

**Motor Veh. Acc. Indem. Corp. v Decora Flooring
Solutions, Inc**

2017 NY Slip Op 32457(U)

November 15, 2017

Supreme Court, New York County

Docket Number: 451475/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ ROBERT D. KALISH
Justice

PART 29

**MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION,**

INDEX NO. 451475/2017

MOTION DATE 9/13/17

Plaintiff,

MOTION SEQ. NO. 001

- v -

**DECORA FLOORING SOLUTIONS, INC
KAROLINA M WOLYNIEC,**

Defendants.

The following papers, numbered 7-19, were read on this motion for entry of a default judgment.

**Notice of Motion – Affirmation in Support – Affidavit of Service – Proposed
Order – No Fee Authorization – Exhibits A-G – RJJ RE: Notice of Motion** | **Nos. 7-19**

Motion by Plaintiff Motor Vehicle Accident Indemnification Corporation pursuant to CPLR 3215 for entry of a default judgment against defendant Decora Flooring Solutions, Inc (“Decora”) is denied, with leave to renew.

BACKGROUND

Plaintiff is a corporation created pursuant to the motor vehicle accident indemnification corporation act. Plaintiff brought this action to recover money it spent relating to a claim stemming from a motor vehicle accident on June 20, 2014 (the “Accident”).

Plaintiff alleges that Donald Ray Snyder (“Snyder”) is a qualified party alleging injuries and damages from the Accident who brought the claim in accordance with the requirements of Articles 51 and 52 of the Insurance Law. (Aff of Fossett ¶ 3.) The Accident allegedly occurred at the intersection of Broadway and Graham Avenue, Brooklyn, New York 11206. (*Ibid.*) The motor vehicle involved in the Accident was allegedly a 2003 Jeep Suburban with a New York license plate number of “FPA2242” and a vehicle identification number of “1J4GW48S53C512179” and owned by Decora (the “Jeep”). (*Ibid.*)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On October 17, 2014, Decora's former insurer, National General Insurance, allegedly informed Snyder that Decora's insurance policy #NYC-3831730-00 had been cancelled with an effective date of April 23, 2012 and that it was denying coverage for Snyder's loss. (Drew affirmation, exhibit G.) As Decora's Jeep was an uninsured vehicle, Snyder allegedly brought his claim before Plaintiff.

Between January 8, 2015 and March 3, 2015, Plaintiff allegedly paid no-fault first-party benefits to or on behalf of Snyder in the amount of \$50,000.00 pursuant to Insurance Law §§ 5213 and 5221. (Aff of Fossett ¶ 9.)

Pursuant to Insurance Law § 5209, Plaintiff allegedly investigated Snyder's claim and determined that Decora owned the Jeep and that the Jeep was uninsured. Plaintiff allegedly spent \$4,818.45 on this investigation. (*Id.* ¶ 8.)

On or around May 10, 2017, Plaintiff settled the claim with Snyder pursuant to Insurance Law § 5213 for \$25,000.00. (*Id.* ¶ 4.)

Plaintiff commenced this action on May 15, 2017 by e-filing a summons and verified complaint. (Drew affirmation, exhibit A.) On May 22, 2017 a process server allegedly served process upon Decora pursuant to Business Corporation Law § 306 (b) (1). (Drew affirmation, exhibit B.) Plaintiff did not complete an additional mailing at the time of service of process. Plaintiff further alleges that it properly noticed Decora pursuant to CPLR 3215. (Affirmation of Drew ¶ 7.)

As Decora has not appeared in this action, Plaintiff now moves for entry of a default judgment.

DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*,

48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

CPLR 3215 (g) (4) provides, in relevant part:

“(i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

“(ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.”

On the instant motion, Plaintiff presents proof of adequate service of process pursuant to Business Corporation Law § 306 (b) (1). In addition, for the purposes of the instant unopposed motion, Plaintiff offers adequate proof of the facts constituting its claim by means of its verified complaint and affidavit of indebtedness. Further, Decora has not appeared in the instant action.

Nevertheless, the Court cannot grant Plaintiff’s instant motion for a default judgment because Plaintiff has failed to show prima facie that it noticed Decora pursuant to CPLR 3215 (g) (4). Plaintiff’s counsel’s affirmation refers the Court to exhibit C thereto, which is an affidavit of additional mailing and a copy of the attached mailing. The affidavit is dated February 1, 2017 and references the case with index number 450041/2017. The copy of the attached mailing is a summons and complaint for the case with index number 450041/2017 and is dated January 9,

2017. A search of the NYSCEF system shows that Plaintiff voluntarily discontinued the action with index number 450041/2017 without prejudice pursuant to CPLR 3217 on February 14, 2017. (NYSCEF Index No. 450041/2017, Doc # 7 [Notice of Discontinuance].)

Further, the affidavit of service of process of the summons and complaint in the instant action upon Decora does not indicate that additional service of the summons by mail was completed. There is a box for such service on the affidavit, but the box is not checked. (Drew affirmation, exhibit B.) While CPLR 3215 (g) (4) (ii) permits simultaneous service of the additional mailing on a defendant corporation, Plaintiff has not shown prima facie that this was done.

As such, Plaintiff has failed to show prima facie entitlement to entry of a default judgment against Decora.

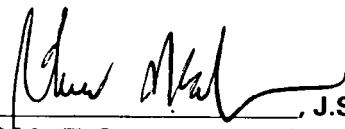
CONCLUSION

Accordingly, it is

ORDERED that Motor Vehicle Accident Indemnification Corporation's motion pursuant to CPLR 3215 for entry of a default judgment against defendant Decora Flooring Solutions, Inc is denied, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: November 15, 2017
New York, New York


_____, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE