

Mei Zhen Wu v Mount Sinai Med. Ctr.

2016 NY Slip Op 31541(U)

August 10, 2016

Supreme Court, New York County

Docket Number: 805389/13

Judge: Martin Shulman

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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: PART 1

-----X
 Mei Zhen Wu, as Administrator of the Estate of
 Sin Loong Ng, deceased,

Plaintiff,

Index No: 805389/13

-against-

Decision and Order

Mount Sinai Medical Center, a/k/a Mount Sinai
 Hospital, Long Island Care Center, Inc., "John
 Does" and "Jane Does", said names being fictitious,
 parties intended being medical professionals who
 rendered services to Sin Loong Ng, deceased.

Defendants.
 -----X

Hon. Martin Shulman, JSC:

In this action alleging *inter alia* medical malpractice and wrongful death, plaintiff Mei Zhen Wu, as Administrator of the Estate of Sin Loong Ng, deceased ("Wu" or "Plaintiff") moves for entry of a default judgment against defendant Long Island Care Center, Inc. ("LICC" or "Defendant"). LICC cross-moves to dismiss based upon lack of service of the summons and complaint (CPLR 3211[a][8]) and for failure to move for a default judgment within one year of the alleged default (CPLR §3215[c]).

Factual and Procedural Background

The complaint alleges that Plaintiff's decedent, Sin Loong Ng ("Ng"), became a resident of LICC, alleged to be a nursing facility, on June 10, 2011 (see complaint at Exh. A to Motion, ¶¶ 3, 7). Ng was transferred to LICC after having undergone two abdominal surgeries in May 2011 at co-defendant The Mount Sinai Hospital, s/h/a Mount Sinai Medical Center, a/k/a Mount Sinai Hospital ("Mount Sinai"), the second of which is alleged to have left him unable to speak or eat (*id.* at ¶¶ 5, 6). The complaint

further alleges that Ng was transferred back to Mount Sinai in September 2011 for a third surgery on his neck and throat, after which he was transferred back to LICC and remained there until his death on March 15, 2012 (*id.* at ¶¶ 7, 9).

Wu was appointed the administrator of Ng's estate on or about October 2, 2013 (*id.* at ¶1). She commenced this action by filing the summons and complaint on October 29, 2013. Plaintiff's counsel avers in his supporting affirmation that service was effectuated upon LICC "on December 2, 2013 by service upon a person of suitable age and discretion pursuant to CPLR Section 308(2)."¹ See Graham Aff. at ¶5. Plaintiff attaches a copy of the affidavit of service which indicates that Azzam Abderrahman (Lic. No. 0820996) ("Abderrahman") purportedly served the summons and complaint upon LICC on that date by personal delivery to "Ms. Linda Brown, Authorized to Accept". See Motion at Exh. B.

Prior to commencing this action, Plaintiff's counsel faxed a request for Ng's medical records to LICC on August 9, 2013 (Cross-Motion at Exh. A). LICC's counsel herein responded on its behalf by letter dated December 16, 2013, requesting that Wu's counsel direct all future communications to them and advising that additional documentation was required before Ng's records could be released (*id.*). Counsel for the parties continued to have intermittent communications regarding the records and it appears LICC initially released Ng's records to Plaintiff's counsel on June 3, 2014, then provided a more legible copy in July 2014 (*id.*).

¹ As LICC is not a natural person, CPLR § 308(2) is inapplicable. Assuming LICC is a corporation (as alleged in the complaint), CPLR §311 governs.

Counsel for Wu and LICC did not communicate again until on or about March 14, 2015 when Plaintiff's counsel sent a letter expressing a desire to engage in settlement discussions as well as requesting that depositions be scheduled (Cross-Motion at Exh. D). Prior thereto, LICC's counsel had received a December 24, 2014 notice pursuant to CPLR 3216 from co-defendant Mount Sinai's counsel demanding that Plaintiff resume prosecuting this action within 90 days (*id.* at Exh. C). Observing from the notice that LICC was a named defendant in this action, defense counsel contacted LICC and confirmed that LICC had no record of being served. Defendant's counsel further confirmed that no affidavit of service had been electronically filed.² As a result, LICC did not respond to Wu's counsel's March 14, 2015 letter.

By letter dated October 6, 2015, counsel for LICC informed Wu's counsel that LICC had not been served, no affidavit of service had been filed and the statute of limitations had expired (*id.* at Exh. E). After reiterating the foregoing to Plaintiff's counsel in January and March of 2016, Wu's counsel forwarded a copy of the affidavit of service to LICC's counsel on April 21, 2016 (*id.*). Upon receipt of the affidavit of service, defense counsel proceeded to contact Ms. Brown, LICC's now retired receptionist who allegedly was served, and learned that she was not authorized to accept service on LICC's behalf and had never accepted service in her 43 years of employment there. Defendant's counsel also contacted LICC's current administrator, Irwin Pomerantz, and its director of risk management, Jayne Eurell, to request that they

² This court observed in its decision and order dated October 22, 2015 (motion seq. 001) that LICC had not electronically filed an answer, nor had Plaintiff electronically filed affidavits of service of the summons and complaint. NYSCEF indicates that Plaintiff's counsel did not file the affidavits of service until April 19, 2016.

review their records. Both were unable to locate any of the pleadings allegedly served, nor any record of such service.³ Counsel for LICC then learned upon further investigation that the New York City Department of Consumer Affairs had revoked Abderrahman's process server's license on January 13, 2104, less than two months after the purported service on LICC, due to violations stemming from his allegedly having executed multiple fraudulent affidavits of service from 2009 through 2013 (see consent order, *id.* at Exh. J). Despite advising Wu's counsel of the foregoing, the within motion and inevitable cross-motion ensued.

Discussion

This court first addresses the timeliness of Plaintiff's motion. Determination of a motion for a default judgment is governed by CPLR §3215[c], which provides in relevant part:

Default not entered within one year. 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.

Wu's motion must be denied and the complaint dismissed as abandoned pursuant to CPLR §3215[c]. Here, assuming the summons and complaint were properly served on LICC on December 2, 2013, LICC had 20 days to answer (CPLR 320[a]) and would have been in default on December 23, 2013. Wu was required to move for a default judgment on or before December 23, 2014 but waited until May 19, 2016 to serve this motion. In light of this one and a half year delay and given the

³ Ms. Brown, Mr. Pomerantz and Ms. Eurell each submit affidavits in support of LICC's cross-motion (see Cross-Motion at Exhs. G, H and I).

statute's mandatory language, the motion for entry of a default judgment must be denied and the complaint dismissed as abandoned pursuant to CPLR §3215[c].

In order for this court to grant an untimely motion for a default judgment, Plaintiff was required to demonstrate a reasonable excuse for the delay and a potentially meritorious claim. See *Kohn v Tri-State Hardwoods, Ltd.*, 92 AD3d 642 (2d Dept 2012). Here, Wu's counsel argues that his firm's ongoing communications with LICC's counsel establish a reasonable excuse for the delay in that it is apparent that Plaintiff never intended to abandon the case (see *Laourdakis v Torres*, 98 AD3d 892 [1st Dept 2012]). It is unnecessary for this court to address this argument since Plaintiff wholly fails to establish that the causes of action alleged against LICC have any merit. The motion's supporting affirmation lacks any discussion of this action's merits and the unverified complaint fails to allege any specific allegations as to LICC. Indeed, the complaint's allegations focus on co-defendant Mount Sinai and it is impossible to ascertain what act(s) of negligence are alleged to be attributable to LICC.

Parenthetically, even if Plaintiff's motion had been timely, it must be denied based upon Wu's failure to comply with CPLR §3215[f], which requires the submission of "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due." Here, the complaint is not verified and the motion is supported solely by Wu's attorney's affirmation. There is only a conclusory claim of merit and no detail in the complaint. In the absence of either a verified complaint or an affidavit by the party, the entry of judgment by default is erroneous and deemed a nullity. *Feffer v Malpeso*, 201 AD2d 60, 61 (1st Dept 1994).

The portion of LICC's cross-motion to dismiss based upon lack of service is denied as moot. Had this portion of the cross-motion not been rendered moot, this court would have been compelled to set the matter down for a traverse hearing. While LICC and its employees go into lengthy detail as to their general practices and procedures upon being served with process, there are no allegations specific to service of the summons and complaint in this action.

For the foregoing reasons, the portion of Defendant's cross-motion seeking dismissal based upon noncompliance with CPLR §3215[c] must be granted, and Plaintiff's motion for a default judgment must be denied. Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that Defendant LICC's cross-motion is granted in part, and the action is dismissed as to Long Island Care Center, Inc.

The Clerk is directed to enter judgment accordingly.

Counsel for Plaintiff and Mount Sinai are directed to appear for a status conference on September 6, 2016, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York. Plaintiff's counsel is directed to notify Mount Sinai's counsel of the status conference date.

The foregoing constitutes this court's Decision and Order.

Dated: New York, New York
August 10, 2016



Hon. Martin Shulman, J.S.C.