

Country-Wide Ins. Co. v Shi Zhang Chan

2016 NY Slip Op 32189(U)

October 25, 2016

Supreme Court, New York County

Docket Number: 161528/14

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

SHI ZHANG CHAN

(“Eligible Injured Party Defendant”),

And

A.C. MEDICAL P.C., VITAL CHIROPRACTIC,
MINGMEN ACUPUNCTURE SERVICES P.C., SP
ORTHOTIC SURGICAL & MEDICAL SUPPLY INC.,
KAPPA MEDICAL, P.C., and METROPOLITAN
MEDICAL & SURGICAL, P.C.,

(“Medical Provider Defendants”),

Defendant(s).

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ANNEXED	1-2 (Exs. A-K)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company moves, pursuant to CPLR 3215, for a default judgment against defendants SP Orthotic Surgical & Medical Supply Inc. (“SP Orthotic”), Kappa Medical, P.C. (“Kappa”) and Metropolitan Medical & Surgical, P.C. (“Metropolitan”) on the ground that the said defendants have failed to answer the complaint,

along with such other and further relief as this Court deems just and proper. After a review of plaintiff's papers and the relevant statutes and case law, plaintiff's motion, which is unopposed, is **denied and the action is disposed as follows.**

FACTUAL AND PROCEDURAL BACKGROUND:

This declaratory judgment action arises from a motor vehicle accident on May 17, 2014. Ex. A. Plaintiff seeks a judgment declaring that it has no obligation to pay defendants' claims for No-Fault benefits because the eligible injured party, Shi Zhang Chan, breached a condition precedent to coverage. Ex. A. Specifically, plaintiff alleges that Chan failed to appear for duly noticed examinations under oath July 16 and August 12, 2014. Exs. A, C, D, E and F.

Plaintiff commenced the captioned action by filing a summons and verified complaint on November 19, 2014. Ex. A. In its verified complaint, plaintiff asserted as a first cause of action that Chan's breach of a condition precedent relieved it of any obligations to Chan under the policy or to pay No-Fault claims submitted by any of the defendants who provided services to Chan arising from the alleged accident. Ex. A. As a second cause of action, plaintiff alleged that it was entitled to a permanent stay of all arbitrations, lawsuits and other claims relating to the alleged accident. Ex. A.

Country-Wide further alleged that the policy it issued contained the "New York Mandatory Personal Injury Protection Endorsement" of the No-Fault regulations, which provide No-Fault benefits pursuant to certain conditions and terms. Ex. A. Such conditions prohibited any action against Country-Wide unless, as a condition precedent thereto, there was full compliance with the terms of the coverage, which included an examination under oath of defendant upon Country-Wide's request. Ex. A.

Plaintiff thereafter served the summons and verified complaint on SP Orthotic, Kappa, and Metropolitan. Ex. B. SP Orthotic was served on February 4, 2015 by personally delivering the summons and verified complaint to “Alex”, a “Manager” for SP Orthotic, at 2946 Avenue S, Brooklyn, New York. Ex. B. Alex confirmed and acknowledged that he had authority to accept service on behalf of SP Orthotic. Ex. B. Metropolitan was served on February 4, 2015 by personally delivering the pleadings to an individual named “Vicky”, a “Manager” for Metropolitan, at 2076 East 13th Street, Brooklyn, New York. Ex. B. Vicky confirmed and acknowledged that she had authority to accept service on behalf of Metropolitan. Ex. B. Kappa was served on February 4, 2015 by personally delivering the pleadings to an individual named “Ralphy”, a receptionist for Kappa, at 1401 Ocean Avenue, Brooklyn, New York. Ex. B. Ralphy confirmed and acknowledged that he had authority to accept service on behalf of Kappa. Ex. B. The process server then mailed the summons and verified complaint to each of the aforementioned defendants. Ex. B.¹

To date, SP Orthotic, Kappa and Metropolitan have not answered the verified complaint. On July 6, 2016, plaintiff filed the instant motion for a default judgment against SP Orthotic, Kappa, and Metropolitan based on their failure to answer.

By order dated October 18, 2016, this Court denied plaintiff’s motion (motion sequence 001) seeking an extension of time to serve defendants Chan, A.C. Medical P.C., Vital Chiropractic, and Mingmen Acupuncture Services P.C. Since those defendants were never served, this Court never obtained jurisdiction over them.

¹Although plaintiff asserts that each of these corporations was served at its “dwelling place/usual place of abode” (Plaintiff’s Aff. In Supp., at pars. 5-7), this Court need not address this apparent inconsistency given the result reached below.

PLAINTIFF'S ARGUMENT:

Plaintiff argues that it is entitled to a default judgment against SP Orthotic, Kappa, and Metropolitan due to Chan's failure to appear for an EUO. It maintains that, because Chan is barred from recovering from plaintiff under the policy, the aforementioned defendants are also barred, as assignees, from recovering under the policy.

LEGAL CONCLUSIONS:

Plaintiff's motion for a default judgment is denied since it failed to move for such relief within one year of defendants' default in answering the complaint. CPLR 3215 (c) provides that:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall* dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. (*emphasis added*).

[T]he policy behind this statute is "to prevent plaintiffs from unreasonably delaying the termination of an action." (*Reyes v Dunbar*, 124 Misc2d 958, 959 [1984], quoting Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3215 [last available in 1992]; *see also* Thirteenth Annual Report of NY Judicial Council, 1947, at 215.)

Portfolio Recovery Assocs., LLC v Ploski, 36 Misc3d 186, 189 (Sup Ct Westchester County 2012).

A court properly exercises its discretion in dismissing a complaint where a plaintiff fails to seek a default judgment within one year after defendant's default in answering the complaint and plaintiff makes no showing of sufficient cause why the complaint should not be dismissed. *See Ewart v Maimonides Med. Ctr.*, 239 AD2d 543, 544 (2d Dept 1997); *Herzbrun v Levine*, 23 AD2d

744 (1st Dept 1965).

As noted above, SP Orthotic, Kappa and Metropolitan were served with process on February 4, 2015. Ex. B. Since defendants' time to answer expired, at the latest, on March 6, 2015, 30 days after February 4, 2015, plaintiff thus had until March 6, 2016, one year after service of the summons and verified complaint, to move for a default judgment. *See* CPLR 3215(c). However, plaintiff did not file the instant motion until July 6, 2016, approximately four months after the expiration of its time in which to do so. Since plaintiff did not "take proceedings" within one year of defendants' default, it has the burden of demonstrating why its complaint should not be dismissed. However, no such showing has even been attempted here. Thus, the claims asserted against SP Orthotic, Kappa and Metropolitan must be dismissed pursuant to CPLR 3215 (c).

Finally, since this Court never obtained jurisdiction over the remaining defendants Chan, A.C. Medical P.C., Vital Chiropractic, and Mingmen Acupuncture Services P.C., and plaintiff's motion for an extension of time to serve those entities has been denied for the reasons set forth in the order of this Court dated October 18, 2016 (motion sequence 001), the entire action must be marked disposed.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion seeking a default judgment against defendants SP Orthotic Surgical & Medical Supply Inc., Kappa Medical, P.C., and Metropolitan Medical & Surgical, P.C. pursuant to CPLR 3215 (motion sequence 002) is denied; and it is further,

ORDERED that the Clerk of the Court shall mark this matter dismissed as against defendants SP Orthotic Surgical & Medical Supply Inc., Kappa Medical, P.C., and Metropolitan Medical & Surgical, P.C. pursuant to CPLR 3215(c); and it is further,

ORDERED that the Clerk of the Court shall mark the entire action disposed since plaintiff's motion for an extension of time to serve process on remaining defendants Shi Zhang Chan, A.C. Medical P.C., Vital Chiropractic, and Mingmen Acupuncture Services P.C. (motion sequence 001) was denied by order of this Court dated October 18, 2016; and it is further,

ORDERED that the preliminary conference scheduled for November 22, 2016 is hereby cancelled; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 25, 2016

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT