

**State Farm Mut. Auto. Ins. Co. v White**

2020 NY Slip Op 32777(U)

August 14, 2020

Supreme Court, Kings County

Docket Number: 505597/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Decision and Order

Plaintiff,

Index No. 505597/2019

-against-

Cal. No. 41-42

Mot. Seq. 01 & 02

Elena White, et al.,

Date: 8/14/2020

Defendants.  
-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

Plaintiff's Motion for Default Judgment dated August 20, 2019; Attorney Affirmation of Robert Rehr, affirmed on August 20, 2019; Attorney Affirmation of Richard C Aitken, Esq., affirmed on September 25, 2019; Affidavit of Jon McWherter, sworn to on September 12, 2019;

Exhibit 1-Notice of Electronic Filing, Summons and Complaint, Ex. A Police Accident Report; Ex. B Certified Policy Record;

Exhibit 2-Affidavits of Service of Summons and Complaint;

Exhibit 3-Notice of Service, Summons and Complaint, Affidavits of Service;

Exhibit 4-Answer with Counter-Claim re: New Chiropractic Care, PC, Profit Rehab, PT PLLC, Real Chiropractic Care, PC and Whiplash Chiropractic, PC;

Exhibit 5-Reply to Counter-Claims;

Exhibit 6-NYS Form NF-2;

Exhibit 7-Status Report Pursuant to Servicemember Civil Relief Act;

Exhibit 8-W9 Andre Jocelyn Duhamel, M.D.;

Exhibit 9-NYS Form NF-3;

Exhibit 10-LexisNexis Public Records search (CONTAINS SSN);

Exhibit 11-DMV Response;

Exhibit 12-Ltr dated February 6, 2017 from Bruno to Lavelle Firm; Letter from

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<p>Lavelle to State Farm dated December 21, 2016; Ltr from Harmon to St. Farm dated March 2, 2017;</p> <p>Exhibit 13-Ltr dated February 6, 2017 from Buron to Lavelle Firm; Ltr from Lavelle to St. Farm dated December 21, 2016;</p> <p>Exhibit 14-Ltr dated April 3, 2017 from Bruno to Harmon; Transcript of Elena White with testimony taken on March 17, 2017;</p> <p>Exhibit 15-Ltr dated March 24, 2017 and May 3, 2017 from Bruno to Harmon;</p> <p>Exhibit 16-Ltr dated April 3, 2017 to Lavelle; EUO of Elena White dated March 17, 2017;</p> <p>Exhibit 17-Ltr dated March 24, 2017 and May 3, 2017 from Bruno to Lavelle;</p> <p>Exhibit 18-No Fault File (approximately 800 pages)</p>	1
<p>Defendant Andre Jocelyn Duhamel, MD, Green Land Acupuncture, PC and Lida's Medical Supply Inc.'s Cross-Motion vacating the default, extension of time to appear and plead; Attorney Affirmation of Oleg Rybak, Esq., affirmed on November 26, 2019; Affidavit of Andre Jocelyn Huhamel, MD, sworn to on November 27, 2019; Affidavit of Ding Hongbing (Green Land Acupuncture, PC) sworn to on December 27, 2019; Affidavit of Inessa Muchnik (Lida's Medical Supply Inc.), sworn to on December 27, 2019;</p> <p>Exhibit A-(Proposed) Answer of Andre Jocelyn Duhamel, MD, Green Land Acupuncture PC, and Lida's Medical Supply Inc., unsigned, together with discovery demands;</p> <p>Exhibit B-Copy of Summons and Complaint re: St. Farm v White, et al. (no index number listed);</p> <p>Exhibit C-Affidavits of Service re: defendant Andre Jocelyn Duhamel, MD personally; Green Land Acupuncture PC via 306 Business Corporation Law; Lida's Medical Supply Inc.; and other affidavits re: other defendants;</p> <p>Exhibit D-Decision and Order of Hon. Norman Janowitz entered May 13, 2014;</p> <p>Exhibit E-Decision and Order of Hon. Robert A. Bruno entered on June 8, 2016;</p> <p>Exhibit F-Decision and Order of Hon. Barbara Jaffe entered on March 23, 2017;</p>	2
<p>Plaintiff's Attorney Affirmation in Opposition to Defendant's Cross Motion of Vanessa Hlinka, affirmed on January 15, 2020;</p> <p>Exhibit A-Attorney Affirmation of Richard C. Aitken, Esq., affirmed on January 16, 2020;</p> <p>Exhibit B-Email and correspondence dated May 23, 2019 from Jane Zone to duhamel150@aol.com</p>	3

MONTELIONE, RICHARD J., J.

Plaintiff moves for default judgment and defendants Andre Jocelyn Duhamel, MD, Green Land Acupuncture, PC and Lida's Medical Supply cross-move to vacate their default pursuant to CPLR 5015(a)(1) and to be allowed to file a late answer pursuant to CPLR 3012(d). The court heard oral arguments from respective counsel on August 5, 2020. Although discretionary because it was not requested in defendant's notice of motion, CPLR 317 was referenced in paragraph 15 of defendants' attorney affirmation, and at the request of defendants' counsel, relief under CPLR 317 was also considered.

Defendant Andre Jocelyn Duhamel, MD

The Affidavit of Service of the Summons and Complaint reflects that defendant Andre Jocelyn Duhamel, MD was *personally served* on April 5, 2019. The affidavit of service provided a physical description of Dr. Duhamel (Defendant's Exhibit C). Dr. Duhamel's affidavit does not address the factual allegations of personal service except to state that the address where service occurred is neither his place of work nor home and states, "(I) did not have notice of the existence of this action until learning of it from counsel in or around October 2019." Plaintiff's counsel provided an email and a copy of a letter to defendant Dr. Duhamel on May 23, 2019 purporting to confirm a telephone conversation regarding a stipulation to discontinue against this defendant with a waiver of claims (Plaintiff's Reply, Exhibit B). The plaintiff also provided proof of service of a second copy of the Summons and Complaint via first class mail at the address purported to be defendant Dr. Duhamel's home address and the defendant did not deny receipt of this second copy of the summons and complaint.

Defendants Green Land Acupuncture PC and Lida's Medical Supply Inc.

The Affidavits of Service upon the defendants Green Land Acupuncture PC and Lida's Medical Supply Inc. indicates service was made pursuant to Section 306 of the Business Corporation Law on March 27, 2019. Plaintiff also provided proof of an additional service of the summons and complaint by first class mail on April 26, 2019 (Exhibit 3). In addition, a separate affidavit of service indicates that a copy of the instant Notice of Motion for Default Judgment was also sent to the defendants notwithstanding that these defendants claim that they only learned of this motion by being informed by their counsel. Regarding defendants' counsel's attorney affirmation, there is no information provided as to how or when

counsel became aware of this litigation or whether counsel in fact, notified any of the defendants of this litigation.

### Legal Analysis

The court finds that Dr. Andre Jocelyn Duhamel, MD's conclusory denial of being served the summons and complaint is inadequate to rebut the presumption of proper service. *See Clover M. Barrett, P.C. v. Gordon* 2011 WL 6825759 (N.Y.A.D. 2 Dept.,2011). Moreover, it appears that either plaintiff's counsel, who allegedly spoke with Dr. Duhamel and sent him a letter and stipulation on May 23, 2019 pursuant to a telephone conversation, or Dr. Duhamel, who allegedly states that he was unaware of this litigation until October 2019, has made a materially false statement. One of these statements is materially false because it is key to whether CPLR 317 is applied to vacate a default and is contingent "...upon a finding of the court that (defendant) did not personally receive notice of the summons in time to defend and has a meritorious defense." *See* CPLR 317; *see also, Retained Realty, Inc. v 1828 51, LLC*, 153 AD3d 1438, 1439 [2d Dept 2017], " 'The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct' " (22 NYCRR 130-1.1 [a]; *see Weissman v Weissman*, 116 AD3d 848, 849, 985 NYS2d 93 [2014]). Conduct is frivolous if, among other things, " 'it asserts material factual statements that are false' [22 NYCRR 130-1.1 [c] [3]]". The fact as to when defendant Duhamel became aware is also material regarding his application under CPLR 5015 because it would go to the heart of the reasonableness of any delay in answering the summons and complaint.

In light of the fact that at least three mailings were sent to defendants Green Land Acupuncture PC and Lida's Medical Supply Inc.-the first by the New York State Secretary of State of the summons and complaint, the second pursuant to CPLR 3215 (g)(4)(i) of the summons and complaint by plaintiff's counsel, and the third mailing of the Motion for Default Judgment by first class U.S. Mail, by plaintiff's counsel, receipt of all of which have been denied by these defendants because, like Dr. Duhamel, the "first time" they learned of this litigation was through their counsel in October 2019, together with the failure of defendant's counsel to provide the court with any information as to how the firm learned of this litigation, leads this court to find that the affidavits submitted by both of these defendants to be inadequate in rebutting the presumption of proper service or that either of these defendants did not have actual notice of the litigation in this matter.

(*Thas v Dayrich Trading Inc.*, 78 AD3d 1163 [2d Dept 2010]). For instance, the affidavits mimic each other regarding each respective principal being responsible for incoming mail, but there is no indication as to who sorted the mail upon delivery and/or distributed it to the appropriate personnel, whether or not there is a mail log, the exact procedures for stamping “received” on incoming mail or scanning such mail or whether any such procedure exists altogether, the designation of “appropriate” personnel to receive specific types of mail after sorting, what type of data is entered into the computer and whether it includes any type of incoming mail, the exact process of forwarding legal mail to defendants’ legal counsel and the exact procedures which would have been followed upon receipt of a summons and complaint from the New York Secretary of State and/or other legal mail.

This action was commenced on March 14, 2019. The affidavit of service on defendant Dr. Duhamel shows service of the summons and complaint on April 5, 2019 with the affidavit being filed on April 29, 2019. The affidavits of service on defendants Green Land Acupuncture PC and Lida’s Medical Supply Inc. shows service on the New York Secretary of State on March 27, 2019 and the affidavits being filed on April 29, 2019. The motion for default judgment was served on October 3, 2019. There being no reasonable explanation for the failure of any of these defendants to serve and file an answer, relief will not be granted pursuant to CPLR 5015(a)(1) or 3012(d) or 317.

Based on the foregoing, it is

ORDERED that plaintiff’s motion for default judgment against all defendants, except the answering defendants, is granted only to the extent that the court defaults these defendants, without prejudice to entering judgment if and when there is a declaration of rights regarding the non-defaulting defendants (*see Ameriprise Ins. Co. v Kim*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 04286 [2020]); (*JBBNY, LLC v Dedvukaj*, 171 AD3d 898 [2d Dept 2019]); and it is further

ORDERED that defendants’ cross-motion pursuant to CPLR 5015(a)(1), 3012(d) and 317 is denied; and it is further

ORDERED that the court *sua sponte* will preside over a hearing to be held at 9:30AM in Part DJMP on March 9, 2021 to determine whether plaintiff’s counsel or defendant Dr. Andre Jocelyn Duhamel, MD, has made a materially false statement, and if so, whether sanctions under 22 NYCRR 130-1.1 et seq. are appropriate; and it is further

ORDERED that the matter is assigned to a random IAS part for a preliminary conference on December 10, 2020.

A copy of this order must be served on all sides within fifteen (15) days of its entry with notice of entry.

This constitutes the decision and order of the court.

Dated: August 14, 2020

  
RICHARD J. MONTELIONE, A.J.S.C.

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