

Hereford Ins. Co. v Klein
2017 NY Slip Op 31601(U)
July 31, 2017
Supreme Court, New York County
Docket Number: 153589/16
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

Index No.
153589/16
**DECISION
and ORDER**
Mot. Seq. 003

DANIEL P. KLEIN, M.D, ENZO CLINICAL LABS, INC.,
BCT MEDICAL ASSOCIATES LIMITED LIABILITY
COMPANY a/k/a BCT MEDICAL ASSOCIATES, HAAR
ORTHOPAEDICS & SPORTS MEDICINE, PC, GRAY
MEDICAL, INC., FIRST ASSIST SURGICAL SERVICES
LIMITED LIABILITY PARTNERSHIP a/k/a FIRST ASSIST
SURGICAL SERVICES, METRO 2014 PHARMACY, INC.,
a/k/a METRO PHARMACY, SB CHIROPRACTIC, PC.,
ACUPUNCTURE NOW, PC., O&P PLUS, LLC., AMERICAN
AMBULATORY SURGICAL CENTER, INC., a/k/a AMERICAN
SURGERY CENTER, SURGERY CETNER OF ORADELL
LIMITED LIABILITY COMPANY a/k/a SURGERY CENTER
OF ORADELL MEDSOURCE, LLC., HEALTHWAY MEDICAL
CARE, PC., KSENIA PAVLOVA, DO, JULES FRANCOIS
PARISIEN, M.D., HILARIO PENA-PAULINO and GENARO
MARTINEZ,

Defendants.

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HON. MELISSA A. CRANE, J.S.C.

This case arises from an automobile accident that occurred on April 10, 2015. involving defendants Hilario Pena-Paulino and Genaro Martinez (“claimants”). Claimants allege that they sustained serious bodily injuries as a result of the collision, and submitted claims to plaintiff for no-fault benefits under the insurance policy that plaintiff issued. Claimants assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on or about April 28, 2016, by a Summons and Complaint, seeking a declaratory judgment against claimants as well as numerous co-defendants/medical providers.

On August 3, 2016, defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., and Ksenia Pavlova, D.O., filed a pre-answer motion to dismiss the complaint. On August 8,

2016, plaintiff filed a cross-motion for default judgment. On October 24, 2016, the court granted default judgment to the following defaulting defendants: Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Haar Orthopaedics & Sports Medicine, P.C., Gray Medical, Inc., First Assist Surgical Services Limited Liability Partnership a/k/a First Assist Surgical Services, O&P Plus, LLC, Surgery Center of Oradell Limited Liability Company a/k/a Surgery of Oradell, and Genaro Martinez. As to defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., and Ksenia Pavlova, D.O., the court denied plaintiff's motion for default judgment and directed the defendants to file and serve an Answer within 20 days of receipt of Order with Notice of Entry (*see* plaintiff's motion for default judgment, Exhibit "I").

By Motion Sequence No. 3, Plaintiff now moves for a default judgment pursuant to CPLR § 3215 against the following defendants: Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O., and Jules Francois Parisien, M.D. As to defendant Jules Francois Parisien, M.D, it is undisputed that, to date, Parisien, has failed to answer plaintiff's complaint. Plaintiff also submits proof of the facts constituting its claim of an alleged staged accident and reason for disclaimer of coverage. Specifically, Plaintiff submits, *inter alia*, the attorney affirmation of David F. Boucher; the Verified Complaint; affidavits of service showing service upon defendants, and affidavits of Joronda McBurnie and Stephen Englert. Plaintiff therefore is entitled to a default judgment against the defendant, Jules Francois Parisien, M.D.

Plaintiff has rejected as untimely the answers of defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O. Plaintiff served and e-filed the October 24, 2016 Order with Notice of Entry, directing defendants to file and serve an answer within 20 days of receipt, on October 28, 2016. Defendants did not file their Answer until December 9, 2016. Defendants cross-move for an Order compelling plaintiffs to accept their Answer. Defendants

submit, *inter alia*, the attorney affirmation of Oleg Rybak. Rybak states that he received the Order with Notice of Entry on November 20, 2016, and defendants filed their answer within the court directed timeframe (*see* defendant's cross-motion, affirmation of Oleg Rybak, Esq., and Exhibit "A"). He states that his officer did not receive an e-filing notification of the Order with Notice of Entry. Rybak also states that defendants have a meritorious defense, namely, that plaintiffs EUO no-show defense does not apply to defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O., and further, that plaintiff cannot prove that claimants' injuries were not casually related to an insured incident.

Pursuant to CPLR 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In order to permit the service of an untimely answer as timely, Defendants must provide both a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action (*see Juseinoski v Board of Educ. Of City of NY*, 15 AD3d 363 [2005]); *see also Bunch v Dollar Budget*, 12 AD3d 391 [2d Dept 2004] (affirming trial court's decision to grant defendant's motion to compel plaintiff to accept a late filed answer where "[t]he defendant's delay in appearing and answering was brief, the default was not willful, and there was no evidence that the plaintiff was prejudice" and because "public policy favors the resolution of cases on the merit").

Here, Defendants' delay was relatively short, and Plaintiffs have not shown that they have been prejudiced. "Under these circumstances, defendants' excuse for the default is reasonable and will be accepted" (*Pieretti v Flair De Art, Inc.*, 99 AD2d 980, 981 [1st Dept 1984]; *Mendoza v Bi-County Paving*, 227 AD2d 302, 302-03 [1st Dept 1996]). Additionally,

“As a matter of general policy, disposition of controversies on the merits is favored” (*Warbett v Polokoff*, 250 NYS2d 633, 634 [1st Dept 1964]).

Finally, defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O., establish a meritorious defense. Although plaintiff alleges that certain medical providers in this case breached a condition precedent to coverage by failing to appear for EUOs, plaintiff does not contend that any of the defendants above failed to appear for EUOs. Further, defendants argue that plaintiff fails to demonstrate that the claimants staged the collision at issue, thus permitting the insurer to disclaim coverage. Despite alleged inconsistencies in the claimants’ EUO testimony, plaintiff has yet to demonstrate that defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O., submitted claims associated with an assignor who deliberately staged an accident.

Wherefore, it is hereby,

ORDERED that defendants’ Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O.’s cross-motion to compel plaintiff to accept their late filed Answer is granted, and defendants’ Answer filed on or about December 9, 2016, is deemed served nunc pro tunc; and it is further

ORDERED that Plaintiff’s motion for default judgment against defendant Jules Francois Parisien, M.D, is granted without opposition, but denied with regard to defendants Acupuncture Now, P.C., Heathway Medical Care, P.C., Ksenia Pavlova, D.O.; and it is further

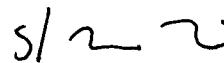
ORDERED and ADJUDGED that Plaintiff has no duty to pay any No-Fault benefits in the form of sums, monies, damages, awards or benefits to defendant Jules Francois Parisien, M.D, their agent, employees, assignees or heirs arising out of any current or future proceeding, including without limitation, arbitration and lawsuits seeking to recover No-Fault benefits with

respect to the collision that occurred on April 10, 2014, referenced in the complaint, and referenced by claim number 54513-02.

This constitutes the decision and order of the court. The court denies all other relief requested.

DATED: July 31 2017
New York, New York

ENTER:



MELISSA A. CRANE, J.S.C