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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AMERICAN TRANSIT INSURANCE COMPANY

Plaintiff,

- v -

MARIO GOMEZ,

Defendant.

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INDEX NO. 651949/2020

MOTION DATE 9/25/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 14, 15, 16, 21, 22

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

I. BACKGROUND

In this action pursuant to Insurance Law § 5106(c) for *de novo* review of a claim for no-fault insurance benefits, the plaintiff-insurer moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendant, Mario Gomez. The defendant opposes the motion and cross-moves, in effect, to compel the plaintiff to accept his late answer pursuant to CPLR 3012(d). The motion is denied and the cross-motion is granted.

The plaintiff alleges, in a complaint verified by its attorney, that the defendant submitted a claim to it in the sum of $122,400.00 for lost wages. The complaint also alleges that the plaintiff timely and properly denied that claim on the ground that the defendant failed to provide timely notice of the accident and failed to timely submit a complete proof of claim for loss of earnings as required by the no-fault regulations. The plaintiff contends that the defendant did not incur the loss of earnings arising from the motor vehicle accident claimed and, in any event, such losses are not recoverable under the subject policy as per the no-fault law and regulations.

The defendant commenced an arbitration proceeding and, on September 20, 2019, an arbitrator awarded him $72,200.00, presumably rejecting, at least in part, the plaintiff's basis for the denial, and a master arbitrator affirmed that award on January 22, 2020. The plaintiff commenced this action seeking *de novo* review pursuant to CPLR 5106. The defendant was

served on March 9, 2020, but failed to timely answer. The plaintiff made the instant motion for a default judgment. On June 3, 2020, the defendant filed his opposition papers, with a proposed answer, and requested that the court to deem the answer served *nunc pro tunc.*

II. DISCUSSION

A. Plaintiff's Motion

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 paras. 3215.22-3215.271]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd 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 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id.; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). With respect to the one cause of action alleged in the complaint by the plaintiff, even that minimal standard is not satisfied.

As to the facts constituting its claims, the plaintiff submits only the summons and complaint, verified by counsel, and an affirmation of counsel. The complaint is not verified by a person with first-hand knowledge of the facts underlying the dispute. It may not therefore be employed as an affidavit (see CPLR 105[u]), and is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, supra at 723; see Martinez v Reiner, supra; Joosten v Gale, supra. Since the plaintiff's attorney claims no personal knowledge of the underlying facts, his affirmation is likewise without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

While an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of the motion (see Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Plan v

Farrell Lines, Inc., 64 NY2d 1092 [1985]; Lewis v Safety Disposal Sys. of Pa., Inc., 12 AD3d 324 [1st Dept. 2004]), no such evidence is appended to the affirmation. For example, the plaintiff does not provide a copy of the defendant's claim for no-fault benefits, the demand for arbitration, the award of the arbitrator, or the award of the master arbitrator. The affirmation alone is insufficient to meet the plaintiff's burden of establishing the prima facie validity of its claim that the defendant was not entitled to recover no-fault reimbursement for lost wages. See Martinez v Reiner, supra. In any event, as explained below, this is no longer an "uncontested cause of action." Joosten v Gale, supra at 535.

B. Defendant's Cross-Motion

As stated above, with his opposition papers the defendant submits a proposed answer and asks the court to deem it served *nunc pro tunc*, He effectively moves to compel the plaintiff to accept his late answer (see CPLR 3012[d]) without filing any Notice of Cross-Motion (CPLR 2214; 2215). In making a determination under CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001).

Here, the defendant's default in answering occurred on March 29, 2020, at the start of the COVID-19 health crisis and during the consequent temporary courthouse closures and e-filing limitations. The defendant's counsel also submits an affirmation averring that staff furloughs and office closures further delayed response to the complaint. To the extent that the delay was in part due to law office failure, there is no indication of willfulness or bad faith, particularly as the defendant had diligently participated in the underlying arbitration proceedings. See Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016). Furthermore, CPLR 2004 authorizes the court to "extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and *upon good cause shown*." (emphasis added). Good cause had been shown by the defendant. Moreover, the plaintiff fails to explain how, under the present circumstances, it would be prejudiced by the service of a late answer. See id.

Although the plaintiff is correct that the defendant fails to address the potential merits of his defense such a showing is "not an essential component of a motion to serve a later answer (CPLR 3012[d]) where, as here, no default order or judgment has been entered." Jones v 414 Equities LLC, supra at 81; see also Artcorp Inc. v Citirich Realty Corp., supra; Shure v Vill. of

Westhampton Beach, Inc., 121 AD2d 887 (1st Dept. 1986); Mufalli v Ford Motor Co., 105 AD2d 642 (1st Dept. 1984). In any event, the court notes that the arbitrators ruled in favor of the defendant. Further, the absence of a Notice of Cross-Motion is not fatal to the cross-motion. CPLR 2001 provides that "at any stage of the action ... the court may permit a mistake, omission, defect or irregularity ... to be corrected, *upon such terms as may be just* or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded..(emphasis added)." The court finds that no substantial right of the plaintiff is prejudiced by the procedural defect in the cross-motion. See Marx v Marx, 258 AD2d 366 (1st Dept. 1999); Plateis v Flax, 54 AD2d 813 (3rd Dept. 1976).

Under these circumstances, and in light of the strong public policy in this state of resolving disputes on the merits, denial of the plaintiff's motion and the grant of the defendant's cross motion is warranted. See Cantave v 170 W. 85 St. Hous. Dev. Fund Corp., 164 AD3d 1157 (1st Dept. 2018); Newyear v Beth Abraham Nursing Home, 157 AD3d 651 (1st Dept. 2018); Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., supra.

III. CONCLUSION

Accordingly, upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is denied; and it is further,

ORDERED that the defendant's motion, in effect, to compel the plaintiff to accept his late answer pursuant to CPLR 3012(a) is granted and the proposed answer appended to the defendant's motion papers is deemed to have been timely served; and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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

10/30/2020
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER