

GEICO v Andrieux

2007 NY Slip Op 34234(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 8491-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

G.E.I.C.O. a/s/o ELOY YNDIGOYEN

Motion Sequence #001, #2, #3
Submitted September 14, 2007

Plaintiff,

-against-

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MARIE YANICK ANDRIEUX,

Defendant.

The following papers were read on these motions:

ANDRIEUX Notice of Motion/Order to Show Cause	1
Affirmation in Opposition.....	2
GEICO Notice of Cross-Motion.....	3
“Answer-Affirmation in Opposition”	4
ANDRIEUX Notice of Motion.....	5
Affirmation in Opposition.....	6

Pro-se defendant, MARIE YANICK ANDRIEUX, moves for an order dismissing the complaint on the ground that the plaintiff’s subrogor, ELOY YNDIGOYEN, was at fault in the underlying automobile accident due to excessive speed. The plaintiff, G.E.I.C.O.(GEICO), as subrogee of YNDIGOYEN, opposes the motion and counsel points out that defendant has not appeared in the action and her time to appear has long expired. In a companion motion, GEICO moves for an order, pursuant to CPLR §3215(a)(b), directing a default judgment or, in the alternative, that the matter be set down for an

inquest in favor of plaintiff, assessing damages, awarding costs and attorney's fees and sanctions. ANDRIEUX opposes the motion on the ground that the complaint was not properly served as she found it on her lawn. Thereafter, she moves the Court to dismiss the action "on the grounds the counsel hasn't convinced the Court that allegations made in the complaint are true and accurate". In what appears to be an "ANSWER/Affirmation in Opposition", ANDRIEUX states that the delay in serving an Answer was due to her "financial ability to retain an attorney" and because service was not effective. GEICO opposes the motion and asks the Court to first consider its motion for a default judgment and, if it reaches the question of service, to set the matter down for a traverse hearing. The motions are decided as follows:

This is a subrogation action in which GEICO seeks to recover expenditures made on behalf of ELOY YNDIGOYEN as a result of an accident that occurred on November 22, 2004, at Grand Avenue and Brooklyn Avenue, Nassau County, New York. GEICO seeks to recover monies paid to its insured for personal injury protection benefits in the sum of \$16,678.17, for additional personal injury protection benefits in the sum of \$6,000.00, and for uninsured motorist benefits in the amount of \$25,000.00. Counsel for GEICO states that the Summons and Complaint was duly served on ANDRIEUX on June 5, 2006. An Affidavit of Service from the process server reflects that "nail and mail" service was made, pursuant to CPLR §308(4), at plaintiff's "last actual address within the state", 3367 Harbor Point Road, Baldwin, New York, and with followup mailing, after three (3) prior attempts to personally serve plaintiff at said residence. It is GEICO's position that more than thirty (30) days has elapsed since ANDRIEUX's failure to appear, and that she has wilfully and deliberately failed to make an appearance and defend the claims asserted against her.

On the initiating Order to Show Cause to dismiss the action, originally dated June 7, 2007 but re-dated July 30, 2007 to provide pro-se defendant additional time to serve the motion, ANDRIEUX asserts that "plaintiff" vehicle was not damaged to the extent alleged in the complaint, nor did "plaintiff" sustain or suffer injury. She claims that "plaintiff" was traveling at "excessive" [speed] on a city street with wet road conditions, and that her vehicle was towed from the scene but that "plaintiff" drove his vehicle away, with no medical treatment given to either driver. She claims that an individual with the physical and property damage claimed would have been taken by ambulance to a nearby hospital and their vehicle would have been inoperable.

In support of its motion for a default judgment, GEICO submits the affidavit of Donna Buttner, a Subrogation Supervisor for GEICO, sworn to June 29, 2007, in which she confirms the sums paid by GEICO on behalf of its subrogor, YNDIGOYEN, and states, upon information and belief, that ANDRIEUX made a left turn in front of plaintiff's subrogor, failing to yield right of way, thereby causing the accident.

In a subsequent affirmation, counsel for GEICO points out that ANDRIEUX had been in contact with their office on numerous occasions after service upon her on June 5, 2006. As early as June 15, 2006, an individual who identified himself as her fiancé, called and stated that ANDRIEUX had been served with the summons and complaint, confirmed that the insurance on the automobile had been cancelled and inquired about "what this was all about". Counsel states that the caller was told that defendant should get an attorney. Thereafter, on June 30, 2006, GEICO received a fax from defendant requesting a 30 day extension to secure an attorney, which was denied, however a stipulation extending defendant's time to answer was forwarded, which defendant did not

sign. Thereafter, an attorney who had been contacted by ANDRIEUX faxed a request for an adjournment to review the papers, which was denied. Counsel for GEICO points out that defendant waited until August 2007 to raise, for the first time, the issue of improper service and has never offered any reason for her failure to interpose a timely answer.

Initially, the Court notes that GEICO's application for a default judgment is beyond the one (1) year period of time provided for in CPLR §3215(a) which directs that an application for a default judgment "shall be made to the clerk within one year after the default". Herein, ANDRIEUX was allegedly served the summons and complaint on June 5, 2005, and the application for a default judgment, dated June 29, 2007, was not served until July 2, 2007. For defaults not entered within one year, CPLR §3215(c), provides as follows:

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. A motion by defendant under this subdivision does not constitute an appearance in the action.

Moreover, "[i]t is well settled that where service of process has been improperly effected, any resulting default judgment is a nullity. This is so even where the defendant had actual notice of the lawsuit, and no meritorious defense, for in such case, the court never had personal jurisdiction over the defendant". *DeMartino v Rivera*, 148 AD2d 568, 539 NYS2d 38 (2nd Dept. 1989); *see also, Laurenzano v Laurenzano*, 222 AD2d 560, 635 NYS2d 668 (2nd Dept. 1995). It appears to the Court that questions have been raised as to the efficacy of service upon the defendant. The *pro-se* affidavits of the defendant are not artfully drawn but Courts will generally give some leeway to *pro-se* litigants (*see,*

Stoves & Stones, Ltd. v Rubens, 237 ADE2d 280, 655 NYS2d 385 [2nd Dept. 1997]), particularly in light of plaintiff's failure to timely file its application for a default judgment.

After a careful reading of the submissions herein, it appears to the Court that an evidentiary hearing is required to determine whether effective service of the Summons and Complaint has been obtained. If jurisdiction is found, the Court must determine whether good cause can be shown by GEICO for the delay in seeking a default judgment and why the complaint should not to be dismissed as abandoned. (*Cf. Brill v Brill*, 2 NY2d 648, 781 NYS2d 261, 814 NE2d 431 (C.A. 2004)). Accordingly, it is hereby

ORDERED, that this matter is specifically referred to the Calendar Control Part for a traverse hearing and shall appear on the calendar of CCP on April 2, 2008 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

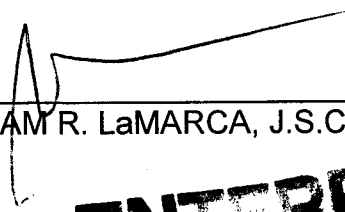
ORDERED, that defendant, ANDRIEUX, shall file a Note of Issue within ninety (90) days from the date of this order and shall serve plaintiff's counsel a copy of same by certified mail, return receipt requested; and it is further

ORDERED, that the failure to file a Note of Issue as directed may be deemed an abandonment of the claims giving rise to the traverse hearing.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 13, 2007


WILLIAM R. LaMARCA, J.S.C.

ENTERED

DEC 20 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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