

Country-Wide Ins. Co. v Persad
2018 NY Slip Op 32856(U)
November 8, 2018
Supreme Court, New York County
Docket Number: 150408/2018
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

Index No.: 150408/2018
Motion Sequence No.: 001
DECISION/ORDER

- against -

KRISTEN PERSAD
("Eligible Injured Party Defendant"),

And

THE JAMAICA HOSPITAL MEDICAL
CENTER DIAGNOSTIC AND TREATMENT
CENTER CORPORATION, JAGA MEDICAL
SERVICES, P.C., LOGIC CHIROPRACTIC,
P.C., COMMUNITY MEDICAL IMAGING
P.C., VSL ACUPUNCTURE P.C. and DNA
PHARMACY INC.,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

This case arises from a July 23, 2017 motor vehicle accident in which plaintiff's insured, Kristen Persad, purportedly sustained personal injuries. Ms. Persad promptly submitted bills to plaintiff starting July 24, 2017. In a letter mailed on September 29, 2017, plaintiff notified Ms. Persad to appear for an examination under oath (EUO) on October 16, 2017. Despite plaintiff's request, Ms. Persad failed to appear for the EUO on this date and the adjourned dates. As such, plaintiff asserts Ms. Persad is in breach of the no-fault insurance agreement and it is not obligated to reimburse any of her medical expenses. Plaintiff commenced this action for declaratory judgment on this issue against Ms. Persad and her purported medical providers.

Plaintiff alleges it served Ms. Persad with the complaint on February 1, 2018. Plaintiff allegedly served the remaining defendants on January 29, 2018 through the Secretary of State, and it allegedly followed up with a mailing on February 15, 2018. Out of all the defendants, only Jamaica Hospital answered the complaint. Plaintiff's motion for summary judgment motion against Jamaica Hospital was resolved by

a stipulation of discontinuance against that party. The current motion, which plaintiff commenced by filing on June 15, 2018 seeks default judgment against the remaining defendants -- Kristen Persad, JAGA Medical Services, P.C., Logic Chiropractic, P.C., Community Medical Imaging P.C., High Level Care Physical Therapy P.C., VSL Acupuncture P.C., and DNA Pharmacy Inc.

Plaintiff's affidavit of service on Kristen Persad does not include an adequate non-military affidavit. Under 50 USC § 3931(b), a default judgment motion must be accompanied by an investigation into the military status of the defendant and an affidavit detailing the investigation, which cannot be cursory (*Unitrin Advantage Ins. Co. v 21st Century Pharm*, 158 AD3d 450 [1st Dept 2018]). The most efficient way to accomplish this investigation is to obtain a report from the Department of Defense, which can survey all the military services. Plaintiff has failed to make this investigation, thus requiring the Court to deny this motion as it relates to Ms. Persad.

JAGA Medical Services, P.C., Logic Chiropractic, P.C., and VSL Acupuncture P.C. have cross-moved, collectively, to vacate their defaults and allow them time to answer. They argue that courts favor litigation on their merits and there is no prejudice to plaintiff if they have an opportunity to answer. The affidavits of their officers – Lyudmila Avshalumova, an officer of VSL; JAGA's owner, James R. Avellini; and Anatoly Abakin, the principal at Logic – deny receipt of the complaint. Cross-movants further note that an affidavit of merit is not necessary where, as here, there has been no adjudication of the default judgment motion. Furthermore, cross-movants assert that their arguments have merit, as plaintiffs have not shown a prima facie case. They assert that there is no evidence plaintiff issued a timely response to Ms. Persad's claim or sent a timely request for additional information such as an EUO. Cross-movants argue that to prevail in a default judgment motion, a plaintiff must show compliance with these regulations (*Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]).

The Court grants the cross-motion. In support of and in opposition to the cross-motion, the parties debate the merits of the case and of cross-movants asserted objections. “[A] meritorious defense is not required to obtain relief under CPLR § 3012 (d)” (*Interboro*, 112 AD3d at 483). Even if it were required, plaintiff must set forth a prima facie case (*see American Transit ins. Co. v Brune*, 2017 NY Misc LEXIS

3132, at *6-*7, 2017 NY Slip Op 31738 [U], at **3 [Sup Ct NY County 2017). Although in its reply plaintiff challenges cross-movants' contention that they did not receive the summons and complaint, their assertion is not sufficient to deny the cross-motion as a matter of law. At the least, the affidavits create a triable issue of fact regarding service. Moreover, under CPLR 3012 (d), this Court has the discretion to determine whether to grant the requested relief (*see Naber Electric v Triton Structural Concrete, Inc.*, 160 AD3d 507 [1st Dept 2018]; *Cirillo v Macy's Inc.*, 61 AD3d 538, 540 [1st Dept 2009] [stating that the "Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer"]). Given the cross-movants' sworn statements, the lack of any asserted prejudice, and cross-movants' challenges to plaintiff's prima facie case, "the policy preference for deciding cases on their merits" must prevail (*see Whittemore v Yeo*, 99 AD3d 496, 496 [1st Dept 2012]). Moreover, though Community Medical Imaging P.C., High Level Care Physical Therapy P.C., and DNA Pharmacy Inc. have not challenged plaintiff's application or answered the complaint, plaintiff must still establish a prima facie case against it. Accordingly, it is

ORDERED that the motion is denied with leave to renew as against the defaulting defendants, Kristen Persad, Community Medical Imaging P.C., and DNA Pharmacy, Inc., showing that plaintiff has satisfied the elements of a prima facie case; and it is further

ORDERED that the cross-motion of JAGA Medical Services, P.C., Logic Chiropractic, P.C., and VSL Acupuncture P.C., is granted, and these defendants have leave to serve and file their answers within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the caption is amended to reflect the discontinuance as against Jamaica Hospital, and the new caption shall read:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY -- PART 34

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

Index No.: 150408/2018

- against -

KRISTEN PERSAD
("Eligible Injured Party Defendant"),

And

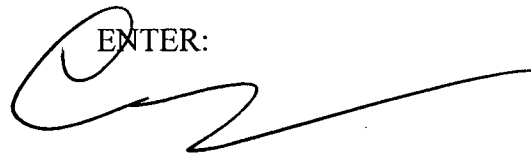
JAGA MEDICAL SERVICES, P.C.,
LOGIC CHIROPRACTIC, P.C.,
COMMUNITY MEDICAL IMAGING
P.C., VSL ACUPUNCTURE P.C. and DNA
PHARMACY INC.,

Defendants.

The Clerk shall amend the caption accordingly, and all future papers shall use the amended caption.

Dated:

11/8/2018

ENTER:


CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.