to appear.

d. Haar Orthopaedics & Sports Medicine, P.C.

Plaintiff alleges that Hertz received a bill from Haar on October 2, 2015. The first EUO request was sent on December 15, 2015, scheduling an EUO for December 29, 2015. After Haar failed to appear for the EUO, the second EUO

request was sent on January 8, 2016, scheduling an EUO for January 22, 2016, for which Haar again failed to appear.

e. Contemporary Orthopedics, P.L.L.C.

Plaintiff offers no proof that it requested any EUO of Contemporary.

f. APS Chiropractic Services, P.C.

Plaintiff alleges that Hertz received a bill from APS on December 23, 2015. The first EUO request was sent on December 15, 2015, scheduling an EUO for December 29, 2015. After APS failed to appear for the EUO, the second EUO request was sent on January 8, 2016, scheduling an EUO for January 22, 2016, for which APS again failed to appear.

g. First Alternative PLM Acupuncture, P.C.

Plaintiff alleges that Hertz received a bill from First on December 29, 2015. The first EUO request was sent on February 1, 2016, scheduling an EUO for February 17, 2016. After First failed to appear for the EUO, the second EUO request was sent on February 22, 2016, scheduling an EUO for March 7, 2016, for which First again failed to appear.

h. Alraed Physical Therapy, P.C.

Plaintiff alleges that Hertz received a bill from Alraed on February 22, 2016. The first EUO request was sent on February 3, 2016, scheduling an EUO for February 19, 2016. After Alraed failed to appear for the EUO, the second EUO request was sent on February 25, 2016, scheduling an EUO for March 11, 2016, for which Alraed again failed to appear.

III. Service and the Defendants' Failure to Appear

Plaintiff commenced this action on July 22, 2016, by e-filing a summons and verified complaint. Plaintiff alleges that it served process upon the Defaulting Defendants on August 8, 2016, through the secretary of state pursuant to Business Corporation Law § 306 (b). Plaintiff further alleges that on or around July 18, 2017, the Defaulting Defendants were noticed pursuant to CPLR 3215 (g) (4) with an additional mailing of the summons and verified complaint. Plaintiff further

alleges that on or around July 18, 2017, the instant motion was served upon the Defaulting Defendants.

Plaintiff now moves for a default judgment against the Defaulting Defendants declaring that there is no no-fault coverage for their alleged claims relating to the alleged July 2, 2015 collision referenced by Hertz claim No. 02-2015-27240.

DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (See CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; see also *Liberty County Mut. v Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Here, Plaintiff has established presumptively valid proof of service of process on the Defaulting Defendants. Plaintiff has also established that the Defaulting Defendants have defaulted in answering. As such, Plaintiff is entitled to the relief it seeks if it submits sufficient proof of the facts constituting its claim.

Plaintiff argues in the instant motion that “[a]ll EUO requests of the providers were sent in a timely fashion pursuant to 11 NYCRR 65-3.5(b).” (Aff of Liew ¶ 18.) Plaintiff further argues that “the EUO letters were sent within 15 business days of receipt of claims and are timely.” (Affirmation of Stewart ¶ 21.) Plaintiff also cites to 11 NYCRR § 65-3.8 (l) and *Prestige Med. P.C. v Travelers Home & Marine Ins. Co.* (995 NYS2d 467, 470 [Civ. Ct. 2014]) and states that “even if Hertz did not timely request the EUO pursuant to 11 NYCRR 65-3.5 (b), which it did, a verification request not made within the 15-day period is not a fatal defect to the request.” (*Id.* ¶ 22.)

In the instant case, the claimants have attended their EUOs and it is the providers who have allegedly failed to appear for EUOs.

In the instant motion, the papers that are submitted are not in the form directed by the Court's rules. Further, Plaintiff, in simply stating that it complied with 11 NYCRR § 65-3.5 (b), makes no showing as to how it complied, other than by providing the "raw data" detailed in section II of the background, above. Plaintiff does not apply 11 NYCRR §§ 65-3.5 (b) or 65-3.8 (l) to its raw data.

It is incumbent upon movant to supply sufficient evidence and arguments to enable the Court to determine whether it complied with the procedures and time frames of the no-fault regulations. (*See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017].) It is for Plaintiff to explain to the Court specifically why it claims that it has complied with the regulations to obtain a motion granting leave for entry of a default judgment.

As one example, Plaintiff fails to make any showing as to Contemporary. Plaintiff does not explain at all why a default judgment should be entered against Contemporary. As a second example, Hertz allegedly received a bill from Sun on September 18, 2015, and allegedly sent Sun a first EUO request on December 15, 2015. This is 59 business days after Hertz's receipt of Sun's bill as alleged in Plaintiff's own affidavit. Plaintiff does not make any specific argument as to how its first EUO request of Sun, 59 business days after its receipt of the bill from Sun referenced in its affidavit, was "timely" per 11 NYCRR § 65-3.5 (b).

This Court will not rubber-stamp requests for a default judgment. Nor will it strain itself to search for a viable legal theory to conform to inapposite facts put forth by a plaintiff on such a motion. Nor will it analyze disparate raw data put together by a plaintiff on such a motion to ascertain the validity of a plaintiff's legal argument in the absence of a cognizable argument by a plaintiff that applies the law to the specific facts of the case at bar.

Inasmuch as Plaintiff seeks a judgment declaring that the Claimants are not eligible injured persons because the collision was fraudulent, this Court will not consider issuing any declaratory judgment that would inequitably affect them until they have been served with process and joined. (*See CPLR 1001.*) That the Claimants had listed an address at which they could not be found on an application for no-fault benefits relating to an accident from over two-and-a-half years ago is of no moment. Licensed process servers and other investigators determine the whereabouts of individuals every day for purposes of valid service of process. It is incumbent on Plaintiff to locate the Claimants and join them in this declaratory judgment action if any specific relief is to be granted inequitably affecting them.

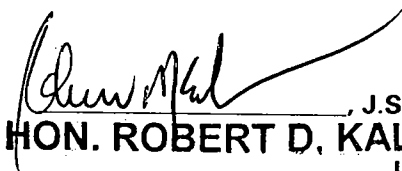
CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Hertz Vehicles, LLC's motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: January 9, 2018
New York, New York


J.S.C.
HON. ROBERT D. KALISI
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE