

Country-Wide Ins. Co. v TC Acupuncture, P.C.

2021 NY Slip Op 31300(U)

April 14, 2021

Supreme Court, New York County

Docket Number: 651793/2015

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

TC ACUPUNCTURE, P.C. A/A/O PAULETTE WALKER,

Defendant.

-----X

INDEX NO. 651793/2015

MOTION DATE 01/22/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that application of Petitioner Country-Wide Insurance Company for an order pursuant to CPLR § 5015 vacating this Court's default judgment entered November 13, 2020 in favor of Respondent TC Acupuncture, an order pursuant to CPLR § 2221 granting Petitioner leave to renew the default judgment, and an order staying Respondent from collecting any moneys pursuant to the default judgment (Motion Seq. 003) is denied in its entirety; and it is further

ORDERED that this proceeding remains disposed in accordance with this Court's Decision and Order dated November 13, 2020 resolving Motion Seq. 002; and it is further

ORDERED that the application of Respondent for an award of additional attorney's fees is denied; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 75 proceeding, Petitioner Country-Wide Insurance Company moves by Order to Show Cause for an order pursuant to CPLR § 5015 vacating this Court's default judgment entered November 13, 2020 and an order pursuant to CPLR § 2221 granting Petitioner leave to renew the November 13, 2020 default judgment (Motion Seq. 003). Petitioner also moves for an order staying any and all attempts by Respondent TC Acupuncture, PC to collect any monies allegedly due pursuant to said judgment, including, but not limited to, the service and enforcement of information subpoenas and motions for contempt.

Respondent opposes the motion in its entirety.

BACKGROUND FACTS

This motion stems from an underlying motor vehicle accident and subsequent arbitration proceeding that took place in 2015.

On May 21, 2015, Petitioner filed a petition to vacate the arbitration award pursuant to CPLR Article 75 (Motion Seq. 001). By Decision and Order dated October 23, 2015, this Court denied the petition and confirmed the arbitrator's award in its entirety (NYSCEF doc No. 26). The October 2015 decision was not filed with the County Clerk's office until February 10, 2016 (NYSCEF doc No. 27). The October 2015 decision directed Respondent to serve a Notice of Entry of the order and judgment on Petitioner.

On November 13, 2017, Respondent filed a proposed judgment in the amount of \$4,015.46 (NYSCEF doc No. 29). Respondent arrived at that sum by calculating the amount of the arbitration award (\$1,521.75), plus interest thereon from January 7, 2014 in the sum of \$1,420.30, plus initial attorney's fees totaling \$588.41 and additional attorney's fees totaling \$195, plus the arbitration fee of \$40, along with costs and disbursements totaling \$250. The

proposed judgment was never entered as it was returned for correction by the Clerk's Office (NYSCEF doc No. 37).

On November 24, 2017, Petitioner filed a proposed counter-judgment in the amount of \$3,260.67 (NYSCEF doc No. 54). Petitioner arrived at this lower amount by calculating the interest from January 7, 2014 until March 1, 2016 (twenty days after the Court's October 2015 order was filed with the County Clerk) for a total interest sum of \$791.31 (Respondent's proposed judgment listed an interest totaling \$1,420.30). Petitioner also calculated the initial attorney's fees to be in the sum of \$462.61 (Respondent's proposed judgment listed an initial attorney's fee amount of \$588.41).

On July 24, 2020, Respondent filed a motion seeking an order modifying the Court's October 2015 decision pursuant to CPLR 221(a) and granting Respondent further attorney's fees pursuant to 11 NYCRR 65-4.19(j)(4) (Motion Seq. 002). Respondent argued that no fault law and its regulations allowed for attorney's fees at every stage of the proceedings (i.e. at the lower and master arbitration level, and at the court level when a party prevails on an Article 75 petition). Respondent attached an affirmation detailing the attorney's hourly rate and the hours worked in opposing the underlying petition (NYSCEF doc No. 40). In the affirmation, Respondent's counsel warranted that he spent five hours opposing the petition at an hourly rate of \$500, for a total sum of \$2,500 in fees to be added to the judgment.

On November 13, 2020, after Petitioner failed to appear or oppose Respondent's motion for modification, the Court granted Respondent's motion on default (NYSCEF doc No. 41). Respondent's modified judgment totaled \$7,803.47. Respondent arrived at that sum by calculating the amount of the award (\$1,521.75) plus interest thereon from the filing date of January 7, 2014 in the amount of \$2,493.64, plus initial attorney's fees totaling \$803.08, the

arbitration fee of \$40, additional attorney's fees totaling \$195, and the aforementioned attorney's fees for opposing the petition totaling \$2,500.

On January 22, 2021, Petitioner filed the instant motion by Order to Show Cause (NSYCEF doc No. 22). Petitioner argues that the Court's November 2020 default order should be vacated pursuant to CPLR § 5015 as Petitioner has a reasonable excuse for its default and a meritorious defense to this proceeding. Petitioner argues it was not properly served with Respondent's motion for modification and only became aware of this matter after Respondent served a Notice of Entry on December 14, 2020 (NYSCEF doc No. 55). Petitioner also argues that the Court should grant Petitioner leave to renew the November 2020 order. Although not included in its Order to Show Cause, Petitioner's affirmation in support of its motion also argues that this action should be dismissed for lack of personal jurisdiction pursuant CPLR 3211(a)(8).

In opposition, Respondent argues that Petitioner was properly served with its prior motion through the NYSCEF system (NYSCEF doc No. 63 at 1). Respondent also argues that Petitioner has not demonstrated a meritorious defense, and that leave to renew is improper given that Petitioner has advanced no new facts or law that could not have been offered in the prior motion that would have altered this Court's prior determination. Respondent also requests an additional attorney's fee award of \$300 for the time spent opposing this motion.

DISCUSSION

It is well settled that on a motion to vacate a default judgment entered based upon a failure to appear or timely serve an answer, the movant must demonstrate both a reasonable excuse for the delay and the existence of a meritorious defense (*Young v Richards*, 26 AD3d 249, 250 [1st Dept. 2006]; *Simon & Schuster, Inc. v Howe Plastics & Chemicals Co., Inc.*, 105 AD2d 604, 605 [1st Dept. 1984]). While courts may, in their discretion, determine that law office

failure constitutes a reasonable excuse for default pursuant to CPLR 2005, a mere allegation of law office failure, without any supporting facts to explain and justify the failure, is insufficient to establish excusable default for the purpose of a motion to vacate a default judgment (*Tandy Computer Leasing v Video X Home Library*, 124 AD2d 530 [1st Dept 1986]). Furthermore, claims of law office failure should be supported by a detailed and credible explanation of the default or defaults at issue (*Campbell-Jarvis v Alves*, 68 AD3d 701, 702 [2nd Dept. 2009]).

Here, Petitioner's purported reasonable excuse for failing to oppose Respondent's motion is that it was not properly served with a copy of the motion, as Respondent did not file an affidavit of service. While Respondent argues it properly served its motion via e-file through the NYSCEF system, Petitioner contends that the email addresses on NYSCEF were outdated and Petitioner's current counsel thus never received the papers (NYSCEF doc No. 49 at 4).

As a preliminary matter, the Court notes as the parties here have consented to e-filing, they are bound by the applicable rules governing service for e-filed actions (*See Woodward v. Millbrook Ventures LLC*, 148 AD3d 658 [1st Dept 2017]). Pursuant to 22 NYCRR 202.5–b[f][2][ii],

“An e-filing party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically. Upon receipt of an interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action . . . Each party receiving the notification shall be responsible for accessing the NYSCEF site to obtain a copy of the document received. Except as provided otherwise in subdivision (h) (2) of this section, the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein.”

Furthermore, pursuant to 22 NYCRR 202.5–b[f][2][i], if there is a change in e-mail addresses for counsel while an action is ongoing, “[i]t is the responsibility of each filing user to

monitor that address and promptly notify the Resource Center in the event of a change in his or her e-mail service address.”

Petitioner attests that on February 13, 2018, its counsel made a good faith attempt to update the attorneys of record in this action by sending a letter to NYSCEF asking that the contact information be updated to reflect Petitioner’s current counsel (NYSCEF doc No. 58). However, the e-filing confirmation for Respondent’s motion reflects that the papers were nevertheless served on the outdated email addresses on July 24, 2020 (NYSCEF doc No. 57). Given that it appears NYSCEF failed to update its system and Petitioner’s current counsel thus never received the papers through no fault of Petitioner, the Court finds that Petitioner has demonstrated a reasonable excuse for its failure to earlier oppose Respondent’s motion for modification.

However, notwithstanding the above determination, the Court finds that Petitioner’s motion must be denied as Petitioner has failed to demonstrate the existence of a meritorious defense. Petitioner’s sole explanation of its meritorious defense is that “Petitioner previously filed and served opposition to respondent’s proposed judgment in November 2017. Petitioner has not received a decision for that” (NYSCEF doc No. 49 at 8). However, the “opposition” was a counter-judgment to the judgment rendered by Respondent after this Court ruled in its favor on the underlying petition; the counter-judgment does not pertain to Respondent’s motion for modification.

Furthermore, the Court notes that Petitioner never “received a decision” on its counter-judgment as the Court did not invite or request said counter-judgment. The Court’s October 2015 decision did not include a “Settle Order” direction wherein both parties would submit proposed

judgments; the October 2015 decision merely ordered that the arbitration award was confirmed and directed Respondent to serve a copy of the order and judgment (NYSCEF doc No. 26). Petitioner's counter-judgment is thus of no moment and cannot be considered a meritorious defense to Respondent's motion for modification. As Petitioner's motion must be denied on this ground alone, the Court is precluded from entertaining Petitioner's application for renewal or for dismissal based on lack of personal jurisdiction¹. While Petitioner's motion must be denied, the Court notes that Petitioner appears to have had a good faith basis for commencing the instant motion and thus declines to award Respondent a further award of attorney's fees for the time spent opposing this motion.

Accordingly, this Court adheres to its default order and judgment dated November 13, 2020 and Petitioner's motion is denied in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

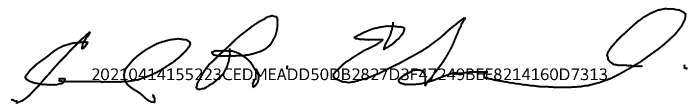
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¹ The Court further notes that Petitioner's argument for dismissal based on lack of personal jurisdiction is inapplicable in any event as Petitioner is the party that commenced this action in the first place.

ORDERED that this proceeding remains disposed in accordance with this Court's Decision and Order dated November 13, 2020 resolving Motion Seq. 002; and it is further

ORDERED that the application of Respondent for an award of additional attorney's fees is denied; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.



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4/14/2021
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	

APPLICATION:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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CHECK IF APPROPRIATE: