

PV Holding Corp. v American Diagnostic Imaging Corp.

2022 NY Slip Op 31015(U)

March 30, 2022

Supreme Court, New York County

Docket Number: Index No. 156213/2020

Judge: William Perry

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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. WILLIAM PERRY PART 23

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.	<u>156213/2020</u>
	MOTION DATE	<u>11/10/2021</u>
	MOTION SEQ. NO.	<u>002</u>

Plaintiff,

- v -

AMERICAN DIAGNOSTIC IMAGING CORP., BRIGHT
 LIGHT ACUPUNCTURE, P.C., CENTRAL SUPPLIES OF
 NEW YORK CORP., CONTEMPORARY ORTHOPEDICS,
 PLLC, ELITE DRUGS, INC., FOSTER MEDICAL, P.C.,
 NATURALIFE CHIROPRACTIC, P.C., NEIGHBORHOOD
 MEDICAL HEALTH CARE, P.C., QUALITY MEDICAL &
 SURGICAL SUPPLIES, L.L.C., RIVERSIDE PARK
 ACUPUNCTURE, P.C., MS ST. LUKES & ROOSEVELT,
 HOLIVER TEJEDA, STEPHANIE RAMIREZ-FRIAS,
 ALESCHENKA RAMIREZ-FRIAS, EDWIN GUERRERO,
 ANNY BRITO

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence 002, Plaintiff PV Holding Corp. moves 1) to add Defendants KV Medical Supply of NY, PC, and Rockaways ASC Development LLC, pursuant to CPLR 3025[b]; and 2) for an extension of time to serve the complaint upon American Diagnostic Imaging Corp. (“American”), pursuant to CPLR 306-b. American cross-moves to dismiss the complaint.

Background

Plaintiff commenced this action on August 8, 2020, seeking declaratory relief that it had no duty to pay certain specious no-fault claims related to a December 11, 2019 collision involving individual Defendants/Claimants Tejeda, Stephanie Ramirez-Frias, Aleschenka Ramirez-Frias,

Guerrero, and Brito. (NYSCEF Doc No. 1, Complaint, at ¶ 18.) On July 6, 2021, the Hon. Alexander Tisch granted Plaintiff's motion sequence 001 for a default judgment against Defendants Bright Light Acupuncture, Contemporary Orthopedics, Elite Drugs, Foster Medical, Naturalife Chiropractic, MS St. Luke's & Roosevelt, and individual Defendants/Claimants Tejada, Stephanie Ramirez-Frias, Aleschenka Ramirez-Frias, and Guerrero. (NYSCEF Doc No. 40.) The Hon. Alexander Tisch then recused himself on October 7, 2021, for unspecified reasons. (NYSCEF Doc No. 42.)

Thereafter, Plaintiff filed motion sequence 002 on October 15, 2021, alleging that it received medical bills from the proposed additional defendants KV Medical of NY and Rockaways ASC Development during the pendency of this action. (NYSCEF Doc No. 44, Pl.'s Memo, at ¶ 19.) Plaintiff also seeks an extension of time to serve the summons and complaint on American, on the grounds that it made a prior attempt at service with due diligence, but that it was unsuccessful. (*Id.* at ¶¶ 27-30.)

Specifically, Plaintiff submits an affidavit of nonservice indicating that a process server attempted to personally serve American at 44 Sea Cliff Avenue, Glen Cove, NY 11542 on August 20, 2020, but that building management stated that American was not known in the building. (NYSCEF Doc No. 51, Affidavit.)

American cross-moves to dismiss the complaint, arguing that prior to the commencement of this action, it had provided multiple notices of arbitration to Plaintiff regarding the medical treatment of the individual Defendants/Claimants, and that each of the notices contained American's true business address of 9-25 Alling Street, Newark, NJ 07012. (NYSCEF Doc No. 55, Cross-motion, at ¶ 5.) American argues that Plaintiff's sole attempt of service does not constitute due diligence and that granting the requested extension would not be for good cause nor

be in the interest of justice, as over 400 days have passed between Plaintiff's receipt of the affidavit of nonservice and the filing of the instant motion. (*Id.* at ¶¶ 12-21.) Further, American argues that it would suffer prejudice if the court granted the extension, as it has spent over a year preparing for arbitration, with hearings set to commence on November 30, 2021. (*Id.* at ¶ 24.)

Discussion

Extensions of time within which plaintiffs may serve process is governed by CPLR 306-b, which provides two separate standards by which to measure an application for an extension: extension may be warranted "upon good cause shown", or "in the interest of justice." (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 102 [2001], citing CPLR 306-b.) To demonstrate "good cause" for an extension of time, a plaintiff must show that he exercised reasonable diligence in attempting to effect service. (*See, e.g., Holbeck v Sosa-Berrios*, 161 AD3d 957, 958 [2d Dept 2018] [finding plaintiff's resort to affix and mail service after only two attempts to deliver the summons and complaint to plaintiff on a weekday, at approximately the same time of day, when the defendant reasonably could have been expected to be at work, and in the absence of any effort to verify defendant's address, was insufficient to establish "good cause"] [citations omitted].)

Where a plaintiff fails to establish "good cause," the court may still grant an extension of time "in the interest of justice," and may consider plaintiff's diligence, or lack thereof, along with any other factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." (*See Holbeck*, 161 Ad3d at 958, citing *Leader*, 97 NY2d at 95.)

The court denies the portion of Plaintiff's motion seeking an extension of time to serve American, as Plaintiff has failed to demonstrate reasonable diligence, American has demonstrated

that it would suffer prejudice, and Plaintiff has not demonstrated any reason for the protracted delay between its receipt of the affidavit of nonservice and the filing of the instant motion. As such, the cross-motion to dismiss the complaint against American is granted.

The remaining unopposed portion of Plaintiff's motion to amend the caption to add KV Medical Supply of NY, PC, and Rockaways ASC Development LLC is granted. Accordingly, it is hereby

ORDERED that the portion of Plaintiff's motion sequence 002 requesting an extension of time to serve American Diagnostic Imaging Corporation is denied; and it is further

ORDERED that the cross-motion of American Diagnostic Imaging Corporation to dismiss the complaint as against it is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the portion of Plaintiff's motion sequence 002 for leave to amend the complaint to add KV Medical Supply of NY, PC and Rockaways ASC Development LLC as defendants is granted; and it is further

ORDERED that the amended summons and complaint, in the form annexed to the motion papers but reflecting the dismissal of American Diagnostic Imaging Corporation, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers but reflecting the dismissal of American Diagnostic Imaging Corporation, shall

be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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PV HOLDING CORP. INCLUDING ALL OF ITS
SUBSIDIARIES AND AFFILIATES, INCLUDING
BUT NOT LIMITED TO AVIS BUDGET,
AVIS CAR RENTAL, LLC, BUDGET CAR RENTAL,
LLC, BUDGET TRUCK RENTAL, LLC,
PAYLESS CAR RENTAL, INC. and ZIPCAR, INC.

Plaintiff,

Index No. 156213/2020

-against-

BRIGHT LIGHT ACUPUNCTURE, P.C., CENTRAL
SUPPLIES OF NEW YORK CORP., CONTEMPORARY
ORTHOPEDICS, PLLC, ELITE DRUGS, INC.,
FOSTER MEDICAL, P.C., NATURALIFE
CHIROPRACTIC, P.C., NEIGHBORHOOD MEDICAL
HEALTH CARE, P.C., QUALITY ACUPUNCTURE,
P.C. MEDICAL & SURGICAL SUPPLIES, L.L.C.,
RIVERSIDE PARK ACUPUNCTURE, P.C.,
MS ST. LUKES & ROOSEVELT, KV MEDICAL
OF NY, P.C., ROCKAWAYS ASC DEVELOPMENT
LLC D/B/A ASC OF ROCKAWAY BEACH, HOLIVER
MEDINA TEJEDA, STEPHANIE RAMIREZ-FRIAS,
ALESCHENKA RAMIREZ-FRIAS, EDWIN GUERRERO
and ANNY BRITO,

Defendants.

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And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh).

3/30/2022

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE