

PV Holding Corp. v Wellness Physical Therapy P.C.
2019 NY Slip Op 32827(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 153911/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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INDEX NO. 153911/2018

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 05/06/2019

MOTION SEQ. NO. 001

Plaintiff,

- v -

WELLNESS PHYSICAL THERAPY P.C., PSYCHOLOGY
AFTER ACCIDENT P.C., TOP Q INC., E B N
ACUPUNCTURE P.C., ATLAS RADIOLOGY P.C.,
QUEENSBORO CHIROPRACTIC P.C., SK PHYSICAL
THERAPY P.C. A/K/A SNPT, P.C., PARAMOUNT MEDICAL
SERVICES, P.C., B AND H PHARMACY D/B/A CHELSEA
MOBILITY, WARREN STREET ORTHOPEDIC
REHABILITATION, P.C., TOTAL CHIROPRACTIC P.C.,
NEW SENSE ACUPUNCTURE P.C., PREFERRED
MEDICAL, P.C., URBAN MEDICAL, P.C., JULISSA
MUMENTES

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the motion of plaintiff 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. ("Plaintiff") for a default judgment against defendants Wellness Physical Therapy P.C., Psychology After Accident P.C., Top Q Inc., Atlas Radiology P.C., Queensboro Chiropractic P.C., SK Physical Therapy P.C. a/k/a SNPR, P.C., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Warren Street Orthopedic Rehabilitation, P.C., Total

Chiropractic P.C., Urban Medical, P.C., Julissa Muentes (“Defendants”) and for an extension of time to serve the summons and complaint on defendant EBN Acupuncture P.C. (“EBN”) is denied, in accord with the following memorandum.

Background

This action arises from a motor vehicle collision that occurred on April 11, 2017, in which defendant Julissa Muentes (“Muentes”) was allegedly injured. Plaintiff is a self-insured company engaged in the business of renting vehicles to private individuals, and is a foreign corporation authorized to do business in the state of New York. The remaining defendants are medical providers who have made claims to Plaintiff as assignees of Muentes. With the exception of EBN, all Defendants were served with process and none have answered or otherwise appeared in this action. Muentes and the remaining Defendants, as her assignees, made claims to Plaintiff for no-fault benefits for treatment allegedly rendered to Muentes for injuries sustained in the collision. Plaintiff assigned claim number 1793457551 to all no-fault claims relating to the alleged April 11, 2017 collision, but Plaintiff questioned the legitimacy of Muentes’ claims because she is not listed as either a driver or vehicle occupant in a police report for the alleged collision (Khalifa Aff. ¶ 13-14). Plaintiff represents that it then “duly and properly” mailed notices of two Independent Medical Examinations (“IME” or “IMEs”) to Muentes, scheduled for June 19, 2017 and August 14, 2017, both of which she failed to attend.

I. The Motion for a Default Judgment

Plaintiff commenced this action on April 27, 2018, and now moves for entry of a default judgment against Defendants and a declaratory judgment that Defendants are not entitled to no-fault benefits and Plaintiff owes no duty to pay their no-fault claims. Under CPLR 3215, a Plaintiff demonstrates its entitlement to entry of a default judgment by submitting proof of

service of the summons and complaint, proof of the claim, and proof of default (CPLR 3215[a], [c]). Although Plaintiff submitted sufficient proof of service on Defendants and proof that they have defaulted by failing to answer or otherwise appear in this action, it failed to submit sufficient proof of the facts constituting its claim.

In order to obtain a declaratory judgment, an insurer must demonstrate that it requested an IME in accordance with the procedures and time frames set forth in 11 NYCRR 65-3.5 (*American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD 841, 841 [1st Dept 2015]). The claim procedure set forth in 11 NYCRR 65-3.5 requires, in relevant part, that (1) within ten business days of receipt of an application for no-fault benefits, the insurer shall forward the prescribed verification forms it will require prior to payment of the initial claim to the parties required to complete them, (2) any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms, and (3) if the additional verification required is an IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms (11 NYCRR 65-3.5[a-b, d]). Contrary to Plaintiff's contention, 11 NYCRR 65-3.5(p) does not obviate its obligation to demonstrate, on a motion for a default judgment, that it timely requested that the non-answering defendant appear at an IME (*Hertz Vehicles, LLC v Cliffside Park Imaging & Diagnostic Center, LLC*, 2017 N.Y. Slip Op. 32947[U] at *2, [Sup Ct, NY County 2017]) (*see also Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 618 [1st Dept 2018]).

In support of its motion, Plaintiff submits, *inter alia*, the affidavit of Michelle Turner (the "Turner Affidavit"), a claims and litigation representative employed by Sedgwick Claims Management Services, Inc., a third party claims administration company authorized to handle

Plaintiff's New York no-fault claims, and the affidavit of Catherine Donovan (the "Donovan Affidavit"), an employee at MES Solutions, a third-party company engaged by Plaintiff to schedule and arrange IMEs on its behalf. The Turner Affidavit describes Plaintiff's regular business practices with respect to no-fault claims and attaches a copy of Muentes' application for no-fault benefits, which is dated May 5, 2017, but does not indicate whether prescribed verification forms were sent to Muentes within 10 days of receipt of the application for no-fault benefits as set forth in 11 NYCRR 65-3.5(a) or when it received completed verification forms, if any. Neither does Turner state when Plaintiff received claims from any of the remaining Defendants. Thus, there is no basis to determine the timeliness of Plaintiff's IME requests (*see Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc.3d 137[A][1st Dept 2016]).

Furthermore, the Donovan affidavit, which addresses mailing of the IME notices on behalf of Plaintiff, states only that a letter scheduling an IME for August 14, 2017 was mailed to Muentes on July 20, 2017. Donovan does not indicate that any notice of the IME allegedly scheduled for June 16, 2017 was mailed. Without explanation, a copy of an IME notice, dated July 20, 2017 with notice of an IME scheduled on August 14, 2017, is attached to the Donovan affidavit, along with a copy of a similar notice addressed to "Yvette Muentes," which is dated June 2, 2017 with notice of an IME scheduled June 19, 2017. The affidavit does not explain the "Yvette Muentes" letter, and its inclusion here casts doubt on the reliability of Plaintiff's claims that it "timely and properly" sent notice of the IMEs to Muentes. Plaintiff has, therefore, failed to provide sufficient proof of its claims because it offered no evidence that it properly noticed the IMEs in accordance with the procedures and time frames set forth in 11 NYCRR 65-3.5.

II. The Motion for an Extension of Time to Serve

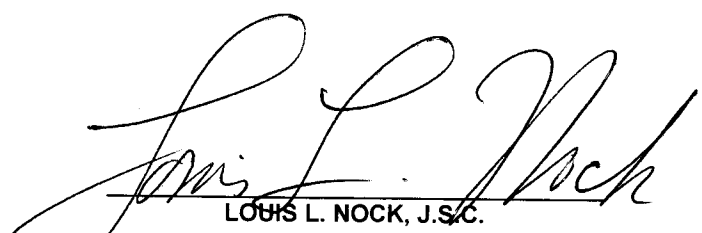
Plaintiff also moves for an extension of time to serve defendant EBN. Pursuant to CPLR 306-b, service of the summons and complaint shall be made within 120 days after the commencement of the action. Upon motion, a court may, within its discretion, grant an extension of time within which to effect service for good cause shown or in the interest of justice (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). Whereas the “good cause” standard requires a showing of reasonable diligence, under the broader “interest of justice” standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.* at 105). In support of its motion, Plaintiff submits only one affidavit of non-service, which represents that it attempted service once upon EBN on May 18, 2018 (NYSCEF Doc. No. 38), and the representation of its counsel that Plaintiff “continues to attempt to locate” EBN (Khalifa Aff. ¶ 20). Plaintiff offers no affidavit of anyone with knowledge demonstrating what efforts it has made to “attempt to locate” or serve EBN. Plaintiff’s application for an extension of the time to serve was made nearly a year after commencement of the action and the attempted service on EBN and over seven months after the 120-day deadline to serve EBN (CPLR 306-b). In light of Plaintiff’s lack of due diligence, the issues related to the meritorious nature of the cause of action discussed *supra* at 2-4, the long delay in attempting to serve EBN, and Plaintiff’s delay in requesting an extension of time to serve, such extension is not warranted under either the “good cause” or the “interest of justice” standard.

Accordingly, it is

ORDERED that the motion for a default judgment and extension of time to serve defendant EBN is denied; and it is further

ORDERED that a status conference in this matter will be held on November 14, 2019 at 2:15 p.m. in Part 38 – Room 1166, 111 Centre Street, New York, New York.

9/20/2019
DATE


LOUIS L. NOCK, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE