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| PV Holding Corp. v AB Quality Health Supply Corp. |
| 2020 NY Slip Op 33427(U) |
| October 15, 2020 |
| Supreme Court, New York County |
| Docket Number: 160260/2017 |
| Judge: Margaret A. Chan |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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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.,

INDEX NO. 160260/2017
MOTION DATE _____
MOTION SEQ. NO. (MS) 003

Plaintiff,

- v -

AB QUALITY HEALTH SUPPLY CORP., ACH
CHIROPRACTIC, P.C., ATLAS RADIOLOGY,
P.C., ENERGY CHIROPRACTIC, P.C., JFL MEDICAL CARE,
P.C., HANK ROSS MEDICAL, P.C., JULES FRANCOIS
PARISIEN, M.D., KINGS REHAB ACUPUNCTURE, P.C.,
MARIA SHEILA MASIGLA, P.T., QUALITY CUSTOM
MEDICAL SUPPLY, INC., KENNETH COLE, SIMONE BOX,
ROBIN GILLES

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 136, 137, 138, 139,
140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for JUDGMENT - DEFAULT.

In this no-fault insurance matter seeking declaratory judgment, plaintiff PV Holding Corp. moves to reargue and renew this court’s December 24, 2019 Decision and Order (December 24 Order) pursuant to CPLR 2221(d) and (e). The December 24 Order denied plaintiff’s second attempt to obtain a default judgment in this matter on the basis that plaintiff failed to “set forth the date on which it received claimant’s application for benefits forms” (NYSCEF # 153). The December 24 Order also set down a date for an evidentiary hearing to determine if plaintiff had evidence in support of its claims; plaintiff failed to produce the requested evidence at the hearing. Appearing defendants AB Quality Health Supply Corp., ACH Chiropractic, P.C., Energy Chiropractic, P.C., JFL Medical Care, Jules Parisien, M.D., Kings Rehab Acupuncture, P.C., Maria Shiela Masigla, P.T., Simone Box, and Robin Gilles oppose the instant motion. The Decision and Order is as follows:

BACKGROUND

Plaintiff previously moved in MS1 for a default judgment against non-appearing defendants Atlas Radiology, P.C., Hank Ross Medical, P.C., Quality Custom Medical Supply, Inc., and Kenneth Cole (NYSCEF #36 – Notice of Motion). These parties never answered or appeared in this matter.

Plaintiff's first motion was denied on November 15, 2018 (November 15 Order), for failure to “set forth the date on which it received claimant's application for benefits forms”, thus failing to establish compliance with 11 NYCRR 65-3.5[a] (NYSCEF #79 – November 15, 2018 Order). The November 15 Order also denied plaintiff's motion for failure to demonstrate that it received any completed verification forms before requesting claimants' examinations under oath, thus failing to comply with 11 NYCRR 65-3.5(d) (*id.*). Plaintiff was ordered to renew its motion or discontinue the action within sixty (60) days of the order. If plaintiff failed to take any such action, plaintiff's complaint was to be dismissed (*id.*). Plaintiff took no action. Nonetheless, this action continued with the appearing parties.

Following the appearing parties' substantial non-compliance with discovery orders, this court struck the appearing parties' answers, affirmative defenses, and counterclaims, and directed plaintiff to file its Note of Issue by September 6, 2019. Plaintiff filed its Note of Issue on August 30, 2019 (NYSCEF #131 – Order dated August 29, 2019).

Subsequently, plaintiff filed a motion for entry of default judgment against the appearing defendants on September 30, 2020 (MS2) that was substantially the same as its first attempt for entry of default judgment against the non-appearing defendants. Indeed, plaintiff's moving papers were nearly identical to the first motion.

As such, this court on December 24, 2019 denied plaintiff's second default judgment attempt on the same grounds as the first default judgment motion (NYSCEF # 153 – December 24, 2019 Order). The December 24, 2019 Order held as follows:

“plaintiff's... motion is defective for the same reasons as its first attempt at default judgment. Thus, plaintiff's motion is denied for failure to comply with CPLR 3215(f)'s proof of claim requirement. There is no evidence as to the date plaintiff received claimant's application for benefits forms (11 NYCRR 65-3.5[a]) or any completed verification forms before requesting claimants' examinations under oath (11 NYCRR 65-3.5[b]), which necessitates a denial of plaintiff's

instant motion (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017])”

(*id.* at 2).

This court ordered an evidentiary hearing, which was held on January 22, 2020. At the hearing, plaintiff’s counsel did not provide the requested evidence and a subsequent hearing was scheduled to allow plaintiff’s counsel another opportunity to produce the requested evidence. However, due to the Covid-19 situation, the subsequent hearing was adjourned without a date. It has yet to occur.

On February 3, 2020, plaintiff filed the instant motion for renewal and reargument of the December 24 Order.

STANDARDS FOR REARGUMENT AND RENEWAL

A motion for CPLR 2221(d) reargument “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d]). The movant bears the burden of demonstrating that “the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*id.*). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present argument different from those originally asserted” (*id.*). Thus, the motion is not intended as a vehicle to rehash what has already been argued or for raising new questions (*see Simpson v Loehmann*, 21 NY2d 990, 990 [1968]).

A motion for CPLR 2221(e) renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination”. CPLR 2221(e)(3) states that the motion “shall contain reasonable justification for the failure to present such facts on the prior motion”. A motion for renewal “is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court’s attention” (*William P. Pahl*, 182 AD2d at 27).

DISCUSSION

Plaintiff’s motion is denied. First, the branch of plaintiff’s motion for reargument fails as plaintiff simply rehashes its already rejected arguments. Indeed, plaintiff seems to misunderstand the nature of the denial. This court denied the motion on the basis of insufficient proof. All plaintiff needs to succeed on its motion for default judgment is proof of when it received claimants’ application for

benefits forms. This court provided plaintiff an opportunity to present this evidence and plaintiff failed to do so. Plaintiff *still* has an opportunity to provide this evidence, as the court has not closed the door on a further evidentiary hearing. This court did not misapprehend or misinterpret any law or fact; plaintiff simply failed to meet its evidentiary burden. The branch of plaintiff's motion for reargument is denied.


Second, as for the branch of plaintiff's motion for renewal, plaintiff presents no new facts or law that would alter the December 24 Order. As such, there is no basis to grant renewal of the prior motion.

Accordingly, it is ORDERED that plaintiff's motion for reargument and renewal is denied in its entirety; it is further

ORDERED that an evidentiary hearing be held on the record for a declaratory judgment via Microsoft Teams on October 28, 2020 at 10:00 am; and it is further

ORDERED that a copy of this Decision and Order with notice of entry is to be served on all parties within 10 days of entry of this order and proof of service is to be filed with the 5 days of said service.

This constitutes the Decision and Order of the Court.

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| <u>10/15/2020</u> | | |  MARGARET A. CHAN, J.S.C. |
| DATE | MARGARET A. CHAN, J.S.C. | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> OTHER |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |