| **Dawson v Carrier** |
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| 2018 NY Slip Op 31393(U) |
| June 29, 2018 |
| Supreme Court, Tioga County |
| Docket Number: 48039 |
| Judge: Eugene D. Faughnan |
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 8th day of June, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

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DEREK W. DAWSON and SUSAN DAWSON

Plaintiffs,

-vs-

MARY J. CARRIER

Defendant.

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DECISION AND ORDER

Index No. 48039
RJI No: 2018-0083-M

APPEARANCES:

COUNSEL FOR PLAINTIFFS:

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COUNSEL FOR DEFENDANT:

THE LAW OFFICE OF JOHN TROP
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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court upon a motion for a default judgment filed April 10, 2018 by Derek W. Dawson and Susan Dawson ("Plaintiffs") and a cross-motion filed on May 30, 2018 by Mary J. Carrier ("Defendant") opposing Plaintiffs' motion and seeking an order compelling Plaintiff to accept her untimely answer.

This action involves a motor vehicle accident occurring in Tioga County on Route 17C on March 29, 2016. Plaintiffs commenced this action by filing a verified complaint on December 1, 2017. Plaintiffs submitted proof of service occurring on December 28, 2017. Plaintiffs allege that Plaintiff Derek Dawson ("Dawson") was traveling west on Route 17C and with the right of way when Defendant turned into Dawson resulting in serious injuries as that term is defined in Insurance Law §5102(d). Plaintiffs also allege that Defendant pled guilty to violating Vehicle and Traffic Law §1141 for failing to yield the right of way. The complain also includes a loss of consortium claim.

Defendant did not answer the verified complaint within 20 days pursuant to CPLR §3012(a). On February 1, 2018, Plaintiffs' counsel sent a copy of the complaint to Defendant's insurance carrier and granted Defendant an extension to answer to February 9, 2018. Defendant did not answer by the extended deadline. Defendant attempted to serve an answer on April 27, 2018 but Plaintiffs' attorney rejected the answer as untimely.

Plaintiffs seek a default judgment regarding both negligence and serious injury. Defendant argues that the period of default is relatively short and the Plaintiffs have not been prejudiced. Additionally, Defendant argues that even if she is found to have defaulted, the Plaintiffs would still have the burden of proving serious injury and damages.

Generally, in order to be granted a default judgment, Plaintiff must submit "proof of service of

the summons and the complaint, ... proof of the facts constituting the claim, the default and ... [p]roof of mailing the notice required by [CPLR §3215 (g) (4) (i)]" CPLR §3215 [f]. Here, Plaintiffs' counsel's affidavit and the affidavit of service establish service and Defendant's default. Additionally, Plaintiffs' verified complaint and Dawson's affidavit provide sufficient proof of the facts constituting the claim.

Defendant does not contest that she defaulted in answering. Rather, she urges the Court to compel the Plaintiffs to accept her untimely answer. Pursuant to 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." "To that end, '[w]hether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.'" *Dinstber v. Allstate Ins. Co.*, 75 AD3d 957, 957-58 (3rd Dept. 2010), *citing Rickert v. Chestara*, 56 AD3d 941, 942 (3rd Dept. 2006), *quoting Harcztark v. Drive Variety, Inc.*, 21 AD3d 876, 876-877 (3rd Dept. 2005); *see Watson v. Pollacchi*, 32 AD3d 565, 565 (3rd Dept. 2006). The existence of a meritorious defense may also be considered in support of a motion to compel acceptance of a late answer and in opposition to a motion for summary judgment. *ABS 1200, LLC v. Kudriashova*, 60 AD3d 1164, 1165 (3rd Dept. 2009)

In the present matter, no excuse is proffered for Defendant's default in answering. No proof has been submitted by a person with knowledge as to the cause of the Defendant's default in answering. Defendant acknowledges that despite the service of the verified complaint and the additional time granted by Plaintiffs' counsel, Defendant's carrier did not even assign the case to defense counsel until April 24, 2018; 77 days beyond the additional time extended by Plaintiff's counsel and over four months after the complaint was served. Defendant argues that the default in answering is akin to law office failure. However, no explanation of the nature or cause of that failure has been proffered.

Further, Defendant failed to submit a proposed answer that would allow the Court to evaluate potential meritorious defenses to the action. *Id. at* 1165. Defendant has failed to proffer any other evidence of a meritorious defense to the claim of negligence. Defendant offered no evidence to suggest that Dawson in any way contributed to the accident or that Defendant's negligence should be excused.

Moreover, at the time Defendant filed her cross motion, Defendant had been in default of answering for over five months. Plaintiffs filed their motion for default on April 10, 2018 and then, presumably in response to the motion, Defendant's carrier assigned defense counsel on April 24, 2018. Given these facts, it can be reasonably inferred that had Plaintiffs not filed their motion for default judgment, Defendant's carrier would not have even assigned counsel, much less sought to compel the acceptance of a late answer. The Court considers the carrier's delay to be reflective of willfulness rather than mere neglect.

In light of the Defendant's failure to offer a reasonable excuse for the delay, failure to provide any evidence of a meritorious defense, the failure to submit a proposed answer, and the five month delay in seeking to compel acceptance of a late answer, the Court concludes that the Defendant has failed to sustain her burden. Therefore, the Defendant's motion to compel Plaintiffs to accept the late answer pursuant to CPLR 3012(d) is **DENIED**.

Accordingly, Plaintiffs' motion for a default judgment on the issue of negligence is **GRANTED**. The Court reaches a different conclusion regarding that portion of Plaintiffs' motion which seeks a default judgment on the issue of "serious injury".

Pursuant to Insurance Law §5104, in "any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury." It has been held that in an action arising from a motor vehicle accident, serious injury is a "threshold" issue. *See Licari v. Elliott*, 57 NY2d 230, 237 (1982).

Thus, proof of serious injury is a necessary element of a *prima facie* case pursuant to Insurance Law §5104.

"[T]he peculiar nature of a "serious injury" claim crosses the boundaries of both the liability and the damages spheres of a lawsuit. While the injuries sustained by a plaintiff in an action arising from a motor vehicle accident constitute the measure of his or her damages, it is the "serious" nature of those injuries which must be established before any recovery for pain and suffering can be obtained." *Abbas v. Cole*, 44 AD3d 31, 33-34 (2nd Dept. 2007). The seriousness or the extent of injuries is not relevant to the issue of damages. *See Id.* at 34. "Issues which pertain to the extent of the injuries suffered by a plaintiff, including whether a plaintiff suffered a serious injury as such term is defined in Insurance Law § 5102(d), should generally be left for the damages phase of the trial." *Perez v. State of New York,* 215 AD2d 740, 742 (2nd Dept. 1995) (citation omitted).

The Court concludes that establishing Defendant's default only resolves the issue of fault. The issue of serious injury remains to be proved by Plaintiffs at an inquest on damages. Therefore, that portion of the Plaintiffs' motion which seeks a default judgment on the issue of serious injury is **DENIED**.

IT IS SO ORDERED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: June 29, 2018
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice