

Country-Wide Ins. Co. v Blenman

2017 NY Slip Op 30307(U)

February 16, 2017

Supreme Court, New York County

Docket Number: 161529/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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COUNTRY-WIDE INSURANCE COMPANY,

Index No.
161529/2014

Plaintiff,

**DECISION
and ORDER**

- v -

IGENIE F. HARRIS BLENMAN,

MOT. SEQ 4

("Eligible Injured Party Defendant"),

AND

KINGS COUNTY HOSPITAL CENTER, DOSHI
DIAGNOSTIC IMAGING SERVICES PC C/O
TANGENT SYSTEMS CORP, STAND-UP MRI
OF BROOKLYN PC, MIDDLE VILLAGE
DIAGNOSTIC IMAGING PC, MAXIM
TYORKIN MD, HILLSIDE SURGICARE, NEW
BEGINNING CHIROPRACTIC PC
C/O LAW OFFICES OF GILL S SCHAPIRA PC,
M & M MEDICAL PC C/O ISRAEL, ISRAEL &
PURDY LLP, INTEGRAL ASSIST MEDICAL PC,
ARCADIA MEDICAL BILLING INC,
VISION REHAB PT PC, XVV INC, JYOTI SHAH MD,
MEDCO TECH INC C/O ISRAEL,
ISRAEL & PRUDY LLP, YEVGENTY
MARGULIS PHD CSW, TONG LI
MD PC C/O ISLAND BILLING AND
PROCESSING LLC, PROMPT MEDICAL
SUPPLY INC, GRAIG GRANOVSKY DC,
NATASHA KELLY, DUNAMIS REHAB PT PC,
JOA CHIROPRACTIC PC C/O
GARY TSIRELMAN PC, AOM MEDICAL
SUPPLY INC, STATE CHIROPRACTIC PC,
PROFESSIONAL CHIROPRACTIC CARE, PC

("Medical Provider Defendants").

Mot. Seq. 004

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is a declaratory judgment action in which plaintiff Country-Wide Insurance Company ("Country-Wide" or "Plaintiff") seeks a judgment declaring that Plaintiff has no obligation to pay defendant medical providers' claims for no-fault benefits because of Igenie F. Harris Blenman ("Blenman"), the eligible injured party defendant's, breach of a condition precedent to coverage to submit to independent medical examinations.

By Notice of Motion dated June 21, 2016 and filed on July 8, 2016, Plaintiff now moves for a default judgment pursuant to CPLR § 3215 against the following defendants: STAND-UP MRI OF BROOKLYN PC, MAXIM TYORKIN MD, HILLSIDE SURGICARE, NEW BEGINNING CHIROPRACTIC PC, INTEGRAL ASSIST MEDICAL PC, ARCADIA MEDICAL BILLING INC, VISIONREHAB PT PC, YEVGENTY MARGULIS PHD CSW, TONG LI MD PC, PROMPT MEDICAL SUPPLY INC ("Prompt"), GRAIG GRANOVSKY DC, NATASHA KELLY, DUNAMIS REHAB PT PC, JOA CHIROPRACTIC PC, STATE CHIROPRACTIC PC and PROFESSIONAL CHIROPRACTIC CARE, PC (collectively, "Defaulting Defendants"). PROMPT opposes. No other opposition is submitted.

Plaintiff submits affidavits of services showing service upon STAND-UP MRI OF BROOKLYN PC on January 5, 2015 via the Secretary of State, and proof of additional mailing; MAXIM TYORKIN MD on January 13, 2015, pursuant to CPLR 308(2); HILLSIDE SURGICARE on January 2, 2015 pursuant to CPLR 308(2); NEW BEGINNING CHIROPRACTIC PC on January 5, 2015 via the Secretary of State and proof of additional mailing; INTEGRAL ASSIST MEDICAL PC, on January 5, 2015 via the Secretary of State and proof of additional mailing; ARCADIA MEDICAL BILLING INC. on January 5, 2015 via the Secretary of State and proof of additional mailing; VISIONREHAB PT PC on January 5, 2015 via the Secretary of State and proof of additional mailing; XVV INC on January 5, 2015 via the Secretary of State and proof of additional mailing;

YEVGENTY MARGULIS PHD CSW on April 22, 2015 pursuant to CPLR 308(2); TONG LI MD PC on January 5, 2015 via the Secretary of State and proof of additional mailing; PROMPT MEDICAL SUPPLY INC on January 5, 2015 via the Secretary of State and proof of additional mailing; GRAIG GRANOVSKY DC on January 5, 2015 via the Secretary of State and proof of additional mailing; NATASHA KELLY on February 4, 2015 via CPLR 308(2); DUNAMIS REHAB PT PC on January 5, 2015 via the Secretary of State and proof of additional mailing; JOA CHIROPRACTIC PC on January 5, 2015 via the Secretary of State and proof of additional mailing; STATE CHIROPRACTIC PC on January 5, 2015 via the Secretary of State and proof of additional mailing; and PROFESSIONAL CHIROPRACTIC CARE, PC.

On February 19, 2016, plaintiff moved for an order deeming service of Plaintiff's Summons and Complaint on all Defendants as timely; or in the alternative, extending the time to file the same. Plaintiff also moved for an Order deeming the filing of the affidavit of service on all Defendants *nunc pro tunc*. By Decision and Order dated March 25, 2016, the Court granted Plaintiff's motion without opposition to the extent that it deemed service of Plaintiff's Summons and Complaint on Defendants as timely. The Court further ordered that the Affidavits of Service as to Defendants, which were filed with the Court on April 20, 2015, were deemed timely filed *nunc pro tunc*.

Plaintiff submits the attorney affirmation of R. Diego Velazquez; the affidavit of Sandra W. Garcia, employed as IME Clerk for Plaintiff; Fatima Zuhra, employed as an Administrative Assistant in Plaintiff's Medical Evaluations Unit; and the affidavit of Jessica Mena-Sibrian, who is employed as a No-Fault Litigation/Arbitration Supervisor. The affiants attest that Blenman failed to appear for duly scheduled orthopedic, neurological and chiropractic IMES on July 24, 2014 and August 14, 2014.

In opposition, Prompt submits the attorney affirmation of David Landfair. First, Prompt states that "Prompt attempted to serve an answer by first-class mail on November 19, 2015, but failed to e-file its answer. Plaintiff has never acknowledged Prompt's untimely answer." Second, Prompt argues that "Plaintiff has not taken proceedings for the entry of judgment within one year after the default" and that Prompt had previously moved for dismissal of the complaint as abandoned based on Plaintiff's failure to take proceedings for the entry of judgment within one year after the default." (See Mot. Seq. 5, still pending). Prompt argues that since Prompt was in default as of February 5, 2015, and this motion was not brought until July 8, 2016, over a year after the alleged default, and

Plaintiff's motion is untimely pursuant to CPLR 3215(c). Prompt also argues that the motion to dismiss should be denied on the grounds that Plaintiff has failed to demonstrate that the IME's were timely scheduled and properly scheduled, and that Blenman failed to appear.

Plaintiff does not submit a reply in opposition to Prompt's opposition.

CPLR 3215(f) provides:

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim * * *

CPLR 3215(c) provides:

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

"Where . . . a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and 'shall' dismiss the claim pursuant to CPLR §3215(c)." (*Giglio v. NTIMP, Inc.*, 86 A.D. 3d 301, 308 [2nd Dept. 2011]; *see also Brown v. Andreoli*, 81 A.D.3d 498, 498 [1st Dept. 2011]).

Here, Plaintiff's motion for default judgment was filed over one year after Defaulting Defendants' alleged default. Plaintiff fails to address any reasonable excuse for its untimeliness.

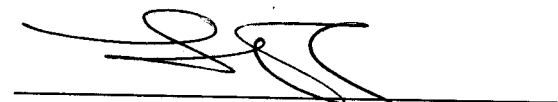
Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for default judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: ~~JANUARY~~ ^{Feb 16} __, 2017

FEB 16 2017



Eileen A. Rakover, J.S.C.