

**Avis Budget, LLC v Middle Vil. Diagnostic Imaging,
P.C.**

2018 NY Slip Op 30682(U)

April 13, 2018

Supreme Court, New York County

Docket Number: 154017/2016

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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AVIS BUDGET, LLC; including all of its subsidiaries and affiliates, including, but not limited to, AVIS CAR RENTAL, LLC; BUDGET CAR RENTAL, LLC; BUDGET TRUCK RENTAL, LLC; and PAYLESS CAR RENTAL, INC.,

Index Number: 154017/2016

Plaintiff,

Motion Sequence Number: 002, 003

-against-

Decision and Order

MIDDLE VILLAGE DIAGNOSTIC IMAGING, P.C.; JULES FRANCOIS PARISIEN, M.D.; CHARLES DENG ACUPUNCTURE, P.C.; ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC; PERSONAL HOME CARE PRODUCTS CORPS.; DARREN T. MOLLO, D.C.; ALLAY MEDICAL SERVICES, P.C.; KSENIA PAVLOVA, D.O.; REYNALDO MEYERS; JASON RODRIGUEZ; AL QASIM CHEN SEE; and ALAIN ANDRE,

Defendants.
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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on (1) plaintiff's motion for default judgment as against defendant Jules Francois Parisien, M.D.; (2) defendant Parisien's cross-motion to compel plaintiff to accept his answer; and (3) plaintiff's motion for summary judgment:

Papers Numbered:

| | |
|--|---|
| <u>Plaintiff's Motion for a Default Judgment</u> (Motion Seq. 001) | |
| Notice of Motion - Affirmation - Affidavit - Exhibits | 1 |
| Notice of Cross-Motion - Affirmation - Exhibits | 2 |
| Reply Affirmation | 3 |
| <u>Plaintiff's Motion for Summary Judgment</u> (Motion Seq. 002) | |
| Notice of Motion - Affirmation - Exhibits | 4 |
| Affirmation in Opposition- Exhibits | 5 |
| Reply Affirmation | 6 |

Background

On or about May 12, 2016, plaintiff, Avis Budget, LLC, including all of its subsidiaries and affiliates, including, but not limited to, Avis Car Rental, LLC, Budget Car Rental, LLC, Budget Truck Rental, LLC, and Payless Car Rental, Inc. (collectively, "Avis"), commenced this action for a judgment declaring that it owes no duty to pay any pending or future no-fault claims arising out of an April 13, 2015 motor vehicle collision in which defendants Reynaldo Meyers, Jason Rodriguez, Al Qasim Chen See, and Alan Andre (collectively, "the Claimants") were allegedly injured. The medical provider defendants (as the Claimants' assignees) thereafter sought no-fault benefits for treatment rendered to the Claimants for their alleged injuries. Avis submits the police report that was made on the date of the alleged accident, which states, inter alia: that the driver of the insured vehicle ("Automobile") was defendant Rodriguez; that the driver of the other vehicle claimed that she was stopped at a stop sign and was struck by the Automobile when she slowly entered the intersection; that the air bags of neither vehicle deployed; that the Claimants were all conscious at the scene; and that none of the Claimants claimed any injuries or received any medical treatment right there. Thereafter, pursuant to its rights under the No-Fault Regulations, Avis allegedly duly and properly sought Examinations Under Oath ("EUOs") of

the Claimants to confirm the legitimacy of the collision and the necessity of any alleged medical treatment. Avis alleges that, despite these demands, all Claimants failed to appear for their scheduled, and re-scheduled, EUOs. Avis further alleges that based on the circumstances, it properly maintained a founded belief that the alleged injuries were not causally related to an insured incident.

The summons and complaint were served upon the following provider defendants via the Secretary of State: on May 23, 2016, Darren T. Mollo, D.C. ("Mollo") and Jules Francois Parisien, M.D. ("Parisien") were served; and on May 27, 2016, Middle Village Diagnostic Imaging, P.C. ("Middle"), Charles Deng Acupuncture, P.C. ("Deng"), Island Life Chiropractic Pain Care PLLC ("Island"), Personal Home Care Products Corp. ("Personal"), and Allay Medical Services, P.C. ("Allay") were served. Service upon the aforementioned provider defendants was complete on the same date as delivery. On June 13, 2016, pursuant to CPLR 311, defendant Ksenia Pavlova, D.O. ("Pavlova") was served; service was complete on June 26, 2016. Pursuant to CPLR 308(2), the summons and complaint were served upon the following individual defendants: on May 30, 2016, Jason Rodriguez was served and service upon him was complete on June 16, 2016; on June 1, 2016, Alain Andre was served and service upon him was complete on June 16, 2016; and on July 9, 2016, Reynaldo Meyers was served and service upon him was complete on August 1, 2016. By Notice of Discontinuance dated June 30, 2016, the parties stipulated to discontinue the instant action as against defendant Al Qasim Chen See only. At the latest, defendants' answers were due to be served by early August, 2016.

By notice of motion dated July 7, 2016, defendants Parisien, Deng, Island, Personal, Mollo, Allay, Pavlova, and Meyers ("the Rybak Defendants"), moved, pursuant to CPLR 3211(a)(4) & (7), to dismiss the complaint, essentially alleging that the complaint fails to state a cause of action. By Decision and Order dated January 13, 2017, this Court denied the motion, finding that the instant action is proper and, indeed, commonplace, and not subject to dismissal. On or about February 13, 2017, the Rybak Defendants, minus Parisien, filed an answer ("the Answer"). To date, defendants Middle, Parisien, Rodriguez, and Andre have failed to appear, answer, or otherwise move against the complaint.

The Instant Motions

By notice of motion dated April 10, 2017, Avis now moves, pursuant to CPLR 3215, for a default judgment as against Middle, Parisien, Rodriguez, and Andre only. By notice of motion dated April 26, 2017, Parisien now cross-moves, pursuant to CPLR 3012(d), compelling Avis to accept his late answer, arguing that it was due to an inadvertent clerical error that the Rybak Firm mistakenly excluded him from the Answer.

By notice of motion dated May 18, 2017, Avis now moves, pursuant to CPLR 3212, for summary judgment against the Rybak Defendants, minus Parisien, on the grounds that the Claimants failed to respond and appear for their duly and properly scheduled EUOs, which, pursuant to the No-Fault Regulations, is a condition precedent to coverage. Avis submits, inter alia: a police report dated April 13, 2015, the date of the alleged accident; an NF-2, dated April 15, 2015, submitted by Andre; an NF-2, dated April 16, 2015, submitted by See; an NF-2, dated April 16, 2015, submitted by Rodriguez; an NF-2, dated May 12, 2015, submitted by Meyers; a letter dated July 9, 2015, notifying Andre that his EUO was scheduled for August 4, 2015; a letter dated August 4, 2015, notifying Andre that his EUO was re-scheduled for August 20, 2015; a letter dated July 9, 2015, notifying Rodriguez that his EUO was scheduled for July 28, 2015; a letter dated July 28, 2015, notifying Rodriguez his EUO was rescheduled for August 12, 2015; a letter dated August 12, 2014, notifying Rodriguez his EUO was rescheduled for a second time for September 1, 2015; a letter dated July 9, 2015, notifying See that his EUO was scheduled for July 31, 2015; a letter dated August 3, 2015, notifying See that his EUO was rescheduled for a second time to August 13, 2015; and a letter dated August 7, 2014, notifying Meyers that his EUO was scheduled for August 26, 2015. Attached to each of the aforementioned letters are envelopes postmarked to the respective dates the letters were sent, and certified mail receipts of each letter.

In opposition, the Rybak Defendants argue, inter alia: (1) that Avis has not met its burden to establish whether it timely and properly requested the EUOs, as it failed to submit proof of when the Claimants' NF-2s were received and, thus, whether it sent to Claimants the EUO request letters within 30 days of their receipt, as required by 11 NYCRR § 65-3.5(d); and (2) that substantial and necessary discovery remains outstanding, precluding summary judgment at this stage.

Discussion

I. Avis's Motion for a Default Judgment Denied; Parisien's Cross-Motion to Compel Granted

Avis has failed to establish its entitlement to a default judgment as against Middle, Parisien, Rodriguez, and Andre. Although, to date, Middle, Rodriguez, and Andre have failed to answer or otherwise appear in this action or move against the complaint, and their respective times to do so have long since expired, Avis failed, pursuant to CPLR 3215(g), to send the aforementioned defendants additional notice of the summons and complaint. See CPLR 3215(g)(3) & (4) ("When a default judgment based upon nonappearance is sought against a natural person [or a corporation which has been served pursuant to Business Corporation Law § 306], an affidavit *shall* be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment"); see also Burlington Ins. Co. v Aisyk Co., Inc., 153 AD3d 777, 778 (2d Dept 2017) ("the Supreme Court properly denied [plaintiff's] motion for leave to enter a default judgment against [defendants]. In support of its motion, the plaintiff failed to submit the statutorily required proof of compliance with CPLR 3215(g)(4)(i) [and] CPLR 3215(g)(3)(i)"). Thus, as Avis has failed to demonstrate its compliance with CPLR 3215(g), its motion for a default judgment is denied.

Parisien's cross-motion to compel Avis to accept his answer is hereby granted. Although the Rybak Firm failed to include Parisien in the Answer it submitted on behalf of the other Rybak Defendants, the Court finds that an inadvertent clerical error in mistakenly excluding Parisien from the Answer establishes a reasonable excuse for the default. See CPLR 3012(d) ("the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default"); see also Watson v Pollacchi, 32 AD3d 565, 565 (3d Dept 2006) ("while there is no question that defendant's excuse of law office failure could have been more clearly articulated, keeping in mind that public policy favors the resolution of cases on the merits, we conclude that the court did not abuse its discretion in accepting that excuse in this instance") (internal citations omitted). The record establishes that the Rybak Firm was representing Parisien at the time it moved to dismiss the complaint on behalf of all the Rybak Defendants, including Parisien. As no Notice of Appearance was subsequently filed by another attorney on Parisien's behalf, the reasonable conclusion to reach is that the Rybak Firm never stopped representing Parisien in this matter, and it was solely due to a clerical error that Parisien's name was left out of the Answer. Furthermore, as Parisien argues in its cross-motion, Avis will not be caused to suffer any prejudice by being compelled to accept Parisien's answer because the only result from this Court granting the requested relief is that Avis will not be able to rely on an inadvertent default and will have to establish its cause of action on the merits.

Accordingly, Avis's motion for a default judgment as against Middle, Parisien, Rodriguez, and Andre is hereby denied without prejudice to renewal upon a set of proper papers; and Parisien's cross-motion to compel Avis to accept his late answer is hereby granted.

II. Avis's Motion for Summary Judgment Denied

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Avis failed to establish entitlement to summary judgment against any of the defendants because Avis did not demonstrate that the Claimant's EUOs were timely scheduled, i.e., within 30 days from receipt of the Claimant's NF-2s. See 11 NYCRR § 65-3.5(d) ("If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms"); see also American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 842 (1st Dept 2015) ("plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law"). Currently, all the record shows is that the Claimants submitted NF-2s, and that Avis notified and scheduled, and re-scheduled, the Claimants' EUOs. What is lacking are the dates on which Avis received the Claimants'

NF-2s, leaving this Court to speculate as to the timeliness of the EUO requests. Accordingly, this Court cannot determine whether Avis complied with the applicable no-fault regulations in scheduling the Claimants' EUOs. "Although any one of [the Claimants'] medical care providers may have submitted a prescribed verification form to establish a claim well within 30 days before [April 13, 2015], or afterward, plaintiff nowhere provides that evidence." See American Tr. Ins. Co. v Denis, 2014 NY Slip Op 30385(U) (Supreme Court, New York County 2014).

Accordingly, Avis's motion for summary judgment as against Deng, Island, Personal, Mollo, Allay, Pavlova, and Meyers is hereby denied without prejudice to renewal upon a set of proper papers.

Conclusion

Motion for a default judgment denied without prejudice to renewal upon a set of proper papers. Cross-motion to compel plaintiff to accept defendant Jules Francois Parisien, M.D.'s answer granted. Plaintiff's motion for summary judgment denied without prejudice to renewal upon a set of proper papers.

Defendant Jules Francois Parisien, M.D. may serve an answer within 30 days of the date hereof.

Dated: April 13, 2018



Arthur F. Engoron, J.S.C.