

Hertz Vehs., LLC v CXY Care Acupuncture, P.C.

2019 NY Slip Op 31438(U)

May 23, 2019

Supreme Court, New York County

Docket Number: 150549/2017

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 37

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HERTZ VEHICLES, LLC,

DECISION AND ORDER

Plaintiff,

Index No. 150549/2017

- against -

CXY CARE ACUPUNCTURE, P.C., GRAHAM MEDICAL
WELLNESS P.C., MKR MEDICAL, P.C., ACCU
REFERENCE MEDICAL LAB, MILLENNIUM
AMBULATORY SURGERY, NEW YORK TRADITIONAL
ACUPUNCTURE, NEW MILLENIUM MEDICAL IMAGING,
GOLDEN ACUPUNCTURE CARE, P.C., VLADIMIR SHUR,
M.D., AURORA MEDICAL SERVICES, PLLC, NEW
GENERATIONAL MEDICAL, ANDREW J. DOWD, M.D.,
TRIBOROUGH ORTHOPEDICS, JOSEPH JENNINGS and
SEAN JENNINGS,

Defendants.
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ARTHUR F. ENGORON, J.:

Plaintiff, Hertz Vehicles, LLC now moves, pursuant to CPLR 3215, for entry of a default judgment against defendants Accu Reference Medical Lab, Millenium Ambulatory Surgery, New Millenium Medical Imaging, Vladimir Shur, M.D., Aurora Medical Services, PLLC, New Generational Medical, Andrew J. Dowd, M.D., Triborough Orthopedics, Joseph Jennings and Sean Jennings. For the reasons set forth below, the motion is granted.

Background

This declaratory judgment action arises out of an alleged motor vehicle accident that occurred on November 7, 2015, when the vehicle owned and insured by plaintiff, in which defendants Joseph Jennings (“Joseph”) and Sean Jennings (“Sean”) were occupants, was involved in a collision (NY St Cts Elec Filing [NYSCEF] Doc No. 32, affirmation of plaintiff’s counsel, Exhibit A [Complaint], ¶ 17). Plaintiff alleges that Joseph and Sean received care from several

medical providers, who have submitted more than \$30,000 in bills for their services (*id.*, ¶ 22). Plaintiff has assigned claim no. 02-2015-34805 to all claims related to the subject November 7, 2015 accident (*id.*, ¶ 18). After the medical provider defendants failed to appear for their scheduled examinations under oath (EUO) on two occasions (*id.*, ¶ 28), plaintiff denied all claims arising out of the alleged subject motor vehicle accident on the ground that Joseph's and Sean's injuries were not causally related to the alleged accident and that the treatment allegedly provided was never actually rendered (*id.*, ¶ 29).

Plaintiff commenced this action for a judgment declaring that defendants have no right to collect no-fault benefits with respect to the alleged November 7, 2015 motor vehicle accident, that plaintiff owes no duty to pay any no-fault benefits, and that plaintiff is entitled to a temporary stay of all arbitrations, lawsuits or claims by defendants related to the no-fault claims arising out of the alleged accident.

The action as against defendants CXY Care Acupuncture, P.C., Graham Medical Wellness P.C., MKR Medical, P.C., New York Traditional Acupuncture, and Golden Acupuncture Care P.C. has been discontinued (NYSCEF Doc Nos. 26, 28 and 40).

Discussion

Plaintiff now moves for a default judgment. CPLR 3215 (a) reads, in part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” To obtain a default judgment, the moving party must submit proof of jurisdiction, a default, and “proof by affidavit made by the party of the facts constituting the claim” (*Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987] [internal quotation marks and citation omitted]; *see also* CPLR 3215 [f]). It is well settled that “a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” shall suffice

(*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). In addition to meeting the additional notice requirements set forth in CPLR 3215 (g), the motion must be made within one year of the default (*see* CPLR 3215 [c]).

The motion is supported by the complaint, the affidavits of service, and numerous letters scheduling EUOs mailed to defendants. Harlan Schreiber (Schreiber), the attorney designated to conduct each EUO, affirms that defendants Accu Reference Medical Lab, Millenium Ambulatory Surgery, New Millenium Medical Imaging, Vladimir Shur, M.D., Aurora Medical Services, PLLC, New Generational Medical, Andrew J. Dowd, M.D., and Triborough Orthopedics never appeared for their scheduled EUOs (NYSCEF Doc No. 31, Schreiber affirmation, ¶¶ 16-57). On December 11, 2017, Schreiber visited the Department of Defense Manpower Data Center and learned that neither Joseph nor Sean were currently on active duty in the military (*id.*, ¶¶ 58-59). Plaintiff also relies on an affidavit from Karen Layne (Layne), a senior no-fault claims representative, who avers that plaintiff investigated the validity of Joseph's and Sean's claims due to the absence of significant damage to the motor vehicle and their refusal of medical assistance at the accident scene (NYSCEF Doc No. 31, Layne aff, ¶ 7). Plaintiff concluded that Joseph's and Sean's injuries were not causally related to the subject motor vehicle accident (*id.*, ¶ 9). Layne avers that plaintiff sought EUOs from Joseph's and Sean's medical providers to assess causality, but they failed to appear for their scheduled EUOs (*id.*, ¶ 10). Plaintiff has denied all claims (*id.*, ¶ 13).

The affidavits of service reveal that several defendants were served on January 20, 2017 pursuant to Business Corporation Law § 306, in accordance with CPLR 311 (a) (1), or Limited Liability Company Law § 303 (a), in accordance with CPLR 311-a (a). Plaintiff personally served defendant Andrew J. Dowd, M.D. with process under CPLR 308 (1) on February 4, 2017, and personally served Vladimir Shur, M.D. with process under CPLR 308 (1) on January 23, 2017.

Plaintiff served Joseph and Sean with the summons and complaint by “nail and mail” service under CPLR 308 (4) on February 2, 2017 after three prior attempts at service on a weekend morning, weekday evening, and weekday afternoon were unsuccessful. Plaintiff has also submitted proof that it mailed additional copies of the summons and complaint to defendants in conformity with CPLR 3215 (g). Thus, plaintiff has demonstrated both personal jurisdiction and defendants’ defaults.

CPLR 3215 (c) requires a plaintiff to “to take proceedings for the entry of judgment within one year after the default” or else the court “shall dismiss the complaint as abandoned.” “The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if ‘sufficient cause is shown why the complaint should not be dismissed’” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2d Dept 2011], quoting CPLR 3215 [c]). The plaintiff must proffer a reasonable excuse and demonstrate the potential merit to the action for the delay (*see Seide v Calderon*, 126 AD3d 417, 417 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]; *Diaz v Perez*, 113 AD3d 421, 421-422 [1st Dept 2014]; *Giglio*, 86 AD3d at 308). The affidavits of service show that the defendants against whom plaintiff seeks a default judgment were all served with process in January and February 2017 (NYSCEF Doc No. 33, affirmation of plaintiff’s counsel, exhibit B). Plaintiff did not serve the instant motion until July 5, 2018, after defendants’ time to answer or appear had expired. Plaintiff acknowledges the delay, but claims that it “waited longer than one year because it was attempting to resolve the case with as many defendants as possible before making a final motion to resolve the case” (NYSCEF Doc No. 31, affirmation of plaintiff’s counsel, ¶ 9). Settlement negotiations may excuse a delay in moving for a default judgment. *See Polanco v Scott*, 41 AD3d 182, 182 (1st Dept 2007); *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 (2d Dept 1987). Thus, plaintiff has

established a reasonable excuse for the delay in moving for a default judgment (*see Seide*, 126 AD3d at 417).

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to enter a default judgment against defendants Accu Reference Medical Lab, Millenium Ambulatory Surgery, New Millenium Medical Imaging, Vladimir Shur, M.D., Aurora Medical Services, PLLC, New Generational Medical, Andrew J. Dowd, M.D., Triborough Orthopedics, Joseph Jennings and Sean Jennings is granted.

Dated: 5/23/19

ENTER:



J.S.C.

HON. ARTHUR F. ENGORON