

PV Holding Corp. v Anesthesia Servs., LLC
2019 NY Slip Op 33693(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 158784/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

INDEX NO. 158784/2018

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 SEQ. NO. 001

Plaintiff,

- v -

ANESTHESIA SERVICES, LLC, BO KWAN KANG, P.T., SPINE SOLUTIONS, D.O., P.A., HEAVENLY POINTS ACUPUNCTURE, PLLC, JJ&R CHIROPRACTIC, P.C., JOSEPH GAMBINO, D.C., KETAN VORA, D.O., P.C., LIFE SYNERGY PHYSICAL THERAPY, P.C., PROSTAR PHYSICAL THERAPY, P.C., SOUTH FLORIDA WELLNESS, INC., WIDE OPEN MRI, P.C., and BIT MOYSEY,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - DEFAULT

In this declaratory judgment action, plaintiff PV Holding Corp.¹ moves, pursuant to CPLR 3215, for a default judgment against defendants Bo Kwan Kang, P.T., Heavenly Points Acupuncture, PLLC, JJ&R Chiropractic, P.C., Joseph Gambino, D.C., Ketan Vora, D.O., P.C., Life Synergy Physical Therapy, P.C., Prostar Physical Therapy, P.C., South Florida Wellness, Inc., and Wide Open MRI, P.C. ("the defaulting defendants"). After a review of the motion

¹ PV Holding Corp. includes all of its subsidiaries and affiliates, including but not limited to Avis Budget, LLC ("Avis"); Avis Car Rental, LLC; Budget Car Rental, LLC; Budget Truck Rental, LLC; Payless Car Rental, Inc.; and Zipcar, Inc. Doc. 1 at par. 1; Doc. 17 at par. 1.

papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle collision (“the collision” or the “incident”) on August 12, 2017 in which defendant Bit Moysey was injured while a passenger in a shuttle bus self-insured by Avis when the bus was rear-ended by another vehicle. Doc. 20. Although Moysey complained to EMS of neck pain at the scene, medical care was refused. Doc. 20.

Subsequent to the date of the incident, Moysey claimed significant injuries arising from the collision and Avis assigned claim number 178039685 to this matter. Doc. 17 at par. 7. Moysey and the other defendants, medical providers which are his or her assignees, made claims to plaintiff for no-fault benefits for treatment rendered to Moysey for injuries allegedly sustained in the collision.

On September 6, 2017, plaintiff received an application for no-fault benefits (form NF-2) from Moysey dated August 14, 2017. Doc. 21.

On January 12, 2018, MES Solutions (“MES”)² wrote to Moysey on plaintiff’s behalf to request that he or she appear for an independent medical examination by Dr. Melvyn Drucker on January 30, 2018. Doc. 22. However, Moysey failed to appear on that date. Doc. 23.

On February 15, 2018, MES wrote to Moysey to advise that the IME was rescheduled for March 27, 2018. Doc. 22. However, Moysey again failed to appear for an IME. Doc. 23.

² MES was a company hired by plaintiff to arrange for Moysey’s IME.

On May 7, 2018, Sedgwick Claims Management Services, Inc. (“Sedgwick”), third party claims administrator for plaintiff, denied Moysey’s claim on the ground that he or she failed to appear for an IME. Doc. 24.

On September 21, 2018, plaintiff commenced the captioned action against defendants Anesthesia Services LLC (“Anesthesia Services”), Bo Kwan Kang, P.T., Spine Solutions, D.O., P.A. a/k/a Benham Myers, D.O. (“Spine Solutions”), P.A., Heavenly Points Acupuncture, PLLC, JJ&R Chiropractic, P.C., Joseph Gambino, D.C., Ketan Vora, D.O., P.C., Life Synergy Physical Therapy, P.C., Prostar Physical Therapy, P.C., South Florida Wellness, Inc., Wide Open MRI, P.C., and Bit Moysey. Doc. 1. As a first cause of action, plaintiff alleged that it was entitled to a judgment declaring that it had no duty to pay any no-fault claims in connection with the collision on the ground that Moysey breached a condition precedent to coverage by failing to appear for an IME. Doc. 1 at pars. 28-30. As a second cause of action, plaintiff alleged that it is entitled to a declaratory judgment on the ground that it had a founded belief that Moysey’s injuries were not caused by the collision. Doc. 1 at pars. 32-33. As a third cause of action, plaintiff claimed that it would suffer irreparable harm if a permanent stay of all arbitrations, lawsuits and/or claims were not issued. Doc. 1 at pars. 35-36.

Plaintiff thereafter served all defendants with process except Anesthesia Services and Spine Solutions (Docs. 2-11; Doc. 19) and discontinued its claims as against Moysey (Doc. 13) and Spine Solutions. Doc. 14.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the defaulting defendants. Docs. 16-27. In support of the motion, plaintiff submits, inter alia, the summons and complaint; affidavits of service; the affirmation of Joshua Shack, Esq. of Rubin, Fiorella, Friedman & Mercante, LLP, attorneys for plaintiff; the affidavit of Michelle Turner, a

claims representative for Sedgwick assigned to this claim; the affidavit of Catherine Donovan, an employee of MES; the affidavit of Dr. Melvyn Drucker; the NF-2 form sent by Moysey; and IME scheduling letters.

In his affirmation in support, Shack states, inter alia, that the defaulting defendants were served with process but failed to answer. Doc. 17, Shack Aff., at par. 23.

In her affidavit, Turner describes plaintiff's business practices with respect to no-fault claims and, although she references the NF-2 sent to plaintiff by Moysey, she does not state when the NF-2 was dated or when it was received by plaintiff. Doc. 17, Turner Aff., at par. 14. Turner also represents that plaintiff's request for Moysey's IME was timely because plaintiff received a bill from Spine Solutions on January 17, 2018 and initially requested the IME on January 30, 2018. Doc. 17, Turner Aff., at par. 21.

In her affidavit, Donovan states that MES' records reveal that Moysey failed to appear for an IME scheduled for January 30, 2018, which was requested by letter sent January 12, 2018, and for an IME scheduled for March 27, 2018, which was requested by letter dated February 15, 2018. Doc. 17, Donovan Aff., at par. 14. Dr. Drucker, the physician who was to have conducted the IME, confirms in his affidavit that Moysey failed to appear for an IME on those dates. Doc. 17, Drucker Aff., at pars. 3-4.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in relevant 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 default motion, the movant must demonstrate proof of service of the complaint, the defaulting party's

failure to answer or appear, as well as proof of the underlying facts supporting the claim (*see Katz v Blau*, 173 AD3d 987, 988 [2d Dept 2019]).

Here, plaintiff has demonstrated proof of service of process on all of the defaulting defendants, as well as proof of their failure to appear. However, plaintiff has failed to establish the facts constituting the claim.

As the First Department has explained . . . for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a claimant failed to appear for an IME or Examination Under Oath (EUO), it must show that it mailed its initial request for verification to the claimant or his/her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification, such as a request for an IME or EUO, within 15 days of receipt of the patient's response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600 [1st Dept 2018] *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing followup notice within 10 days of claimant's nonappearance]).

The demand for an IME constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's initial response to the verification request (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 46 N.Y.S.3d 579 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470, 33 N.Y.S.3d 54 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851, 16 N.Y.S.3d 457 [1st Dept 2015]; *American Tr. Ins. Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441, 441, 6 N.Y.S.3d 480 [1st Dept 2015]).

PV Holding Corp. v Hank Ross Med., P.C., 2019 NY Slip Op 32789(U), *3-4 (Sup Ct, NY County 2019).

As noted above, the NF-2 completed by Moysey is dated August 14, 2017. Although the NF-2 was stamped "received" on September 6, 2017, Turner does not address whether this was the date on which plaintiff received the NF-2, as it appears to be. If September 6, 2017 was in

fact the day on which plaintiff received the NF-2, then plaintiff would have had 10 days from that date to send Moysey prescribed verification forms pursuant to 11 NYCRR 65-3.5(a). However, given Turner's failure to state whether September 6, 2017 was the day on which the NF-2 was received by plaintiff, or whether prescribed verification forms were sent to Moysey within 10 days of receipt of the NF-2, this Court cannot determine whether plaintiff complied with 11 NYCRR 65-3.5(a).

Additionally, since Turner does not state when plaintiff received completed prescribed verification forms from Moysey, if ever, or when she received claims from any of the other defendants, there is no basis upon which this Court can determine the timeliness of plaintiff's request for Moysey's IME. 11 NYCRR 65-3.5(d); *See American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc.3d 137(A) (App Term 1st Dept 2016).

Although Turner asserts, in effect, that plaintiff's request for Moysey's IME was timely because plaintiff received a bill from Spine Solutions on January 17, 2018 and requested the IME on January 30, 2018, and thus within the 30-day period set forth in 11 NYCRR 65-3.5(d) (Doc. 17, Turner Aff., at par. 21), this does not obviate the fact that plaintiff failed to establish that its request for the prescribed verification forms was timely.

Further, plaintiff failed to comply with 11 NYCRR 65-3.6(b), which requires an insurer to reschedule an IME by mailing a followup notice within 10 days after a claimant's nonappearance. Here, Moysey failed to appear for an IME on January 30, 2018 and, although the IME was rescheduled for March 27, 2018, the notice was not sent to Moysey until February 15, 2018, after the expiration of the 10-day period.


Finally, Turner's affidavit, which was executed in Montana, does not contain a certificate of conformity as required by CPLR 2309 (c). Dr. Drucker's affidavit reflects that it was written in an unidentified county in New York, but it was notarized by a Florida notary. If the affidavit was in fact notarized in Florida, then it, too, would require a certificate of conformity.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied with leave to renew upon proper papers, should plaintiff be so advised, within 30 days after entry of this order, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of the court.

12/17/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN