

**Nationwide Affinity Ins. Co. of Am. v Martinez**

2020 NY Slip Op 31187(U)

May 1, 2020

Supreme Court, New York County

Docket Number: 161163/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

INDEX NO. 161163/2018

MOTION DATE 12/17/2019

MOTION SEQ. NO. 001

- v -

ANA MARTINEZ, JUAN CARLOS TORRES-HERNANDEZ, HEIDY ABREU, DYNAMIC MEDICAL IMAGING, P.C., QUEENS WELLNESS MEDICAL, P.C., WEI DAO ACUPUNCTURE, P.C., RESTOR ALIGN CHIROPRACTIC, P.C.

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15 were read on this motion to/for JUDGMENT - DEFAULT.

In this declaratory judgment action, the plaintiff insurer moves pursuant to CPLR 3215 for leave to enter a default judgment against Dynamic Medical Imaging PC, Queens Wellness Medical PC, Wei Dao Acupuncture PC and Restor Align Chiropractic PC, declaring that they are not entitled to no-fault benefits pursuant to article 51 of the Insurance Law with regard to the motor vehicle accident that is alleged to have occurred on February 7, 2018, and that the plaintiff is not obligated to honor or pay any claims for reimbursement submitted by the defendants under policy number 6631F386647. The plaintiff moves for this relief on the grounds that it has a 'founded belief' that defendants Ana Martinez, Juan Carlos Torres-Hernandez and Heidi Abreu, misrepresented both (i) who was driving the vehicle at the time of the accident and (ii) who was a passenger in the vehicle at the time of the accident. "founded belief" that the injuries for which Rivera sought treatment did not arise from an insured event. See Central General Hosp. v Chubb Group of Ins. Cos., 90 NY2d 195 (1997); Zappone v Home Ins. Co, 55 NY2d 131 (1982); Mount Sinai Hosp. v Triboro Council, 263 AD2d 11 (2nd Dept. 1999). The plaintiff also seeks an extension of time to serve defendant Ana Martinez pursuant to CPLR 306-b and a directive regarding alternative service pursuant to CPLR 308(5). No opposition is submitted. The motion is denied without prejudice.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1<sup>st</sup> Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1<sup>st</sup> Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, proof of the facts constituting the claim. "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac par. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

Here, the plaintiff claims that, following an investigation, and upon information and belief, defendant Juan Carlos Torres-Hernandez was driving the vehicle, and not defendant Ana Martinez as was claimed, and that defendants Ana Martinez and Heidi Abreu were not occupants of the vehicle at the time of the alleged accident, as they claimed. However, the plaintiff fails to append the investigation report or any affidavit of an individual with personal knowledge of the contents therein. As such the plaintiff has failed to submit proof of the facts constituting the claim, and the motion for default judgment is denied. However, as these defects may be cured, the motion is denied without prejudice to renewal on proper papers.

As to the branch of the plaintiff's motion seeking to extend its time to serve defendant Ana Martinez and to do so by alternative service, CPLR 306-b provides that: if service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. Moreover, "[i]t is well established that CPLR 308(5) vests a court with the discretion to direct an alternative method of service of process

when it has determined that the methods set forth in CPLR 308 (1), (2) and (4) are ‘impracticable.’” Home Fed. Sav. Bank v Versace, 252 AD2d 480, 480 (2<sup>nd</sup> Dept. 1998), quoting CPLR 308 [5]; see State St. Bank & Trust Co. v. Coakley, 16 AD3d 403, 403 (2<sup>nd</sup> Dept. 2005). “Although the impracticability standard ‘is not capable of easy definition’ [Markoff v South Nassau Community Hosp., 91 AD2d 1064, 1065, affd 61 NY2d 283], it does not require the applicant to satisfy the more stringent standard of ‘due diligence’ under CPLR 308(4), or to make a showing that ‘actual prior attempts to serve a party under each and every method provided in the statute have been undertaken.’” Astrologo v Serra, 240 AD2d 606, 606 (2<sup>nd</sup> Dept. 1997), quoting Kelly v Lewis, 220 AD2d 485, 485 (2<sup>nd</sup> Dept. 1995). Due process requires only that the method approved by the court be reasonably calculated to apprise the defendant of a pending lawsuit. See Harkness v Doe, 261 AD2d 846 (4<sup>th</sup> Dept. 1999); see also Henderson-Jones v City of New York, 87 AD3d 498, 506 (1<sup>st</sup> Dept. 2011).

Here, the plaintiff establishes that it has been unable to serve defendant Ana Martinez at her known address, 24-37 89th Street, East Elmhurst, NY 11369, which appears on her No-Fault applications, or at 115 Ludington Street, Buffalo, NY 14206, the address that appears on her insurance policy. The affidavits of service submitted by the plaintiff demonstrate that at both addresses, service could not be made as the process server was informed that Ana Martinez no longer resided there. Moreover, plaintiff avers that it has not been successful finding any other residence for defendant Ana Martinez after making a diligent search of public records.

However, beyond demonstrating a sound basis for seeking alternative service pursuant to CPLR 308(5), a plaintiff must show that the method that it proposes is one that the court can endorse as being reasonably calculated to apprise the defendant that they are the subject of a lawsuit. See Cives Steel Co. v. Unit Builders, Inc., 262 A.D.2d 164, 164, 692 N.Y.S.2d 65, 65 (1999); Baidoo v. Blood-Dzraku, 48 Misc. 3d 309, 312–13, 5 N.Y.S.3d 709, 713 (N.Y. Sup. Ct. 2015). Here, the plaintiff fails to propose any form of alternative service reasonably calculated to apprise defendant Ana Martinez that she is the subject of a lawsuit. As such, the branch of the plaintiff’s motion under CPLR 306-b and 308(5) is denied without prejudice to renewal on proper papers.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion is denied without prejudice to renewal upon proper papers, if made within 60 days of the date of entry of this order.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

5/1/2020  
DATE

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NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE