State Farm Mut. Auto. Ins. Co. v Cisse
2022 NY Slip Op 30528(U)
January 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 508143/2019
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

-against-

Individual Defendants:
MAMADOU CISSE, YOSELIMARY CANALES a/k/a YOSELLIMARY CANALES PEREZ, KISSY FERNANDEZ a/k/a KISSY FERNANDEZ REYNOOSO, YUDELKA DE LA CRUZ, MARIA COLOME DE URENA, JONTRE A. GORDON,

Healthcare Defendants:
ACTIVE RANGE P.T. P.C., AMA SUPPLY INC., BLISS DRUGS INC., CUSTOM RX PHARMACY LLC, LIFE EQUIPMENT INC., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MYRTLE DME NYC INC., PARKSIDE CHIROPRACTIC P.C., PDA NY THERAPY, P.C., RIGHT AID MEDICAL SUPPLY CORP., STONE CHIROPRACTIC P.C., SUTPHIN SUPPLY INC., WEST ACUPUNCTURE P.C., and WESTCHESTER RADIOLOGY& IMAGING, P.C.

Defendants.

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DECISION/ORDER

Index No.: 508143/2019
Motion Date: 3/16/2021
Mot. Seq. 1 & 2

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

Papers	NYSCEF Doc. No.
Plaintiff's Notice of Motion for Default Judgment dated February 26, 2020 (NYSCEF #24), Attorney Affirmation of Colleen A. Rappa, Esq. affirmed on February 26, 2020 (NYSCEF #25), Affidavit of Arlene Murray, sworn on April 13, 2020 (NYSCEF # 26) Affidavit of Richard C. Aitken Esq., sworn on October 26, 2020 (NYSCEF # 27), Exhibits 1-18 (NYSCEF # 28-45)	24-45
Defendants' Notice of Cross-Motion dated March 9, 2021 (NYSCEF # 54), Affidavit of Attorney Oleg Rybak, Esq. in Opposition to Motion and in Support of Cross-Motion affirmed on March 9, 2021 (NYSCEF # 55) Exhibits (NYSCEF # 56-63)	53-63
Affirmation of Attorney Robert Rehr, Eq. in Opposition to Cross-Motion affirmed on March 15, 2021 (NYSCEF # 64) Exhibits (NYSCEF # 65-69)	64-69

Upon the forgoing papers, plaintiff, State Farm Mutual Automobile Insurance Company ("plaintiff") moves this Court for a default judgment for failing to appear or answer the summons and complaint, pursuant to CPLR § 3215, and a declaratory judgment declaring that plaintiff has no legal obligation to reimburse the defendants' no-fault benefits. Defendants, Westchester Radiology & Imaging, P.C., Right Aid Medical Supply Corp., Primavera Physical Therapy, P.C., West Acupuncture P.C., Metro Pain Specialists Professional Corporation., PDA NY Chiropractic P.C., ("moving defendants") cross-move this Court for an Order pursuant to CPLR § 5015(a)(1), vacating the aforementioned defendants' default in this matter, and, upon vacatur, for an Order pursuant to CPLR § 3012(d) granting the defendant an extension of time to appear and plead in this matter, compel plaintiff to accept defendants' answer, and for such other and further relief as to this Court seems to be just and proper, at law, or in equity.

Background

This is an action seeking a declaratory judgment that plaintiff is not legally obligated to provide a liability defense, indemnification or no-fault benefits in relation to a motor vehicle accident. On March 29, 2018, defendant Mamadou Cisse was driving a 2008 Toyota, which was insured by plaintiff. Defendants Yoselimary Canales and Kissy Fernandez were rear seat passengers when the 2008 Toyota was involved in an accident with a 2004 BMW, owned by defendant Jontre A. Gordon, operated by defendant Yudelka De La Cruz and containing passenger, defendant Maria Colome De Urena. It is uncontroverted that defendant Cisse was using the 2008 Toyota as a taxi and had charged defendants Canales and Fernandez for the ride, at the time of the accident. Defendant Cisse's insurance policy excludes plaintiff from covering "DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A

VEHICLE WHILE BEING USED TO CARRY ***PERSONS*** FOR CHARGE." An examination under oath was scheduled for defendant Cisse twice, defendant Cisse was informed of the examination under oath by mail, and defendant Cisse never appeared. On December 21, 2020, moving defendants filed an answer after plaintiff had moved for default judgment. Plaintiff rejected the answer on December 23, 2020.

Discussion

On a motion for leave to enter a default judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim by an affidavit made by the party, and proof of the defendant's default. *See* CPLR § 3215; *Mercury Cas. Co. v. Surgical Ctr. At Milburn, LLC,* 65 A.D.3d 1102 (2d Dep't 2009*).* A party seeking to vacate a default in appearing or answering must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action. *Hamilton Public Relations v. Scientivity, LLC,* 129 A.D.3d 1025 (2d Dep't 2015). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court. *Bardales v. Blades,* 191 A.D.2d 667, 668 (2d Dep't 1993).

In the instant case, plaintiff proffered proof of filed affidavits of service and an affidavit from Arlene Murray, a claims examiner, which support plaintiff's claim. Moreover, it is undisputed that defendants failed to appear or answer within the period provided by CPLR § 320(a).

Moving defendants provide two purported reasonable excuses. First, moving defendants argue that they were not timely served with the summons and complaint, because they were served via the Secretary of State who, at the time of service, had a backlog. However, "service

of process on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant." *Associated Imports v. Amiel Publ.*, 168 A.D.2d 354 (1st Dep't 1990); *see Perkins v. 686 Halsey Food Corp.*, 36 A.D.3d 881 (2d Dep't 2007).

Second, moving defendants allege law office failure. Moving defendants further maintain "the number of No-Fault Declaratory Judgment cases exceed the number of staff and attorneys at Defendants' law firm that is necessary to respond on behalf of each defendant healthcare provider in each case within the timeframe set forth in CPLR § 320(a)." Affirmation in Opposition to Motion and in Support of Cross-Motion Page 4. "Law office failure may, under certain circumstances, constitute a reasonable excuse for a default, but the party seeking to vacate the default must provide detailed allegations of fact that explain the failure." *Matter of Esposito*, 57 A.D.3d 894, 895 (2d Dep't 2008). "While the Supreme Court has the discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure." *HSBC Bank USA, Nat. Ass'n v. Wilder*, 101 A.D.3d 683 (2d Dep't 2012). In the instant case, the Court does not accept either excuse. However, because moving defendants' delay in answering the complaint was relatively short, and because plaintiff is not prejudiced by the delay, the Court will nevertheless entertain vacating the default.

As for a potentially meritorious defense, moving defendants contend that because plaintiff did not pay the claims or issue a denial to moving defendants within 30 days, plaintiff is now precluded from asserting a defense against paying the claims. Under 11 NYCRR 65-3.8, "[w]ithin 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." An insurance carrier "that fails to deny a claim within the 30-day

period is generally precluded from asserting a defense against payment of the claim." *A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co.,* 101 A.D.3d 53, 65 (2d Dep't 2012). In the instant case, it is undisputed that plaintiff did not deny the claims within the 30-day period. However, plaintiff argues that because defendant Cisse did not participate in the examination under oath, the 30-day denial period was tolled, and plaintiff is not precluded from asserting this defense. Moreover, plaintiff maintains that since the car accident in question was not covered as the defendant Cisse was carrying passengers for charge, an exception to the 30-day denial period applies. Specifically, the insurer "may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" even when it has failed to reject the claim during the 30-day period. *Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 199 (1997), see Zapone v. Home Ins. Co.,* 55 N.Y.2d 131 (1982). Here, there is uncontroverted evidence that the vehicle was only insured for passenger use, but was used as a taxi, and failing to raise an issue of fact regarding the use of the vehicle for livery defendants have failed to establish a potentially meritorious defense. *Amica Mutual Insurance Company v. Alexis*, 186 A.D.3d 707 (2d Dep't 2020). For the forgoing reasons it is hereby

ORDERED that the plaintiff's motion for a default judgment is granted; and it is further

ORDERED that moving defendants' motion to vacate their default is denied; and it is further

ORDERED that plaintiff shall settle an order and judgment on 10-days notice within 45 days of the date of entry of this order. Any proposed order and judgment shall not have preclusive effect on any appearing defendants. *Tower Ins. Co. of New York v. Einhorn*, 133 A.D.3d 841 (2d Dep't 2015); and it is further

ORDERED that all other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: JAN 1 2 2022

Hon. Richard J. Montelione