

PV Holding Corp. v American Neurology Servs., P.C.
2019 NY Slip Op 31807(U)
June 24, 2019
Supreme Court, New York County
Docket Number: 160264/2017
Judge: Margaret A. Chan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN**PART****IAS MOTION 33EFM***Justice*

-----X

INDEX NO.160264/2017

PV HOLDING CORP. INCLUDING ALL OF ITS SUBSIDIARIES
AND AFFILIATES, INCLUDING BUT NOT LIMITED TO AVIS
BUDGET, LLC, AVIS CAR RENTAL, LLC, BUDGET CAR
RENTAL, LLC, BUDGET TRUCK RENTAL, LLC, PAYLESS CAR
RENTAL, INC. AND ZIPCAR, INC.,

MOTION DATE**MOTION SEQ. NO.**001

Plaintiffs,

- v -

AMERICAN NEUROLOGY SERVICES, P.C., ADVANCED
CHIROPRACTIC CARE, P.C., VILLAGE PHYSICAL THERAPY,
CHIROPRACTIC & ACUPUNCTURE, PLLC A/K/A VILLAGE
CHIROPRACTIC, P.C., CHRISTOS TSEROTAS, L.AC., DYNAMIC
PT, P.C., FIRST CARE CHIROPRACTIC OF N.J., P.C., DIANA
BEYNIN, D.C., METRO PAIN SPECIALISTS PROFESSIONAL
CORPORATION, FU-QI ACUPUNCTURE, P.C., LAWRENCE
MILES

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for

JUDGMENT - DEFAULT

In this no-fault insurance matter, plaintiffs PV Holding Corp. and its subsidiaries and affiliates including Avis Budget LLC, Avis Car Rental, LLC, Budget Car Rental, LLC, Budget Truck Rental, LLC, Payless Car Rental, Inc., and Zipcar Inc. (collectively "plaintiffs") move pursuant to CPLR 3215 seeking default judgment on their claims for declaratory judgment. Plaintiffs seeks a declaration that: (1) plaintiffs owe no duty to pay the no-fault claims regarding claimant Lawrence Miles' ("Miles") November 1, 2012 collision (the "accident") (NYSCEF # 1, Verified Complaint, ¶ 29); and (2) plaintiffs are entitled to a permanent stay preventing any arbitrations, lawsuits and/or claims by defendants relating to the no-fault claims arising from the accident (*id.*, ¶ 35).

Plaintiffs now seek default judgment against American Neurology Services, P.C. Village Physical Therapy, Chiropractic & Acupuncture, PLLC a/k/a Village Chiropractic P.C., Christos Tserotas, L.AC. ("Tserotas"), First Care Chiropractic of N.J., P.C, Diana Beynin D.C., Metro Pain Specialists Professional Corporation, and Fu-Qi Acupuncture P.C. (collectively "defaulting defendants") (NYSCEF # 14, Affirmation in Support, ¶ 2). Plaintiffs discontinued this matter against the two remaining medical provider defendants - Advanced Chiropractic Care, P.C. and

Dynamic Pt, P.C. (NYSCEF # 14, at 2). Plaintiffs concede to lack of service on defendant Miles (NYSCEF # 14, Affirmation in Support, ¶2).

FACTS

Plaintiffs are self-insured companies engaging in the business of renting vehicles to private persons throughout the United States and are foreign corporations authorized to transact business in the State of New York (NYSCEF # 1, ¶ 1). Miles was the driver and sole occupant in one of plaintiffs' cars on November 1, 2012, when Miles was involved in an automobile collision (*id.*, ¶ 12).

Plaintiffs submit a police report on Miles' accident which indicates that the adverse vehicle was making a U-turn and struck the plaintiffs' vehicle driven by Miles; that neither drivers claimed any injuries, both refused medical attention and, no towing was required. (NYSCEF # 17, Police Report).

Despite the lack of injuries noted on the police report, plaintiffs received notice that Miles reported serious injuries and required tens of thousands of dollars in medical care (NYSCEF #1, ¶ 13). Plaintiffs suspect that Miles' injuries were either intentionally caused by claimant or unrelated to the accident (*id.*, ¶¶ 17-18). As such, plaintiffs scheduled an Independent Medical Examination ("IME") of Miles on two or more occasions, but Miles never appeared for the scheduled IME (NYSCEF # 19). Following the failure to comply with the requests for IMEs, plaintiffs denied the claims of the medical providers for Miles' accident (NYSCEF # 1, ¶¶ 20).

Plaintiffs filed Summons and Verified Complaint in this action on November 1, 2017, and the Summons and Verified Complaint were served upon the defaulting defendants at various times between December 11, 2017 to February 6, 2018 (NYSCEF ## 1, 3-5, 7, 10-11, Affidavits of Service). Proper service to all the defaulting defendants except for defendant Tserotas was supported by affidavits of service (*id.*). The time within which the defaulting defendants may answer or otherwise move to respond to the complaint has expired and has not been extended. On December 26, 2018, the plaintiffs filed the instant motion for default judgment pursuant to CPLR § 3215. The defaulting defendants have not appeared in this action by filing an answer to the complaint, or submitting opposition to the motion for default, which was timely filed.

DISCUSSION

Service on Tserotas was Improper

Per CPLR 308(2), the serving party must submit an affidavit swearing that the mailing was done by first class mail, in an envelope marked "personal and

confidential”, and that envelope did not show that the mailing involved a lawsuit. Strict compliance with CPLR 308 is required to obtain personal jurisdiction (*see Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002]). An affidavit of service that does not include such information cannot establish proper service pursuant to CPLR 308(2) (*see Olsen v Haddad*, 187 AD2d 375 [1st Dept 1992]).

The original affidavit proving service on Tserotas does not indicate that the mailing was done by first class mail, in an envelope marked personal and confidential, and that envelope did not show that the mailing involved a lawsuit (NYSCEF # 2). Due to this infirmity, the court does not have jurisdiction over defendant Tserotas. Hence, default judgment is denied as to defendant Tserotas.

Default Judgment as to Remaining Defaulting Defendants

Plaintiffs’ motion for default judgment is granted as to defendants American Neurology Services, P.C. Village Physical Therapy, Chiropractic & Acupuncture, PLLC a/k/a Village Chiropractic P.C., First Care Chiropractic of N.J., P.C, Diana Beynin D.C., Metro Pain Specialists Professional Corporation, and Fu-Qi Acupuncture P.C. Plaintiffs offer their verified complaint, police report, IME scheduling letters, and supporting affidavits in support of their claim that Miles was properly scheduled to appear for IMEs on multiple occasions, but he failed to present himself for the exam. Miles’ failure to appear for a properly scheduled IME violates a condition precedent to coverage for all No-Fault claims (11 NYCRR 65-2.4). As such, plaintiffs have demonstrated their entitlement to default judgment as to the aforementioned defaulting defendants.

Accordingly, it is ORDERED that plaintiffs’ motion for default judgment as to defendant Christos Tserotas is denied for improper service; it is further

ORDERED, that plaintiffs’ motion for default judgment against American Neurology Services, P.C. Village Physical Therapy, Chiropractic & Acupuncture, PLLC a/k/a Village Chiropractic P.C., First Care Chiropractic of N.J., P.C, Diana Beynin D.C., Metro Pain Specialists Professional Corporation, and Fu-Qi Acupuncture P.C. is granted; it is further

ORDERED, DECLARED AND ADJUDGED that plaintiffs are not obligated to provide No-Fault coverage to American Neurology Services, P.C. Village Physical Therapy, Chiropractic & Acupuncture, PLLC a/k/a Village Chiropractic P.C., First Care Chiropractic of N.J., P.C, Diana Beynin D.C., Metro Pain Specialists Professional Corporation, and Fu-Qi Acupuncture P.C. for the No-Fault claims submitted to plaintiffs pursuant to claim number 12B063586; it is further

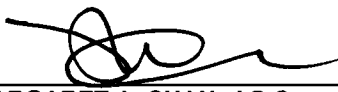
ORDERED, DECLARED AND ADJUDGED that plaintiffs are granted a permanent stay of any arbitration, lawsuit, or claim relating to claim number 12B063586; it is further

ORDERED that this action is discontinued as to defendants Advanced Chiropractic Care, P.C. and Dynamic Pt, P.C.; it is further

ORDERED, that plaintiffs are to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office and the Clerk of the Trial Support Office within 30 days of the date hereof; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment as written.

This constitutes the decision and order of the court.

<u>6/24/2019</u>			
DATE		MARGARET A. CHAN, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☐ GRANTED IN PART	☒ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE