

Fair Lawn ASC LLC v Casarella
2019 NY Slip Op 33930(U)
November 25, 2019
Supreme Court, Westchester County
Docket Number: 59230/2016
Judge: Joan B. Lefkowitz
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Court/County: _____

Case Title: _____

Docket Number: _____

Judge: Joan B. Lefkowitz

EXPERT(s): _____

File date: _____ Type: _____

Doc Reviewer April Llave

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	Motion Order	_MO	LBLX
	Trial Order	_TO	LBLX
	Trial Pleading	_TP	LBLX
	Trial Motion, Memorandum, and Affidavit	_TM	LBLX
	Interrogatories	_IN	Questions only or questions and answers
	Trial Deposition and Discovery	_TD	Reports (JV ONLY) Requests for production of documents (JV ONLY) Depositions (FULL) (JV partials OK) Civil deposition affidavits
	Trial Filing	_TF	Statements Reports
	Original Transcript	_OT	Transcripts of hearings and trials (FULL)
	Verdict, Agreement and Settlement (actuals)	_VS	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
	Jury Instruction (actual)	_JI	Proposed and submitted jury instructions
	Expert Depositions	_ED	FULL
	Expert Transcripts	_ET	FULL
	Partial Expert Testimony	_EP	Partial Depos or Transcripts
	Expert Report and Affidavit	_ER	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	_PR	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
	Paper Only	_PO	Letters, Correspondence, other docs as instructed (JV and Court Express Archive)
	CV	_CV	Curriculum Vitae

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
FAIR LAWN ASC LLC,

Plaintiff,

-against-

DECISION & ORDER

Index No. 59230/2016

Motion Date: Nov. 25, 2019

Seq. No. 7

MIKE CASARELLA A/K/A MICHAEL C. CASARELLA
A/K/A MIKE C. CASARELLA and MELISSA M. MURPHY
A/K/A MELISSA M. CASARELLA,

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on plaintiff's motion seeking an order, inter alia, granting it a default judgment against defendants for their failure to appear at two settlement conferences:

Order to Show Cause; Affirmation in Support; Exhibits A-Q;
Memorandum of Law in Support
Affidavits of Service
NYSCEF File

Upon the foregoing papers and the proceedings held on November 25, 2019, this unopposed motion is determined as follows:

In its amended complaint plaintiff alleges, inter alia, that it entered into an agreement with defendant Mike Casarella a/k/a Michael C. Casarella a/k/a Mike C. Casarella ("Casarella") pursuant to which plaintiff provided surgical services from October 2015-January 2016 to Casarella (Plaintiff's Exhibit C). Plaintiff states that it billed Casarella \$204,900.00 for surgical services rendered to Casarella by plaintiff (*id.*) Plaintiff alleges that Casarella received checks from his insurer totaling \$106,437.22 in connection with the services rendered by plaintiff, that Casarella deposited those amounts into bank account/s held by him and his wife, defendant Melissa M. Murphy a/k/a Melissa M. Casarella ("Murphy"), but that Casarella has not paid plaintiff (*id.*). Plaintiff seeks, among other things, reimbursement of the \$204,900.00 with interest from January 29, 2016, to impose a constructive trust on the insurance proceeds received, and an order directing an accounting of the amounts received from Casarella's insurer (*id.*).

By court notice dated August 9, 2019 and filed to NYSCEF the parties were advised to appear for a conference in the Settlement Conference Part on September 10, 2019 (Plaintiff's Exhibit L). Since defendants were appearing pro se and had not consented to service by NYSCEF, plaintiff served the August 9, 2019 notice on them by regular mail and to their respective email addresses (Plaintiff's Exhibit M). Defendants failed to appear at the September 10, 2019 conference. A notice dated September 10, 2019 was issued by the court advising the parties to appear for a conference in the Settlement Conference Part on October 2, 2019 and warning that failure to appear "may result in a dismissal/default judgment" (Plaintiff's Exhibit N). Plaintiff served the September 10, 2019 notice on defendants by regular mail and email (Plaintiff's Exhibit O). When defendants failed to appear for the October 2, 2019 conference plaintiff was provided with a briefing schedule for this motion (Plaintiff's Exhibit P). Plaintiff served the briefing schedule and this motion upon defendants by regular mail and email (Plaintiff's Exhibit Q and NYSCEF Document 186, respectively).

On this motion, plaintiff has submitted proof of service of the summons, the amended complaint, and the present motion. Additionally, plaintiff incorporates by reference the affidavit, with related exhibits, of Paul Drucker, D.P.M., plaintiff's principal, which was submitted in support of plaintiff's motion (seq. 6) for a default judgment which was denied by Order of this court filed on August 7, 2019 (Plaintiff's Exhibit K). Included among those exhibits are explanations of benefits ("EOBs") from Casarella's insurer (NYSCEF Documents 132-135) and statements for a bank account held jointly by Casarella and Murphy (NYSCEF Document 136). Plaintiff contends that the EOBs and the bank statements demonstrate that Casarella received payments from his insurer for the services rendered by plaintiff and that those payments were deposited into his bank account.

Pursuant to the Uniform Rules for the New York State Trial Courts (22 NYCRR) §202.27(a), if a plaintiff appears at a conference and the defendant fails to appear, the court may grant judgment by default or order an inquest. Here it is undisputed that defendants failed to appear at two scheduled court conferences without notice to the court or plaintiff's counsel, and that defendants have also failed to oppose the instant motion. Accordingly, plaintiff is entitled to a default judgment. However, insofar as there appear to be inconsistencies between the amounts which plaintiff states were paid by the insurer and deposited by Casarella and the information which appears on the EOBs and bank statements, plaintiff has failed to establish proof of damages, and an inquest on damages is required.

In view of the foregoing, it is

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted a default judgment against defendants on the issue of liability, defendants' counterclaims are dismissed, and damages will be determined at inquest; and it is further

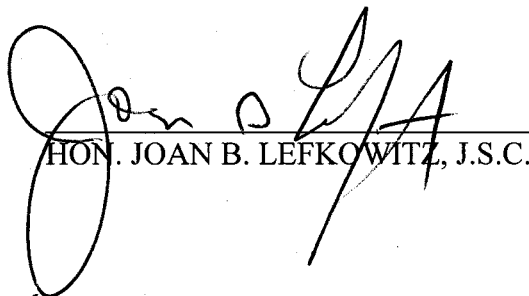
ORDERED that plaintiff shall file a note of issue within 20 days of the date hereof for an inquest as to damages; and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part, Courtroom 1600, on January 14, 2020, at 9:15 a.m. to schedule a date for an inquest on damages; and it is further

ORDERED that plaintiff shall serve this Order with notice of entry, within 5 days by First Class Mail and by email and shall file proof of service of this Order with notice of entry upon defendants by December 6, 2019.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 25, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

To:
Service upon all counsel via NYSCEF
Service by First Class Mail and Email Upon Defendants:

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cc: Settlement Part Clerk
Compliance Conference Part Clerk