

Nationwide Ins. Co. of Am. v Morillo
2017 NY Slip Op 31093(U)
May 18, 2017
Supreme Court, New York County
Docket Number: 159204/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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NATIONWIDE INSURANCE COMPANY
OF AMERICA,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 159204/16
Mot. Seq. No. 001

INDIVIDUAL DEFENDANTS

CARLOS MORILLO, GREGORIO CASTILLO

HEALTHCARE PROVIDER DEFENDANTS

AXIAL CHIROPRACTIC, P.C.,
BARNERT SURGICAL CENTER, L.L.C.,
BEST TOUCH PT, P.C.
CITY WIDE HEALTH FACILITY, INC.,
EVERGREEN ACUPUNCTURE, P.C.,
F-R MOBILE PHYSICIAN, P.C.
GARA MEDICAL CARE, P.C.,
LESTER NADEL, M.D., P.C.,
LIDA'S MEDICAL SUPPLY, INC.,
LUBOV KLIMOVA, M.D.,
MANHATTAN BEACH PHARMACY, INC.,
MEDICSBURG, P.C.,
QUEENS CHIROPRACTIC, P.C.,
STATE CHIROPRACTIC, P.C.,

Defendants.

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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 AFFIRMATION IN SUPPORT	1-2 (Exs. A-NN)

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

In this declaratory judgment action, plaintiff Nationwide Insurance Company of America moves for an order: (1) pursuant to CPLR 3215, granting it a judgment on default against defendants

Carlos Morillo (“Morillo”), Barnert Surgical Center, L.L.C. (“Barnert”), Best Touch PT, P.C. (“Best Touch”), Evergreen Acupuncture, P.C. (“Evergreen”), F-R Mobile Physicians, P.C. (“F-R”), Gara Medical Care, P.C. (“Gara”), Lester Nadel, M.D., P.C. (“Nadel”), Lida’s Medical Supply, Inc. (“Lida’s”), Lubov Klimova, M.D. (“Klimova”), Manhattan Beach Pharmacy, Inc. (“Manhattan Beach”), Medicsburg, P.C. (“Medicsburg”), Queens Chiropractic, P.C. (“Queens Chiropractic”), and State Chiropractic, P.C. (“State Chiropractic”) due to their failure to answer or otherwise appear in this matter; (2) granting plaintiff a judgment declaring that there is not any no-fault coverage for alleged claims relating to an alleged motor vehicle on February 6, 2016 referenced by plaintiff’s claim number 689885-GC; and (3) for such other and further relief as this Court deems just and proper. After a review of plaintiff’s motion papers, as well as the relevant case law and statutes, the motion is **denied with leave to renew upon proper papers.**

Defendant Morillo was allegedly injured in a motor vehicle accident on February 6, 2016 while a passenger in a vehicle insured pursuant to a policy issued by plaintiff to defendant Gregorio Castillo (“Castillo”). Ex. A, at pars. 3-4, 33-37. Morillo sought treatment following the incident and assigned his rights to reimbursement for the costs of the treatment to the medical providers named as defendants herein. Ex. A, at par. 4. In an attempt to investigate how the alleged incident occurred, plaintiff sought to conduct Morillo’s examination under oath (“EUO”), but he failed to appear for the same. Exs. A, at pars. 11-18; Exs. CC-GG, II-NN.

Plaintiff commenced this action on November 1, 2016 (Ex. A) and now moves, pursuant to CPLR 3215, for a default judgment against defendants Morillo, Barnert, Best Touch, Evergreen, F-R, Gara, Nadel, Lida’s, Klimova, Manhattan Beach, Medicsburg, Queens Chiropractic, and State

Chiropractic due to their failure to answer or otherwise appear in this matter.¹ Upon default, plaintiff seeks a declaration that it is under no obligation to pay any claims based on the February 6, 2016 accident due to the failure by Morillo to appear for an EUO, a condition precedent to suit.

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial. . . , the plaintiff may seek a default judgment against him [or her].” In order to establish its entitlement to a default judgment a “movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011); *see Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

Here, plaintiff has failed to submit proper proof of service with respect to several of the defendants. Initially, service upon Morillo, who was purportedly served by affix and mail pursuant to CPLR 308 (4), was improper. Section 308(4) allows a plaintiff to affix the summons “to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .” “The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received.”

¹Plaintiff does not move against defendants Axial Chiropractic, P.C. and City Wide Health Facility, Inc., which have answered the complaint. Exs. B and C. Although Gregorio Castillo is named as a defendant, there is no affidavit of service reflecting that he was served and plaintiff does not move for a default against him.

McSorley v Spear, 50 AD3d 652, 653 (2d Dept 2008), quoting *Gurevitch v Goodman*, 269 AD2d 355 (2d Dept 2000).

The process server failed to show due diligence in attempting to serve Morillo personally pursuant to CPLR 308(1) or by “delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served . . .” pursuant to CPLR 308(2). The affidavit of service with respect to Morillo, completed on what appears to be a template, reflects that he was served at his “actual place of business-dwelling place-usual place of abode” by affixing the summons and complaint to his door but does not specify which of the foregoing locations was the actual place of service. Ex. D. Additionally, the three attempts to serve Morillo were all made on weekdays, one during business hours and two at times during which he could have been expected to be in transit to or from work. *See Earle v Valente*, 302 AD2d 353 (2d Dept 2003).

Further, there is no indication of what efforts the process server made in an attempt to ascertain where Morillo should be served including, but not limited to, checking with the Department of Motor Vehicles to determine his correct address. *See Spath v Zack*, 36 AD3d 410 (1st Dept 2007). Moreover, since there is no indication that the process server performed an investigation into Morillo’s actual place of employment, it was improper for him to have resorted to affix and mail service. *See O’Connell v Post*, 27 AD3d 630 (2d Dept 2006); *Riverwalk Holding, Ltd. v Fiallo*, 40 Misc3d 1211(A) (Sup Ct Queens County 2013). Given that service of the summons and complaint on Morillo was improper, a default judgment cannot be entered against him.

Plaintiff’s motion must also be denied as against Barnert, an unauthorized foreign limited liability company, since it did not strictly comply with the service requirements of Business

Corporation Law (“BCL”) 307 when it purportedly served that defendant. *See Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57(1990). The procedures set forth in BCL 307 are substantively identical to those set forth in Limited Liability Company Law § 304 and both apply to business entities not authorized to do business in New York. *See Interboro Ins. Co. v Tahir*, 129 AD3d 1687 (4th Dept 2015). Since service upon Medicsburg, an unauthorized foreign corporation, also did not comply with BCL 307, no default can be entered against that entity.²

Additionally, plaintiff has failed to submit sufficient “proof of the facts constituting the claim.” CPLR 3215(f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). It is error to issue a default judgment “without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim.” *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006). Where a verified complaint is submitted in support of a motion for default pursuant to CPLR 3215, it may be used to establish the facts constituting the claim. See CPLR 3215(f). Here, however, the complaint is verified by Stephen Klimek, who states in his verification that he is employed by “Nationwide” but does not specify whether he is employed by plaintiff Nationwide Insurance Company of America. Although the verification contains a reference to “Nationwide Affinity Insurance Company of America”, it does not reflect whether that is Klimek’s employer. Further, Klimek states neither that he is authorized to verify the complaint on behalf of plaintiff (*cf. Allstate Prop. & Cas. Ins. Co. v Carrier*, 147 AD3d 889, 890 [2d Dept 2017]) nor that he is verifying the complaint on behalf of plaintiff. Ex. A.

²Given the expiration of the 120-day period in which to serve Barnert and Medicsburg, as well as Morillo, which began to run on the date of the commencement of this action (see CPLR 306-b), plaintiff would, at this point, be required to move to extend the time to re-serve these entities, if it be so advised.


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

ORDERED that plaintiff's motion for a default judgment is denied with leave to renew upon proper papers; and it is further,

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

Dated: May 18, 2017

ENTER:



KATHRYN E. FREED, J.S.C.